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12
 13 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

14 KIRBY SPENCER, individually and on)
 15 behalf of a class of similarly situated)
 individuals,)
 16)
 17 Plaintiff,)
 18 v.)
 19 KOHL’S DEPARTMENT STORES, INC.,)
 20 Defendant.)
 21)
 22)

Case No. 2:14-cv-01646-RFB-CWH
STIPULATED PROTECTIVE ORDER
REGARDING PRODUCTION OF
CONFIDENTIAL INFORMATION
 Hon. Richard F. Boulware, II
 Magistrate Judge Carl W. Hoffman

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1 **1. PURPOSES AND LIMITATIONS**

2 Disclosure and discovery activity in this action may involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than prosecuting this litigation may be
5 warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the
6 following Stipulated Protective Order. The parties acknowledge that this Order does not
7 confer blanket protections on all disclosures or responses to discovery and that the
8 protection it affords from public disclosure and use extends only to the limited information
9 or items that are entitled to confidential treatment under the applicable legal principles. The
10 parties further acknowledge, as set forth in Section 7.3, below, that this Stipulated
11 Protective Order does not entitle them to file confidential information under seal without
12 court approval; Civil Local Rule 10-5(b) sets forth the procedures that must be followed
13 when a party seeks permission from the court to file material under seal.

12 **2. DEFINITIONS**

13 **2.1 Challenging Party:** a Party or Non-Party that challenges the designation of
14 information or items under this Order.

15 **2.2 “CONFIDENTIAL” Information or Items:** information (regardless of
16 how it is generated, stored or maintained) or tangible things that qualify for protection
17 under Federal Rule of Civil Procedure 26(c).

18 **2.3 Counsel (without qualifier):** Outside Counsel of Record and House
19 Counsel (as well as their support staff).

20 **2.4 Designating Party:** a Party or Non-Party that designates information or
21 items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

22 **2.5 Disclosure or Discovery Material:** all items or information, regardless of
23 the medium or manner in which it is generated, stored, or maintained (including, among
24 other things, testimony, transcripts, and tangible things), that are produced or generated in
25 disclosures or responses to discovery in this matter.

26 **2.6 Expert:** a person with specialized knowledge or experience in a matter
27 pertinent to the litigation and retained by a Party or its counsel to serve as an expert
witness or as a consultant in this action.

1 **2.7 House Counsel**: attorneys who are employees of a party to this action.
2 House Counsel does not include Outside Counsel of Record or any other outside counsel.

3 **2.8 Non-Party**: any natural person, partnership, corporation, association, or
4 other legal entity not named as a Party to this action.

5 **2.9 Outside Counsel of Record**: attorneys who are not employees of a party to
6 this action but are retained to represent or advise a party to this action and have appeared in
7 this action on behalf of that party or are affiliated with a law firm which has appeared on
8 behalf of that party.

9 **2.10 Party**: any party to this action, including all of its officers, directors,
10 employees, consultants, retained experts, and Outside Counsel of Record (and their support
11 staffs).

12 **2.11 Producing Party**: a Party or Non-Party that produces Disclosure or
13 Discovery Material in this action.

14 **2.12 Professional Vendors**: persons or entities that provide litigation support
15 services (e.g., photocopying, videotaping, translating, preparing exhibits or
16 demonstrations, and organizing, storing, or retrieving data in any form or medium) and
17 their employees and subcontractors.

18 **2.13 Protected Material**: any Disclosure or Discovery Material that is
19 designated as “CONFIDENTIAL.”

20 **2.14 Receiving Party**: a Party that receives Disclosure or Discovery Material
21 from a Producing Party.

22 **3. SCOPE**

23 The protections conferred by this Stipulation and Order cover not only Protected
24 Material (as defined above), but also (1) any information copied or extracted from
25 Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected
26 Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel
27 that might reveal Protected Material.

4. DURATION

 Even after final disposition of this litigation, the confidentiality obligations
imposed by this Order shall remain in effect until a Designating Party agrees otherwise in

1 writing or a court order otherwise directs. Final disposition shall be deemed to be the later
2 of (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2)
3 final judgment herein after the completion and exhaustion of all appeals, rehearings,
4 remands, trials, or reviews of this action, including the time limits for filing any motions or
5 applications for extension of time pursuant to applicable law.

6 **5. DESIGNATING PROTECTED MATERIAL**

7 **5.1 Exercise of Restraint and Care in Designating Material for Protection.**

8 Each Party or Non-Party that designates information or items for protection under
9 this Order must take care to limit any such designation to specific material that qualifies
10 under the appropriate standards. The Designating Party must designate for protection only
11 those parts of material, documents, items, or oral or written communications that qualify –
12 so that other portions of the material, documents, items, or communications for which
13 protection is not warranted are not swept unjustifiably within the ambit of this Order.

14 If it comes to a Designating Party’s attention that information or items that it
15 designated for protection do not qualify for protection, the Designating Party must
16 promptly notify all other Parties that it is withdrawing the mistaken designation.

17 **5.2 Manner and Timing of Designations.** Except as otherwise provided in this
18 Order, or as otherwise stipulated or ordered, Disclosure or Discovery Material that
19 qualifies for protection under this Order must be clearly so designated before the material
20 is disclosed or produced.

21 Designation in conformity with this Order requires:

22 **(a)** for information in documentary form (e.g., paper or electronic documents,
23 but excluding transcripts of depositions or other pretrial or trial proceedings), that the
24 Producing Party affix the legend “CONFIDENTIAL” to each page that contains protected
25 material, except that in the case of multi-page documents bound together by staple or other
26 permanent binding, the word(s) “Confidential” need only be stamped on the first page of
27 the document for the entire document to be treated as Confidential.

(b) for depositions, including exhibits thereto, or other pretrial testimony: (i) a
statement on the record by any counsel or the deponent, at the time of such disclosure; or
(ii) written notice from any Party or Non-Party’s counsel or the deponent or his/her

1 counsel, sent within fourteen business days after receiving a copy of the deposition
2 transcript, designating all or some of the transcript and/or documents referred to therein as
3 Confidential. Such written notice designating deposition testimony as “Confidential” must
4 be sent to counsel for all Parties, the deponent, and counsel for the deponent. Only those
5 portions of the transcripts so designated as “Confidential” may be treated as Confidential.
6 Unless a “Confidential” designation is made prior to the expiration of the initial 14-day
7 period after the deposition, or it is affirmatively represented that no “Confidential”
8 designations will be forthcoming at the expiration of this 14-day period, the entire
9 deposition testimony shall be considered “Confidential” until the expiration of this initial
10 14-day period. The Parties may modify this procedure for any particular deposition or
11 pretrial testimony by a writing signed by counsel for all Parties and by the deponent or
12 counsel for the deponent, without further order from the Court.

11 (c) for information produced in some form other than documentary and for any
12 other tangible items, that the Producing Party affix in a prominent place on the exterior of
13 the container or containers in which the information or item is stored the legend
14 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant
15 protection, the Producing Party, to the extent practicable, shall identify the protected
16 portion(s).

17 **5.3 Inadvertent Failures to Designate.** An inadvertent failure to designate
18 qualified information or items does not, standing alone, waive the Designating Party’s
19 right to secure protection under this Order for such material. Upon correction of a
20 designation, the Receiving Party must make reasonable efforts to assure that the material is
21 treated in accordance with the provisions of this Order.

21 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

22 **6.1 Timing of Challenges.** Any Party may challenge a designation of
23 confidentiality at any time. A Party does not waive its right to challenge a confidentiality
24 designation by electing not to mount a challenge promptly after the original designation is
25 disclosed.

25 **6.2 Meet and Confer.** A Party that elects to initiate a challenge to a
26 Designating Party’s confidentiality designation must do so in good faith and must begin
27

1 the process by notifying counsel for the Designating Party in writing. To avoid ambiguity
2 as to whether a challenge has been made, the written notice must recite that the challenge
3 to confidentiality is being made in accordance with this specific paragraph of the
4 Protective Order. The parties shall attempt to resolve each challenge in good faith and must
5 begin the process by conferring within 10 days of the date of service of notice. In
6 conferring, the Challenging Party must explain the basis for its belief that the
7 confidentiality designation was not proper and must give the Designating Party an
8 opportunity to review the designated material, to reconsider the circumstances, and, if no
9 change in designation is offered, to explain the basis for the chosen designation. A
10 Challenging Party may proceed to the next stage of the challenge process only if it has
11 engaged in this meet and confer process first or establishes that the Designating Party is
12 unwilling to participate in the meet and confer process in a timely manner.

11 **6.3 Judicial Intervention.** If the Parties cannot resolve a challenge by
12 negotiation, and the Court has not provided for a different procedure to handle such
13 disputes, then the Challenging Party may make an application for a ruling from the Court
14 on the continued application of the “Confidential” designation of such information or
15 document. The burden is on the party asserting confidentiality to establish the information
16 is entitled to protection.

17 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

18 **7.1 Basic Principles.** A Receiving Party may use Protected Material that is
19 disclosed or produced by another Party or by a Non-Party in connection with this case only
20 for prosecuting, defending, or attempting to settle this litigation. Such Protected Material
21 may be disclosed only to the categories of persons and under the conditions described in
22 this Order. Protected Material must be stored and maintained by a Receiving Party at a
23 location and in a secure manner that ensures that access is limited to the persons authorized
24 under this Order.

25 **7.2 Disclosure of “CONFIDENTIAL” Information or Items.**

26 Confidential Information shall not be used or disclosed by the Parties, Counsel for
27 the parties, or any other persons identified in this section for any purpose whatsoever other
than in this litigation, including any appeal thereof. Unless otherwise ordered by the court

1 or permitted in writing by the Designating Party, a Receiving Party may disclose any
2 information or item designated “CONFIDENTIAL” only to:

3 (a) Counsel of record for the Parties, their employees, their staff, and
4 their support personnel (including any outside vendor for simple reproduction,
5 computer scanning, or photocopying);

6 (b) The officers, directors, and employees (including House Counsel) of
7 the Receiving Party to whom disclosure is reasonably necessary for this litigation;

8 (c) Experts (as defined in this Order) of the Receiving Party to whom
9 disclosure is reasonably necessary for this litigation and who have signed the
10 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

11 (d) The Court, its personnel, and the jury;

12 (e) Court reporters and videographers present at any hearing, deposition
13 or trial;

14 (f) Professional jury or trial consultants, mock jurors, and Professional
15 Vendors or other consultants to whom disclosure is reasonably necessary for this
16 litigation and who have signed the “Acknowledgment and Agreement to Be
17 Bound” (Exhibit A);

18 (g) Actual or potential witnesses in connection with any deposition,
19 hearing or trial. However, the witness shall not be entitled to retain possession of
20 any such Confidential Information following the completion of his deposition and
21 shall return any such Confidential Information to counsel who disclosed it to him
22 during the course of his deposition;

23 (h) The author or recipient of a document containing the information or
24 a custodian or other person who otherwise possessed or knew the information.

25 (i) Other persons only by written consent of the Producing Party or
26 upon order of the Court and on such conditions as may be agreed or ordered.

27 **7.3 Filing Protected Material.** Without written permission from the
Designating Party or a court order secured after appropriate notice to all interested persons,
a Party may not file in the public record in this action any Protected Material. A Party that
seeks to file under seal any Protected Material must comply with Civil Local Rule 10-5(b)

1 and any other rules or orders by the court governing the filing of confidential documents. If
2 a Party's request to file Protected Material under seal is denied by the court, then the Party
3 may file the information in the public record.

4 **7.4 Use in Court.** In the event that any Confidential Information is used in any
5 Court proceeding in this action, it shall not lose its confidential status through such use,
6 and the party using such shall take all reasonable steps to maintain its confidentiality
7 during such use unless the Court orders otherwise.

8 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**
9 **OTHER LITIGATION**

10 If a Party is served with a subpoena or a court order issued in other litigation that
11 compels disclosure of any information or items designated in this action as
12 "CONFIDENTIAL," that Party must:

13 (a) promptly notify in writing the Designating Party (by email if possible).
14 Such notification shall include a copy of the subpoena or court order;

15 (b) promptly notify in writing the party who caused the subpoena or order to
16 issue in the other litigation that some or all of the material covered by the subpoena or
17 order is subject to this Protective Order. Such notification shall include a copy of this
18 Stipulated Protective Order; and

19 (c) cooperate with respect to all reasonable procedures sought to be pursued by
20 the Designating Party whose Protected Material may be affected.

21 If the Designating Party timely seeks a protective order, the Party served with the
22 subpoena or court order shall not produce any information designated in this action as
23 "CONFIDENTIAL" before a determination by the court from which the subpoena or order
24 issued, unless the Party has obtained the Designating Party's permission. The Designating
25 Party shall bear the burden and expense of seeking protection in that court of its
26 confidential material – and nothing in these provisions should be construed as authorizing
27 or encouraging a Receiving Party in this action to disobey a lawful directive from another
court.

1 **9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE**
2 **PRODUCED IN THIS LITIGATION**

3 (a) The terms of this Order are applicable to information produced by a Non-
4 Party in this action and designated as "CONFIDENTIAL." Such information produced by
5 Non-Parties in connection with this litigation is protected by the remedies and relief
6 provided by this Order.

7 (b) In the event that a Party is required, by a valid discovery request, to produce
8 a Non-Party's confidential information in its possession, and the Party is subject to an
9 agreement with the Non-Party not to produce the Non-Party's confidential information,
10 then the Party shall:

11 (1) promptly notify in writing the Requesting Party and the Non-Party
12 that some or all of the information requested is subject to a confidentiality
13 agreement with a Non-Party;

14 (2) promptly provide the Non-Party with a copy of the Stipulated
15 Protective Order in this litigation, the relevant discovery request(s), and a
16 reasonably specific description of the information requested; and

17 (3) make the information requested available for inspection by the Non-
18 Party.

19 (c) If the Non-Party fails to object or seek a protective order from this court
20 within 10 days of receiving the notice and accompanying information, the Receiving Party
21 may produce the Non-Party's confidential information responsive to the discovery request.
22 If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any
23 information in its possession or control that is subject to the confidentiality agreement with
24 the Non-Party before a determination by the court. Absent a court order to the contrary, the
25 Non-Party shall bear the burden and expense of seeking protection in this court of its
26 Protected Material.

27 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
Protected Material to any person or in any circumstance not authorized under this
Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the

1 Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all
2 unauthorized copies of the Protected Material, (c) inform the person or persons to whom
3 unauthorized disclosures were made of all the terms of this Order, and (d) request such
4 person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is
attached hereto as Exhibit A.

5 **11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
6 **PROTECTED MATERIAL**

7 The inadvertent production or disclosure of privileged or otherwise protected
8 information, documents, or other materials shall not constitute a waiver of any applicable
9 privilege or protections, including, for example, the attorney-client privilege, the work
10 product protection, or any other privilege or protection provided under the law. Upon
11 receiving written notice from the Producing Party that privileged information or work
12 product material has been inadvertently produced, all such information and copies thereof
shall be returned to the Producing Party within two business days of receipt of such notice.
13 Any analysis, memoranda or notes which were internally generated by the Receiving Party
14 based upon such information shall be destroyed. Upon receiving written notice from the
15 Producing Party that Confidential Information has not been appropriately so designated, all
16 such information shall be immediately re-designated and treated appropriately. The Party
17 receiving such material re-designated as Confidential shall make a reasonable, good faith
18 effort to ensure that any analysis, memoranda, or notes which were internally generated
19 based upon such information shall immediately be treated in conformance with any such
re-designation.

20 **12. MISCELLANEOUS**

21 **12.1 Right to Further Relief.** Nothing in this Order abridges the right of any
22 person to seek its modification by the court in the future.

23 **12.2 Right to Assert Other Objections.** By stipulating to the entry of this
24 Protective Order, no Party waives any right it otherwise would have to object to disclosing
25 or producing any information or item on any ground not addressed in this Stipulated
26 Protective Order. Similarly, no Party waives any right to object on any ground to the use in
evidence of any of the material covered by this Protective Order.

1 **12.3 Remedies and Continuing Jurisdiction.** In the event of a breach or
2 threatened breach of any provision of this Order, the non-breaching Party shall be entitled
3 to seek immediate injunctive relief from the Court, without the necessity of showing any
4 irreparable injury or special damages. Such remedy shall not be deemed to be the exclusive
5 remedy for the breach of this Order, but shall be in addition to all other remedies available
6 to the non-breaching Party, whether at law or equity, or pursuant to any applicable
7 provisions of the Federal Rules of Civil Procedure, including the power to hold parties or
8 other violators of this Order in contempt or such other sanctions as may be available to the
9 Court. This Court shall retain jurisdiction of all matters pertaining to this Order, and the
10 Parties agree to submit to the jurisdiction of this Court for matters relating to the
11 enforcement of this Order.

12 **12.4 No Greater Protection of Specific Documents.** Except on privilege
13 grounds not addressed by this Order, no Party or Non-Party may withhold information
14 from discovery on the ground that it requires protection greater than that afforded by this
15 Order unless the party moves for an order providing such special protection.

16 **13. FINAL DISPOSITION**

17 Within 60 days after the final disposition of this action, as defined in paragraph 4,
18 each Receiving Party must return all Protected Material to the Producing Party or destroy
19 such material. As used in this subdivision, “all Protected Material” includes all copies,
20 abstracts, compilations, summaries, and any other format reproducing or capturing any of
21 the Protected Material. However, each Receiving Party shall not be required to locate,
22 isolate, and return e-mails (including attachments to e-mails) that may include
23 Confidential Information, or Confidential Information contained in deposition transcripts
24 or drafts or final expert reports. Whether the Protected Material is returned or destroyed,
25 the Receiving Party must submit a written certification to the Producing Party (and, if not
26 the same person or entity, to the Designating Party) by the 60 day deadline that affirms that
27 the Receiving Party has not retained any copies, abstracts, compilations, summaries or any
other format reproducing or capturing any of the Protected Material. Notwithstanding this
provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers,
trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and

1 trial exhibits, expert reports, attorney work product, and consultant and expert work
2 product, even if such materials contain Protected Material. Any such archival copies that
3 contain or constitute Protected Material remain subject to this Protective Order.

4 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD

5 Dated: March 3, 2016

Dated: March 3, 2016

6 /s/ Michael A. Innes

/s/ Evan M. Meyers

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17 Attorneys for Defendant

Attorneys for Plaintiff and the
putative class

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20 PURSUANT TO STIPULATION, IT IS SO ORDERED.

21 DATED: March 4, 2016



22 Carl W. Hoffman
23 United States Magistrate Judge
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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare
under penalty of perjury that I have read in its entirety and understand the Stipulated
Protective Order that was issued by the United States District Court, District of Nevada in
the case of Spencer v. Kohl’s Department Stores, Inc., Case No. 2:14-cv-01646-RFB-
CWH, dated _____. I agree to comply with and to be bound by all the terms of this
Stipulated Protective Order and I understand and acknowledge that failure to so comply
could expose me to sanctions and punishment in the nature of contempt. I solemnly
promise that I will not disclose in any manner any information or item that is subject to this
Stipulated Protective Order to any person or entity except in strict compliance with the
provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court,
District of Nevada for the purpose of enforcing the terms of this Stipulated Protective
Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone
number] as my agent for service of process in connection with this action or any
proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____