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Pursuant to the Discovery Order entered in this case (Dkt. No. 63), the parties hereby jointly move the Court for entry of a Protective Order.

The parties have extensively conferred and narrowed their disputes, but they have not been able to completely reach an agreement regarding some of the specific provisions in an Agreed Protective Order for the above case.

Attached hereto for the Court's consideration are the parties' proposed Protective Orders. Specifically, attached as "Exhibit 1" is a consolidated version of the proposed Protective Order, wherein the text that is agreed upon is not highlighted, the text proposed by Plaintiff but objected to by Defendants is highlighted in blue, and the text proposed by Defendants but objected to by Plaintiff is highlighted in yellow. The parties have also attached Plaintiff's proposed Protective Order as "Exhibit 2" and Defendants' proposed Protective Order as "Exhibit 3." The parties' positions on the remaining issues are as set forth below.

**A. Whether In-House Counsel Or Other Individuals Should Be Permitted Access To Highly Confidential Financial Information (Section 5 of the Proposed Protective Order)**

**1. Plaintiff's Position**

The in-house counsel for Plaintiff Wireless Recognition Technologies LLC ("WRT") has responsibility for making decisions dealing directly with this litigation and also assists outside counsel with the present action. Accordingly, WRT seeks to permit its in-house counsel access to Defendants' financial information relating to the Accused Instrumentalities, in order that he may make decisions and engage in meaningful settlement negotiations.

WRT's position is entirely proper. First, the "competitive decision-making" test is the standard for determining whether in-house counsel should see sensitive or confidential information. *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984). It is not a matter of dispute that Plaintiff WRT is a non-practicing entity. Therefore, WRT does not compete with Defendants, and there could be no possible competitive harm from WRT's in-house counsel seeing financial information for purposes of case supervision and settlement.

Secondly, this Court has already decided the issue under a similar if not an identical set of facts in favor of plaintiff. *Light Transformation Techs. LLC v. Anderson Custom Elecs., Inc.*, Order, Case No. 2:09-cv-354 (E.D. Tex. Mar. 30, 2011).<sup>1</sup> There, the non-practicing entity was Light Transformation Technologies LLC, whose parent was Acacia Research Corporation,<sup>2</sup> the same parent entity as that of the present Plaintiff WRT. The scope of language used there was also the same as that offered presently by WRT, given the context of the Protective Order.<sup>3</sup>

## **2. Defendants' Position**

Defendants object to Plaintiff's proposal to allow its in-house counsel, who is a competitive decision maker, access to Defendants' highly confidential financial information. Plaintiff's counsel, Brad Botsch, who is responsible for managing this litigation is a business development executive of Plaintiff's parent, Acacia Research Group, a patent acquisition and licensing entity. Mr. Botsch advises and participates in business decisions relating to licensing and enforcement of patents acquired by Acacia, including patents acquired by its subsidiary, Plaintiff WRT. (*See* Dkt. No. 78-1 (Botsch Decl.) at ¶¶ 2-5.) This Court has held that when a company's "entire business model with [its] patent-holding companies ... revolves around the acquisition, enforcement (through litigation), and licensing of patent ..., it is difficult to argue that someone such as [its in-house counsel], who is heavily involved in these aspects of the business, is somehow not a competitive decisionmaker." *See, e.g., ST Sales Tech Holdings, LLC v. Daimler Chrysler Co.*, 2008 U.S. Dist. LEXIS 107096, \*22-26 (E.D. Tex. Mar. 14, 2008) (granting protective order denying access to counsel for patent licensing entity).<sup>4</sup> Thus, based on Plaintiff/Acacia's business model, all of its in-house counsel are competitive decision makers.

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<sup>1</sup> Ex. 4 (Dkt. No. 241).

<sup>2</sup> Ex. 5 (Dkt. No. 169 at ¶ 4, 3).

<sup>3</sup> Ex. 6 (Dkt. No. 169-1 at ¶ 9, 6).

<sup>4</sup> Ex. 7.

Furthermore, under the balancing test of *U.S. Steel*, the substantial and potentially dangerous risk of inadvertent disclosure outweighs any need that in-house counsel may have for such information. Plaintiff/Acacia could use Defendants' highly confidential financial information to their detriment in determining which patents to acquire or assert and in pricing its patent licenses with other companies. However, in-house counsel managing litigation for Plaintiff does not need access to Defendants' highly confidential financial information to prosecute or settle Plaintiff's claims in the litigation. Plaintiff's outside counsel and independent financial experts will have access to such information, and like other competitors and investors who must make financial decisions, Plaintiff's in-house counsel can make decisions about settlement based on its outside counsel's advise and publicly available information.

Compounding the problem are the facts that Plaintiff has filed several suits against the Defendants already on the same products, and continues to prosecute additional patents in the Patent Office. (Dkt. No. 68-2 (Yudell Decl.) at ¶¶ 1, 4.) Plaintiff seeks to provide its in-house counsel access to highly confidential financial information about Defendants' products and unfettered ability to participate in prosecution of Plaintiff's patents, thereby allowing Plaintiff to steer the patents in directions where Defendants' highly confidential financial information might project sales to be most critical. *See ST Sales Tech Holdings*, 2008 U.S. Dist. LEXIS 107096 at \*18-20.

Thus, Plaintiff's proposal to permit in-house counsel or other undefined in-house individuals access to Defendants' highly confidential financial information must be rejected.

**B. Adequate Procedures To Protect Defendants' Highly Confidential Source Code And Plaintiff's Ability To Access The Same (Sections 6(b)(i), 6(b)(ix) and 6(b)(xi-xv) of the Proposed Protective Order)**

**1. Plaintiff's Position**

It is with reluctance that Plaintiff WRT requests the Court's intervention on the issue of treatment of source code and spends the Court's valuable energy on such matter. While the present Defendants, like all Defendants, seek to protect their source code, WRT requires

sufficient access to the source code to enable its technical experts to support its infringement case.

Starting with the entirety of the Protective Order, itself, the nearly forty-page draft was originally drafted by Defendants. As Defendants' production will likely outweigh WRT's, they are obviously motivated to devise as complicated and oppressive a set of terms and conditions as possible, and even a cursory review of the document illustrates they that have done just that.

In the source code paragraph itself, WRT requested a few concessions from Defendants who have refused to budge away from their original language.

WRT has reasonably requested that its expert be able to use an electronic storage device (e.g., flash drive) under the strict provisions of the ten-page paragraph – under a stand-alone, non-networked personal computer with no peripheral devices – and that Defendants ensure the source code works with software utilities under their harshly imposed conditions.<sup>5</sup> Defendants deny the former storage request and would permit the latter only at their option and WRT's expense. Despite that the code review is at Defendants' facilities, on their computer with their restrictions, Defendants have refused to offer technical help in operating the source code if WRT's expert requires it.<sup>6</sup>

Defendants have provided strict conditions on the number of pages to be printed, the number of blocks of code, the security conditions of the printed pages, and requirement of an access log to the pages identifying who, when and how long they are viewed.<sup>7</sup> They would prohibit printed copies of the source code, other than attached to sealed court filings, expert reports and the like.<sup>8</sup> They would prohibit electronic copies even where reasonably necessary, and prohibit character recognition needed by experts in sifting through thousands of lines of

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<sup>5</sup> See Ex. 1, § 6(b)(i).

<sup>6</sup> *Id.*

<sup>7</sup> See Ex. 1, § 6(b)(ix).

<sup>8</sup> See Ex. 1, § 6(b)(xi).

code.<sup>9</sup> They would deny any type of storage of the code that WRT's expert may need to get its job done in a reasonable and efficient manner.<sup>10</sup>

Defendants' set of conditions imposes a veritable mine field of requirements making the activities of WRT's expert extremely difficult to accomplish and therefore unduly expensive for its client. Moreover, the conditions are moot since source code is to be treated as highly confidential,<sup>11</sup> and WRT's expert must agree to and acknowledge the provisions of the Protective Order under the provisions of Exhibit A.<sup>12</sup>

That Defendants seek to force this onerous, ten-page set of rules on Plaintiff WRT, with little or no room for compromise, is a notable illustration of WRT's challenge in resolving disputes with the Defendants.

## **2. Defendants' Position**

The parties agree that the Defendants' Highly Confidential Source Code should be afforded additional protections beyond those provided for other Confidential Information. Defendants' proposed provisions acknowledge the highly sensitive nature of the respective parties' Source Code and outline specific procedures that provide reasonable restrictions on access and safeguards to prevent unauthorized dissemination and use of such material. Plaintiff's proposed provisions, on the other hand, attempt to circumvent the requirements for inspecting the Source Code at a secure site and do not provide much heightened security beyond what is required for Highly Confidential - Outside Counsel Only. Plaintiff also objects to many of Defendants' provisions based on the purported inconvenience to its outside counsel.

Defendants insist that there should be reasonable restrictions on any copies made of the Source Code reviewed at the secure site. In particular, Defendants' provisions prohibit making

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<sup>9</sup> See Ex. 1, § 6(b)(xii).

<sup>10</sup> See Ex. 1, § 6(b)(xiii).

<sup>11</sup> See Ex. 1, § 6(a).

<sup>12</sup> See Ex. 1, § 6(b)(vii).



any paper copies or electronic images of the Source Code except to the extent relevant and necessary for any pleading, exhibits, expert reports, depositions, or other court documents. (*See* Ex. 1, § 6(b)(xi) and (xii).) This prohibition does not impede Plaintiff’s access to the Source Code or litigation of its case. Furthermore, Defendants insist that paper copies may not be scanned using OCR or converted into a text-searchable format, which would otherwise obviate the requirement that access to searchable copies of the Source Code be limited to the secure site. Plaintiff’s counter-proposals for these provisions that prohibit copies “except as may be reasonably necessary in the litigation of this action” fails to articulate the specific type of activities that would be permitted. Absent this type of clarity, the producing party loses control over what copies can be made, and subsequently where they may end up, and the parties will be left to debate later whether a copy was “reasonably necessary.” Defendants’ proposal avoids this ambiguity.

Defendants’ proposal also defines specific limits on the amount of Source Code that may be printed at any given time (*e.g.*, no more than 10% or 500 pages) as well as other reasonable steps to maintain the security and confidentiality of the Source Code (*e.g.*, copies kept in secure locked area). (*See* Ex. 1, § 6(b)(ix).) Without these restrictions, Plaintiff would be free to print the entirety of Source Code files, including portions not needed for its case. Defendants also expect the receiving party to maintain an access log of all copies of the Source Code in its possession, which will be produced upon request, that identifies who received copies of the Source Code and when it was provided, as well as a certification at the end of case that all copies of the Source Code have been returned. (*See* Ex. 1, § 6(b)(xiv).) The purpose of the log is to provide the producing party with a record of all individuals that accessed the material in case a breach in confidentiality is discovered later. Plaintiff objects to making the log available and certifying the return of Source Code because it would be burdensome on its counsel, but the security of the Source Code should be paramount and the alleged burdens on Plaintiff are

minimal. The parties also disagree on whether additional peripheral devices may be connected to the Source Code Computer<sup>13</sup> or brought into the secure site. (*See* Ex. 1, § 6(b)(i) and (xiii).) Again, these provisions do not hinder Plaintiff's ability to review the Source Code and are meant to ensure that copies of the Source Code are not taken from or communicated electronically outside of the secure site. Plaintiff's proposal to permit a flash drive to store copies of the Source Code (§ 6(b)(i)), which can then be taken and reviewed elsewhere, flies in the face of requiring the Source Code be inspected at the secure site. In addition, the parties dispute whether the cost of providing any additional tools or software utilities should be borne by the receiving party. (*Id.*) Defendants assert that since these programs are not essential for accessing the Source Code but rather merely aid in its review, they should be provided at the receiving party's expense. Furthermore, Plaintiff's requirement that Defendants provide "the help of personnel with appropriate technical expertise" to assist in its review of the Source Code goes beyond the requirements of providing instructions on how to operate the Source Code Computer in the Court's standard protective order, which Defendants have already agreed to provide.

Finally, Defendants seek further assurance that any experts or consultants retained by the parties that access the Source Code will agree to not perform software development work for commercial purposes related to the functionality covered by the Source Code reviewed for a period of one year after substantive involvement in this litigation. (Ex. 1, § 6(b)(xv).) The rationale for this provision is to help ensure that an expert does not improperly utilize any portion of the Source Code it reviewed, since it is hard to separate the knowledge of the source code from one's memory. Plaintiff's stated opposition is that an expert will have already signed the Protective Order, but the potential for inadvertent use in this instance greatly exceeds the limited restriction placed on a potential expert.

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<sup>13</sup> The parties do not dispute that a printer may be connected to the Source Code Computer to print copies of the Source Code on watermarked pre-Bates numbered paper, which is separately addressed in § 6(b)(ix) of Exhibit 1.

**C. Treatment Of Subpoenas Or Court Orders To Compel Protected Documents  
(Section 14 of the Proposed Protective Order)**

**1. Plaintiff's Position**

In reference to subpoenas or court orders to compel protected documents served on a receiving party, the parties agree that the receiving party is to notify the producing party promptly.

After such notice, Plaintiff departs company from Defendants' draft. As the information sought belongs to the producing party, Plaintiff has the receiving party tender notice to the producing party, who will attend to the matter accordingly and bear the corresponding duties and obligations. As the producing party has a vested interest in preserving the protected status of its own information, it is in the best position to assume such duties as well as to absorb the associated costs.

On the contrary, Defendants' draft imposes a set of conditions on the receiving party, including the type of notice to the producing party, the type of notice to the party causing the subpoena to be issued, and on the party in the other action that caused the subpoena to issue. Like Plaintiff's proposal, the fees are absorbed by the producing party. These actions are clearly designed to have the receiving party inform all necessary parties about the protected status of the producing party's information. However, Plaintiff WRT's position is more logical as it places the burden on the party whose information is sought – namely, the producing party – and does not have the receiving party perform actions whose fees are absorbed by the producing party.

**2. Defendants' Position**

Consistent with the purposes of a protective order, Defendants' proposed language gives a party that produces confidential information in this case an opportunity to ensure that such confidentiality is protected if the information in the possession of the receiving party is the subject of a third party subpoena. Plaintiff, on the other hand, seeks to absolve the receiving party of any responsibility for responding to such a subpoena by shifting that responsibility to the party from which it obtained the information in discovery. Plaintiff would even require the

producing party to indemnify the receiving party. Plaintiff's proposal turns the purpose of a protective order under Federal Rule of Civil Procedure 26 on its head: rather than protecting a party producing discovery in this case, it exposes that party to liability.

Furthermore, Plaintiff's proposal imposes duties and obligations on a producing party and its counsel that they may not be able to meet. For any subpoena or court order directed to a receiving party that would require disclosure of a producing party's designated highly confidential information, Plaintiff's proposal would allow the receiving party to shift responsibility to the producing party's counsel "to attend to *all* matters associated with such subpoena or court order on behalf of receiving party," and provides that "the producing party shall bear *all* duties and obligations relating to the matter, including without limitation indemnification of receiving party in regard thereto" (emphasis added). Thus, if the subpoena or court order sought any information designated as highly confidential by a producing party, regardless of whether it sought other information as well, Plaintiff's proposal would allow the subpoenaed receiving party to simply wash its hands of the whole matter by giving notice to the producing party. However, the producing party's counsel may have conflicts that prevent it from acting on behalf of the receiving party in any capacity, especially as to aspects of a subpoena going beyond the confidential information of the producing party. Moreover, only the subpoenaed party can serve objections under Federal Rule of Civil Procedure 45(c)(2)(B), such that the producing party could not respond in such a manner, and would be limited to the more expensive option of moving to quash or modify the subpoena. If the subpoena commands production of more than the producing party's highly confidential information, the producing party may not have standing to make such a motion. *Brown v. Braddick*, 595 F.2d 961 (5th Cir. 1979) (no standing where the movant lacks personal right or privilege with respect to the materials subpoenaed).

## **D. Patent Prosecution Bar (Section 23 of the Proposed Protective Order)**

### **1. Plaintiff's Position**

Plaintiff WRT is willing to impose upon itself a patent prosecution bar, just not one so open ended and extreme in its language as set forth by Defendants.

WRT's proposed language prohibits counsel who receives confidential information from providing advice or opinions to facilitate patent prosecution. The language makes two exceptions. The first is that counsel may take part in reexamination proceedings, which is fair in that if Defendants' counsel may challenge the validity of the patents-in-suit, then Plaintiff's counsel should be able to challenge them. Secondly, it also excludes confidential financial information, which rightfully does not belong in a prosecution bar. *In re Deutsche Bank Trust Co. Ams.*, 605 F.3d 1373, 1381 (Fed. Cir. 2010) (“[F]inancial data and other sensitive business information, even if deemed confidential, would not normally be relevant to a patent application and thus would not normally be expected to trigger a patent prosecution bar.”). Accordingly, it achieves the Federal Circuit's balancing test between the risk of inadvertent use of Defendants' confidential information and harm to Plaintiff in its choice of counsel.<sup>14</sup>

On the other hand, Defendants propose barring virtually any prosecution activity, including preparing, prosecuting, drafting, editing, and/or amending of patent applications, specifications, claims, and/or responses to office actions. Their proposed bar prohibits work on reissues, where the specification may be amended for clarification purposes, and claims may be amended to further narrow them, none of which activities could adversely impact Defendants.

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<sup>14</sup> *Id.* “[A] patent prosecution bar must show on a counsel-by-counsel basis: (1) that counsel's representation of the client in matters before the PTO does not and is not likely to implicate competitive decisionmaking related to the subject matter of the litigation so as to give rise to a risk of inadvertent use of confidential information learned in litigation, and (2) that the potential injury to the moving party from restrictions imposed on its choice of litigation and prosecution counsel outweighs the potential injury to the opposing party caused by such inadvertent use.”

While seemingly offering to permit WRT's counsel to participate in reexaminations, Defendants' offering is indeed empty and riddled with inconsistencies. Defendants' offered language states that counsel is not precluded from taking part in reexaminations, but only where the validity of claims is challenged, except that counsel may not craft the claims. It also states that counsel may not participate, either directly or indirectly in the proceedings either. Exactly how WRT's counsel may participate in reexaminations in a meaningful way for its client is a mystery. Despite Defendants' *de facto* prohibition of participation in reexaminations, Defendants' litigation counsel, themselves, may institute such reexaminations; in other words, Defendants' counsel may attack the validity of Plaintiff WRT's claims before the U.S. Patent and Trademark Office, yet Plaintiff WRT's own counsel may not defend against such action without likely violating Defendants' propounded language.

Defendants' proposed over-reach even extends to three years beyond the final resolution of the cases in the action. Accordingly, despite that all claims may be settled with all Defendants in the present action, Defendants would like to bar Plaintiff WRT's own counsel for another three years after that. That counsel most knowledgeable about WRT's patent portfolio would be prohibited from serving their client for years after the present action, at no disadvantage to the present Defendants, can hardly be considered a fair offering by Defendants.

Accordingly, rather than balancing their interests with Plaintiff WRT's interest in its choice of counsel, Defendants ignore WRT's interests altogether. *Id.* (“[T]he court should consider . . . the potential difficulty the client might face if forced to rely on other counsel for the pending litigation or engage other counsel to represent it before the PTO.”).

## **2. Defendants' Position**

Defendants propose a patent prosecution bar that will permit the exchange of highly confidential information in this litigation, including design and source code information for the accused products, while removing the danger that such information could be used, even inadvertently, during the prosecution of patents for Plaintiff or others. (*See* Ex. 1 at pp. 26-27 (yellow highlighting).) In evaluating the appropriateness of a protective order, a court must

consider the risk and potential danger of “inadvertent or accidental disclosure” and weigh it against the potential burden and impairment the protective order may have on the other party. *U.S. Steel Corp.*, 730 F.2d at 1468.

In applying *U.S. Steel* to the evaluation of a proposed patent prosecution bar in *Deutsche Bank*, the Federal Circuit instructed that the initial inquiry is whether the individuals that will be subject to the bar are involved in “competitive decision making,” which included “making strategic decisions on the type and scope of patent prosecution that might be available or worth pursuing for such inventions, writing, reviewing, or approving new patent applications or continuations-in-part of application to cover those inventions, or strategically amending or surrendering claim scope during prosecution.” 605 F.3d at 1380. The Federal Circuit held that when attorneys are involved in such patent prosecution activities, there is a risk of inadvertent disclosure, and therefore such attorneys should not be exempted from a prosecution bar. *Id.* The Federal Circuit then said that the risk of use or inadvertent disclosure should be balanced against potential harm of the restriction, such as denying the patentee the right to continue using prosecution counsel that has a history of representing the patentee. *Id.* at 1380-81.

Here, Defendants’ proposed patent prosecution bar is narrowly tailored to individuals who obtain highly confidential information, which includes product design and source code information. These individuals would pose a risk of inadvertent disclosure if they were allowed to participate in the prohibited activities of “preparing, prosecuting, drafting, editing, and/or amending of patent applications, specifications, claims, and/or responses to office actions . . .” (*See Ex. 1 at p. 27.*) Thus, the individuals that would be subject to Defendants’ proposed patent prosecution bar satisfy the initial “competitive decision making” portion of the analysis recited in *Deutsche Bank*. 605 F.3d at 1380.

The second portion of the *Deutsche Bank* analysis is also satisfied because Plaintiff will not be unduly prejudiced by Defendants’ proposal. Plaintiff’s litigation counsel does not have a history of representing Plaintiff in patent prosecution matters. For several years, Plaintiff has used Craig Yudell as its prosecution counsel. Mr. Yudell has been involved with the prosecution

of Plaintiff's patents since early 2009, and he is counsel of record for: the patent-in-suit, the related '474 patent asserted in a separate litigation against the same Defendants and products, the reexamination proceedings regarding the '474 patent that were instigated by a third party, and the prosecution of a patent application that is a continuation of the application that led to the patent-in-suit. (*See, e.g.*, Ex. 8.) Thus, Plaintiff is well represented and will not be unduly prejudiced if its litigation counsel is subject to Defendants' proposed patent prosecution bar.

By contrast, Plaintiff's proposed "patent prosecution bar" is not a bar of any type. Plaintiff's proposal merely states that a receiving party may not use any of the confidential information produced in this case during patent prosecution activities. (Ex. 1 at p. 26 (blue highlighting).) That proposal would allow individuals receiving Defendants' highly confidential information, including source code for the accused products, to participate in patent prosecution for anyone, including Plaintiff, on subject matter identical to that at issue in this litigation. Plaintiff's proposal fails to address the danger of inadvertent use, which the Federal Circuit has recognized as almost inevitable for someone in a competitive decision making position. *See Deutsche Bank*, 605 F.3d at 1378 ("[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so.") (citing *FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980)). And given that Plaintiff continues to prosecute continuation applications, as well as a reexamination of a related patent asserted by Plaintiff against Defendants in a separate litigation, there is great danger that Plaintiff would make inadvertent use of Defendants' highly confidential information. Therefore, Plaintiff's proposal is inadequate and must be rejected.

**E. Whether The Parties Must OCR Documents Before Producing Them, And If So, Whether The OCR Costs Should Be Split Between The Parties (Section 31 of the Proposed Protective Order)**

**1. Plaintiff's Position**

The sole contention before the Court is whether Defendants must perform optical character recognition ("OCR") of their electronically produced documents.



Defendants' refusal to OCR the documents before they are produced is respectfully not understood. It hardly bears mentioning that Defendants will likely produce many thousands of pages of documents in response to Plaintiff WRT's requests for production, or that it would be much easier and cost effective for the owners of the documents to perform the OCR before they are transmitted to WRT. It also bears little mention that the Defendants, most notably Google, are some of the largest holders and purveyors of information facilities in the entire world. That Defendants would not comply with the simple request is emblematic of Defendants' inflexibility in resolving issues with WRT and preserving the Court's valuable time and resources.

## **2. Defendants' Position**

The final dispute between the parties concerns the format of documents produced in this litigation. (*See* Ex. 1 at p. 31, § 31.) To be clear, this issue does not concern the format for production of electronically stored information, such as email or source code, which by its very nature is already in an electronically searchable format. Rather, this dispute concerns the format for the production of paper documents that are imaged for electronic production, as well as other electronic documents that are not electronically searchable. Plaintiff proposes that, for all documents that are not electronically searchable, the producing party must perform optical character recognition ("OCR") so that the receiving party can more easily search those documents. (*See id.* (blue highlighting).)

While Plaintiff's proposal is made in neutral terms such that the OCR burden is placed on the producing party, this will impose Plaintiff's litigation costs onto Defendants because accused infringers produce the majority of documents in a patent litigation. *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) ("In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer."). Thus, through the guise of the Proposed Protective Order, Plaintiff attempts to transfer a portion of its anticipated litigation costs onto Defendants by requiring Defendants to OCR all electronically produced files. *Id.* Plaintiff, however, can show no good cause to transfer this OCR burden and cost to Defendants, and therefore Plaintiff's proposal should be rejected. Instead, the parties should simply be required

to comply with Rule 34 of the Federal Rules of Civil Procedure and produce “documents as they are kept in the usual course of business . . .”

WHEREFORE PREMISES CONSIDERED, Plaintiff and Defendants respectfully request the Court to make a determination and enter an Protective Order in this matter as submitted by the parties.

Dated: August 18, 2011

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this 18th day of August, 2011.

*/s/ Daniel T. Shvodian*

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Daniel T. Shvodian