

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ALOFT MEDIA, LLC,

Plaintiff,

v.

ORACLE CORPORATION, ET AL.,

Defendants.

§
§
§
§
§
§
§
§
§
§
§

Civil Action No. 6:09-CV-304

JURY TRIAL DEMANDED

AGREED PROTECTIVE ORDER

This Agreed Protective Order is issued to facilitate document disclosure and production under the Local Rules of this Court and the Federal Rules of Civil Procedure. Unless modified pursuant to the terms contained in this Order, this Order shall remain in effect through the conclusion of this litigation and thereafter as set forth below.

In support of this order, the Court finds that:

1. Documents or information containing confidential proprietary and confidential business information (“Confidential Information”) is likely to be disclosed or produced during the course of discovery in this litigation;
2. Documents or information including, but not limited to, (1) business/strategic plans; (2) sales, cost and price information including sales/financial projections; (3) non-public marketing information including marketing plans; (4) detailed sales and financial data that includes costs and profits information; (5) customer lists; (6) licensing, licensing policies, and licensing negotiations;

(7) non-public technical specifications, schematics and documents showing the Producing Party's product functionality, features and operation; (8) other information of business, commercial, competitive, financial, marketing, sales and technical significance comparable to the items listed in this paragraph; (9) information of a personal nature or that is directed to the integrity or reputation of a party or its principals or members; (10) information contained in non-public pleadings and motions from previous and collateral litigations; and (11) trade secrets ("Confidential – Outside Counsels' Eyes Only" Information or "Confidential – Outside Attorneys' Eyes Only – Financial" Information) is likely to be disclosed or produced during the course of discovery in this litigation;

3. The parties to this litigation contend (and may assert) that public dissemination and disclosure of Confidential, Confidential – Outside Counsels' Eyes Only, and/or Confidential Attorneys' Eyes Only – Financial Information could severely injure or damage the party disclosing or producing the Confidential, Confidential – Outside Counsels' Eyes Only, and/or Confidential Attorneys' Eyes Only – Financial Information and could place that party at a competitive disadvantage;

4. To protect the respective interests of the parties and to facilitate the progress of disclosure and discovery in this case, the following Order should issue:

IT IS THEREFORE ORDERED THAT:

1. This Protective Order shall apply to all information, documents and things subject to discovery in this Action produced either by a party or a non-party in discovery in this Action including, without limitation, testimony adduced at deposition upon oral examination and upon written questions, answers to interrogatories, documents and things produced, information obtained from inspection disclosed pursuant to subpoena under Fed. R. Civ. P. 45 ("Discovery Material").

2. Each party to this litigation that produces or discloses any materials, answers to interrogatories, responses to requests for admission, trial testimony, deposition testimony, and transcripts of trial testimony and depositions, or information that the Producing Party believes should be subject to this Protective Order may designate the same as “Confidential,” “Confidential – Outside Counsels’ Eyes Only,” or “Confidential Attorneys’ Eyes Only – Financial.”

- A. Designation as “Confidential”: Any party may designate information as “Confidential” only if, in the good faith belief of such party and its counsel, the unrestricted disclosure of such information could be potentially prejudicial to the business or operations of such party or its principals and/or members.
- B. Designation as “Confidential – Outside Counsels’ Eyes Only”: Any party may designate information as “Confidential – Outside Counsels’ Eyes Only” only if, in the good faith belief of such party and its counsel, the information is among that considered to be most sensitive by the party, including but not limited to trade secret or other confidential source code, research, development, financial, technical or other commercial information and/or information of a personal nature or that is directed to the integrity or reputation of a party or its principals or members.
- C. Designation as “Confidential Attorneys’ Eyes Only – Financial”: Any party may designate information as “Confidential Attorneys’ Eyes Only – Financial” only if, in the good faith belief of such party and its counsel, the information constitutes financial documents showing or summarizing Defendants’ sales volume, revenue, and profitability information; answers to interrogatories

directed to similar information; and expert reports directed to the issues of damages, excluding Confidential – Outside Counsels’ Eyes Only information attached to such expert reports.

3. Documents or discovery responses containing Confidential, Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial Information disclosed or produced by any party in this litigation are referred to as “Protected Documents.” Except as otherwise indicated below, all Protected Documents are entitled to confidential treatment as described below.

4. Protected Documents shall not include (a) advertising materials, (b) materials that on their face show that they have been published to the general public, or (c) documents that have submitted to any governmental entity without request for confidential treatment.

5. At any time after the delivery of Protected Documents, counsel for the Receiving Party may challenge the Confidential, Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial designation of all or any portion thereof by providing written notice thereof to counsel for the Producing Party. Thereafter, the parties shall meet and confer in good faith in an attempt to resolve the dispute. If the parties are unable to agree as to whether the confidential designation of discovery material is appropriate, the Receiving Party shall have seven (7) days from the meet and confer to file a motion, requesting that the Court cancel or modify a designation. The Producing Party shall have the burden of establishing that the disputed Protected Documents are entitled to confidential treatment. If the Receiving Party does not timely file a motion, requesting that the Court cancel or modify a designation, then the Protected Documents in dispute shall retain their status as originally designated by the Producing Party. All

Protected Documents are entitled to confidential treatment pursuant to the terms of this Order until and unless the parties formally agree in writing to the contrary or a contrary determination is made by the Court as to whether all or a portion of a Protected Document is entitled to confidential treatment.

6. Confidential Treatment. Protected Documents and any information contained therein shall not be used or shown, disseminated, copied, or in any way communicated to anyone for any purpose whatsoever, except as provided for in this Protective Order.

7. Confidential – Outside Counsels’ Eyes Only Information shall be disclosed only to the following persons:

- A. Counsel of record in this action for the Receiving Party;
- B. Employees of such counsel assigned to and necessary to assist such counsel in the preparation and trial of this action;
- C. The Court, its personnel, jurors, technical advisors, and court reporters, stenographers and videographers transcribing or recording testimony at depositions, hearings or the trial of this action;
- D. Persons employed by the Producing Party, such as those identified in the Protected Documents as an author of the document in part or in whole, or persons to whom a copy of such Protected Documents was sent prior to its production in this action, provided, however, that no one may show Protected Documents to an ex-employee of a Producing Party without first notifying the Producing Party and providing the Producing Party with an opportunity to object prior to such disclosure;

- E. Actual or potential independent experts and consultants, provided that they have complied with the provisions of paragraph 23 below. A technical expert or consultant shall be defined as a person who is neither an employee of a party nor anticipated to become an employee in the near future, and who is retained or employed as a bona fide consultant or expert for purposes of this litigation by or at the direction of counsel for a party;
 - F. Litigation service providers, including jury consultants, mock jurors, graphics consultants, mediators, translators, graphic designers and firms and document processing firms (including document duplication providers, coding, imaging or scanning service providers);
 - G. Up to two in-house attorneys for each Defendant who comply with the notice provision of paragraph 23 and who execute the undertaking set forth in Exhibit A; and
 - H. Any other person with the prior written consent of the Producing Party.
8. Confidential Information shall be disclosed only to the following persons:
- A. Persons identified in paragraphs 7A – 7H;
 - B. Defendants' in-house attorneys involved in the preparation of this Action and clerical employees actually assisting such counsel;
 - C. One designated employee of each Defendant, provided that the employee has executed the undertaking set forth in Exhibit A and complies with the provisions of paragraph 23 below; and
 - D. Any other person with the prior written consent of the Producing Party.

9. Confidential Attorneys' Eyes Only – Financial Information shall be disclosed only to the following persons:

- A. Persons identified in paragraphs 7A – 7H, except that defendants' in-house counsel, paralegals or clerical employees under this paragraph shall not have access to any co-defendants' Confidential Attorneys' Eyes Only – Financial material;
- B. Up to two client representatives from Plaintiff, provided that the client representatives have executed the undertaking set forth in Exhibit A and comply with the provisions of paragraph 23 below; and
- C. Any other person with the prior written consent of the Producing Party.

PROSECUTION BAR

10. The "Prosecution Bar" materials refers to those Confidential and Confidential – Outside Counsels' Eyes Only -designated materials and documents comprising or containing non-public technical information concerning computer code capable of performing logic related to decision-making. For avoidance of doubt, while this definition of "Prosecution Bar" materials is carefully tailored to avoid unnecessary over-breadth, the parties agree that the "Prosecution Bar" materials extends to encompass the functionality of any feature that has at any time been accused of infringement in this litigation.

11. To be clear, this means that the following documents and materials shall not be considered or classified as "Prosecution Bar" materials: (i) publications, including patents and published patent applications; (ii) materials regarding third party systems or products that are publicly known; and (iii) information that is publicly available. "Confidential Attorneys' Eyes Only

– Financial”-designated materials shall not contain “Prosecution Bar” materials. Therefore, review of “Confidential Attorneys’ Eyes Only – Financial”-designated materials shall not trigger the “Prosecution Bar.”

12. Any person reviewing any of an opposing party’s “Prosecution Bar” materials shall not, for a period commencing upon receipt of such information and ending one year following the conclusion of this case (including any appeals) engage in any “Prosecution Activity” on behalf of a party asserting a patent in this case or any successor in ownership, assignee, or exclusive licensee of a patent asserted in this case. Furthermore, any person reviewing “Prosecution Bar” materials of an opposing party or another co-Defendant shall not, for a period commencing upon receipt of such information and ending one year following the conclusion of this case (including any appeal) engage in any “Prosecution Activity” involving claims on a method, apparatus, or system relating to the subject matter of the non-public technical information disclosed or described in the “Prosecution Bar” materials reviewed.

13. “Prosecution Activity” shall mean: obtaining disclosure materials for new inventions and inventions under development; investigating prior art relating to those inventions; making strategic decisions on the type and scope of patent protection that might be available or worth pursuing for such inventions; writing, reviewing, or approving new applications to cover those inventions; or strategically amending or surrendering claim scope during prosecution. “Prosecution Activity” expressly excludes any involvement by either party in reviewing communications from the United States Patent & Trademark Office regarding a reexamination proceeding, or from discussing claim interpretation issues or ways of distinguishing claims in any such reexamination from any cited prior art, including with reexamination patent counsel in reexamination proceedings

concerning the patents-in-suit; however, such Counsel may not prosecute any such reexamination and may not reveal the content of "Prosecution Bar" materials to reexamination counsel of agents.

14. Nothing in this section shall be construed as preventing any attorney from challenging the validity or enforceability of any patent, including without limitation in proceedings in this Court or reexamination or reissue proceedings in the United States or foreign patent offices. The parties expressly agree that the "Prosecution Bar" set forth herein shall be personal to any attorney who reviews "Prosecution Bar" material and shall not be imputed to those other persons or attorneys who have not viewed "Prosecution Bar" material.

MISCELLANEOUS PROVISIONS

15. The term "copy" as used herein means any photographic, mechanical or computerized copy or reproduction of any document or thing, or any verbatim transcript, in whole or in part, of such document or thing.

16. To the extent that Protected Documents or information contained therein are used in depositions, at hearings, or at trial, such documents or information shall remain subject to the provisions of this Order, along with the transcript pages of the deposition testimony and/or trial testimony referring to the Protected Documents or information contained therein.

17. Any court reporter or transcriber who reports or transcribes testimony in this action shall agree that all Confidential, Confidential – Outside Counsels' Eyes Only, or Confidential Attorneys' Eyes Only – Financial information designated as such under this Order shall remain as designated and shall not be disclosed by them, except pursuant to the terms of this Order, and that any notes or transcriptions of such testimony (and any accompanying exhibits) will be retained by the reporter or delivered to counsel of record.

18. At the request of any party, the original and all copies of any deposition transcript, in whole or in part, shall be clearly marked Confidential, Confidential – Outside Counsels’ Eyes Only, or Confidential Attorneys’ Eyes Only – Financial by the reporter upon all sections containing Protected Information. The Designating Party must make the designation request within twenty-one (21) calendar days of the deposition. If the Designating Party is a non-party, written notice of the request shall be provided to all parties. Any portions so designated shall thereafter be separated and treated in accordance with the terms of this Order. Prior to expiration of twenty-one (21) calendar days, all persons in attendance at the deposition shall treat the deposition, the deposition transcript and associated exhibits, and all information contained therein as Protected Information under the Confidential Outside Counsels’ Eyes Only designation.

19. Inadvertent or unintentional production of documents or information containing Confidential, Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial information that is not designated “confidential” shall not be deemed a waiver in whole or in part of a claim for confidential treatment. The inadvertent or unintentional production of documents or information which a party or non-party later claims should not have been produced because of a privilege will not be deemed to waive any privileges. A party or non-party may request the return of any inadvertently produced privileged material, and the Receiving Party shall make no further use such document(s) or information and, as soon as practicable, shall return or destroy all copies of such inadvertently produced document(s) or information, and confirm such destruction in writing to the Producing Party.

20. After termination of this litigation, the provisions of this Order shall continue to be binding, except with respect to those documents and information that become a matter of public

record. This Court retains and shall have continuing jurisdiction over the parties and recipients of the Protected Documents for enforcement of the provisions of this Order following termination of this litigation.

21. Upon termination of this action by dismissal, judgment, or settlement, within sixty (60) days of conclusion of this action, counsel for the Receiving Party shall return the Protected Documents to the counsel for the Producing Party. In lieu of returning the Protected Documents, a party may destroy all such Protected Documents within sixty (60) days of the conclusion of this action and certify to the Producing Party that it has destroyed the Protected Documents. The Receiving Party may keep its attorney work product which refers or relates to any Protected Documents. Attorney work product may be used in subsequent litigation provided that such use does not disclose Protected Documents or any information contained therein.

22. This Order shall be binding upon the parties and their attorneys, successors, executors, personal representatives, administrators, heirs, legal representatives, assigns, subsidiaries, divisions, employees, agents, independent contractors, or other persons or organizations over which they have control.

23. In order for a Receiving Party to disclose documents containing Confidential, Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial information to persons under paragraph 7E, 7G, 8C or 9B above, the Receiving Party must provide written notice to all counsel no less than five (5) business days prior to any disclosure of such Protected Documents. The written notice shall contain the name, title, business address, present occupation (or job description), past and present business relationships with the party retaining them or other party to the litigation, current curriculum vitae of the expert or consultant to whom the

information will be disclosed (if such disclosure occurs under paragraph 7E above), and an undertaking in the form of Exhibit A signed by that person (such original signed document to be kept by the attorney retaining such person).

- A. If, within five (5) business days after receipt of the notice, counsel for the Producing Party does not object to the disclosure, any Confidential, Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial information designated by that party may be disclosed to such person. If within five (5) business days of receipt of such a notice of intent to disclose counsel for the Producing Party objects to such intended disclosure, Producing Party shall not make the disclosure until such objection is resolved by agreement of the parties or by a ruling of the Court on a motion by the Producing Party.
- B. Counsel’s objection must be for good cause, stating with particularity the reasons for the objection, and must be in writing and served on all parties to this action within the five-day period. The parties shall meet and confer to attempt to resolve the dispute within five (5) business days from the date of mailing of the objection. If the parties cannot resolve the dispute, the Producing Party may move the Court for an order that access to Confidential, Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial information be denied to the designated person. Such motion shall be made within ten (10) business days of the mailing or electronic delivery of the objection. The parties shall comply with the procedures and time periods set forth in this Amendment, provided, however, that the Producing Party may make

a motion in an abbreviated time period if that party has a compelling reason to do so.

- C. Failure to object within the five-day period shall be deemed approval, but shall not preclude a Producing Party from objecting to continued access to Confidential, Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial information by that person where facts suggesting a basis for objection are subsequently learned by the Producing Party or its counsel.

24. The recipient of any Confidential, Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial information shall maintain such information in a secure and safe place, and shall exercise at least the same degree of care in handling the information as is exercised by the recipient with respect to its own Confidential, Confidential – Outside Counsels’ Eyes Only information, and/or Confidential Attorneys’ Eyes Only – Financial.

25. Review of source code:

- A. Access to the machine-readable version of code shall only be provided to persons authorized to receive Confidential – Outside Counsels’ Eyes Only information and only on “stand-alone” computers (that is, not connected to a network, internet, or peripheral device except that the stand-alone computers may be connected to a printer or printers) in computer searchable format at a secure location at the offices of the Producing Party’s counsel, or any other location mutually agreed upon by the Producing Party and Requesting Party, to be made available during regular business hours (8:00 a.m. to 6:00 p.m. local time) on 24

hours notice. The Producing Party must produce source code in the form in which it is kept in the ordinary course of the Producing Party's business. Access to such location may also be provided on Saturdays and Sundays, so long as actual notice is provided to the Producing Party by no later than 9:00 a.m. local time on the Friday before the weekend for which access is requested. The Requesting Party shall make its best efforts to restrict its access to normal business hours. One "stand-alone" computer shall be provided at Producing Party's counsel's office (or other mutually agreeable location). An additional computer may be provided upon request, if available.

- B. The Producing Party must allow printing of paper copies of code at the time of inspection by the Requesting Party, which the Requesting Party may take when completing an inspection. As such, the Producing Party shall make available a laser printer with commercially reasonable printing speeds for on-site printing during inspection of the source code. The party receiving paper copies of such code must keep that code in a secured container or location at all times. Paper copies of code may not themselves be copied and may not be removed from a secured container unless in a secured, private area. Notwithstanding the foregoing sentence, attorneys may make copies of the paper copies for use as exhibits in court proceedings and at depositions. These additional copies will be treated the same as the original printouts. The Code Reviewers (defined in section C below) may have in their offices a paper copy of those portions of the code on which they are working. The Code Reviewers shall also be entitled to

take notes relating to the source code, but may not copy the source code into the notes. Such notes shall be treated the same as the original printouts. The Requesting Party shall maintain a complete log of Bates numbers printed, and shall produce such log at the time its first expert reports are delivered.

- C. The Producing Party shall install tools that are sufficient for viewing and searching the source code produced, on the platform produced, if such tools exist and are presently used in the ordinary course of the Producing Party's business, by its employees, to review and search the code. However, the Code Reviewers may use their own searching or review tools for inspecting the code if agreed to by the parties at least 5 days before any Code Reviewer is scheduled to inspect the code. In such situation, the Requesting Party shall provide a licensed copy of such searching or review tool to the Producing Party for installation on the stand-alone computer. For purposes of this paragraph, "Requesting Party" and "Code Reviewers" includes technical advisors (and members of his or her professional staff) retained by the Requesting Party to review the code in compliance with this Order and Counsel.

26. If a party intends to file with the Court any documents constituting or containing any Confidential, Confidential – Outside Counsels' Eyes Only, and/or Confidential Attorneys' Eyes Only – Financial information, that party shall take all steps necessary to file such documents under seal, following the procedure required by Local Rule CV 5(a)(7).

27. This Protective Order does not prevent or otherwise restrict outside counsel from rendering advice to their clients and, in the course thereof, relying generally on Confidential,

Confidential – Outside Counsels’ Eyes Only, and/or Confidential Attorneys’ Eyes Only – Financial information; provided, however, that in rendering such advice counsel shall not disclose, reveal or describe any such materials except insofar as allowed (if allowed at all) under the terms of this Order.

28. The Court anticipates and encourages the parties to file a motion to modify the terms hereof with respect to shifting the cost burden of production equitably; and other terms that may be reasonably required to protect a party as provided in Rule 26(b) or (c) of the Federal Rules of Civil Procedure.

29. This Order is entered without prejudice to the right of any party to apply to the Court at any time for additional protection, or to relax or rescind the restrictions of this Order, when convenience or necessity requires. The Court shall take appropriate measures to protect Protected Material, however designated, at trial and any hearing in this case.

So ORDERED and SIGNED this 2nd day of September, 2010.



JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS**

TYLER DIVISION

ALOFT MEDIA, LLC,

Plaintiff,

v.

ORACLE CORPORATION, ET AL.,

Defendants.

§
§
§
§
§
§
§
§
§

Civil Action No. 6:09-CV-304

JURY TRIAL DEMANDED

CONFIDENTIALITY UNDERTAKING UNDER PROTECTIVE ORDER

I, _____ declare that:

1. My present residential address is: _____.

2. My present employer is _____ and the address of my present employer is _____.

3. My present occupation or job title is _____.

4. I have attached hereto my curriculum vitae.

5. I hereby acknowledge that I have read the Protective Order in this Action, that I am familiar with the terms thereof, and that I agree to be bound by the terms thereof.

6. I hereby acknowledge that, pursuant to the Protective Order, I may receive (select all that apply):

Confidential

Confidential – Outside Counsels’ Eyes Only

Confidential Attorneys' Eyes Only – Financial

information in this Action, and certify my understanding that such information is provided to me pursuant to the terms and restrictions of the Protective Order.

7. I agree not to reveal any Confidential, Confidential – Outside Counsels' Eyes Only, and/or Confidential Attorneys' Eyes Only – Financial information or any notes containing that information to anyone not authorized to receive such information pursuant to the terms of the Protective Order, and I agree not to use, directly or indirectly, or allow the use of that information for any purpose other than directly associated with my duties in this litigation.

8. I understand that if I am to retain copies of the materials that I receive which have been designated as containing or reflecting Confidential, Confidential – Outside Counsels' Eyes Only, and/or Confidential Attorneys' Eyes Only – Financial, they shall be safely stored in a manner consistent with the Protective Order. I understand that I all copies of any such materials are to remain in my custody until the conclusion of this Action or the completion of my assigned duties, whereupon the copies are to be destroyed or returned to the Producing Party. Such return or destruction shall not relieve me from the obligations imposed upon me by the Protective Order. I further agree to notify any support personnel (such as paralegals, administrative assistants, secretaries, clerical and administrative staff) who are necessary to assist me of the terms of the Protective Order and of their obligation not to reveal any Confidential, Confidential – Outside Counsels' Eyes Only, and/or Confidential Attorneys' Eyes Only – Financial information to anyone not authorized to receive such information pursuant to the terms of the Protective Order. I understand that I shall be subject to the jurisdiction of the U.S. District Court for the Eastern District of Texas in any proceeding relating to my performance under, compliance with, or violation of the

Protective Order.

Executed On: _____ Name: _____