

1 HONORABLE JOHN C. COUGHENOUR  
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7

8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE WESTERN DISTRICT OF WASHINGTON**  
10 **AT SEATTLE**

11 RUSHFORTH CONSTRUCTION CO.,  
12 INC., d/b/a AP | RUSHFORTH, a  
13 Washington corporation,

14 Plaintiffs,

15 vs.

16 ARCH SPECIALTY INSURANCE  
17 COMPANY, a foreign insurance company;  
18 ENDURANCE AMERICAN SPECIALTY  
19 INSURANCE COMPANY, a foreign  
20 insurance company; SCOTTSDALE  
21 INSURANCE COMPANY, a foreign  
22 insurance company; JAMES RIVER  
23 INSURANCE COMPANY, a foreign  
24 insurance company; SENECA SPECIALTY  
INSURANCE COMPANY, a foreign  
insurance company; GEMINI INSURANCE  
COMPANY, a foreign insurance company;  
UNITED SPECIALTY INSURANCE  
COMPANY, a foreign insurance company;  
MITSUI SUMITOMO INSURANCE  
COMPANY OF AMERICA, a foreign  
insurance company; OHIO SECURITY  
INSURANCE COMPANY, a foreign

Case N. C17-1063-JCCC  
STIPULATED PROTECTIVE ORDER

25 STIPULATED PROTECTIVE ORDER  
C17-1063-JCC  
PAGE - 1

1 insurance company; THE OHIO  
2 CASUALTY INSURANCE COMPANY, a  
3 foreign insurance company; NEW  
4 HAMPSHIRE INSURANCE COMPANY,  
a foreign insurance company; WESCO  
INSURANCE COMPANY, a foreign  
insurance company,,

5 Defendants.

6 1. PURPOSES AND LIMITATIONS

7 Discovery in this action is likely to involve production of confidential, proprietary, or  
8 private information for which special protection may be warranted. Accordingly, the parties  
9 hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The  
10 parties acknowledge that this agreement is consistent with LCR 26(c). It does not confer blanket  
11 protection on all disclosures or responses to discovery, the protection it affords from public  
12 disclosure and use extends only to the limited information or items that are entitled to  
13 confidential treatment under the applicable legal principles, and it does not presumptively entitle  
14 parties to file confidential information under seal.

15 2. “CONFIDENTIAL” MATERIAL

16 “Confidential” material shall include the following documents and tangible things  
17 produced or otherwise exchanged:

- 18 • Claim file documents which reflect or refer to rate information, reserves, attorney-client  
privileged communications, or work product relating to the defense of Rushforth, and/or  
19 other competitive business information.
- 20 • Documents reflecting insurer procedures and guidelines.

21 3. SCOPE

22 The protections conferred by this agreement cover not only confidential material (as  
23 defined above), but also (1) any information copied or extracted from confidential material; (2)  
24 all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony,

25 STIPULATED PROTECTIVE ORDER

C17-1063-JCC

PAGE – 2

1 conversations, or presentations by parties or their counsel that might reveal confidential  
2 material.

3 However, the protections conferred by this agreement do not cover information that is  
4 in the public domain or becomes part of the public domain through trial or otherwise.

5 **4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL**

6 **4.1 Basic Principles.** A receiving party may use confidential material that is disclosed or  
7 produced by another party or by a non-party in connection with this case only for prosecuting,  
8 defending, or attempting to settle this litigation. A party's disclosure of confidential material  
9 pursuant to this agreement shall not waive such party's privileges, immunities, or protections  
10 that would otherwise apply to such material. Confidential material may be disclosed only to the  
11 categories of persons and under the conditions described in this agreement. Confidential  
12 material must be stored and maintained by a receiving party at a location and in a secure manner  
13 that ensures that access is limited to the persons authorized under this agreement.

14 **4.2 Disclosure of "CONFIDENTIAL" Information or Items.** Unless otherwise ordered  
15 by the court or permitted in writing by the designating party, a receiving party may disclose any  
16 confidential material only to:

17 (a) the receiving party's counsel of record in this action, as well as employees of counsel  
18 to whom it is reasonably necessary to disclose the information for this litigation;

19 (b) the officers, directors, and employees (including in house counsel), excess insurers,  
20 regulators, auditors, reinsurers, retrocessionaires, and brokers of the receiving party to whom  
21 disclosure is reasonably necessary, unless the parties agree that a particular document or material  
22 produced is for Attorney's Eyes Only and is so designated;

23 (c) experts and consultants to whom disclosure is reasonably necessary for this litigation  
24 and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

25 **STIPULATED PROTECTIVE ORDER**

C17-1063-JCC

PAGE – 3

(d) the court, court personnel, and court reporters and their staff;

(e) copy or imaging services retained by counsel to assist in the duplication of confidential material, provided that counsel for the party retaining the copy or imaging service instructs the service not to disclose any confidential material to third parties and to immediately return all originals and copies of any confidential material;

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of transcribed deposition testimony or exhibits to depositions that reveal confidential material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this agreement;

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information;

(h) any other party as required by law.

4.3 Filing Confidential Material. Before filing confidential material or discussing or referencing such material in court filings, the filing party shall confer with the designating party to determine whether the designating party will remove the confidential designation, whether the document can be redacted, or whether a motion to seal or stipulation and proposed order is warranted. Local Civil Rule 5(g) sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

## 5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party or non-party that designates information or items for protection under this agreement must take

## STIPULATED PROTECTIVE ORDER

STRUCTURED  
C17-1063-ICC

PAGE - 4

1 care to limit any such designation to specific material that qualifies under the appropriate  
2 standards. The designating party must designate for protection only those parts of material,  
3 documents, items, or oral or written communications that qualify, so that other portions of the  
4 material, documents, items, or communications for which protection is not warranted are not  
5 swept unjustifiably within the ambit of this agreement.

6 Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
7 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to  
8 unnecessarily encumber or delay the case development process or to impose unnecessary  
9 expenses and burdens on other parties) expose the designating party to sanctions.

10 If it comes to a designating party's attention that information or items that it designated  
11 for protection do not qualify for protection, the designating party must promptly notify all other  
12 parties that it is withdrawing the mistaken designation.

13 **5.2 Manner and Timing of Designations**. Except as otherwise provided in this  
14 agreement (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or  
15 ordered, disclosure or discovery material that qualifies for protection under this agreement must  
16 be clearly so designated before or when the material is disclosed or produced.

17 (a) *Information in documentary form*: (e.g., paper or electronic documents and  
18 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial  
19 proceedings), the designating party must affix the word "CONFIDENTIAL" to each page that  
20 contains confidential material. If only a portion or portions of the material on a page qualifies  
21 for protection, the producing party also must clearly identify the protected portion(s) (e.g., by  
22 making appropriate markings in the margins).

23 (b) *Testimony given in deposition or in other pretrial proceedings*: the parties and  
24 any participating non-parties must identify on the record, during the deposition or other pretrial

25 **STIPULATED PROTECTIVE ORDER**

C17-1063-JCC

PAGE - 5

1 proceeding, all protected testimony, without prejudice to their right to so designate other  
2 testimony after reviewing the transcript. Any party or non-party may, within fifteen days after  
3 receiving the transcript of the deposition or other pretrial proceeding, designate portions of the  
4 transcript, or exhibits thereto, as confidential. If a party or non-party desires to protect  
5 confidential information at trial, the issue should be addressed during the pre-trial conference.

6 (c) Other tangible items: the producing party must affix in a prominent place on the  
7 exterior of the container or containers in which the information or item is stored the word  
8 "CONFIDENTIAL." If only a portion or portions of the information or item warrant protection,  
9 the producing party, to the extent practicable, shall identify the protected portion(s).

10 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to  
11 designate qualified information or items does not, standing alone, waive the designating party's  
12 right to secure protection under this agreement for such material. Upon timely correction of a  
13 designation, the receiving party must make reasonable efforts to ensure that the material is  
14 treated in accordance with the provisions of this agreement.

15 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

16 6.1 Timing of Challenges. Any party or non-party may challenge a designation of  
17 confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality  
18 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic  
19 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to  
20 challenge a confidentiality designation by electing not to mount a challenge promptly after the  
21 original designation is disclosed.

22 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute  
23 regarding confidential designations without court involvement. Any motion regarding  
24 confidential designations or for a protective order must include a certification, in the motion or

25 STIPULATED PROTECTIVE ORDER

C17-1063-JCC

PAGE – 6

1 in a declaration or affidavit, that the movant has engaged in a good faith meet and confer  
2 conference with other affected parties in an effort to resolve the dispute without court action.  
3 The certification must list the date, manner, and participants to the conference. A good faith  
4 effort to confer requires a face-to-face meeting or a telephone conference.

5         6.3     Judicial Intervention. If the parties cannot resolve a challenge without court  
6 intervention, the designating party may file and serve a motion to retain confidentiality under  
7 Local Civil Rule 7 (and in compliance with Local Civil Rule 5(g), if applicable). The burden of  
8 persuasion in any such motion shall be on the designating party. Frivolous challenges, and those  
9 made for an improper purpose (e.g., to harass or impose unnecessary expenses and burdens on  
10 other parties) may expose the challenging party to sanctions. All parties shall continue to  
11 maintain the material in question as confidential until the court rules on the challenge.

12 7.     PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER  
13 LITIGATION

14         If a party is served with a subpoena or a court order issued in other litigation that compels  
15 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that  
16 party must:

17             (a) promptly notify the designating party in writing and include a copy of the subpoena  
18 or court order;

19             (b) promptly notify in writing the party who caused the subpoena or order to issue in the  
20 other litigation that some or all of the material covered by the subpoena or order is subject to  
21 this agreement. Such notification shall include a copy of this agreement; and

22             (c) cooperate with respect to all reasonable procedures sought to be pursued by the  
23 designating party whose confidential material may be affected.

24             //

25 STIPULATED PROTECTIVE ORDER  
C17-1063-JCC  
PAGE – 7

1 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

2 If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential  
3 material to any person or in any circumstance not authorized under this agreement, the receiving  
4 party must immediately (a) notify in writing the designating party of the unauthorized  
5 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material,  
6 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms  
7 of this agreement, and (d) request that such person or persons execute the "Acknowledgment  
8 and Agreement to Be Bound" that is attached hereto as Exhibit A.

9 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED  
10 MATERIAL

11 When a producing party gives notice to receiving parties that certain inadvertently  
12 produced material is subject to a claim of privilege or other protection, the obligations of the  
13 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This  
14 provision is not intended to modify whatever procedure may be established in an e-discovery  
15 order or agreement that provides for production without prior privilege review. The parties agree  
16 to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

17 10. NON TERMINATION AND RETURN OF DOCUMENTS

18 Within 60 days after the termination of this action, including all appeals, each receiving  
19 party must return all confidential material to the producing party, including all copies, extracts  
20 and summaries thereof. Alternatively, the parties may retain confidential material, while  
21 utilizing appropriate methods of maintaining the confidentiality of such material consistently  
22 with the requirements of this agreement.

23 Notwithstanding this provision, counsel are entitled to retain one archival copy of all  
24 documents filed with the court, trial, deposition, and hearing transcripts, correspondence,

25 STIPULATED PROTECTIVE ORDER

C17-1063-JCC

PAGE – 8

1 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert  
2 work product, even if such materials contain confidential material.

3 The confidentiality obligations imposed by this agreement shall remain in effect until a  
4 designating party agrees otherwise in writing or a court orders otherwise.

5 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

6  
7 Dated: February 12, 2018 REED McCLURE

8 By: *s/Christopher J. Nye*  
9 Christopher J. Nye, WSBA No. 29690  
10 Attorney for Defendant Arch Specialty  
Insurance Company

11  
12 Dated: February 12, 2018 NICOLAIDES FINK THORPE  
13 MICHAELIDES SULLIVAN, LLP

14 By: *s/Sara M. Thorpe*  
15 Sara M. Thorpe, Bar No. 146529  
16 Attorney for Defendant Arch Specialty  
17 Insurance Company- *Pro Hac Vice*

18 Dated: February 12, 2018 HARPER | HAYES PLLC

19 By: *s/Gregory L. Harper*  
20 Gregory L. Harper, WSBA No. 27311  
21 Thomas M. Williams, WSBA No. 47654  
22 Attorneys for Plaintiff, Rushforth  
23 Construction Co.

1 Dated: February 12, 2018

JERRY MOBERG & ASSOCIATES, P.S.

7 Dated: February 12, 2018

WILSON SMITH COCHRAN &  
DICKERSON

13 Dated: February 12, 2018

SCHEER LAW GROUP LLP

19 Dated: February 12, 2018

LEWIS BRISBOIS BISGAARD &  
SMITH LLP

25 STIPULATED PROTECTIVE ORDER  
C17-1063-JCC  
PAGE – 10

2 By: *s/Kara R. Masters*

3 Kara R. Masters, WSBA No. 23459  
4 Jerry Moberg, WSBA No. 5282  
5 Attorneys for Defendant, James River  
6 Insurance Co.

9 By: *s/John M. Silk*

10 John M. Silk, WSBA No. 15035  
11 Lisa C. Neal, WSBA No. 25686  
12 Attorney for Defendants, Ohio Security  
13 Insurance Co. and The Ohio Casualty  
14 Insurance Co.

15 By: *s/Jonathan D. Holt*

16 Jonathan Dirk Holt, WSBA No. 28433  
17 Kelsey L. Shewbert, WSBA No. 51214  
18 Attorneys for Defendant, United Specialty  
19 Insurance Co.

21 By: *s/Gregory S. Worden*

22 Gregory S. Worden, WSBA No. 24262  
23 John T. Bender, WSBA No. 49658  
24 Lane J. Ashley, Bar No. 073296-*Pro Hac Vice*  
25 Attorneys for Defendant, Wesco Insurance  
Company

1 Dated: February 12, 2018

JENSEN MORSE BAKER PLLC

2 By: *s/Steven D. Jensen*

3 Steven D. Jensen, WSBA No. 26495  
4 Gabriel Baker, WSBA No. 28476  
5 Attorneys for Defendant, New Hampshire  
Insurance Company

6 Dated: February 12, 2018

LEATHER & ASSOCIATES, PLLC

7 By: *s/Thomas Lether*

8 Thomas Lether, WSBA No. 18089  
9 Eric Neal, WSBA No. 31863  
10 Attorneys for Defendant, Seneca Specialty  
Insurance Company

11 Dated: February 12, 2018

12 SELMAN BREITMAN LLP

13 By: *s/Peter J. Mintzer*

14 Peter J. Mintzer, WSBA No. 19995  
15 Attorneys for Defendant, Gemini Insurance  
Company

17 Dated: February 12, 2018

18 MURPHY ARMSTRONG & FELTON LLP

19 By: *s/James P. Murphy*

20 James P. Murphy, WSBA No. 18125  
21 Tracy Y. Williams, WSBA No. 35239  
22 Attorneys for Defendant, Endurance  
American Specialty Insurance Company

23 //

24 //

25 STIPULATED PROTECTIVE ORDER

C17-1063-JCC

PAGE - 11

1 PURSUANT TO STIPULATION, IT IS SO ORDERED.

2 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of  
3 any documents in this proceeding shall not, for the purposes of this proceeding or any other  
4 proceeding in any other court, constitute a waiver by the producing party of any privilege  
5 applicable to those documents, including the attorney-client privilege, attorney work-product  
6 protection, or any other privilege or protection recognized by law.

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8 DATED: February 14, 2018

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John C. Coughenour  
United States District Court Judge

**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 for the Western District of Washington on [date] in the case of \_\_\_\_\_ *Rushforth Construction Co., Inc. d/b/a AP / Rushforth v. Arch Insurance Company, et al.*, Case No. 2:17-cv-1063-JCC. 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 further promise that I will not disclose in any manner any information or item that is subject to the 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 for the Western District of Washington for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_

## STIPULATED PROTECTIVE ORDER

STK CERTIFIED  
C17-1063-JCC

PAGE - 13

## **CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2018, I filed the following documents:

(1) ***Stipulated Protective Order***; (2) and (this) ***Certificate of Service***, with the Clerk of the Court

using the CM/ECF system and also send electronic notification to the following:

Greg L Harper  
Thomas M. Williams  
Harper | Hayes PLLC  
600 University Street, Suite 2420  
Seattle, WA 98101-1129  
*Attorneys for Plaintiffs*

Jonathan Dirk Holt  
Kelsey L. Shewbert  
Scheer Law Group LLP  
701 Pike Street, Suite 2200  
Seattle, WA 98101-2358  
***Attorneys for United Specialty***

John M. Silk  
Lisa C. Neal  
Sarah Eversole  
Wilson Smith Cochran Dickerson  
901 Fifth Ave., Suite 1700  
Seattle, WA 98164-2050  
*Attorneys for Ohio Security*

Geoffrey J.M. Bridgman  
Daniel F. Shickich  
Ogden, Murphy, Wallace  
1601 Fifth Ave., Suite 2100  
Seattle, WA 98101-1686  
*Attorneys for Scottsdale Ins. Co.*

Kara R. Masters  
Jerry Moberg  
Jerry Moberg & Associates, P.S.  
P.O. Box 130  
Ephrata, WA 98823  
*Attorneys for James River*

Steven D. Jensen  
Gabriel Baker  
Jensen Morse Baker PLLC  
216 First Ave. S, Suite 204  
Seattle, WA 98104-2534  
*Attorneys for New Hampshire Ins. Co.*

Peter J. Mintzer  
Selman Breitman, LLP  
800 Fifth Ave., Suite 4100  
Seattle, WA 98104-3100  
*Attorneys for Gemini*

Loretta Douglas  
Selman Breitman  
33 New Montgomery Street, Floor 6  
San Francisco, CA 94105-4537  
***Attorney for Gemini***

Jonathan Dirk Holt  
Scheer Law Group LLP  
701 Pike Street, Suite 2200  
Seattle, WA 98101-2358  
***Attorney for Ohio Casualty***

Gregory S. Worden  
John T. Bender  
Lewis Brisbois Bisgaard & Smith LLP  
1111 Third Ave., Suite 2700  
Seattle, WA 98101  
*Attorneys for Wesco*

Lane J. Ashley  
Lewis, Brisbois, Bisgaard & Smith LLP

Sara M. Thorpe

## STIPULATED PROTECTIVE ORDER

C17-1063-JCC

PAGE - 14

633 W. 5<sup>th</sup> Street, Suite 4000  
Los Angeles, CA 90071  
*Pro Hac Vice for Wesco*

Nicolaides Fink Thorpe Michaelides Sullivan  
LLP  
101 Montgomery Street, Suite 2300  
San Francisco, CA 94101  
*Pro Hac Vice Counsel for Arch Specialty*

James P. Murphy  
Tracy Y. Williams  
Murphy Armstrong & Felton LLP  
701 Millennium Tower  
719 Second Avenue  
Seattle, WA 98104  
*Attorneys for Endurance American  
Specialty Ins. Co.*

Thomas Lether  
Eric Neal  
Lether & Associates  
1848 Westlake Ave. N, Suite 100  
Seattle, WA 98109  
*Attorneys for Seneca Specialty Ins. Co.*

Executed at Seattle, Washington this 12<sup>th</sup> day of February, 2018.

Rebecca C. Lewis  
Legal Secretary  
Reed McClure  
1215 Fourth Avenue, Suite 1700  
Seattle, WA 98161-1087  
Tel: (206) 292-4900  
Fax: (206) 223-0152  
Email:

STIPULATED PROTECTIVE ORDER  
C17-1063-JCC  
PAGE - 15