

[Counsel Listed on Signature Block]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

NOTE CHANGES MADE BY THE COURT

SPEX TECHNOLOGIES, INC.,

Plaintiff,

v.

KINGSTON TECHNOLOGY
CORPORATION, KINGSTON
DIGITAL, INC., KINGSTON
TECHNOLOGY COMPANY, INC.,
IMATION CORPORATION,
DATA LOCKER INC., DATA
LOCKER INTERNATIONAL, LLC,

Defendants.

Case No. 8:16-CV-01790-JVS-AGR

**STIPULATED PROTECTIVE
ORDER**

SPEX TECHNOLOGIES, INC.,
Plaintiff,

v.

WESTERN DIGITAL
CORPORATION, WESTERN
DIGITAL TECHNOLOGIES, INC.,
HGST, INC.,

Defendants.

Case No. 8:16-CV-01799-JVS-AGR

NOTE CHANGES MADE BY THE COURT

NOTE CHANGES MADE BY THE COURT

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SPEX TECHNOLOGIES, INC., Plaintiff v. TOSHIBA AMERICA ELECTRONICS COMPONENTS INC., TOSHIBA AMERICA INFORMATION SYSTEMS, INC., TOSHIBA AMERICA, INC., AND TOSHIBA CORPORATION, Defendants.	Case No. 8:16-CV-01800-JVS-AGR
SPEX TECHNOLOGIES, INC., Plaintiff, v. APRICORN, INC., Defendant.	Case No. 2:16-CV-07349-JVS-AGR

1 It is hereby stipulated by the parties that the Court enter the following Order
2 protecting confidentiality of both party and non-party information to be disclosed in
3 these litigations.

4 1. PURPOSES AND LIMITATIONS

5 Disclosure and discovery activity in this action are likely to involve
6 production of confidential, proprietary, or private information for which special
7 protection from public disclosure and from use for any purpose other than
8 prosecuting this litigation may be warranted. This Order does not confer blanket
9 protections on all disclosures or responses to discovery and the protection it affords
10 from public disclosure and use extends only to the limited information or items that
11 are entitled to confidential treatment under the applicable legal principles and Civil
12 Local Rules. As set forth in Section 14.3 below, this Protective Order does by itself
13 not entitle the Parties to file confidential information under seal; Civil Local Rule
14 79-5 sets forth the procedures that must be followed and the standards that will be
15 applied when a party seeks permission from the court to file material under seal.

16 2. DEFINITIONS

17 2.1 Challenging Party: a Party or Non-Party that challenges the
18 designation of information or items under this Order.

19 2.2 "CONFIDENTIAL" Information or Items: information (regardless of
20 how it is generated, stored or maintained) or tangible things that constitute or
21 include information that is not publicly known and that cannot be ascertained from
22 an inspection of publicly available documents.

23 2.3 Counsel (without qualifier): Outside Counsel of Record and House
24 Counsel (as well as their respective support staff).

25 2.4 Designating Party: a Party or Non-Party that designates information or
26 items that it produces in disclosures or in responses to discovery as
27 "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
28 ONLY," or "HIGHLY CONFIDENTIAL – SOURCE CODE."

1 2.5 Disclosure or Discovery Material: all items or information, regardless
2 of the medium or manner in which it is generated, stored, or maintained (including,
3 among other things, testimony, transcripts, and tangible things), that are produced,
4 disclosed or generated in disclosures, responses to discovery, or depositions in this
5 matter.

6 2.6 Expert: a person who (1) has been retained by a Party or its counsel to
7 serve as an expert witness or as a consultant in this action, (2) is not a past or
8 current employee of a Party or of a Party's competitor, and (3) at the time of
9 retention, is not anticipated to become an employee of a Party or of a Party's
10 competitor.

11 2.7 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"
12 Information or Items: extremely sensitive "Confidential Information or Items,"
13 disclosure of which to another Party or Non-Party, even under the restricted terms
14 and conditions applicable to material designated "CONFIDENTIAL," would not
15 adequately protect the interests of the Designating Party. Examples of HIGHLY
16 CONFIDENTIAL – ATTORNEYS' EYES ONLY material include, but are not
17 limited to, the following:

- 18 A. Confidential licenses and licensing terms;
19 B. Confidential sales, pricing, profit, and other financial
20 information;
21 C. Confidential business, marketing, and strategic plans and
22 forecasts;
23 D. Confidential technical information, including design,
24 engineering and development documents;
25 E. Employee personal information, to the extent such information
26 is produced and not redacted;
27 F. Trade Secrets; and
28

1 G. Any other type or category of information which a Producing
2 Party believes must be held in highest level of confidence
3 because it could otherwise create a competitive disadvantage.

4 2.8 "HIGHLY CONFIDENTIAL – SOURCE CODE" Information or
5 Items: "Confidential Information or Items" representing schematics, Hardware
6 Description Language (HDL) or Register Transfer Level (RTL) files or computer
7 code and associated comments and revision histories, the disclosure of which the
8 Parties acknowledge would create a substantial risk of serious harm such that
9 disclosure could not be avoided by less restrictive means ("Source Code"). For
10 avoidance of doubt, Source Code includes, but is not limited to, source files,
11 "include" files, make files, intermediate output files, executable files, header files,
12 resource files, library files, module definition files, map files, object files, linker
13 files, net lists, circuit schematics, browser info files, debug files, computer code,
14 scripts, assembly, binaries and object code and other human-readable files used in
15 the compilation of Source Code into a software program. The Receiving Party shall
16 not attempt to build or compile the Source Code.

17 2.09 House Counsel: attorneys who are employees of a Party or a related
18 entity. House Counsel does not include Outside Counsel of Record or any other
19 outside counsel.

20 2.10 Non-Party: any natural person, partnership, corporation, association, or
21 other legal entity not named as a Party.

22 2.11 Outside Counsel of Record: attorneys who are not employees of a
23 Party but are retained to represent or advise a Party and have appeared in this action
24 on behalf of that Party or are affiliated with a law firm which has appeared on
25 behalf of that Party.

26 2.12 Party: any party to this action, including all of its officers, directors,
27 employees, consultants, retained experts, and Outside Counsel of Record (and their
28 support staffs).

1 2.13 Producing Party: a Party or Non-Party that produces Disclosure or
2 Discovery Material in this action.

3 2.14 Professional Vendors: persons or entities that provide litigation
4 support services (e.g., photocopying, videotaping, translating, preparing exhibits or
5 demonstrations, and organizing, storing, or retrieving data in any form or medium)
6 and their employees and subcontractors.

7 2.15 Protected Material: any Disclosure or Discovery Material that is
8 designated as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS'
9 EYES ONLY," or "HIGHLY CONFIDENTIAL – SOURCE CODE."

10 2.16 Receiving Party: a Party that receives Disclosure or Discovery
11 Material from a Producing Party.

12 3. SCOPE

13 The protections conferred by this Order cover not only Protected Material (as
14 defined above), but also (1) any information copied or extracted from Protected
15 Material; (2) all copies, excerpts, summaries, or compilations of Protected Material;
16 and (3) any testimony, conversations, or presentations by Parties or their Counsel
17 that might reveal Protected Material. However, the protections conferred by this
18 Order do not cover the following information: (a) any information that is in the
19 public domain at the time of disclosure to a Receiving Party, including but not
20 limited to (i) publicly available advertising materials, (ii) materials that have been
21 published to the general public, or (iii) documents that have been submitted to any
22 governmental entity without request for confidential treatment, or that becomes part
23 of the public domain after its disclosure to a Receiving Party as a result of
24 publication not involving a violation of this Order, including becoming part of the
25 public record through trial or otherwise; and (b) any information known to the
26 Receiving Party prior to the disclosure or obtained by the Receiving Party after the
27 disclosure from a source who obtained the information lawfully and under no
28 obligation of confidentiality to the Designating Party. Nothing in this Order shall

1 restrict in any way a Producing Party's use or disclosure of its own Protected
2 Material. Any use of Protected Material at trial shall be governed by a separate
3 agreement or order.

4 4. DURATION

5 Even after final disposition of this litigation, the confidentiality obligations
6 imposed by this Order shall remain in effect until a Designating Party agrees
7 otherwise in writing or a court order otherwise directs. Final disposition shall be
8 deemed to be the later of (1) dismissal of all claims and defenses in this action, with
9 or without prejudice; and (2) final judgment herein after the completion and
10 exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,
11 including the time limits for filing any motions or applications for extension of time
12 pursuant to applicable law. The Court will retain jurisdiction over disputes arising
13 from this stipulated protective order for ninety (90) days after final disposition, as
14 defined in the preceding sentence.

15 5. DESIGNATING PROTECTED MATERIAL

16 5.1 Exercise of Restraint and Care in Designating Material for Protection.

17 Each Party or Non-Party that designates information or items for protection under
18 this Order must take care to limit any such designation to specific material that it
19 reasonably believes there is good cause to protect in accordance with the definitions
20 and provisions of this Order. To the extent it is practical to do so, the Designating
21 Party must designate for protection only those parts of the material, documents,
22 items, or oral or written communications that it reasonably believes qualify for
23 protection. Mass, indiscriminate, or routinized designations are prohibited.

24 If it comes to a Designating Party's attention that information or items that it
25 designated for protection do not qualify for protection at all or do not qualify for the
26 level of protection initially asserted, that Designating Party must promptly notify all
27 other Parties that it is withdrawing the designation.

28 5.2 Manner and Timing of Designations. Except as otherwise provided in

5 Designation in conformity with this Order requires:

15 If a Party or Non-Party identifies a set of documents that are better made
16 available for inspection, the Party or Non-Party may make the original documents
17 or materials available for inspection as they are kept in the ordinary course of
18 business. The Party or Non-Party need not designate them for protection until after
19 the inspecting Party has indicated which material it would like copied and
20 produced. During the inspection and before the designation, all of the material
21 made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –
22 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the
23 documents it wants copied and produced, the Producing Party must determine
24 which documents, or portions thereof, qualify for protection under this Order. Then,
25 before producing the specified documents, the Producing Party must affix the
26 appropriate legend (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
27 ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE
28 CODE) as required by this Order.

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1 (b) ~~for testimony given in deposition or in other pretrial or trial proceedings,~~
2 that the Designating Party identify on the record, before the close of the deposition,
3 ~~hearing, or other proceeding,~~ all protected testimony and specify the level of
4 protection being asserted. When it is impractical to identify separately each portion
5 of testimony that is entitled to protection and it appears that substantial portions of
6 the testimony may qualify for protection, the Designating Party may invoke on the
7 record (before the deposition, ~~hearing, or other proceeding~~ is concluded) a right to
8 have up to 30 days from the time the final transcript is available to identify the
9 specific portions of the testimony as to which protection is sought and to specify the
10 level of protection being asserted. Only those portions of the testimony that are
11 appropriately designated for protection within the 30 days shall be covered by the
12 provisions of this Protective Order. Alternatively, a Designating Party may specify,
13 at the deposition or up to 30 days afterwards if that period is properly invoked, that
14 the entire transcript shall be treated as "CONFIDENTIAL" or "HIGHLY
15 CONFIDENTIAL – ATTORNEYS' EYES ONLY." A Designating Party may also
16 specify that portions of the deposition transcript be identified as containing
17 "HIGHLY CONFIDENTIAL – SOURCE CODE." In the event that the deposition
18 is videotaped, the original and all copies of the videotape shall be marked by the
19 video technician pursuant to the terms of this Protective Order to indicate that the
20 contents of the videotape are subject to this Protective Order.

21 Parties shall give the other parties notice if they reasonably expect a
22 deposition, ~~hearing, or other proceeding,~~ to include Protected Material so that the
23 other parties can ensure that only authorized individuals including those who have
24 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A) are present
25 at those proceedings. Counsel for the Producing Party shall have the right to
26 exclude from oral depositions—other than the deponent, the deponent's counsel, the
27 reporter and the videographer (if any)—any person who is not authorized by this
28 Protective Order to receive or access Protected Material based on the designation of

1 such Protected Material. Such right of exclusion shall be applicable only during
2 periods of examination or testimony regarding such Protected Material. The use of
3 a document as an exhibit at a deposition shall not in any way affect its designation
4 as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
5 ONLY."

6 Transcripts containing Protected Material shall have an obvious legend on
7 the title page that the transcript contains Protected Material, and the title page shall
8 be followed by a list of all pages (including line numbers as appropriate) that have
9 been designated as Protected Material and the level of protection being asserted by
10 the Designating Party. The Designating Party shall inform the court reporter of
11 these requirements. Any transcript that is prepared before the expiration of the 30-
12 day period for designation shall be treated during that period as if it had been
13 designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" in its
14 entirety unless otherwise agreed. After the expiration of that period, the transcript
15 shall be treated only as actually designated.

16 (c) for information produced in some form other than documentary and for
17 any other tangible items, that the Producing Party affix in a prominent place on the
18 exterior of the container or containers in which the information or item is stored the
19 legend "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
20 ONLY," or "HIGHLY CONFIDENTIAL – SOURCE CODE." If only a portion or
21 portions of the information or item warrant protection, the Producing Party, to the
22 extent practicable, shall identify the protected portion(s) and specify the level of
23 protection being asserted.

24 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
25 failure to designate qualified information or items does not, standing alone, waive
26 the Designating Party's right to secure protection under this Order for such material.
27 Upon timely correction of a designation, the Receiving Party must make reasonable
28 efforts to assure that the material is treated in accordance with the provisions of this

1 Order.

2 5.4 Export Restriction. "EXPORT-CONTROL-RESTRICTED"
3 documents, information, material, and testimony may not be exported, re-exported,
4 temporarily imported, transferred, or retransferred to any non-U.S. person, country,
5 or entity, by any means, without the appropriate approval of the U.S. Department of
6 State, Directorate of Defense Trade Controls ("DDTC") for International Traffic in
7 Arms Regulations ("ITAR") Restricted materials, and the U.S. Department of
8 Commerce, Bureau of Industry and Security ("BIS") for Export Administration
9 Regulations ("EAR") Restricted materials. These restrictions also apply to United
10 States citizens and permanent residents employed by a company or organization
11 that falls within the definition of "foreign person." See ITAR, 22 C.F.R. § 120.16.
12 United States persons employed by such a foreign organization or company are not
13 eligible to receive ITAR-controlled information absent an authorization from the
14 DDTC or EAR-controlled information absent an authorization from the BIS.

15 The parties agree to treat all materials designated by another party as
16 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," "HIGHLY
17 CONFIDENTIAL – SOURCE CODE," or "EXPORT-CONTROL RESTRICTED"
18 as EXPORT-CONTROL-RESTRICTED materials. Absent appropriate
19 authorization (as explained above) or consent from the Producing Party (as
20 explained below), persons (as defined by ITAR § 120.15) with access to documents
21 treated as EXPORT-CONTROL-RESTRICTED shall not transfer, carry, or send
22 such information to a location outside the United States, including via any
23 electronic device or means, nor otherwise share such information with any person
24 not explicitly authorized to receive such information as set forth above.

25 Although materials designated as "HIGHLY CONFIDENTIAL –
26 ATTORNEYS' EYES ONLY," "HIGHLY CONFIDENTIAL – SOURCE CODE,"
27 or "EXPORT-CONTROLLED RESTRICTED" by another party will be treated as
28 EXPORT-CONTROL-RESTRICTED by default as a precautionary measure, the

1 parties anticipate that not all such materials are subject to the above federal export
2 restrictions. If the Receiving Party believes any “HIGHLY CONFIDENTIAL –
3 ATTORNEYS' EYES ONLY,” “HIGHLY CONFIDENTIAL – SOURCE CODE,”
4 or “EXPORT-CONTROL-RESTRICTED” materials are not subject to federal
5 export restrictions and can properly be shared with a foreign national under the
6 other provisions of this Order, the Receiving Party may seek consent of the
7 Producing Party to share the document. Consent shall not be withheld except for
8 good cause shown. The restrictions contained within this paragraph do not create
9 or otherwise impose an obligation on the Receiving Party to verify an individual’s
10 citizenship, who is permitted to have access under Paragraph 7.3 (c), (e) (f) or (g).

11 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

12 6.1 Timing of Challenges. Any Party or Non-Party may challenge a
13 designation of confidentiality at any time. Unless a prompt challenge to a
14 Designating Party's confidentiality designation is necessary to avoid foreseeable,
15 substantial unfairness, unnecessary economic burdens, or a significant disruption or
16 delay of the litigation, a Party does not waive its right to challenge a confidentiality
17 designation by electing not to mount a challenge promptly after the original
18 designation is disclosed.

19 6.2 Meet and Confer. The Challenging Party shall initiate the dispute
20 resolution process by providing written notice of each designation it is challenging
21 and describing the basis for each challenge. To avoid ambiguity as to whether a
22 challenge has been made, the written notice must recite that the challenge to
23 confidentiality is being made in accordance with this specific paragraph of the
24 Protective Order. The parties shall attempt to resolve each challenge in good faith
25 and must begin the process by conferring directly (in voice to voice dialogue; other
26 forms of communication are not sufficient) within 14 days of the date of service of
27 notice. In conferring, the Challenging Party must explain the basis for its belief that
28 the confidentiality designation was not proper and must give the Designating Party

to request a discovery conference regarding a proposed motion

1 an opportunity to review the designated material, to reconsider the circumstances,
2 and, if no change in designation is offered, to explain the basis for the chosen
3 designation. A Challenging Party may proceed to the next stage of the challenge
4 process only if (1) it has engaged in this meet and confer process first, or (2)
5 establishes that the Designating Party is unwilling to participate in the meet and
6 confer process in a timely manner.

7 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without
8 court intervention, the Designating Party shall ^{contact the magistrate judge's CRD} ~~file and serve a motion~~ to retain
9 confidentiality under Civil Local Rule 7 ~~(and in compliance with Civil Local Rule~~
10 ~~79-5, if applicable)~~ within 21 days of the initial notice of challenge or within 14
11 days of the parties agreeing that the meet and confer process will not resolve their
12 dispute, whichever is later. ^{request a discovery conference regarding a proposed} In addition, the Challenging Party may ~~file a motion~~
13 challenging a confidentiality designation at any time after complying with the meet
14 and confer requirements imposed in the preceding paragraph, including a challenge
15 to the designation of a deposition transcript or any portions thereof. Any motion
16 brought pursuant to this provision, whether by the Designating Party or Challenging
17 Party, must be accompanied by a competent declaration affirming that the movant
18 has complied with the meet and confer requirements imposed by the preceding
19 paragraph.

20 The burden of persuasion in any such challenge proceeding shall be on the
21 Designating Party. Frivolous challenges and those made for an improper purpose
22 (e.g., to harass or impose unnecessary expenses and burdens on other parties) may
23 expose the Challenging Party to sanctions. Unless the Designating Party has waived
24 the confidentiality designation by failing to file a motion to retain confidentiality as
25 described above, all parties shall continue to afford the material in question the
26 level of protection to which it is entitled under the Producing Party's designation
27 until the court rules on the challenge.

28 7. ACCESS TO AND USE OF PROTECTED MATERIAL

1 7.1 Basic Principles. A Receiving Party may use Protected Material that is
2 disclosed or produced by another Party or by a Non-Party in connection with this
3 case only for prosecuting, defending, or attempting to settle this litigation. Such
4 Protected Material may be disclosed only to the categories of persons and under the
5 conditions described in this Order. Nothing in this Order shall bar or otherwise
6 restrict any attorney herein from rendering advice to his or her client with respect to
7 this litigation; provided, however, that in rendering such advice and in otherwise
8 communicating with his client, the attorney shall not make specific disclosure of
9 any information or item of the Protected Material. When the litigation has been
10 terminated, a Receiving Party must comply with the provisions of section 15 below
11 (FINAL DISPOSITION).

12 Protected Material must be stored and maintained by a Receiving Party at a
13 location and in a secure manner that ensures that access is limited to the persons
14 authorized under this Order.

15 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless
16 otherwise ordered by the court or permitted in writing by the Designating Party, a
17 Receiving Party may disclose any information or item designated
18 "CONFIDENTIAL" only to:

19 (a) the Receiving Party's Outside Counsel of Record in this action, as well
20 as employees of said Outside Counsel of Record to whom disclosure is reasonably
21 necessary for this litigation;

22 (b) the officers, directors, and employees (including House Counsel) of
23 the Receiving Party to whom disclosure is reasonably necessary for this litigation
24 and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit
25 A);

26 (c) Experts (as defined in this Order) of the Receiving Party (1) to whom
27 disclosure is reasonably necessary for this litigation, (2) who have signed the
28 "Acknowledgment and Agreement to Be Bound" (Exhibit A), and (3) as to whom

1 the procedures set forth in paragraph 7.4, below, have been followed;

2 (d) the court and its personnel;

3 (e) court reporters and their staff, professional jury or trial consultants,
4 interpreters or translators, and Professional Vendors to whom disclosure is
5 reasonably necessary for this litigation and who have signed the "Acknowledgment
6 and Agreement to Be Bound" (Exhibit A);

7 (f) during their depositions, witnesses in the action for the Designating
8 Party, the Producing Party and any party with knowledge about the document;

9 (g) the author or recipient appearing on the face of a document containing
10 the information or a custodian or other person who otherwise possessed or knew the
11 information; and

12 (h) any mediator who is assigned to hear this matter, and his or her staff.

13 7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
14 ONLY," and "HIGHLY CONFIDENTIAL – SOURCE CODE" Information or
15 Items. Unless otherwise ordered by the court or permitted in writing by the
16 Designating Party, a Receiving Party may disclose any information or item
17 designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or
18 "HIGHLY CONFIDENTIAL – SOURCE CODE" only to:

19 (a) the Receiving Party's Outside Counsel of Record in this action, as well
20 as employees of said Outside Counsel of Record to whom it is reasonably necessary
21 to disclose the information for this litigation;¹

22 (b) Experts of the Receiving Party (1) to whom disclosure is reasonably
23 necessary for this litigation, (2) who have signed the "Acknowledgment and
24 Agreement to Be Bound" (Exhibit A), and (3) as to whom the procedures set forth

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26
27 ¹ This Order contemplates that House Counsel shall not have access to any information or items designated
28 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL – SOURCE CODE."

1 in paragraph 7.4, below, have been followed;

2 (c) the court and its personnel;

3 (d) court reporters and their staff, professional jury or trial consultants,
4 interpreters or translators, and Professional Vendors to whom disclosure is
5 reasonably necessary for this litigation and who have signed the "Acknowledgment
6 and Agreement to Be Bound" (Exhibit A);

7 (e) during their depositions, witnesses in the action for the Designating
8 Party or the Producing Party (not the Receiving Party), including former employees
9 whom Receiving Party has a good faith belief had access to the information during
10 their employment with the Designating Party or the Producing Party;

11 (f) the author or recipients appearing on the face of a document containing
12 the information or a custodian or other person who otherwise possessed or knew the
13 information; and

14 (g) any mediator who is assigned to hear this matter, and his or her staff.

15 7.4 Procedures for Approving or Objecting to Disclosure of
16 "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
17 ONLY" or "HIGHLY CONFIDENTIAL – SOURCE CODE" Information or Items
18 to Experts.

19 (a) Unless otherwise ordered by the Court or agreed to in writing by the
20 Designating Party, a Party that seeks to disclose to an Expert (as defined in this
21 Order) any information or item that has been designated "CONFIDENTIAL,"
22 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," or "HIGHLY
23 CONFIDENTIAL – SOURCE CODE" pursuant to paragraph 7.2 or 7.3 first must
24 make a written request to the Designating Party that (1) sets forth the full name of
25 the Expert and the city and state of his or her primary residence, (2) attaches a copy
26 of the Expert's current resume and the "Acknowledgement and Agreement to be
27 Bound," (3) identifies the Expert's current employer(s), (4) identifies each person or
28 entity from whom the Expert has received compensation or funding for work in his

1 or her areas of expertise or to whom the expert has provided professional services,
2 including in connection with a litigation, at any time during the preceding five
3 years,² and (5) identifies (by name and number of the case, filing date, and location
4 of court) any litigation in connection with which the Expert has offered expert
5 testimony, including through a declaration, report, or testimony at a deposition or
6 trial, during the preceding five years.

7 (b) A Party that makes a request and provides the information specified in
8 the preceding respective paragraphs may disclose the subject Protected Material to
9 the identified Expert unless, within 7 days of delivering the request, the Party
10 receives a written objection from the Designating Party. Any such objection must
11 set forth in detail the grounds on which it is based.

12 (c) A Party that receives a timely written objection must meet and confer
13 with the Designating Party (through direct voice to voice dialogue) to try to resolve
14 the matter by agreement within seven days of the written objection. If no agreement
15 is reached, the Party seeking to make the disclosure to the Expert may file a motion
16 as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if
17 applicable) seeking permission from the court to do so. Any such motion must
18 describe the circumstances with specificity, set forth in detail the reasons why
19 disclosure to the Expert is reasonably necessary, assess the risk of harm that the
20 disclosure would entail, and suggest any additional means that could be used to
21 reduce that risk. In addition, any such motion must be accompanied by a competent
22 declaration describing the parties' efforts to resolve the matter by agreement (i.e.,
23 the extent and the content of the meet and confer discussions) and setting forth the
24 reasons advanced by the Designating Party for its refusal to approve the disclosure.

25 _____
26 ² If the Expert believes any of this information is subject to a confidentiality obligation to a Non-Party, then the
27 Expert should provide whatever information the Expert believes can be disclosed without violating any
28 confidentiality agreements, and the Party seeking to disclose to the Expert shall be available to meet and confer with
the Designating Party regarding any such engagement.

1 In any such proceeding, the Party opposing disclosure to the Expert shall
2 bear the burden of proving that the risk of harm that the disclosure would entail
3 (under the safeguards proposed) outweighs the Receiving Party's need to disclose
4 the Protected Material to its Expert.

5 8. PROSECUTION BAR

6 Absent written consent from the Producing Party, any individual who
7 receives access to "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or
8 "HIGHLY CONFIDENTIAL – SOURCE CODE" information shall not be
9 involved in the prosecution of patents or patent applications relating to the subject
10 matter of this action, including without limitation the patents asserted in this action
11 and any patent or application claiming priority to or otherwise related to the patents
12 asserted in this action, before any foreign or domestic agency, including the United
13 States Patent and Trademark Office ("the Patent Office"). For purposes of this
14 paragraph, "prosecution" includes directly or indirectly drafting or amending patent
15 claims. To avoid any doubt, "prosecution" does not include representing a party
16 during a post-issuance proceeding before a domestic or foreign agency (including,
17 but not limited to, a reissue, ex parte reexamination or *inter partes* reexamination)
18 so long as the individual does not participate in any way in drafting or amending
19 patent claims. For the sake of clarity, the preceding sentence includes advising,
20 counseling or any other input into drafting and amending claims. "Prosecution"
21 also does not include representing a petitioner in a post-issuance proceeding before
22 a domestic or foreign agency. This Prosecution Bar shall begin when a person has
23 accessed "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or
24 "HIGHLY CONFIDENTIAL – SOURCE CODE" information and shall end one
25 (1) year after final termination of this action, including final resolution of any
26 appeals or after the time to appeal has expired without an appeal having been filed.

27 9. SOURCE CODE

28 (a) To the extent production of source code becomes necessary in

1 this case, a Producing Party may designate source code as "HIGHLY
2 CONFIDENTIAL - SOURCE CODE" if it comprises or includes confidential,
3 proprietary or trade secret source code.

4 (b) Protected Material designated as "HIGHLY CONFIDENTIAL –
5 SOURCE CODE" shall be subject to all of the protections afforded to "HIGHLY
6 CONFIDENTIAL – ATTORNEYS' EYES ONLY" information, including the
7 Prosecution Bar set forth in Paragraph 8, and may be disclosed only to the
8 individuals to whom "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
9 ONLY" information may be disclosed, as set forth in Paragraph 7.3.

10 (c) Any Source Code produced in discovery shall be made available
11 for inspection as it is kept in the ordinary course of business (including but not
12 limited to in native form and in the file-naming and directory structure in which it is
13 ordinarily kept), in a format allowing it to be reasonably reviewed and searched,
14 during normal business hours (or at other mutually agreeable times), at an office of
15 the Producing Party's counsel or another mutually agreed upon location, or, in the
16 case of Non-Party Source Code, at a location designated by the Non-Party. Upon
17 initial inspection, the Receiving Party shall give at least ten (10) days prior written
18 notice of its intent to review Source Code. Written notices of subsequent
19 inspections shall be made at least three (3) business days prior to the intended start
20 of the review. The Source Code shall be made available for inspection in a secured
21 room ("Source Code Room") on a secured computer without Internet access or
22 network access to other computers ("Source Code Computer"), and the Receiving
23 Party shall not copy, remove, or otherwise transfer any portion of the Source Code
24 onto any recordable media or recordable device. The Producing Party may
25 designate a person to periodically visually monitor the activities of the Receiving
26 Party's representatives during any source code review, but only to ensure that there
27 is no unauthorized recording, copying, or transmission of the source code. The
28 inspection may not be monitored using mechanical, software or electronic means,

1 including video cameras, still cameras or keyloggers. The use of any laptop
2 computer with a camera, input/output device, recordable media, or recordable
3 device (*e.g.*, USB memory stick, CDs, portable hard drives, cameras (including
4 cellular phones with camera functionality), sound recorders, etc.) is prohibited
5 while accessing the Protected Code Computer, and no such devices or media shall
6 be permitted in the Source Code Room.

7 The Source Code Computer shall include software utilities that
8 provide the ability to (a) view, search, and identify the line number of any source
9 file, (b) search for a given pattern of text through multiple files, and (c) compare
10 two files. Acceptable software utilities for source code include Notepad++ and
11 Eclipse. Default Windows programs such as Notepad are not sufficient.
12 Schematics shall be produced using the software used by the Producing Party to
13 access the schematics during the normal course of business. In addition to these
14 tools, the Receiving Party may request that commercially available software tools
15 for reviewing and searching Source Code be installed on the Source Code
16 Computer, provided, however, that (a) the Receiving Party possesses any
17 appropriate license to such software tools which may be transferred to the
18 Producing Party for the purposes of the inspection, or reimburses the Producing
19 Party for the costs to obtain a license to such software tools; (b) the Producing
20 Party approves such software tools (such approval shall not be unreasonably
21 withheld); (c) the Receiving Party provides the Producing Party with written
22 justification as to why such other software tools are reasonably necessary for the
23 Receiving Party to perform its review of the Source Code consistent with all of the
24 protections herein; and (d) the request to install the software tools is made at least
25 five (5) business days in advance of the date upon which the Receiving Party
26 wishes to have the additional software tools available for use on the Source Code
27 Computer. To the extent only the Receiving Party possesses or has access to the
28 software tools, the Receiving Party must provide the Producing Party with the

1 licensed software tool(s) at least five (5) business days in advance of the date upon
2 which the Receiving Party wishes to have the additional software tools available
3 for use on the Source Code Computer if the Producing Party does not object to
4 such installation. If the Producing Party objects to a software tool requested by the
5 Receiving Party, it shall, within five (5) business days of receiving the Receiving
6 Party's request, initiate the dispute resolution process set forth in Paragraph 6. For
7 emphasis, it should be noted that Source Code review tools may not be used to
8 circumvent the protections of this Protective Order in any way. The electronic
9 Source Code shall be produced in a manner that preserves filenames and directory
10 structures. The Receiving Party's Outside Counsel of Record and/or Experts shall
11 be entitled to take notes relating to the Source Code, including on a laptop computer
12 without a camera, but may not copy the Source Code into their notes. Any notes
13 relating to the Source Code shall be subject to all of the restrictions of the
14 "HIGHLY CONFIDENTIAL – SOURCE CODE" designation. The inadvertent
15 leaving of materials in the Source Code Room does not operate as a waiver of the
16 attorney work product doctrine or any other applicable privilege and such materials
17 shall be returned to their owner promptly. No copies of all or any portion of the
18 Source Code may leave the Source Code Room except as otherwise provided in this
19 Protective Order. Further, no other written or electronic record of the Source Code
20 is permitted except as otherwise provided in this Protective Order.

21 (d) During or after a Source Code inspection, the Receiving Party may
22 request that the Producing Party print specified portions of the Source Code that are
23 reasonably necessary for the preparation of court filings, pleadings, expert reports,
24 or other papers, or for deposition or trial, but shall not request paper copies for the
25 purpose of reviewing the Source Code other than electronically as set forth in
26 paragraph (c) in the first instance. Should the Producing Party believe the
27 requested number or content of the printouts is excessive, the parties shall meet and
28 confer regarding the request. If the concerns cannot be resolved, the Producing

1 Party shall file for a protective order within 10 business days of raising its
2 objection. Unless it objects to the request, within three (3) business days of
3 receiving a request for paper copies of Source Code from the Receiving Party, the
4 Producing Party shall provide the requested portions of Source Code in paper form
5 to the Receiving Party, with bates numbers and the label "HIGHLY
6 CONFIDENTIAL – SOURCE CODE." If the Producing Party objects to the
7 amount of Source Code requested by the Receiving Party in paper form, it shall,
8 within three (3) business days of receiving the Receiving Party's request, initiate the
9 dispute resolution process set forth in Paragraph 6.

10 (e) The Receiving Party shall maintain a record of the address where each
11 paper copy of the Source Code is kept or moved and the name of each person with
12 access to each paper copy of the Source Code at the provided address. The
13 Receiving Party shall further maintain a record indicating any individual who has
14 inspected any portion of the Source Code in electronic or paper form. The
15 Receiving Party shall maintain all paper copies of any printed portions of the
16 Source Code in a secured, locked area when not in immediate use. In addition, the
17 Receiving Party may ship paper copies of printed portions of the Source Code via a
18 secure courier delivery service, signature required (e.g. Federal Express) to persons
19 authorized to access same under this Protective Order, who shall also maintain all
20 paper copies of any printed portions of the Source Code in a secured, locked area
21 when not in immediate use. The Receiving Party shall not create any electronic or
22 other images of the paper copies and shall not convert any of the information
23 contained in the paper copies into any electronic format, except small excerpts
24 thereof reasonably necessary for court filings, expert reports, discovery responses
25 and other similar documents. All such documents shall be clearly marked
26 "HIGHLY CONFIDENTIAL – SOURCE CODE" and, if filed, shall be filed under
27 seal. The Receiving Party shall only make additional paper copies if such
28 additional copies are (1) necessary to prepare court filings, pleadings, or other

1 papers (including expert reports), (2) necessary for deposition, or (3) otherwise
2 necessary for the preparation of its case. Any paper copies used during a deposition
3 shall be retrieved by the Producing Party at the end of each day and must not be
4 given to or left with a court reporter or any other unauthorized individual.

5 10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED
6 IN OTHER LITIGATION

7 If a Party is served with a subpoena or a court order issued in other litigation
8 that compels disclosure of any information or items designated in this action as
9 "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
10 ONLY" or "HIGHLY CONFIDENTIAL – SOURCE CODE," that Party must:

11 (a) promptly notify in writing the Designating Party. Such notification
12 shall include a copy of the subpoena or court order;

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

17 (c) cooperate with respect to all reasonable procedures sought to be
18 pursued by the Designating Party whose Protected Material may be affected.³

19 If the Designating Party timely seeks a protective order, the Party served with
20 the subpoena or court order shall not produce any information designated in this
21 action as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS'
22 EYES ONLY" or "HIGHLY CONFIDENTIAL – SOURCE CODE" before a
23 determination by the court from which the subpoena or order issued, unless the
24 Party has obtained the Designating Party's permission. The Designating Party shall
25

26
27 ³ The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to
28 afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from
which the subpoena or order issued.

1 bear the burden and expense of seeking protection in that court of its confidential
2 material – and nothing in these provisions should be construed as authorizing or
3 encouraging a Receiving Party in this action to disobey a lawful directive from
4 another court.

5 11. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE
6 PRODUCED IN THIS LITIGATION

7 (a) The terms of this Order are applicable to information produced by a
8 Non-Party in this action and designated as "CONFIDENTIAL," "HIGHLY
9 CONFIDENTIAL – ATTORNEYS' EYES ONLY," or "HIGHLY
10 CONFIDENTIAL – SOURCE CODE." Such information produced by Non-Parties
11 in connection with this litigation is protected by the remedies and relief provided by
12 this Order. Nothing in these provisions should be construed as prohibiting a Non-
13 Party from seeking additional protections.

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

- 18 1. promptly notify in writing the Requesting Party and the Non-
19 Party that some or all of the information requested is subject to a confidentiality
20 agreement with a Non-Party;
- 21 2. promptly provide the Non-Party with a copy of the Protective
22 Order in this litigation, the relevant discovery request(s), and a reasonably specific
23 description of the information requested; and
- 24 3. make the information requested available for inspection by the
25 Non-Party.

26 (c) If the Non-Party fails to object or seek a protective order from this
27 court within 14 days of receiving the notice and accompanying information, the
28 Receiving Party may produce the Non-Party's confidential information responsive

1 to the discovery request. If the Non-Party timely seeks a protective order, the
2 Receiving Party shall not produce any information in its possession or control that
3 is subject to the confidentiality agreement with the Non-Party before a
4 determination by the court.⁴ Absent a court order to the contrary, the Non-Party
5 shall bear the burden and expense of seeking protection in this court of its Protected
6 Material.

7 12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

8 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
9 Protected Material to any person or in any circumstance not authorized under this
10 Protective Order, the Receiving Party must immediately (a) notify in writing the
11 Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve
12 all unauthorized copies of the Protected Material, (c) inform the person or persons
13 to whom unauthorized disclosures were made of all the terms of this Order, and (d)
14 request that such person or persons execute the "Acknowledgment and Agreement
15 to Be Bound" that is attached hereto as Exhibit A.

16 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
17 PROTECTED MATERIAL

18 Inadvertent or unintentional production of "CONFIDENTIAL," "HIGHLY
19 CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY
20 CONFIDENTIAL – SOURCE CODE" documents or information without such
21 designations shall not be deemed a waiver in whole or in part of a claim for
22 treatment as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS'
23 EYES ONLY" or "HIGHLY CONFIDENTIAL – SOURCE CODE." If, through
24 inadvertence, a Producing Party provides any information pursuant to this litigation
25 without marking the information as "CONFIDENTIAL," "HIGHLY
26

27 ⁴ The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-
28 Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.

1 CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY
2 CONFIDENTIAL – SOURCE CODE" the Producing Party may subsequently
3 inform the Receiving Party of the specific designation of the disclosed information,
4 and the Receiving Party shall treat the disclosed information as
5 "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES
6 ONLY" or "HIGHLY CONFIDENTIAL – SOURCE CODE" information upon
7 receipt of written notice from the Producing Party. To the extent the Receiving
8 Party has already disclosed such information, the Receiving Party shall use its best
9 efforts to promptly collect any copies of disclosed material that have been provided
10 to individuals other than those authorized under this Protective Order, and if
11 collected, shall destroy or return them to the Producing Party.

12 An inadvertent failure to designate does not relieve a recipient of obligations
13 under ITAR and EAR. Furthermore, ITAR and EAR contain additional provisions
14 relating to the disclosure of any actual or suspected infractions regarding
15 "EXPORT-CONTROL-RESTRICTED" documents and things.⁵ Any party aware
16 of actual or suspected violations of ITAR and/or EAR will immediately inform, and
17 await further instructions from, the Producing Party.

18 If a Producing Party inadvertently produces a document, tangible item or
19 electronically stored information that it later discovers or in good faith asserts to be
20 privileged, protected by the work product doctrine, or subject to some other
21 immunity from disclosure ("Privileged Material") the production of that Privileged
22 Material shall not be deemed to constitute a waiver of any applicable privileges,
23 work product protection, or immunity from disclosure. In such circumstances, upon
24 discovery of the inadvertent disclosure, the Producing Party shall immediately
25 notify the Receiving Party of the inadvertent production, and request either the
26

27 ⁵ See, e.g., ITAR, 22 C.F.R. § 127.12; EAR, 15 C.F.R. §§ 730-44.
28

1 return or confirmation of destruction of the Privileged Materials. Within five (5)
2 business days of receiving such notification, the Receiving Party shall return or
3 confirm destruction of all such materials. Such return or confirmation of destruction
4 shall not preclude the Receiving Party from seeking to compel production of the
5 materials (based on information independent of the content of the returned,
6 allegedly privileged materials in question) and shall not constitute an admission by
7 the Receiving Party that the materials were, in fact, privileged or otherwise
8 protected in any way. The Producing Party shall retain the Privileged Material for
9 submission to the Court in the event the Receiving Party moves to compel.

10 14. MISCELLANEOUS

11 14.1 Right to Further Relief. Nothing in this Order abridges the right of any
12 person to seek its modification by the court in the future.

13 14.2 Right to Assert Other Objections. No Party waives any right it
14 otherwise would have to object to disclosing or producing any information or item
15 on any ground not addressed in this Protective Order. Similarly, no Party waives
16 any right to object on any ground to use in evidence of any of the material covered
17 by this Protective Order.

18 14.3 Filing Protected Material. Without written permission from the
19 Designating Party or a court order secured after appropriate notice to all interested
20 persons, a Party may not file in the public record in this action any Protected
21 Material. In order to be treated as confidential, any materials filed with the Court
22 must be lodged with a request for filing under seal in compliance with Civil Local
23 Rule 79-5.

24 15. FINAL DISPOSITION

25 Within 60 days after the final disposition of this action, as defined in
26 paragraph 4, each Receiving Party must return all Protected Material to the
27 Producing Party or destroy such material. As used in this subdivision, "all Protected
28 Material" includes all copies, abstracts, compilations, summaries, and any other

1 format reproducing or capturing any of the Protected Material. Whether the
2 Protected Material is returned or destroyed, the Receiving Party must submit a
3 written certification to the Producing Party (and, if not the same person or entity, to
4 the Designating Party) by the 60 day deadline that (1) identifies (by category, where
5 appropriate) all the Protected Material that was returned or destroyed and (2)
6 affirms that the Receiving Party has not retained any copies, abstracts,
7 compilations, summaries or any other format reproducing or capturing any of the
8 Protected Material. Notwithstanding this provision, Counsel are entitled to retain an
9 archival copy of all pleadings, motion papers, trial, deposition, and hearing
10 transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert
11 reports, attorney work product, and consultant and expert work product, even if
12 such materials contain Protected Material. Outside Counsel of Record need not
13 purge its document management system or backup tapes to eliminate Protected
14 Material. Any such archival copies that contain or constitute Protected Material
15 remain subject to this Protective Order as set forth in Section 4 (DURATION).

16
17 IT IS SO ORDERED.

18
19 DATED: 6/27/17

Alicia G. Rosenberg

Hon. James V. Selna

United States District Judge

Magistrate

20
21
22
23
24 DATED: June 14, 2017

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