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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF SAN DIEGO

12 Coordination Proceeding
Special Title (Rule 1550 (b))

) JUDICIAL COUNCIL COORDINATION
) PROCEEDING NO. 4095

13 FIREARMS CASE

) San Francisco Superior Court No. 303753
) Los Angeles Superior Court No. BC210894
) Los Angeles Superior Court No. BC214794

14 Including actions:

15 People, et. al. v. Arcadia Machine & Tool, Inc., et.
16 al.

) DEFENDANTS' MEMORANDUM
) REGARDING LIMITED DISCOVERY,
) DOCUMENT DEPOSITORY AND
) PROTECTIVE ORDER

17 People, et. al. v. Arcadia Machine & Tool, Inc., et.
18 al.

) Hon. Vincent P. DiFiglia
) Dept: 65

19 People, et. al. v. Arcadia Machine & Tool, Inc., et.
20 al.

21 **I. INTRODUCTION**

22 At the July 14, 2000 Preliminary Trial Conference, the Court ordered the plaintiffs and
23 defendants to meet and confer on the following three subjects and submit their positions to the
24 Court on August 11, 2000:

- 25 (1) Proposed limited discovery during the pendency of defendants' demurrers and
26 motion to strike;
27 (2) A document depository; and
28 (3) A stipulated protective order.

8/9/00

1 **II. LIMITED DISCOVERY**

2 Defendant Manufacturers proposed that the parties respond to the limited number of
3 interrogatories and requests for production identified by each side at a December 16, 1999 meeting
4 in San Francisco during the pendency of the demurrers and motions to strike. Some defendants
5 responded to the discovery requests identified by plaintiffs and other defendants have not
6 responded. Plaintiffs have not responded to any of the specific discovery requests identified by
7 Defendant Manufacturers.

8 Plaintiffs have refused to agree to fully respond to the limited discovery with information
9 and documents during the pendency of the demurrers and motions to strike. In the absence of an
10 agreement from plaintiffs to fully respond, defendants are very reluctant to strike any further
11 limited discovery deals with plaintiffs wherein defendants produce additional documents and
12 information and plaintiffs refuse to respond to the identified interrogatories and requests but
13 merely produce piecemeal information that should have been produced to defendants under the
14 December 1999 agreement. Therefore, defendants request, in accordance with the Court's oral
15 July 14, 2000 ruling, that discovery be stayed pending the Court's September 15, 2000 hearing on
16 the demurrers and motion to strike. (See Transcript of July 14, 2000 conference, pp. 45-46
17 attached as Exhibit "A".)

18 **III. DOCUMENT DEPOSITORY**

19 Defendants have discussed the concept of a document depository among themselves.
20 Liaison Counsel for defendants has also discussed a document depository with Liaison Counsel for
21 plaintiffs. All issues regarding a depository have not been explored or agreed upon. Defendants
22 request additional time in which to meet and confer with plaintiffs on these issues.

23 However, defendants have no objection to plaintiffs' suggestion that they identify a single
24 location at which documents produced by defendants in discovery will be kept. Defendants
25 require that the location be secured in a mutually agreeable manner so that the protections afforded
26 to Confidential and Highly Confidential Information in the Protective Order are honored.
27 Defendants will also agree to establish a single location, similarly secured, at which documents
28 produced by plaintiffs will be kept. Defendants propose that the logical and efficient location for

1 each side's depository is the offices of Liaison Counsel located in San Diego. Defendants further
2 propose that each side bear the expenses of maintaining their own depository.

3 **IV. PROTECTIVE ORDER**

4 **1. INTRODUCTION.**

5 Defendant Manufacturers seek to protect trade secrets and other confidential
6 research, development, commercial and financial information from public disclosure through a
7 Protective order. Plaintiffs have expressed a similar interest in preventing the public disclosure of
8 information in their possession, including law enforcement information requested by defendants in
9 discovery. Defendants believe the interests of both sides in confidentiality can be accommodated
10 while allowing each side access to important information relevant to the issues in the litigation
11 through entry of an appropriate protective order.

12 The parties have extensively negotiated the terms of a Protective Order and have
13 reached agreement in many areas. However, areas of disagreement remain on important subjects.^{1/}
14 Defendants believe that their positions on those areas strike the appropriate balance between the
15 protection of trade secrets and other confidential matters and the parties' rights to pursue their
16 claims and assert defenses. Brown Bag Software v. Symantec Corp., 960 F.2d 1465 (9th Cir. 1992)
17 (risk of disclosure to be balanced against risk of impaired ability to pursue claims). (Defendants'
18 Proposed Protective Order is attached as Exhibit B. Italicized text represents language on which
19 the parties have not reached agreement.)

20 The protections sought by defendants are primarily intended to preclude their own
21 industry competitors from obtaining confidential and proprietary business information and using it
22 to secure competitive advantage. These appropriate protections can only be achieved through
23 unambiguously worded and strictly enforced limitations on who may have access to Confidential

24 ¹ The negotiations on the Protective Order occurred over the last 2-3 months between
25 counsel for Defendant Manufacturers and counsel for plaintiffs in the context of the Boston
26 litigation, including Robert J. Nelson and Brian J. Siebel counsel for plaintiffs in the California
27 cases as well. Mr. Nelson agreed on August 1, 2000, that the progress made through negotiations
28 in Boston would be the basis for the alternative protective orders submitted for consideration to the
Court in California. The Boston negotiations concluded on August 7, 2000, with disagreement on
the issues outlined in this memorandum.

1 Information. Clear procedures addressing how Confidential Information is to be managed during
2 the pendency of the case are also important because once a Protective Order is violated, the
3 confidentiality of the protected information may be forever lost.

4 **2. OBJECTIONS TO CONFIDENTIAL^{2/} DESIGNATIONS SHOULD**
5 **BE DECIDED BY THIS COURT APPLYING CALIFORNIA**
6 **LAW.**

7 Plaintiffs have objected to language proposed by defendants in paragraph 7. The
8 language at issue is whether a document which has been denied confidential treatment by a trial
9 court in another jurisdiction should, by virtue of that ruling, be denied confidential treatment in
10 this case before all challenges and appeals of the trial court order in the other jurisdiction have
11 been exhausted. Plaintiffs' position ignores the fact that, pending appeal, the confidentiality of the
12 documents at issue typically is maintained. Thus, plaintiffs in this case seek the right to publicize
13 confidential information even before the plaintiffs can do so in the jurisdiction in which the court
14 has ruled on confidentiality because of the appeal. Moreover, defendants maintain that an interim
15 ruling by a trial court in another jurisdiction applying different law should not preclude this
16 Court's independent determination of confidentiality issues.

17 Plaintiffs' expressed concern that the appeal process in the other jurisdiction could
18 be lengthy is unavailing because it ignores the reality that during that appeal process, plaintiffs can
19 petition this Court to rule on the confidentiality of the same document. Defendants' language
20 preserves the defendants' right to appeal but in no way deprives plaintiffs of their right to seek
21 prompt determination of confidentiality under California law. Most importantly, plaintiffs may
22 use the Confidential Information, under the terms of the Protective Order, in the prosecution of
23 their case while issues of confidentiality are being decided. Plaintiffs are neither harmed nor
24 unreasonably impaired by adoption of defendants' paragraph 7.

25 ///

26 ///

27 ² The parties have agreed that there will be two levels of confidentiality – Confidential Information
28 and Highly Confidential Information. Unless specifically stated, any reference to Confidential Information
or documents shall also include Highly Confidential Information or documents.

1 **3. OBJECTIONS TO CONFIDENTIAL DESIGNATIONS SHOULD BE**
2 **MADE AND RESOLVED IN ADVANCE OF TRIAL.**

3 Defendants believe it is appropriate to set a deadline by which objections to
4 confidentiality designations should be made and resolved; plaintiffs do not. As discovery is now
5 contemplated, plaintiffs will have had defendants' documents and ample time to contest
6 confidentiality if they choose to do so. Thus, the deadline defendants propose would give the
7 parties sufficient time to review the opposition's confidential documents and pursue other
8 discovery relating to the designations. The deadline would, however, ensure that the parties are
9 not burdened by such objections and motion practice during the weeks leading up to trial.
10 Defendants have proposed, in paragraph 17 of their Proposed Order, that the parties be obligated
11 to have all issues relating to confidential designations submitted to the Court sixty (60) days prior
12 to the Trial Readiness Conference.

13 **4. MODIFICATION OF THE PROTECTIVE ORDER SHOULD BE**
14 **SOUGHT BY MOTION OF THE PARTY SEEKING**
15 **MODIFICATION.**

16 Both sides have agreed to a provision whereby "[a]ny party may petition the Court
17 for modification of the terms of this Protective Order for good cause shown, after notice and
18 opportunity for hearing." Def. Proposed Order, ¶ 23. Paradoxically, plaintiffs propose a
19 contradictory, burdensome and fundamentally unfair provision wherein the party resisting
20 modification of the Protective Order must file a motion and bear the burden of persuading the
21 Court that the order should be followed as entered. Paragraph 18 of plaintiffs' Proposed Protective
22 Order provides that following notification of an intent to provide Confidential Information to a
23 person not entitled to receive it under the Protective Order, the party designating the information
24 as confidential must file a motion to bar the disclosure. Defendants submit there is no reason to
25 place an affirmative burden on the Designating Party. Plaintiffs' proposed procedure is illogical
26 and invites excessive motion practice on a subject that has been extensively negotiated and
27 approved by the Court. If a party has a good faith basis on which to expand the categories of
28 persons entitled to see Confidential Information, that party should bear the burden of
demonstrating why the modification of the order is justified. (The issue, by definition, is not the

1 confidentiality of the documents plaintiffs would seek to disclose, but whether the plaintiffs have a
2 compelling need to disclose the information to a category of persons not otherwise entitled to see
3 it in order to prove its case.)

4 **5. THE PROTECTIVE ORDER SHOULD UNAMBIGUOUSLY**
5 **PROVIDE THAT ITS PROTECTIONS ARE IN PLACE UNTIL**
6 **THE COURT ORDERS OTHERWISE OR BY AGREEMENT**
6 **OF THE PARTIES.**

7 The parties agree that “[t]he obligations and protections imposed by this order shall
8 continue beyond the conclusion of this action, including any appeals, or until the Court orders
9 otherwise.” Pltf. Proposed Order, ¶ 2; Def. Proposed Order, ¶ 20. The parties have been unable to
10 agree on language to achieve that result which also recognizes that issues relating to Confidential
11 Information may arise during the trial of this case.

12 Defendants submit that paragraphs 20 and 21 of their Proposed Order clearly state
13 the two circumstances under which Confidential Information may lose its protected status: by
14 written agreement of the Designating Party or by Court order. Defendants’ language also accounts
15 for the possibility that issues regarding the protection of Confidential Information at a public trial
16 of this case may arise. Those “issues . . . may be presented to the Court as each party deems
17 appropriate.” Def. Proposed Order, ¶ 20.

18 Plaintiffs’ proposed language is ambiguous. First of all, plaintiffs’ proposed
19 language in paragraph 21 that “[t]his Protective Order is not intended to govern the use of
20 Confidential or Highly Confidential Information at any trial of this action” can be read to mean
21 that upon commencement of trial, the Protective Order no longer has application. Although
22 plaintiffs have stated that they do not intend the language to be given that interpretation, plaintiffs
23 have curiously refused to acknowledge the single and unambiguous meaning of defendants’
24 proposed language: “Issues regarding the protection of Confidential Information or Highly
25 Confidential Information during trial may be presented to the Court as each party deems
26 appropriate.” Def. Proposed Order, ¶ 20. Defendants ask the Court to adopt their proposed
27 language in paragraphs 20 and 21 so it is clear that documents do not automatically lose their
28 confidentiality protection at the commencement of trial.

1 **6. PERSONS ENTITLED TO ACCESS TO CONFIDENTIAL**
2 **INFORMATION.**

3 By agreement of the parties, Confidential Information^{3/} “refers to information,
4 documents or other material that the Designating Party reasonably and in good faith believes
5 constitutes or reflects (1) a Trade Secret or (ii) information whose confidentiality is otherwise
6 protectable under applicable law.” Pltf. and Def. Proposed Orders, ¶ 1.b. Certain defendants have
7 informed plaintiffs that the majority of documents, for which protection will be sought, will be
8 designated as Confidential Information, as opposed to Highly Confidential Information.

9 Defendants’ proposed language setting forth who may have access to Confidential
10 Information serves the dual purpose of precluding competitor access to trade secrets and other
11 proprietary business information and permitting plaintiffs’ unimpaired use of Confidential
12 Information in the prosecution of their case.^{4/} To ensure that public and competitor access is
13 precluded, it is important that certain clearly stated provisions be included in a Protective Order.

14 **A. Private Counsel Of Record In This Case And Their Staff.**

15 Defendants propose that counsel of record having access to Confidential
16 Information be limited to outside privately employed counsel (totaling 27 on the service list).
17 (¶ 11.a.) Counsel of record who are employees of the public entity plaintiffs, as opposed to
18 outside counsel, (totaling 23 on the service list) should not be given possession of Confidential
19 Information because by virtue of their status as public officials, their files may be requested and
20 made public through the Freedom of Information Act, 5 U.S.C.A. § 552, or the California Public
21 Records Act, Cal. Gov. Code § 6250, et seq. See County of Los Angeles v. Superior Court, 2000
22 Cal. App. Lexis 607 *19 (July 31, 2000) (pending litigation exemption to § 6254 applies only to
23 documents created by a public entity for its own use in anticipation of litigation). The competitive
24 injury potentially suffered by these manufacturing defendants is too great to risk unfettered public

25 ³ Use of the term “Confidential Information” in § VI specifically refers to Confidential
26 Information as opposed to Highly Confidential Information.

27 ⁴ The parties have agreed that any person having access to Confidential Information shall
28 agree in writing to the non-disclosure terms of the agreed to Confidentiality Acknowledgment
attached as Exhibit B to the Proposed Orders.

1 dissemination of their trade secrets and other sensitive business information. To the extent that
2 representatives of each plaintiff, counsel or otherwise, needs to be informed of Confidential
3 Information to make decisions regarding the direction of the case, defendants' proposed language,
4 discussed below accommodates this expressed need.

5 **B. Representatives Of Each Plaintiff.**

6 Defendants propose that "Representatives of each plaintiff" may have access to
7 Confidential Information "provided, however, that representatives of plaintiffs shall not be
8 permitted to make or retain photocopies or summaries of confidential documents or information."
9 (§ 11.b.). Defendants' language permits representatives of plaintiffs to see, study, digest and
10 discuss Confidential Information along with their private attorneys but precludes those documents
11 or summaries from going into a public file subject to possible public disclosure. Defendants
12 submit that their language permits plaintiffs freedom to work with Confidential Information while
13 protecting the information from widespread dissemination potentially reaching manufacturer
14 competitors.

15 **C. Expert Witness Not Affiliated With Industry Competitors.**

16 Defendants propose that the parties be permitted to share Confidential Information
17 with experts who have been retained to assist in trial preparation and experts retained to testify. (§
18 11.c.). The important limitation on this disclosure, objected to by plaintiffs, is that neither
19 plaintiffs nor defendants be permitted to disclose Confidential Information to "experts" who are
20 presently affiliated with a competitor of the Designating Party or any consultant, contractor,
21 vendor, parent or affiliate of the competitor. Again, this is a reasonable provision which keeps
22 sensitive information from competitors while not unreasonably limiting plaintiffs' ability to
23 develop expert testimony.

24 A hypothetical example highlights the need for defendants' language and the
25 danger of plaintiffs' proposed provision. Assume that an in-house engineer is working for
26 Manufacturer A on new product technology in tandem with an outside contractor or consultant.
27 Simultaneously, the in-house engineering department of Manufacturer B is working on similar
28 new product technology. Under the terms of a Protective Order, Manufacturer B's new product

1 technology research is produced by Manufacturer B and designated as Confidential Information.

2 Further assume that either the in-house engineer or the outside consultant for
3 Manufacturer A agrees to serve as an expert for plaintiffs and receives Manufacturer B's
4 Confidential Information. Under plaintiffs' proposed language, there is a substantial risk that
5 Manufacturer B's Confidential Information and documents will inevitably be disclosed by the
6 expert to its competitor, Manufacturer A. In any event, the expert working for Manufacturer A
7 cannot erase from his or her mind the confidential information of Manufacturer B disclosed to him
8 or her in the course of this litigation. The competitive value of the trade secret would immediately
9 be lost and competitive injury is virtually certain. See PepsiCo, Inc. v. Redmond, 54 F.3d 1262
10 (7th Cir. 1995) (recognizing presumption that former employee would inevitably disclose trade
11 secret information of former employer).

12 If plaintiffs are somehow unable to obtain sufficient expert testimony from outside
13 the firearms manufacturing industry to criticize industry practices, plaintiffs "may petition the
14 Court for modification of this Protective Order for good cause shown after notice and opportunity
15 for hearing." Pltf. Proposed Order, ¶ 23; Def. Proposed Order, ¶ 22. In the meantime, a clear
16 prohibition must be in place to prevent disclosure of trade secrets and other Confidential
17 Information to industry competitors.

18 **D. Any Deponent Who Had Access To The Confidential Information Through**
19 **His Or Her Employment.**

20 During negotiations with plaintiffs over the terms of a Protective Order, plaintiffs
21 stressed that they need the freedom to show Confidential Information to a "whistleblower" witness
22 then or formerly employed by the Designating Party. Defendants acceded to plaintiffs' request
23 and agreed to the language of defendants' proposed paragraph 11.d.:

24 Any deponent who is reasonably believed to be or to have been
25 eligible to have access to the Confidential Information by virtue of
26 his or her employment or other affiliation with the Designating
27 Party.^{5/}

28 ⁵ For unexplained reasons, this provision is acceptable to plaintiffs with regard to disclosure of Highly Confidential Documents. See Pltf. Proposed Order, ¶ 12.d.

1 Plaintiffs' prefatory phrase in their proposed paragraph 11.d., "actual or proposed"
2 witness is a limitless group of people, which would include present employees of manufacturing
3 competitors. Such language would render the Protective Order meaningless.

4 Practically, the only witnesses with whom confidential documents could be used
5 under the Evidence Code are expert witnesses and those lay witnesses having some degree of
6 personal knowledge of the confidential subject matter by virtue of his or her employment by the
7 Designating Party. Plaintiffs have not identified another type of witness who could place
8 confidential documents into evidence or otherwise comment or rely on the documents in his
9 testimony. Defendants' language does not constrain plaintiffs but does protect defendants from
10 competitive injury through widespread disclosure of confidential documents.

11 7. **PERSONS ENTITLED TO ACCESS TO HIGHLY CONFIDENTIAL**
12 **INFORMATION.**

13 By agreement of the parties, "Highly Confidential Information" refers to
14 Confidential Information . . . but only when . . . so competitively sensitive that their disclosure is
15 highly likely to cause competitive injury to the Designating Party. Pltf. and Def. Proposed Orders
16 ¶¶ 1c. Certain defendants have informed plaintiffs that only a small subset of confidential
17 documents will receive a Highly Confidential designation. The parties are in general agreement
18 that the persons to whom Highly Confidential Information may be disclosed should be more
19 restrictive. They have not fully agreed on those restrictions.

20 A. **Private Attorneys Of Record For Plaintiffs Who Have Filed Notices Of**
21 **Appearance And Their Permanently Employed Staff.**

22 There are two areas of disagreement in the parties' respective paragraphs 12a. One,
23 whether public officials who are also counsel of record in this case shall have access to Highly
24 Confidential Information. Defendants refer the Court to its arguments regarding permitting access
25 to, but prohibiting possession of, confidential information by public officials set forth in § 6A
26 above. Two, whether plaintiffs' counsel can utilize temporary employees to review and work with
27 defendants most competitively confidential and sensitive information. Defendants believe that the
28 required use of permanent employees affords a degree of control over Highly Confidential

1 Information without unreasonably impairing plaintiffs' ability to work with such information and
2 documents.

3 **B. Expert Witnesses Not Affiliated With Manufacturing Competitors.**

4 The parties again disagree over the language governing expert witness access to
5 Highly Confidential Information. Defendants' proposed language strikes the appropriate
6 compromise between shielding the information from competitors and permitting plaintiffs to
7 develop expert witness testimony in support of their theories. See defendants' arguments set forth
8 in § V, C above. To the extent plaintiffs later find themselves in a specific circumstance in which
9 they need to provide Highly Confidential Information to expert employed by a manufacturing
10 competitor, the Court's order may be modified for good cause shown.

11 **8. COUNSEL IN SIMILAR LITIGATION PENDING IN OTHER**
12 **JURISDICTIONS SHOULD NOT HAVE ACCESS TO CONFIDENTIAL**
13 **INFORMATION PRODUCED IN CALIFORNIA UNDER THE COURT'S**
14 **PROTECTIVE ORDER.**

15 Plaintiffs seek to exponentially expand the number of persons having access to
16 defendants' trade secrets to include attorneys representing other plaintiffs in other state and federal
17 courts around the country.^{6/} Such a significant and unnecessary expansion in the number of people
18 who have access to defendants' competitively sensitive information creates too great of risk that
19 documents will escape into the public domain and into the hands of manufacturing competitors.

20 Ideally, all persons having access to Confidential Information under the Protective
21 Order in this case are persons who are before this Court as litigants, attorneys and witnesses.
22 Should the Protective Order be violated, the responsible person or litigant can be effectively
23 sanctioned in the context of these coordinated cases. If literally hundreds of attorneys around the
24 country who are not of record in this case have access to defendants' Confidential Information and
25 the information is leaked, it may be impossible to identify the responsible party.

26 ⁶ There are presently twenty lawsuits filed by state and municipal entities which allege, under a
27 variety of theories, that firearms manufacturers, distributors and/or retailers are responsible for criminal
28 and intentional misuse of firearms. There are numerous other lawsuits brought by other private entities and
persons making similar claims. The defendant parties differ from case to case and, of course, the legal
theories and law applicable to those theories may differ from jurisdiction to jurisdiction. Most importantly,
the law applicable to protection of trade secrets and other competitively sensitive information may differ as
well.

Moreover, there is the question of whether this Court wants to police the protection of defendants' Confidential Information all over the country. Defendants submit the appropriate protection of Confidential Information in other jurisdictions should be left to the courts and their protective orders in those jurisdictions. Plaintiffs' expressed desire to simultaneously conduct discovery of Confidential Information in multiple jurisdictions may be efficient for plaintiffs but ignores the fundamental purpose of the Protective Order – to prevent Confidential Information from falling into the hands of the public and business competitors.

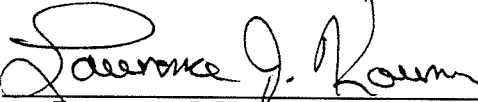
Plaintiffs' counsel in other litigation against members of the firearms industry in other jurisdictions can have access to defendants' Confidential Information under Protective Orders entered in those jurisdictions under their applicable court rules. Enforcement of those Protective Orders can be exercised locally and dissemination of Confidential Information only to those persons entitled to access can be more effectively monitored and controlled.

Respectfully Submitted,

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

Dated: August 11, 2000

By:



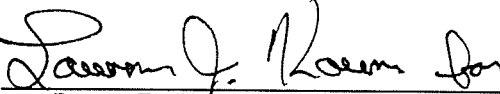
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WILDMAN, HARROLD, ALLEN & DIXON

Dated: August 11, 2000

By:



James B. Vogts

Liaison Counsel for Defendant Manufacturers

SEDGWICK, DETERT, MORAN & ARNOLD

Dated: August 11, 2000

By:



Diane Gorczyca

Liaison Counsel for the Defendant Distributors

KOLETSKY, MANCINI, FELDMAN & MORROW

Dated: August 11, 2000

By:



Susan Caldwell

Liaison Counsel for the Defendant Trade Associations

1 MADE PRODUCTIONS; WE HAVE MADE RESPONSES; WE HAVE RECEIVED
2 NOTHING BACK SO FAR AT ALL.

3 THE COURT: WELL, I'M NOT GOING TO TAKE THAT POSITION
4 UNTIL I GIVE THE PARTIES THE OPPORTUNITY TO MEET AND CONFER
5 WITH RESPECT TO THIS ISSUE, SO WE'LL LEAVE THAT ISSUE OPEN,
6 BUT THAT IS WHAT IS GOING TO OCCUR, BECAUSE I'M NOT -- I'M
7 NOT PREPARED AT THIS TIME TO DEAL WITH COMPLEX DISCOVERY
8 ISSUES, SO YOU MEET AND CONFER ON THAT, AND HOW MUCH TIME DO
9 YOU NEED TO LET ME KNOW AS TO THAT PROVISION?

10 MR. NELSON: 30 DAYS.

11 MR. DORR: 30 DAYS? THAT'S TOO LONG. WE WOULD LIKE TO
12 GET THE DISCOVERY GOING OR AGREE THERE HAS BEEN NO AGREE-
13 MENT, ONE WAY OR THE OTHER. MAYBE A WEEK, YOUR HONOR.

14 MR. NELSON: THAT'S AGREEABLE WITH PLAINTIFFS.

15 THE COURT: ALL RIGHT. WITH RESPECT TO THE PARAMETERS,
16 IF ANY, OF ALLOWABLE DISCOVERY, PENDING THE HEARING ON THE
17 DEMURRERS AND MOTION TO STRIKE, COUNSEL ARE TO MEET AND
18 CONFER AND ADVISE THE COURT BY THE 21ST OF JULY WHETHER
19 THERE HAS BEEN AGREEMENT AND TO -- IF THERE HAS BEEN, TO
20 SUPPLY THE COURT IN WRITING WITH THE APPROPRIATE STIPULATION
21 CONCERNING THE AGREED UPON DISCOVERY.

22 IN THE EVENT THAT THAT IS NOT ACCOMPLISHED, OR THE
23 COURT HAS NOT GIVEN YOU ADDITIONAL TIME BETWEEN NOW AND
24 THEN, IT WILL BE THE ORDER OF THE COURT THAT THERE WILL BE
25 NO DISCOVERY PENDING THE HEARING ON THE DEMURRER. OKAY?

26 LOOKING AT THE SCHEDULE FOR DISCOVERY AND OTHER
27 PRETRIAL EVENTS, ITEM FOUR, I HAVE ALREADY INDICATED THAT I
28 THINK THAT IT'S PREMATURE TO SET OUT DATES. HOWEVER, WITH

EXHIBIT A

1 RESPECT TO THE ISSUE OF EXPERT WITNESSES IT HAS BEEN SUG-
2 GESTED BY THE DEFENSE THAT THIS BE DONE PURSUANT TO A LITTLE
3 ARTICLE ABOUT HOW THEY DO IT OVER IN FEDERAL COURT, WHICH,
4 HAVING PRACTICED FOR 30 YEARS, THIS IS A PROBLEM WE'VE BEEN
5 DEALING WITH UNSUCCESSFULLY FOR AS LONG AS I CAN RECALL, AND
6 I THINK THAT ANYTHING OTHER THAN SIMULTANEOUS EXCHANGE OF
7 EXPERTS IS FRAUGHT WITH PROBLEMS, AND I THINK THAT WHEN IT
8 DOES COME TIME FOR US TO EXCHANGE EXPERTS, PURSUANT TO 2034,
9 THAT THAT SHOULD BE DONE IN ACCORDANCE WITH THE CODE, SIMUL-
10 TANEOUSLY. ANOTHER REASON WHY I FEEL THAT WAY IS FROM WHAT
11 ALL I'M HEARING ABOUT THE LITIGATION GOING ON ALL AROUND
12 THIS COUNTRY, I WOULD BE MUCH SURPRISED, COUNSEL, IF ALL OF
13 YOU DIDN'T KNOW WHO ALL OF THE EXPERTS ARE IN EVERY AREA AND
14 DON'T HAVE FILES FULL OF STUFF FROM THOSE EXPERTS ON BOTH
15 SIDES.

16 MR. DORR: IF I COULD RESPOND TO THAT, YOUR HONOR, THE
17 FACT IS WE DO NOT KNOW. THIS IS NEW LITIGATION. THE CI-
18 TIES' SUITS BY MUNICIPALITIES BEGAN ONLY ABOUT -- ROUGHLY A
19 YEAR AND A HALF AGO. THERE ARE NO CASES ANYWHERE WHERE
20 THERE HAVE BEEN EXPERT DISCLOSURES OF ANY KIND, AND WE DO
21 NOT KNOW. THESE ARE -- THIS LITIGATION IS FILLED WITH
22 CLAIMS OF THE KIND WE SEE IN THIS COMPLAINT, BROAD, GENERAL
23 CLAIMS INVOLVING ISSUES OF CAUSATION, PROOF, DAMAGES, THAT
24 ARE RELATIVELY UNIQUE. THIS ISN'T EVEN TOBACCO. THE TOBAC-
25 CO FOLKS TEND TO KNOW WHO THE EXPERTS ARE. THEY HAVE BEEN
26 THROUGH IT. THEY HAVE GOT THEIR OWN ISSUES. THIS IS BRAND
27 NEW.

28 WE HAVE NO CLUE, NOT A SINGLE CLUE WHO THEY ARE

EXHIBIT A

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21 al.

22 The parties hereto, through their undersigned counsel, hereby stipulate and agree to the
23 entry of the following order ("Protective Order") pursuant to Cal. Code Civ. Pro. §§ 2025(i),
24 2030(e), 2031(f) and 2033(e) and Civ. Code § 3426.5 for the protection of trade secrets,
25 confidential research, development and commercial information, *and other information whose*
26 *confidentiality is otherwise protectable under applicable law^{1/}* that may be produced or otherwise
27 disclosed during the course of this action.
28

^{1/} Italicized text represents language on which the parties have not reached agreement.

Definitions

1. The following definitions apply to this Order:
 - a. The term “document” or “documents” shall include all writings discoverable under California Code of Civil Procedure § 2031.
 - b. “Confidential Information” refers to information, documents or other material that the designating party reasonably and in good faith believes constitutes or reflects (i) a Trade Secret or (ii) information whose confidentiality is otherwise protectable under applicable law.
 - c. “Highly Confidential Information” refers to Confidential Information concerning the following: (a) development of products or technologies; (b) current or prospective marketing plans and methods; (c) current or prospective business planning and financial documents, but only when any of the above types of information are so competitively sensitive that their disclosure is highly likely to cause competitive injury to the Designating Party.
 - d. The term “Trade Secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Purpose

2. This Protective Order shall govern the use and dissemination of all information, documents or materials that are produced by the parties or other persons in the Action and designated as Confidential or Highly Confidential in accordance with the terms of this Protective Order. This

1 Protective Order is not intended to address or govern claims of work product or privilege that may be
2 asserted by any of the parties, except as otherwise provided in this Order.

3 4 **Designation and Treatment**

5
6 3. Any party to this action or other person who produces or supplies information, documents
7 or other materials in this action (hereinafter the "Designating Party") may designate as "Confidential
8 Information" or "Highly Confidential Information" any information, document or material that meets
9 the definitions in Paragraphs 1(b) or (c) of this Protective Order. The designations "Confidential
10 Information" and "Highly Confidential Information" shall be made by affixing on the document or
11 material containing such information, and upon each page so designated if practicable, words that in
12 substance state, **"CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER"** or **"HIGHLY**
13 **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER,"** respectively. Any material,
14 document or information for which it is impracticable to affix such a legend may be designated by
15 written notice to that effect with a reasonable description of the material in question.

16 4. At the option of the Designating Party, and to facilitate prompt discovery by allowing
17 inspection or review before formal designation in the manner specified above, all information,
18 material or documents produced in response to a subpoena or discovery request shall be treated as
19 Confidential Information or Highly Confidential Information pending inspection and copying.
20 Subject to paragraph 16 of this Order, copies of information, material, and documents selected for
21 copying and reproduced for the inspecting party will lose their status as Confidential Information or
22 Highly Confidential Information unless delivered with the necessary legend.

23 5. All persons having access to Confidential Information and Highly Confidential Information
24 shall maintain it in a safe and secure manner to ensure compliance with this Order. Any summary,
25 extract, paraphrase, quotation, restatement, compilation, notes or copy containing Confidential
26 Information or Highly Confidential Information, or any electronic image or database containing
27 Confidential Information or Highly Confidential Information, shall be subject to the terms of this
28

1 Order to the same extent as the material or information from which such summary, extract, paraphrase,
2 quotation, restatement, compilation, notes, copy, electronic image, database is derived.

3 6. A Designating Party may in good faith redact non-responsive and/or irrelevant
4 Confidential Information or Highly Confidential Information from any document or material.
5 However, unredacted copies of such documents shall be maintained by the Designating Party.
6 Designated attorneys for a Discovering Party and, if necessary, qualified Experts under paragraph
7 11(c) retained by them, may have access to the unredacted versions of the documents at a place of the
8 Designating Party's choosing but only for the purpose of ascertaining the appropriateness of any
9 redactions.

10 7. This Protective Order shall not be construed to protect from production or to permit
11 the designation of any document that the party has not made reasonable efforts to keep
12 confidential, of any document that has been produced in any other action or proceeding without
13 confidentiality protection, except inadvertently produced documents, of any document that has
14 been lawfully obtained by and from another source, or of any document that has been denied
15 confidential treatment in any other action or proceeding *by a final order as to which all appeals*
16 *and other opportunities to challenge have been exhausted or for which the time for appealing or*
17 *otherwise challenging has expired.*

18 **Limitations on Use**

19 8. Except to the extent expressly authorized by this Order, Confidential Information and
20 Highly Confidential Information shall not be used or disclosed for any purpose other than the
21 preparation and trial of this case and in any appeal taken from any judgment herein. Nothing
22 designated as Confidential Information or Highly Confidential Information shall be used for any
23 commercial, business, marketing, competitive, personal, or other purposes whatsoever.

24 **Limitations on Disclosure**

25 9. Except with the prior written consent of the Designating Party, or as expressly authorized
26 by this Order, no person receiving Confidential Information or Highly Confidential Information may
27 disclose it to any other person. Nothing in this Order, however, shall be deemed to restrict in any
28 manner the Designating Party's use of its own Confidential Information or Highly Confidential

1 Information. Each party may disclose its own Confidential Information or Highly Confidential
2 Information without regard to this Order, unless otherwise prohibited from doing so.

3 10. Any person to whom Confidential Information or Highly Confidential Information
4 may be disclosed pursuant to this Order, except this Court and its personnel, first shall have an
5 opportunity to read a copy of this Protective Order and shall agree in writing to the non-disclosure
6 terms of the Confidentiality Acknowledgment annexed hereto as Exhibit A ("Confidentiality
7 Acknowledgment A"). Counsel for the party obtaining a person's signature on the Confidentiality
8 Acknowledgment shall retain the original signed acknowledgment until such time as the identity
9 of the signatory is disclosed or until good cause for earlier disclosure of the acknowledgment is
10 shown.

11 11. Access to Confidential Information shall be limited to:

- 12 a. *Private attorneys of record (including staff persons employed by such*
13 *counsel) in the action in which the information is produced;*
- 14 b. *Representatives of each plaintiff, provided, however, that representatives of*
15 *plaintiffs shall not be permitted to make or retain photocopies or summaries*
16 *of Confidential or Highly Confidential documents or information;*
- 17 c. *Any expert who has been retained or specially employed by a party in*
18 *preparation for trial or as a testifying witness and who is neither employed by*
19 *nor affiliated with a competitor of the producing party, or any consultant,*
20 *contractor, vendor, parent or affiliate of such competitor, but only to the extent*
21 *reasonably necessary to enable such expert to render assistance;*
- 22 d. *Any deponent who is reasonably believed to be or to have been eligible to have*
23 *access to Confidential Information by virtue of his or her employment or other*
24 *affiliation with the Designating Party;*
- 25 e. Court reporters and videographers involved in rendering professional services
26 in the action; and
- 27 f. The Court and its personnel, subject to the provisions of paragraph 16 of this
28 Order.

12. Access to Highly Confidential Information shall be limited to:

- a. *Individual private attorneys of record who have filed notices of appearance on behalf of plaintiffs and permanently employed staff persons of such attorneys. Plaintiffs will in good faith endeavor to keep to the minimum necessary to prosecute this action the number of attorneys of record and staff persons to whom such information is disclosed.*
- b. Three (3) attorneys and two (2) staff persons from each firm of record representing each co-defendant, absent further order of the Court upon good cause shown and after notice and opportunity for hearing, who shall be identified to the Designating Party before or contemporaneously with disclosure;
- c. *Any expert who has been retained or specially employed by a party in preparation for trial or as a testifying witness and who is neither employed by nor affiliated with a competitor of the producing party, or any consultant, contractor, vendor, parent or affiliate of such competitor, but only to the extent reasonably necessary to enable such expert to render assistance;*
- d. Any deponent who is reasonably believed to be or to have been eligible to have access to the Highly Confidential information by virtue of his or her employment or other affiliation with the Designating Party.
- e. Court reporters and videographers involved in rendering professional services in the action; and
- f. The Court and its personnel, subject to the provisions of paragraph 16 of this Order.

13. If a party or other person receiving Confidential Information or Highly Confidential Information pursuant to this Order thereafter receives a subpoena or order to produce such information in any other action or proceeding before any other court or agency, such party or person shall, if there are fewer than ten (10) days to comply, within two (2) days, if possible, or immediately, if not, or if there are more than ten (10) days, at least seven (7) court days prior to the due date of compliance,

1 notify the Designating Party of the pendency of the subpoena, public records request or order in
2 writing. To give the Designating Party an opportunity to obtain such relief, the party or person from
3 whom the information is sought shall not make the disclosure before the actual due date of compliance
4 set forth in the subpoena or order.

5 **Depositions Involving Confidential or Highly Confidential Information**

6 14. Portions of a deposition or depositions in their entirety may be designated Confidential
7 Information or Highly Confidential Information by counsel for the deponent or the Designating Party,
8 with respect to documents or information that it has produced, by indicating that fact on the record
9 at the deposition or in writing no later than ten (10) days after the date of the deposition. While it is
10 not intended that this Order shall permit wholesale designation of deposition transcripts as
11 confidential, this Order shall permit temporary designation of an entire transcript as Confidential
12 Information or Highly Confidential Information where less than all of the testimony in that transcript
13 would fall into those categories, subject to the following procedure. The court reporter shall include
14 on the cover page a clear indication that the deposition has been so designated. Once designated, any
15 deposition transcript in which Confidential Information or Highly Confidential Information is
16 discussed, and any exhibits containing Confidential Information or Highly Confidential Information,
17 shall be treated as such. Within ten (10) court days of receipt of the final, unsigned deposition
18 transcript by counsel for the Designating Party, such counsel shall advise the court reporter of the
19 pages, lines and exhibits (if such exhibits are not otherwise so designated) in which Confidential
20 Information or Highly Confidential Information appears. The transcript shall be supplemented to
21 indicate such designation. Failure to particularize a designation in this manner after a temporary
22 designation of the deposition in its entirety shall result in the loss of any designation and shall entitle
23 recipients of the deposition to treat the transcript as non-confidential.

24 15. No one may attend, or review the transcripts of, the portions of any depositions at
25 which Confidential or Highly Confidential information is shown or discussed, other than persons
26 authorized to receive access to Confidential or Highly Confidential Information.

1 **Filing or Use of Confidential or Highly Confidential Information as Evidence**

2 16. Where any Confidential Information or Highly Confidential Information or information
3 derived therefrom is included in any court filing, such filing shall be marked "**CONFIDENTIAL -**
4 **SUBJECT TO PROTECTIVE ORDER**" and shall be placed in a sealed envelope marked with the
5 caption of the case and held under seal, provided, however, that when any such materials are filed with
6 the court in pretrial proceedings, counsel shall also file unsealed redacted versions of any briefs,
7 applications, or other filings that contain or set forth Confidential Information or Highly Confidential
8 Information. The redacted versions of any documents shall be served on all counsel of record within
9 10 days after the date that the sealed documents are filed in Court. The unsealed redacted documents
10 shall not be filed with the Court until 15 calendar days following the service on counsel of record.

11 **Objections to Designations**

12 17. Any party may, after production of material designated under this Protective Order,
13 until sixty (60) days prior to the Trial Readiness Conference, object to its designation by notifying the
14 Designating Party in writing of that objection and specifying the designated material to which the
15 objection is made. The parties shall confer within fifteen (15) days of service of any written objection.
16 If the objection is not resolved, the Designating Party shall, within fifteen (15) days of the conference,
17 file and serve a motion to resolve the dispute and shall bear the burden of proof on the issue. In doing
18 so, the Designating Party shall follow the procedures of paragraph 16 of this Order, if applicable. If
19 no such motion is filed within the stated time period, the material shall cease to be treated as
20 confidential or highly confidential information. If a motion is filed, information subject to dispute
21 shall be treated consistently with its designation until further order of the Court. With respect to any
22 material which is redesignated or ceases to be subject to the protection of this Protective Order, the
23 Designating Party shall, at its expense, provide to each party which so requests additional copies
24 thereof from which all confidentiality legends affixed hereunder have been adjusted to reflect the
25 redesignation or removed as appropriate.

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Inadvertent Waiver

18. Inadvertent failure to designate any information pursuant to this Protective Order shall not constitute a waiver of any otherwise valid claim for protection, so long as such claim is asserted within fifteen (15) days of the discovery of the inadvertent failure. At such time, arrangements shall be made for the Designating Party to substitute properly labeled copies. However, until the receiving party is notified that the information is designated as Confidential Information or Highly Confidential Information, the receiving parties shall be entitled to treat the material as non-confidential.

19. In the interest of expediting discovery in these proceedings and avoiding unnecessary costs: (1) inadvertent disclosure in this litigation of privileged information and/or work product shall not constitute a waiver of any otherwise valid claim of privilege, immunity, or other protection; and (2) failure to assert a privilege and/or work product in this litigation as to one document or communication shall not be deemed to constitute a waiver of the privilege, immunity, or protection as to any other document or communication allegedly so protected, even involving the same subject matter. In the case of inadvertently produced privileged and/or work product documents, upon request of the Producing Party, the documents together with all copies thereof and any notes made therefrom shall be returned forthwith to the party claiming privilege and/or work product immunity. Any party may, within five (5) court days after notification of inadvertent disclosure under this Paragraph, object to the claim of inadvertence by notifying the Designating/Producing Party in writing of that objection and specifying the designated/produced material to which the objection is made. The parties shall confer within fifteen (15) days of service of any written objection. If the objection is not resolved, the Designating Party shall, within fifteen (15) days of the conference, file and serve a motion to resolve the dispute and shall bear the burden of proof on the issue. If a motion is filed, information subject to dispute shall be treated consistently with the Designating/Producing Party's most recent designation until further order of the Court.

Non-Termination

20. *Any information or documents designated as Confidential Information or Highly Confidential Information shall continue to be treated as such until such time as (a) the Designating Party expressly agrees in writing that the information, documents, testimony or other materials in*

1 question are no longer Confidential or Highly Confidential or (b) there is a finding by the Court that
2 the information or documents are not the proper subject of protection under this order. Issues
3 regarding the protection of Confidential and Highly Confidential Information during trial may be
4 presented to the Court as each party deems appropriate.

5 21. The obligations and protections imposed by this Order shall continue beyond the
6 conclusion of this action, including any appeals, or until the Court orders otherwise. Within sixty (60)
7 days after receipt of a request from the Designating Party, made after this action has concluded and
8 the time for possible appeal has been resolved, Confidential Information or Highly Confidential
9 Information (other than exhibits at the official court of record) shall be returned to the appropriate
10 Designating Party or, at the sole option of the Designating Party, shall be destroyed. Counsel for any
11 party or third party receiving Confidential Information or Highly Confidential Information in this
12 action shall make written certification of compliance with this provision and shall deliver the same
13 to counsel for each Designating Party within one hundred eighty (180) days after such request.

14 **Continuing Jurisdiction**

15 22. Any party may petition the Court for a modification of the terms of this Protective
16 Order for good cause shown, after notice and opportunity for a hearing. This Court shall have
17 continuing jurisdiction to modify, amend, enforce, interpret or rescind this Protective Order
18 notwithstanding the termination of this action.

19 **ORDER**

20 The foregoing is made the order of this Court.
21

22
23 Dated: August ____, 2000

24 _____
Vincent P. DiFiglia
Judge of the Superior Court
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26
27
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EXHIBIT A
TO PROTECTIVE ORDER
CONFIDENTIALITY AGREEMENT

The undersigned hereby acknowledges and agrees:

1. I am aware that a Protective Order (the "Order") has been entered in the above-captioned action. I have had the opportunity to read the Order and understand that my willful disclosure of Confidential or Highly Confidential Information may constitute contempt of court, and agree to submit to this Court's jurisdiction for purposes of enforcement of the Order.

2. I will not disclose or discuss any Confidential information or Highly Confidential information with any person except those persons specifically listed in the Order under the procedures therein specified.

Name: _____

Address: _____

Telephone No.: _____

Dated: _____