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11 [Additional counsel on signature page]

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 ORACLE AMERICA, INC., a Delaware
corporation; ORACLE INTERNATIONAL
16 CORPORATION, a California corporation

17 Plaintiffs,

18 v.

19 HEWLETT PACKARD ENTERPRISE
COMPANY, a Delaware corporation; and DOES
20 1-50,

21 Defendants.

No. 16-cv-01393-JST

~~PROPOSED~~ STIPULATED
AMENDED PROTECTIVE ORDER

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WHEREAS, during the course of this action, the parties and certain non-parties may be subject to discovery requests and/or proceedings that seek the disclosure of information that the party or non-party to whom the request is directed considers to be confidential and/or proprietary.

WHEREAS, the parties wish to preserve the confidentiality of such information through the use of a protective order.

IT IS THEREFORE HEREBY STIPULATED AND AGREED, by and between Oracle America, Inc., Oracle International Corporation (together, "Oracle"), and Hewlett Packard Enterprise Company ("HPE"), that the parties petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Paragraph J(1) below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

A. Scope

This Order shall govern the handling of: (1) documents, depositions, deposition exhibits, interrogatory responses, admissions, and any other information or material produced, given or exchanged by and among the parties and any non-parties to this litigation (including, without limitation, any non-party that seeks to intervene or to object to any of the proceedings in the litigation) in connection with discovery in this litigation; and (2) any information copied or extracted from Protected Material (as defined below). The protections conferred by this Stipulation and Order do not cover the following information: (1) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this

1 Order; and (2) any information known to the Receiving Party prior to the disclosure or obtained
2 by the Receiving Party after the disclosure from a source who obtained the information lawfully
3 and under no obligation of confidentiality to the Producing Party. Reference to or use of Protected
4 Material by either party at a hearing does not make the underlying Protected Material part of the
5 public domain except to the extent that the Protected Material is entered into the public record by
6 the Court or the designating party. Any use of Protected Material at trial shall be governed by a
7 separate agreement or order.

8 **B. Duration**

9 Even after final disposition of this litigation, the confidentiality obligations
10 imposed by this Order shall remain in effect until a Producing Party agrees otherwise in writing or
11 a court order otherwise directs. Final disposition shall be deemed to be the later of: (1) dismissal
12 of all claims and defenses in this action, with or without prejudice; and (2) final judgment herein
13 after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this
14 action, including the time limits for filing any motions or applications for extension of time
15 pursuant to applicable law.

16 **C. Definitions**

17 1. “Attorneys’ Eyes Only” shall mean all documents and testimony, and all
18 information contained therein, and other information designated as “Attorneys’ Eyes Only,” if
19 such documents or testimony contain highly sensitive private information, non-public business or
20 financial information, or software code, the disclosure of which would, in the good faith judgment
21 of the party designating the material as “Attorneys’ Eyes Only,” cause serious and irreparable harm
22 to that party’s business or the business of any of that party’s customers or clients if the material is
23 disclosed to persons allowed to see Confidential material beyond the persons specified in
24 Paragraph E(2) below. Documents, testimony, or other material that merely identify or refer to
25 customers do not, without more, meet the criteria for Attorneys’ Eyes Only. The parties anticipate
26 that this designation will be used very sparingly. Information that is already publicly available
27 may not be designated as “Attorneys’ Eyes Only.”
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1 2. **“Confidential”** shall mean all documents and testimony, and all
2 information contained therein, and other information designated as confidential, if such documents
3 or testimony contain trade secrets, proprietary business information, competitively sensitive
4 information, or any other non-public business information, the disclosure of which would, in the
5 good faith judgment of the party designating the material as confidential, be detrimental to the
6 conduct of that party’s business or the business of any of that party’s customers or clients if the
7 material becomes public. Information that is already publicly available may not be designated as
8 “Confidential.”

9 3. **“Discovery Material”** shall mean all items or information, regardless of
10 the medium or manner in which it is generated, stored, or maintained (including, among other
11 things, testimony, transcripts, and tangible things), that are produced or generated in disclosures
12 or responses to discovery requests in this matter.

13 4. **“Producing Party”** shall mean the parties to this action or any non-parties
14 producing “Confidential” or “Attorneys’ Eyes Only” information in connection with depositions,
15 document production or otherwise, or the party asserting the confidentiality privilege, as the case
16 may be.

17 5. **“Protected Material”** shall refer to any disclosure or Discovery Material
18 that is designated as “Confidential” or “Attorneys’ Eyes Only.”

19 6. **“Receiving Party”** shall mean the parties to this action or any non-parties
20 receiving “Confidential” or “Attorneys’ Eyes Only” information in connection with depositions,
21 document production, or otherwise.

22 **D. Designating Protected Material**

23 1. The parties may designate documents produced, testimony given, or any
24 other materials exchanged in connection with this action as “Confidential” or “Attorneys’ Eyes
25 Only” under the terms of this Order and Fed. R. Civ. P. 26(c).

26 2. Each party or non-party that designates information or items for protection
27 under this Order must take care to limit any such designation to specific material that qualifies
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1 under the appropriate standards. Mass, indiscriminate, or routinized designations are prohibited.

2 3. Except as otherwise provided in this Order, or as otherwise stipulated or
3 ordered, Discovery Material that qualifies for protection under this Order must be clearly
4 designated as either “Confidential” or “Attorneys’ Eyes Only” before the material is disclosed or
5 produced.

6 4. Documents or other materials (apart from depositions or other pretrial
7 testimony) shall be designated by affixing the legend “Confidential” or “Attorneys’ Eyes Only” to
8 each page containing any Confidential or Attorneys’ Eyes Only information, except that in the
9 case of multi-page documents bound together by a staple or other permanent binding, the word(s)
10 “Confidential” or “Attorneys’ Eyes Only” need only be stamped on the first page of the document
11 in order for the entire document to be treated as Confidential or Attorneys’ Eyes Only. The failure
12 to designate a document as “Confidential” or “Attorneys’ Eyes Only” does not constitute a waiver
13 of such claim, and a Producing Party may so designate a document after such document has been
14 produced, with the effect that such document is thereafter subject to the protections of this Order.
15 For native documents (such as Excel files) or software code, the Producing Party will endorse the
16 designation on a slipsheet in the production.

17 5. Depositions or other pretrial testimony shall be designated by notice via
18 email or in writing, sent to all parties within ten (10) business days after receiving a copy of the
19 final transcript thereof, and by directing the court reporter that the appropriate confidentiality
20 legend be affixed to the first page of the original and all copies of the transcript containing any
21 Confidential or Attorneys’ Eyes Only material. Unless otherwise stated on the record, all
22 depositions and other pretrial testimony shall be deemed to be “Attorneys’ Eyes Only” until the
23 expiration of the tenth business day after counsel receives a copy of the transcript thereof, after
24 which time such deposition or pretrial testimony shall be treated in accordance with its actual
25 designation, if any. The parties may modify this procedure for any particular deposition, through
26 agreement on the record at such deposition, without further order of the Court.

27 6. The Receiving Party may, at any time, notify the Producing Party that the
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1 Receiving Party does not concur in the designation of a document or other material as Confidential
2 or Attorneys' Eyes Only. If the Receiving Party contends that any document or other material
3 designated as Confidential or Attorneys' Eyes Only is not entitled to confidential treatment, the
4 Receiving Party shall give written notice to the party who designated the material, specifically
5 identifying the challenged material. The Producing Party, by its counsel, shall respond in writing
6 within five (5) business days of receipt of the written request (or within ten (10) business days if
7 the Producing Party is a third party to this litigation), or within such other period of time as may
8 be designated by order of the Court or agreement of the parties. If the Producing Party refuses to
9 remove the Confidential or Attorneys' Eyes Only designation, its written response shall state the
10 reasons for this refusal. If the challenge to the confidential designation is not resolved after a good
11 faith meet and confer, which should take place within five (5) business days of the Producing
12 Party's written response, the parties will submit a joint letter brief following the procedures
13 described in the Standing Order for All Civil Cases Before District Judge Jon S. Tigar.
14 Specifically, the Receiving Party shall prepare its portion of the joint letter brief following the
15 parties' meet and confer and serve it on the Producing Party within five (5) business days of the
16 meet and confer. Within five (5) business days after receiving the Receiving Party's portion of
17 the joint letter brief, the Producing Party shall prepare its portion of the joint letter brief and serve
18 it on the Receiving Party. The Receiving Party shall file the joint letter on behalf of the parties
19 within one (1) business day of receiving the Producing Party's portion of the joint letter brief. This
20 Protective Order does not alter the burden of proving that the challenged material is entitled to
21 confidential treatment as governed by applicable law. If the Receiving Party does not prepare a
22 joint letter brief, such documents or materials shall continue to be treated as designated by the
23 Producing Party. If such a joint letter brief is filed, the documents or other materials shall be
24 deemed as designated by the Producing Party unless and until the Court rules otherwise.

25 **E. Access to Confidential Information**

26 1. Except with the prior written consent of the Producing Party or by Order of
27 the Court, **Confidential** information shall not be furnished, shown, or disclosed to any person or
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2 entity except to:

- 3 a. Personnel of HP or Oracle involved in the litigation of this matter
4 and who have been advised of their obligations hereunder;
- 5 b. Outside counsel of record for the parties to this action and their
6 associated attorneys, paralegals, and other professional personnel
7 (including support staff) who are directly assisting such counsel in
8 the preparation of this action for trial or other proceedings herein,
9 are under the supervision or control of such counsel, and who have
10 been advised by such counsel of their obligations hereunder; in
11 house counsel John Schultz, HPE Executive Vice President, Chief
12 Legal and Administrative Officer, and Corporate Secretary; Rishi
13 Varma, HPE General Counsel; Robert Particelli, HPE Senior Vice
14 President and Deputy General Counsel, Litigation; Vaishali Udupa,
15 HPE Vice President, Associate General Counsel, IP Litigation and
16 Policy; Deanna Kwong, HPE IP Litigation Counsel; Dorian Daley,
17 Oracle's Executive Vice President and General Counsel; Deborah
18 Miller, Oracle's Vice President and Associate General Counsel,
19 Litigation; Jeffrey Ross, Oracle's Assistant General Counsel; Colin
20 Farrell, Oracle Corporate Counsel; and paralegals and legal
21 department administrative personnel who are directly assisting such
22 in-house counsel in the preparation of this action for trial or other
23 proceedings herein, are under the supervision or control of such
24 counsel, and who have been advised by such counsel of their
25 obligations hereunder;
- 26 c. Expert witnesses or consultants and their support staff retained by
27 the parties or their counsel to furnish technical or expert services in
28 connection with this action or to give testimony with respect to the

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subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential information is furnished, shown, or disclosed in accordance with Paragraphs (E)(4) and (5) below;

- d. The Court and court personnel;
- e. An officer before whom a deposition is taken, including stenographic and video reporters and any necessary secretarial, clerical, or other personnel of such officer;
- f. Trial and deposition witnesses;
- g. Any person indicated on the face of a document to be the author, addressee, or a copy recipient of the document;
- h. Vendors with whom counsel of record for the parties to this litigation have contracted for purely clerical functions, such as the copying of documents;
- i. Mock jurors and jury consultants who have been engaged by any party and/or a party's consultant in preparation for trial. For any jury research, an appropriate screening process must be used to assure that the jury consultant(s) and mock jurors chosen for any mock jury presentation are not current or former officers, directors, employees, or consultants of any party or any direct competitors of any party. Each jury consultant and/or mock jurors must agree in writing to be bound by this Order by signing and undertaking the form of Exhibit A to this Order; and
- j. Any other person agreed to by the parties.

2. Except with the prior written consent of the Producing Party or by Order of the Court, **Attorneys' Eyes Only** information shall not be furnished, shown, or disclosed to any person or entity except to those persons listed above in Paragraph (E)(1) under item (b), item (c)

1 (subject to Paragraph (E)(5) below), item (d), item (e), item (g), item (h), item (i) and item (j).
2 Attorneys' Eyes Only information may be furnished, shown, or disclosed to any person or entity
3 listed above under Paragraph (E)(1)(f) if that person or entity is (i) an author, addressee, or a copy
4 recipient of the document, or (ii) an employee, officer, or director of the Producing Party. For any
5 person or entity under Paragraph (E)(1)(f) that is not within the scope of the preceding sentence,
6 Attorneys' Eyes Only information may be furnished, shown, or disclosed to such person or entity
7 only (i) with the prior written consent of the Producing Party or by Court Order, and (ii) after the
8 person or entity has signed Exhibit A attached hereto and agreed to comply with and be bound by
9 its terms.

10 3. Confidential and Attorneys' Eyes Only information shall be utilized by the
11 Receiving Party and/or its counsel, as applicable, only for purposes of this litigation (including,
12 for example, communications with third parties related to the service of and/or responses to
13 subpoenas) and for no other purposes, unless the Receiving Party independently learned of the
14 Confidential or Attorneys' Eyes Only information. A Receiving Party may not utilize Confidential
15 and Attorneys' Eyes Only information for the purposes of contacting, communicating or
16 negotiating with a third party for the purposes of establishing, modifying, and/or furthering a
17 business relationship, provided, however, that nothing in this protective order shall preclude a
18 Receiving Party from using information developed from independent sources for any purpose. A
19 Receiving Party is not precluded from using such independently derived information by virtue of
20 having also received it pursuant to this Protective Order. The parties acknowledge that each party
21 respectively may have developed information regarding certain customers independent of any
22 disclosure or production in the litigation. The parties also acknowledge that the salespeople for
23 the respective parties may communicate with customers and potential customers in the ordinary
24 course of their jobs, and that such communications do not, alone, reflect the use of protected
25 information.

26 4. Before any disclosure of Confidential or Attorneys' Eyes Only information
27 is made to an expert witness or consultant or their support staff pursuant to Paragraph (E)(1)(c)
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1 above, counsel for the Receiving Party shall obtain from the expert, the expert's written agreement,
2 in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Confidential
3 or Attorneys' Eyes Only information may be provided to an expert witness or consultant to the
4 extent necessary for such expert or consultant to prepare a written opinion, to prepare to testify, or
5 to assist counsel in the prosecution or defense of this litigation, provided that such expert or
6 consultant (i) is not currently an employee of, or advising or discussing employment with, or
7 consultant to, any party to or any competitor of any party to this litigation, as far as the expert or
8 consultant can reasonably determine, and (ii) is using said Confidential or Attorneys' Eyes Only
9 information solely in connection with this litigation. Where an expert witness or consultant has
10 employees at the same firm or company working at the direction of the expert witness or
11 consultant, only the expert witness or consultant (and not the other employees) need sign
12 Exhibit A. However, the employees shall also be bound by the confidentiality obligations in this
13 Order to the same extent the expert witness or consultant is.

14 5. At least five (5) business days prior to providing an expert or expert
15 consultant with any information that has been designated as Confidential or Attorneys' Eyes Only
16 by a Producing Party, counsel must first identify the expert in writing to opposing counsel. This
17 written identification shall include a current resume or curriculum vitae. Should the opposing
18 party or any non-party object to the disclosure of its Protected Material to the designated expert or
19 expert consultant, it shall provide written notice within five (5) business days. The objecting party
20 or non-party shall meet and confer with the party identifying the expert on that objection within
21 two (2) business days of the written objection being served on counsel. If the meet and confer
22 does not resolve the dispute, the parties agree to expedite the filing of a joint letter with the Court.
23 The parties agree that this joint statement will be filed with the Court within two (2) business days
24 of the meet and confer.
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1 **F. Protected Material Subpoenaed or Ordered Produced in Other Litigation**

2 If a party is served with a subpoena or a court order issued in other litigation that
3 compels disclosure of any information or items designated in this action as Confidential or
4 Attorneys' Eyes Only, that party must:

- 5 a) promptly notify in writing the Producing Party. Such notification shall include a
6 copy of the subpoena or court order;
- 7 b) promptly notify in writing the party who caused the subpoena or order to issue in
8 the other litigation that some or all of the material covered by the subpoena or order
9 is subject to this Protective Order. Such notification shall include a copy of this
10 Stipulated Protective Order; and
- 11 c) cooperate with respect to all reasonable procedures sought to be pursued by the
12 Producing Party whose Protected Material may be affected.

13 If the Producing Party timely seeks a protective order, the party served with the subpoena or court
14 order shall not produce any information designated in this action as Confidential or Attorneys'
15 Eyes Only before a determination by the court from which the subpoena or order issued, unless
16 the party has obtained the Producing Party's permission. The Producing Party shall bear the
17 burden and expense of seeking protection in that court of its Protected Material, and nothing in
18 these provisions should be construed as authorizing or encouraging a Receiving Party in this action
19 to disobey a lawful directive from another court.

20 **G. Unauthorized Disclosure of Protected Materials**

21 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
22 Protected Material to any person or in any circumstance not authorized under this Stipulated
23 Protective Order, the Receiving Party must immediately (a) notify in writing the Producing Party
24 of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
25 Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made
26 of all the terms of this Order, and (d) request such person or persons to execute a written agreement,
27 in the form of Exhibit A attached hereto, to comply with and be bound by the terms of this Order.
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1 **H. Inadvertent Production of Privileged Materials**

2 1. If information subject to a claim of attorney-client privilege, attorney work
3 product, or any other ground on which production of such information should not be made to any
4 party is nevertheless inadvertently produced to a party or parties, Federal Rule of Evidence 502(b)
5 and Federal Rule of Civil Procedure 26(b)(5)(B) shall apply.

6 2. If any privileged material is inadvertently produced in this matter, the
7 Producing Party may claim it back by requesting return or destruction in writing, stating that the
8 production was inadvertent. Within five (5) business days upon receipt of such written notice, the
9 Receiving Party shall confirm in writing that it has either (1) returned the items identified and
10 destroyed any copies which were made or (2) immediately sequestered the material in question
11 and provided the party making the claim of inadvertent disclosure notice that the Receiving Party
12 intends to challenge the material as not privileged or not inadvertently produced. This paragraph
13 does not restrict the right of the Receiving Party to challenge the Producing Party’s claim of
14 privilege.

15 3. The failure of a party at a deposition to challenge the assertion of any
16 privilege, work-product protection, or immunity over any document shall not prejudice the right
17 of such party to challenge the assertion of any such privilege or immunity in accordance with the
18 other procedures described in this paragraph.

19 **I. Final Disposition**

20 1. Within 60 days of the termination of this action between the parties,
21 including final appellate action or the expiration of time to appeal or seek further review, each
22 party or other individual subject to the terms of this Order shall use reasonable efforts to either
23 return or destroy materials designated “Confidential” or “Attorneys’ Eyes Only.”

24 2. The Receiving Party’s reasonable efforts shall not require the return or
25 destruction of “Confidential” or “Attorneys’ Eyes Only” materials from: (1) disaster recovery or
26 business continuity backups, (2) data stored in system-generated temporary folders or near-line
27 storage, (3) unstructured departed employee data, and/or (4) material that is subject to legal hold
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1 obligations or commingled with other such material. Backup storage media will not be restored
2 for purposes of returning or certifying destruction of “Confidential” or “Attorneys’ Eyes Only”
3 material, but such retained information shall continue to be treated in accordance with the Order.

4 3. Notwithstanding the above requirements to return or destroy Protected
5 Material, counsel may retain for archival purposes complete copies of all court papers (and exhibits
6 thereto), correspondence, pleadings, deposition and trial transcripts (and exhibits thereto), legal
7 memoranda, expert reports and attorney work product that contain or refer to Confidential or
8 Attorneys’ Eyes Only materials, provided that such Counsel shall not disclose such materials to
9 any person, except pursuant to court order. Nothing shall be interpreted in a manner that would
10 violate any applicable canons of ethics or codes of professional responsibility.

11 **J. Miscellaneous**

12 1. If any party intends to file with the Court materials that have been
13 designated as Confidential or Attorneys’ Eyes Only, the filing party must comply with Civil Local
14 Rule 79-5. Prior to any hearings and/or trial in this matter, counsel for the parties shall meet and
15 confer to negotiate a proposal regarding the treatment of Confidential or Attorneys’ Eyes Only
16 information proposed to be used at such hearing or trial.

17 2. The parties to this action agree that the production of any Discovery
18 Material by any non-party shall be subject to and governed by the terms of this Order.

19 3. Nothing in this Order shall prevent or restrict a Producing Party’s own
20 disclosure or use of its own Protected Material for any purpose. Nothing in this Order shall be
21 construed to prejudice any party’s right to object to the use or disclosure of any Protected Material
22 in court or in any court filing. This Order is made without prejudice to the right of any party to
23 seek further or additional protection of any Protected Material or to modify this Order in any way,
24 including, without limitation, an order that certain material not be produced at all.

25 4. The parties and any other persons subject to the terms of this Order agree
26 that the Court shall retain jurisdiction over them for the purpose of enforcing this Order.

27 5. Nothing in this Order shall prevent any party or other person from seeking
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modification of this Order or from objecting to discovery that it believes to be otherwise improper.

IT IS SO STIPULATED.

Dated: April 23, 2018

LATHAM & WATKINS LLP

By: /s/ Christopher S. Yates
Christopher S. Yates
Attorneys for Plaintiffs
Oracle America, Inc. and
Oracle International Corporation.

Dated: April 23, 2018

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Blaine H. Evanson
Blaine H. Evanson
Attorneys for Hewlett Packard Enterprise
Company

PURSUANT TO STIPULATION, IT IS SO ORDERED:

DATED: April 23, 2018

By: 
The Honorable Jon S. Tigar

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ATTESTATION OF CONCURRENCE IN THE FILING

Pursuant to Civil Local Rule 5-1(i)(3), I declare that concurrence has been obtained from each of the above signatories to file this document with the Court.

Dated: April 23, 2018

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Blaine H. Evanson
Blaine H. Evanson
Attorneys for Hewlett Packard Enterprise
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EXHIBIT A

I have been given a copy of the Stipulated Protective Order entered in the actions titled *Oracle America, Inc., et al. v. Hewlett Packard Enterprise Company, et al.*, Civil Action No. 16-cv-01393 JST, pending in the United States District Court for the Northern District of California. I have read and understand the terms of the Order. I understand that unauthorized disclosure of “Confidential” or “Attorneys’ Eyes Only” information will constitute a violation of the Order and that the parties reserve the right to seek appropriate redress, including sanctions, from the Court for willful violations thereof. With full knowledge of the terms and requirements of the Order, I agree to be bound by its terms. I agree that I shall not disclose to others, except in accordance with the Order, such information or documents, and that such information or documents shall be used only for the purpose of the legal proceeding in which the documents were produced. I further agree and attest to my understanding that my obligation to honor the confidentiality of such information or documents will continue even after the termination of this legal proceeding.

I agree to subject myself to the jurisdiction of the United States District Court for the Northern District of California for the purposes of enforcement of this Order.

Dated: _____

By: _____