APPENDIX B: Protective Order Guidelines (based on the trial rules).

(a) Purpose. This document provides guidance on the procedures for filing of motions to seal and the entry of protective orders in proceedings before the Board. A protective order is not entered by default but must be proposed by one or more parties and must be approved and entered by the Board. The protective order governs the protection of confidential information contained in documents, discovery, or testimony adduced, exchanged, or filed with the Board. The parties are encouraged to agree on the entry of a stipulated protective order. Absent such agreement, the default protective order may be entered by the Board.

(b) Timing; lifting or modification of the Protective Order. The terms of a protective order take effect upon the filing of a Motion to Seal by a party, and remain in place until lifted or modified by the Board.

(c) Protective Order to Govern Treatment of Confidential Information. The terms of a protective order govern the treatment of the confidential portions of documents, testimony, and other information designated as confidential, as well as the filing of confidential documents or discussion of confidential information in any papers filed with the Board. The Board shall have the authority to enforce the terms of the Protective Order, to provide remedies for its breach, and to impose sanctions on a party and a

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party's representatives for any violations of its terms.

(d) Contents. The Protective Order shall include the following terms:

(1) Designation of Confidential Information. The producing party shall have the obligation to clearly mark as "PROTECTIVE ORDER MATERIAL" any documents or information considered to be confidential under the Protective Order.

(2) Persons Entitled to Access to Confidential Information. A party receiving confidential information shall strictly restrict access to that information to the following individuals who first have signed and filed an Acknowledgement as provided herein:

(A) Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(B) Party Representatives. Representatives of record for a party in the proceeding.

(C) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(D) In-house counsel. In-house counsel of a party.

(E) Support Personnel. Administrative assistants, clerical staff, court reporters,

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and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding. Such support personnel shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(F) The Office. Employees and representatives of the U.S. Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and staff, other Office support personnel, court reporters, and other persons acting on behalf of the Office.

(3) Employees (*e.g.*, corporate officers), consultants, or other persons performing work for a party, other than those persons identified in (d)(2)(A)–(E), shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person and after signing the Acknowledgment. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

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(4) Protection of Confidential Information. Persons receiving confidential information shall take reasonable care to maintain the confidentiality of that information, including:

(A) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;

(B) Otherwise using reasonable efforts to maintain the confidentiality of the information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;

(C) Ensuring that support personnel of the recipient who have access to the confidential information understand and abide by the obligation to maintain the confidentiality of information received that is designated as confidential; and

(D) Limiting the copying of confidential information to a reasonable number of copies needed to conduct the proceeding and maintaining a record of the locations of such copies, which similarly must be kept secure.

(5) Treatment of Confidential Information. Persons receiving confidential information shall use the following procedures to maintain confidentiality of documents and other information—

(A) Documents and Information Filed With the Board.

(i) A party may file documents or information with the Board along with a Motion to Seal. The Motion to Seal should provide a non-confidential description of the

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nature of the confidential information that is under seal, and set forth the reasons why the information is confidential, or if the information has been designated as confidential by the opposing party, that party shall set forth the reasons why the information redacted is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The documents or information shall remain under seal unless the Board determines that some or all of it does not qualify for confidential treatment.

(ii) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential, or if the information has been designated as confidential by the opposing party, that party shall set forth the reasons why the information redacted is confidential and should not be made publicly available. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal, unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.

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(B) Documents and Information Exchanged Among the Parties. Documents (including deposition transcripts) and other information designated as confidential that are disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as "PROTECTIVE ORDER MATERIAL" and shall be produced in a manner that maintains its confidentiality.

(6) Confidential Testimony. Any person providing testimony in a proceeding may, on the record during the testimony, preliminarily designate the entirety of the person's testimony and all transcriptions thereof as confidential, pending further review. Within ten days of the receipt of the transcript of the testimony, that person, or that person's representative, shall advise the opposing party of those portions of the testimony to which a claim of confidentiality is to be maintained, and the reasons in support of that claim. Such portions shall be treated as confidential and maintained under seal in any filings to the Board unless, upon motion of a party, the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(7) Other Restrictions Imposed By the Board. In addition to the foregoing, the Board may, in its discretion, include other terms and conditions in a Protective Order it enters in any proceeding.

(8) Requirement of Acknowledgement. Any person receiving confidential

information during a proceeding before the Board shall, prior to receipt of any confidential information, first sign an Acknowledgement, under penalty of perjury, stating the following:

(A) The person has read the Protective Order and understands its terms;

(B) The person agrees to be bound by the Protective Order and will abide by its terms;

(C) The person will use the confidential information only in connection with that proceeding and for no other purpose;

(D) The person shall only extend access to the confidential information to support personnel, such as administrative assistants, clerical staff, paralegals, and the like, who are reasonably necessary to assist him or her in the proceeding. The person shall inform such support personnel of the terms and requirements of the Protective Order prior to disclosure of any confidential information to such support personnel and shall be personally responsible for their compliance with the terms of the Protective Order; and

(E) The person agrees to submit to the jurisdiction of the Office for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

(e) Filing of Proposed Protective Order. The party filing a Motion to Seal shall include with its supporting papers a copy of a proposed Protective Order and shall certify that the party accepts and agrees to the terms of the Protective Order. Prior to the receipt of

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confidential information, any other party to the proceeding also shall certify that the party accepts and agrees to the terms of the proposed Protective Order. The proposed Protective Order shall remain in effect until superseded by a Protective Order entered by the Board. If the parties agree to accept the terms of the Default Protective Order, they are not required to provide a copy but must certify that they accept and agree to its terms.

(f) Duty To Retain Acknowledgements. Each party to the proceeding shall maintain a signed Acknowledgement from each person acting on its behalf who obtains access to confidential information after signing an Acknowledgement, as set forth herein, and shall produce such Acknowledgements to the Office upon request.

(g) Motion to Seal. A party may file an opposition to the motion that may include a request that the terms of the proposed Protective Order be modified including limiting the persons who are entitled to access under the Order. Any such opposition shall state with particularity the grounds for modifying the proposed Protective Order. The party seeking the modification shall have the burden of proving that such modifications are necessary. While the motion is pending, no disclosure of confidential information shall be made to the persons for whom disclosure is opposed, but the filing of the motion shall not preclude disclosure of the confidential information to persons for whom disclosure is not opposed and shall not toll the time for taking any action in the proceeding.

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(h) Other Proceedings. Counsel for a party who receives confidential information in a proceeding will not be restricted by the Board from representing that party in any other proceeding or matter before the Office. Confidential information received in a proceeding, however, may not be used in any other Office proceeding in which the providing party is not also a party.

(i) Disposal of Confidential Information. Within 60 days after final termination of a proceeding, including any appeals, or within 60 days after the time for appeal has expired, each party shall assemble all copies of all confidential information it has received, including confidential information provided to its representatives and experts, and shall return or destroy the confidential information and provide a certification of destruction to the party who produced the confidential information.

(j) Modifications to the Default Protective Order. The parties may propose modifications to the Default Protective Order. The Board will consider changes agreed to by the parties, and generally will accept such proposed changes if they are consistent with the integrity and efficient administration of the proceedings. For example, the parties may agree to modify the Default Protective Order to provide additional tiers or categories of confidential information, such as "Attorneys' Eyes Only." The Board will presumptively accept agreed-to changes that provide additional categories of confidentiality as long as they are reasonable and adequately define what types of materials are to be included in

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the additional categories. The Board will not accept overly inclusive definitions that encourage the parties to categorize all or most of their discovery materials as "Attorneys' Eyes Only."

When a proceeding before the Board involves the same parties and subject matter as a parallel district court proceeding, parties may propose that a protective order entered by the district court be adopted by the Board. The Board may enter such a proposed protective order especially if certain provisions commonly found in district court protective orders that are unnecessary or inappropriate in proceedings before the Board are removed before submitting the proposed protective order to the Board. For example, provisions protecting computer source code may be unnecessary because proceedings before the Board rarely, if ever, require analysis of computer source code. Likewise, prosecution bars are rarely appropriate in proceedings before the Board because the disadvantage caused by a prosecution bar to patent owners wishing to make use of amendment or reissue processes in most cases outweighs the risk that confidential technical information about existing or future commercial products will be revealed during a proceeding. Finally, all terms of district court protective orders that conflict with Board procedures for filing or otherwise handling confidential information should be removed before the proposed order is submitted to the Board.

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DEFAULT PROTECTIVE ORDER

The following Default Protective Order will govern the filing and treatment of confidential information in the proceeding:

Default Protective Order

This protective order governs the treatment and filing of confidential information, including documents and testimony.

1. Confidential information shall be clearly marked "PROTECTIVE ORDER MATERIAL."

2. Access to confidential information is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(B) Party Representatives. Representatives of record for a party in the proceeding.

(C) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(D) In-house counsel. In-house counsel of a party.

(E) Support Personnel. Administrative assistants, clerical staff, court reporters and

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other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(F) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

3. Employees (e.g., corporate officers), consultants, or other persons performing work for a party, other than those persons identified above in (d)(2)(A)–(E), shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person and after signing the Acknowledgment. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

4. Persons receiving confidential information shall use reasonable efforts to

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maintain the confidentiality of the information, including:

(A) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;

(B) Otherwise using reasonable efforts to maintain the confidentiality of the information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;

(C) Ensuring that support personnel of the recipient who have access to the confidential information understand and abide by the obligation to maintain the confidentiality of information received that is designated as confidential; and

(D) Limiting the copying of confidential information to a reasonable number of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

5. Persons receiving confidential information shall use the following procedures to maintain the confidentiality of the information:

(A) Documents and Information Filed With the Board.

(i) A party may file documents or information with the Board along with a Motion to Seal. The Motion to Seal should provide a non-confidential description of the nature of the confidential information that is under seal, and set forth the reasons why the information is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing

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the Motion to Seal. The documents or information shall remain under seal unless the Board determines that some or all of it does not qualify for confidential treatment.

(ii) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(B) Documents and Information Exchanged Among the Parties. Documents (including deposition transcripts) and other information designated as confidential that are disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as "PROTECTIVE ORDER MATERIAL" and shall be produced in a manner that maintains its confidentiality.

6. Within 60 days after the final disposition of this action, including the

exhaustion of all appeals and motions, each party receiving confidential information must return, or certify the destruction of, all copies of the confidential information to the producing party.

(k) Standard Acknowledgement of Protective Order. The following form may be used to acknowledge a protective order and gain access to information covered by the protective order:

[CAPTION]

Standard Acknowledgment for Access to Protective Order Material

I _____, affirm that I have read the Protective Order; that I will abide by its terms; that I will use the confidential information only in connection with this proceeding and for no other purpose; that I will only allow access to support staff who are reasonably necessary to assist me in this proceeding; that prior to any disclosure to such support staff I informed or will inform them of the requirements of the Protective Order; that I am personally responsible for the requirements of the terms of the Protective Order and I agree to submit to the jurisdiction of the Office and the United States District Court for the Eastern District of Virginia for purposes of enforcing the terms of the

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Protective Order and providing remedies for its breach.

[Signature]

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