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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Case No. CV 19-0035-TUC-RM (LAB)

Russell B. Toomey,

Plaintiff,

STIPULATED PROTECTIVE ORDER

vs.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as Chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as member of the Arizona Board of Regents; **Lyndel Manson**, in her capacity as member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her capacity as member of the Arizona Board of Regents; **Jay Heiler**, in his capacity as member of the Arizona Board of Regents; **Fred Duval**, in his capacity as member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Service Division of the Arizona Department of Administration,

Defendants.

The Court recognizes that many of the documents and much of the information (“Materials” as defined herein) being sought through discovery in the above-captioned action are normally kept confidential by the parties. The Materials to be exchanged throughout the course of the litigation between the parties may contain trade secret or other confidential research, development, commercial, or highly personal information, as is contemplated by

1 Federal Rule of Civil Procedure 26(c)(1)(G). Additionally, the Materials to be exchanged
2 throughout the course of the litigation between the parties may contain Protected Health
3 Information (“PHI”), as that term is defined in 45 C.F.R. § 160.103, of Plaintiff and other
4 Plan beneficiaries, which should be produced subjected to the provisions of the Health
5 Insurance Portability and Accountability Act of 1996, codified primarily at 18, 26 & 42
6 U.S.C. (2003) (“HIPAA”). The parties have agreed to be bound by the terms of this
7 Protective Order (“Order”) in this action to facilitate the document production and disclosure
8 and protect the respective interests of the parties in their trade secrets, confidential, and/or
9 highly personal information. This Order shall remain in effect unless modified pursuant to
10 the terms contained in this Order.

11 IT IS THEREFORE ORDERED THAT,

12 The following Definitions shall apply in this Order:

13 A. The term “Confidential Information” will mean and include information
14 contained or disclosed in any materials, including documents, portions of documents,
15 answers to interrogatories, responses to requests for admissions, trial testimony, deposition
16 testimony, and transcripts of trial testimony and depositions, including data, summaries, and
17 compilations derived therefrom that is deemed to be Confidential Information by any party
18 to which it belongs.

19 B. The term “Materials” will include, but is not be limited to: documents;
20 correspondence; memoranda; financial information; email; specifications; marketing plans;
21 marketing budgets; customer information; materials that identify customers or potential
22 customers; price lists or schedules or other matter identifying pricing; minutes; letters;
23 statements; cancelled checks; contracts; invoices; drafts; books of account; worksheets;
24 forecasts; notes of conversations; desk diaries; appointment books; expense accounts;
25 recordings; photographs; motion pictures; sketches; drawings; notes of discussions with
26 third parties; other notes; business reports; instructions; disclosures; other writings; records
27 of website development; and internet archives.

28 C. The term “Counsel” will mean counsel of record, and other attorneys,

1 paralegals, secretaries, and other support staff employed in the following parties:

- 2 • ACLU Foundation of Arizona;
- 3 • American Civil Liberties Union;
- 4 • Fennemore Craig, P.C.;
- 5 • Perkins Coie LLP;
- 6 • Willkie Farr & Gallagher LLP; and
- 7 • The Arizona Department of Administration.

8 The following provisions shall apply in this litigation:

9 1. Each party to this litigation may disclose PHI without the written authorization
10 of the individual whose PHI is disclosed in accordance with 45 CFR § 164.512(e), which
11 allows for disclosure of such information in the course of a judicial proceeding in response
12 to a subpoena, discovery request, or other lawful process, that is not accompanied by an
13 order of the court, if the parties enter into a qualified protective order that meets the
14 requirements of 45 CFR § 164.512(e)(1)(v).

15 2. Each party to this litigation that produces or discloses any Materials, answers
16 to interrogatories, responses to requests for admission, trial testimony, deposition testimony,
17 and transcripts of trial testimony and depositions, or information that the producing party
18 believes should be subject to this Protective Order may designate the same as
19 “CONFIDENTIAL” or “CONFIDENTIAL – FOR COUNSEL ONLY.”

20 (a) Designation as “CONFIDENTIAL”: Any party may designate
21 information as “CONFIDENTIAL” only if, in the good faith belief
22 of such party and its Counsel, the unrestricted disclosure of such
23 information could be harmful to the business or operations of such
24 party or the information consists of PHI.

25 (b) Designation as “CONFIDENTIAL – FOR COUNSEL ONLY”: Any
26 party may designate information as “CONFIDENTIAL – FOR
27 COUNSEL ONLY” only if, in the good faith belief of such party and its
28 Counsel, the information is among that considered to be most sensitive

1 by the party, including but not limited to trade secret or other
2 confidential research, development, financial, personal, medical,
3 customer related data or other commercial information.

4 3. In the event the producing party elects to produce Materials for inspection, no
5 marking need be made by the producing party in advance of the initial inspection. For
6 purposes of the initial inspection, all Materials produced will be considered as
7 “CONFIDENTIAL – FOR COUNSEL ONLY,” and must be treated as such pursuant to the
8 terms of this Order. Thereafter, upon selection of specified Materials for copying by the
9 inspecting party, the producing party must, within a reasonable time prior to producing those
10 Materials to the inspecting party, mark the copies of those Materials that contain
11 Confidential Information with the appropriate confidentiality marking.

12 4. Whenever a deposition taken on behalf of any party involves the disclosure of
13 Confidential Information of any party:

14 (a) the deposition or portions of the deposition must be designated as
15 containing Confidential Information subject to the provisions of this Order;
16 such designation must be made on the record whenever possible, but a party
17 may designate portions of depositions as containing Confidential Information
18 after transcription of the proceedings; a party will have until thirty (30) days
19 after receipt of the deposition transcript to inform the other party or parties to
20 the action of the portions of the transcript to be designated “CONFIDENTIAL”
21 or “CONFIDENTIAL – FOR COUNSEL ONLY.”

22 (b) the disclosing party will have the right to exclude from attendance at the
23 deposition, during such time as the Confidential Information is to be disclosed,
24 any person other than the deponent, Counsel (including their staff and
25 associates), the court reporter, and the person(s) agreed upon pursuant to
26 paragraph 8, below; and

27 (c) The originals of the deposition transcripts and all copies of the
28 deposition must bear the legend “CONFIDENTIAL” or

1 “CONFIDENTIAL – FOR COUNSEL ONLY,” as appropriate, and the
2 original or any copy ultimately presented to a court for filing must not be filed
3 unless it can be accomplished under seal, identified as being subject to this
4 Order, and protected from being opened except by order of this Court.

5 5. All Confidential Information designated as “CONFIDENTIAL” or
6 “CONFIDENTIAL – FOR COUNSEL ONLY” must not be disclosed by the receiving party
7 to anyone other than those persons designated within this Order and must be handled in the
8 manner set forth below, and in any event, must not be used for any purpose other than in
9 connection with this litigation, unless and until such designation is removed either by
10 agreement of the parties, or by order of the Court.

11 6. Information designated “CONFIDENTIAL – FOR COUNSEL ONLY” may be
12 viewed only by:

- 13 (a) Counsel (as defined in paragraph C, above) of the receiving party;
- 14 (b) Independent experts and stenographic and clerical employees associated
15 with such experts. Prior to receiving any Confidential Information of
16 the producing party, the expert must execute a copy of the “Agreement
17 to Be Bound by Stipulated Protective Order,” attached hereto as Exhibit
18 A. Counsel for the receiving party must provide the name and
19 curriculum vitae of the expert and a copy of the executed Exhibit A to
20 the producing party at least five (5) business days prior to providing any
21 Confidential Information to such expert. The producing party may
22 object to the disclosure within the five (5) day period, in which case, the
23 parties agree to promptly confer and use good faith to resolve any
24 objection. If the parties are unable to resolve any objection, the
25 objecting party may file a motion seeking a ruling regarding the
26 disclosure with the Court within ten (10) days following the meet and
27 confer. Counsel for the receiving party must retain executed copies of
28 such exhibits;

- 1 (c) The Court and any Court staff and administrative personnel;
- 2 (d) Any court reporter employed in this litigation and acting in that capacity;
- 3 and
- 4 (e) Any person indicated on the face of the document to be its author or co-
- 5 author, or any person identified on the face of the document as one to
- 6 whom a copy of such document was sent before its production in this
- 7 action.

8 7. Information designated “CONFIDENTIAL” may be viewed only by the

9 individuals listed in paragraph 5, above, and by the additional individuals listed below:

- 10 (a) Party principals or executives who are required to participate in policy
- 11 decisions with reference to this action;
- 12 (b) Technical personnel of the parties with whom Counsel for the parties
- 13 find it necessary to consult, in the discretion of such Counsel, in
- 14 preparation for trial of this action; and
- 15 (c) Stenographic and clerical employees associated with the individuals
- 16 identified above.

17 8. All information that has been designated as “CONFIDENTIAL – FOR

18 COUNSEL ONLY” by the producing or disclosing party, and any and all reproductions of

19 that information, must be retained in the custody of the Counsel for the receiving party,

20 except that independent experts authorized to view such information under the terms of this

21 Order may retain custody of copies such as are necessary for their participation in this

22 litigation, but only during the course of this litigation. The principals, employees or other

23 agents of the parties who received information prior to and apart from this litigation that was

24 subsequently disclosed in this litigation as being either “CONFIDENTIAL” or

25 “CONFIDENTIAL – FOR COUNSEL ONLY” may also retain copies of that information

26 as is necessary for use in their respective businesses.

27 9. Before any Materials produced in discovery, answers to interrogatories,

28 responses to requests for admissions, deposition transcripts, or other documents which are

1 designated as Confidential Information are filed with the Court for any purpose, the party
2 seeking to file such material must seek permission of the Court to file the material under
3 seal. Nothing in this order shall be construed as automatically permitting a party to file
4 under seal. The party seeking leave of Court shall show “compelling reasons” (where the
5 motion is more than tangentially related to the merits of the case) or “good cause” for filing
6 under seal. *See Ctr. For Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir.
7 2016). Additionally, such party seeking to file under seal shall, within the applicable
8 deadline, file a redacted, unsealed version of any motion, response or reply if such party is
9 waiting for a ruling from the Court on filing an unredacted, sealed version of the same
10 document.¹ Further, no portion of the trial of the matter shall be conducted under seal.

11 10. Confidential Information and Materials designated “CONFIDENTIAL” or
12 “CONFIDENTIAL – FOR COUNSEL ONLY” shall be used solely for the prosecution or
13 defense of this action. A party who wishes to use Confidential Information and/or Materials
14 designated “CONFIDENTIAL” or “CONFIDENTIAL – FOR COUNSEL ONLY” for a
15 purpose other than the prosecution or defense of this action must request permission, in
16 writing, from Counsel for the producing party. The receiving party’s request must identify
17 the Confidential Information and/or Materials designated “CONFIDENTIAL” or
18 “CONFIDENTIAL – FOR COUNSEL ONLY” that the receiving party wishes to use, and
19 identify the purpose for which it wishes to use Confidential Information and/or Materials
20 designated “CONFIDENTIAL” or “CONFIDENTIAL –FOR COUNSEL ONLY.” If the
21 parties cannot resolve the question of whether the receiving party can use Confidential
22 Information and/or Materials designated “CONFIDENTIAL” or “CONFIDENTIAL – FOR
23 COUNSEL ONLY” for a purpose other than the prosecution or defense of this action within
24

25
26 ¹ If a party wishes to use the opposing party’s confidential designations to support or oppose
27 a motion, the opposing party bears the burden to make the “compelling reasons” showing.
28 In the event the party wishing to use the confidential information anticipates this scenario
arising, the party shall initiate a discovery dispute conference call consistent with the terms
of the Court’s Rule 16 Scheduling Order at least fourteen (14) days before the due date of
the filing in which the party wishes to reference the information.

1 fourteen (14) days of the producing party's receipt of such a request, the receiving party may
2 move the Court for a ruling on the receiving party's request. In the event any party files a
3 motion seeking to use Confidential Information and/or Materials designated
4 "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" for a purpose other
5 than the prosecution or defense of this action, the Confidential Information and/or Materials
6 designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR COUNSEL ONLY" shall be
7 submitted to the Court, under seal, for an in-camera inspection. Any Confidential
8 Information and/or Materials designated "CONFIDENTIAL" or "CONFIDENTIAL – FOR
9 COUNSEL ONLY" at issue must be treated as Confidential Information, as designated by
10 the producing party, until the Court has ruled on the motion or the matter has been otherwise
11 resolved. Any Confidential Information and/or Materials containing PHI may not be used
12 or disclosed for any purpose other than the prosecution or defense of this action.

13 11. At any stage of these proceedings, any party may object to a designation of
14 Materials as Confidential Information. The party objecting to confidentiality must notify,
15 in writing, Counsel for the producing party of the objected-to Materials and the grounds for
16 the objection. If the dispute is not resolved consensually between the parties within fourteen
17 (14) days of receipt of such a notice of objections, the objecting party may move the Court
18 for a ruling on the objection. In the event any party files a motion challenging the designation
19 or redaction of information, the document shall be submitted to the Court, under seal, for an
20 in-camera inspection. The Materials at issue must be treated as Confidential Information,
21 as designated by the producing party, until the Court has ruled on the objection or the matter
22 has been otherwise resolved.

23 12. At any stage of these proceedings, any party may request that it be permitted to
24 disclose Materials designated as Confidential Information to individuals not permitted by
25 this Order to view such Materials. The party must notify, in writing, Counsel for the
26 producing party of the identity of the relevant Materials and the individuals to whom the
27 party wishes to disclose the Materials. If the request is not resolved consensually between
28 the parties within fourteen (14) days of receipt of such a request, the requesting party may

1 move the Court for a ruling allowing such disclosure. In the event any party files a motion
2 requesting such disclosure, the document shall be submitted to the Court, under seal, for an
3 in-camera inspection. The Materials at issue must be treated as Confidential Information,
4 as designated by the producing party, until the Court has ruled on the request.

5 13. All Confidential Information must be held in confidence by those inspecting or
6 receiving it. To the extent the Confidential Information has not been disclosed prior to and
7 apart from this litigation, it must be used only for purposes of this action. If the Confidential
8 Information was exchanged between the parties prior to and apart from this litigation for
9 purposes of conducting their respective businesses, the parties may continue to use that
10 otherwise Confidential Information for that purpose. The parties may not distribute the
11 Confidential Information beyond those persons or entities that had received the Confidential
12 Information prior to this litigation. In addition, counsel for each party, and each person
13 receiving Confidential Information, must take reasonable precautions to prevent the
14 unauthorized or inadvertent disclosure of such information. If Confidential Information is
15 disclosed to any person other than a person authorized by this Order, the party responsible
16 for the unauthorized disclosure must immediately bring all pertinent acts relating to the
17 unauthorized disclosure to the attention of the other parties and, without prejudice to any
18 rights and remedies of the other parties, make every effort to prevent further disclosure by
19 the party and by the person(s) receiving the unauthorized disclosure.

20 14. No party will be responsible to another party for disclosure of Confidential
21 Information under this Order if the information in question is not labeled or otherwise
22 identified as such in accordance with this Order.

23 15. If a party, through inadvertence, produces any Confidential Information
24 without labeling or marking or otherwise designating it as such in accordance with this
25 Order, the producing party may give written notice to the receiving party that the Materials
26 produced are deemed Confidential Information, and that the Materials produced should be
27 treated as such in accordance with that designation under this Order. The receiving party
28 must treat the Materials as confidential, once the producing party so notifies the receiving

1 party. If the receiving party has disclosed the Materials before receiving the designation,
2 the receiving party must notify the producing party in writing of each such disclosure.
3 Counsel for the parties will agree on a mutually acceptable manner of labeling or marking
4 the inadvertently produced Materials as “CONFIDENTIAL” or “CONFIDENTIAL – FOR
5 COUNSEL ONLY” – SUBJECT TO PROTECTIVE ORDER.

6 16. Nothing within this Order will prejudice the right of any party to object to the
7 production of any discovery material on the grounds that the material is protected as
8 privileged or as attorney work product.

9 17. Nothing in this Order will bar Counsel from rendering advice to their clients
10 with respect to this litigation and, in the course thereof, relying upon any information
11 designated as Confidential Information, provided that the contents of the information must
12 not be disclosed.

13 18. This Order will be without prejudice to the right of any party to oppose
14 production of any information for lack of relevance or any other ground other than the mere
15 presence of Confidential Information. The existence of this Order must not be used by either
16 party as a basis for discovery that is otherwise improper under the Federal Rules of Civil
17 Procedure.

18 19. Information designated Confidential pursuant to this Order also may be
19 disclosed if: (a) the party or non-party making the designation consents to such disclosure;
20 (b) the Court, after notice to all affected persons, allows such disclosure; or (c) the party to
21 whom Confidential Information has been produced thereafter becomes obligated to disclose
22 the information in response to a lawful subpoena, provided that the subpoenaed party gives
23 prompt notice to Counsel for the party which made the designation, and permits Counsel for
24 that party sufficient time to intervene and seek judicial protection from the enforcement of
25 this subpoena and/or entry of an appropriate protective order in the action in which the
26 subpoena was issued.

27 20. Nothing in this Confidentiality Order shall limit any producing party’s use of
28 its own documents or shall prevent any producing party from disclosing its own Confidential

1 Information to any person. Such disclosures shall not affect any confidential designation
2 made pursuant to the terms of this Order so long as the disclosure is made in a manner which
3 is reasonably calculated to maintain the confidentiality of the information. Nothing in this
4 Order shall prevent or otherwise restrict Counsel from rendering advice to their clients, and
5 in the course thereof, relying on examination of stamped confidential information.

6 21. Within thirty (30) days of the final termination of this action, including any and
7 all appeals, each party must purge all Confidential Information from all machine-readable
8 media on which it resides and must either (a) return all Confidential Information to the party
9 that produced the information, including any copies, excerpts, and summaries of that
10 information, or (b) destroy same. With respect to paper copies, return or destruction of
11 Confidential Information is at the option of the producing party. Notwithstanding the
12 foregoing, Counsel for each party may retain all Confidential Information, provided that any
13 documents containing Confidential Information are marked as subject to this Order, and will
14 continue to be bound by this Order with respect to all such retained information, after the
15 conclusion of this litigation. Further, attorney work product Materials that contain
16 Confidential Information need not be destroyed, but, if they are not destroyed, the person in
17 possession of the attorney work product will continue to be bound by this Order with respect
18 to all such retained information, after the conclusion of this litigation.

19 22. The restrictions and obligations set forth within this Order will not apply to any
20 information that: (a) the parties agree should not be designated Confidential Information;
21 (b) the parties agree, or the Court rules, is already public knowledge; or (c) the parties agree,
22 or the Court rules, has become public knowledge other than as a result of disclosure by the
23 receiving party, its employees, or its agents, in violation of this Order.

24 23. Any party may designate as “CONFIDENTIAL” or “CONFIDENTIAL – FOR
25 COUNSEL ONLY” any Materials that were produced during the course of this action
26 without such designation before the effective date of this Order, as follows:

- 27 (a) Parties to this action may designate such Materials by sending written
28 notice of such designation, accompanied by copies of the designated

1 Materials bearing the appropriate legend of “CONFIDENTIAL” or
2 “CONFIDENTIAL – FOR COUNSEL ONLY” to all other parties in
3 possession or custody of such previously undesignated Materials. Any
4 party receiving such notice and copies of designated Materials pursuant
5 to this subparagraph shall return to the producing party all undesignated
6 copies of such Materials in its custody or possession, or shall affix the
7 appropriate legend to all copies of the designated Materials in its custody
8 or possession.

9 (b) Upon notice of designation pursuant to this paragraph, parties shall also:

10 (i) make no disclosure of such designated Materials or information
11 contained therein except as allowed under this Order; and (ii) take
12 reasonable steps to notify any persons known to have possession of such
13 designated Materials or information of the effect of such designation
14 under this Order.

15 (c) All such designations must be made within thirty (30) days of the date
16 of this Order.

17 24. Transmission by e-mail or facsimile is acceptable for all notification purposes
18 within this Order.

19 25. This Order may be modified by agreement of the parties, subject to approval
20 by the Court.

21 26. The Court may modify the terms and conditions of this Order for good cause,
22 or in the interest of justice, or on its own order at any time in these proceedings.

23 27. After termination of this action, the provisions of this Order shall continue to
24 be binding, except with respect to those documents and information that became a matter of
25 public record. This Court retains and shall have continuing jurisdiction over the parties and
26 recipients of Confidential Information and Materials designated as confidential for
27 enforcement of the provisions of this Order following termination of this litigation.

28 28. Entering into, agreeing to, and/or producing or receiving documents designated

1 as “CONFIDENTIAL” or “CONFIDENTIAL – FOR COUNSEL ONLY” or otherwise
2 complying with the terms of this Order shall not constitute an admission or adjudication by
3 any party that any particular document designated as Confidential Information is private,
4 confidential, or proprietary information warranting protection.

5 **SO STIPULATED.**

6 Dated: March 5, 2021

7 **ACLU FOUNDATION OF ARIZONA**

8 By /s/ Christine K. Wee

9 Victoria Lopez

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Regents, d/b/a University of Arizona; Ron
Shoopman; Larry Penley; Ram Krishna; Bill
Ridenour; Lyndel Manson; Karrin Taylor Robson;
Jay Heiler; and Fred Duval*

SO ORDERED.

Dated this 5th day of March, 2021.



Leslie A. Bowman
United States Magistrate Judge

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Russell B. Toomey,

Plaintiff,

vs.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as Chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as member of the Arizona Board of Regents; **Lyndel Manson**, in her capacity as member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her capacity as member of the Arizona Board of Regents; **Jay Heiler**, in his capacity as member of the Arizona Board of Regents; **Fred Duval**, in his capacity as member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Service Division of the Arizona Department of Administration,

Defendants.

Case No. CV 19-0035-TUC-RM (LAB)

**AGREEMENT TO BE BOUND
STIPULATED PROTECTIVE
ORDER**

Date:
Time:
Dept:
Judge:

I, _____, declare and say that:

1. I am employed as _____

By

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2. I have read the Stipulated Protective Order (the “Order”) entered in _____ and have received a copy of the Order.

3. I promise that I will use any and all “Confidential” or “Confidential – For Counsel Only” information, as defined in the Order, given to me only in a manner authorized by the Order, and only to assist Counsel in the litigation of this matter.

4. I promise that I will not disclose or discuss such “Confidential” or “Confidential – For Counsel Only” information with anyone other than the persons described in paragraphs 3, 8 and 9 of the Order.

5. I acknowledge that, by signing this agreement, I am subjecting myself to the jurisdiction of the United States District Court for the District of Arizona with respect to the enforcement of the Order.

6. I understand that any disclosure or use of “Confidential” or “Confidential – For Counsel Only” information in any manner contrary to the provisions of the Protective Order may subject me to sanctions for contempt of court.

7. I will return all “Confidential” or “Confidential – For Counsel Only” Materials (as defined in the Order) to the attorney who provided it to me, upon request of that attorney, and will confirm in writing to the requesting attorney that I have done so. I shall not retain any copies of said Materials or any information contained within “Confidential” or “Confidential – For Counsel Only” Materials.

I declare under penalty of perjury that the foregoing is true and correct.

Date: _____

Signature