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Multi-Defendant Patent Litigation: Controlling Costs and Pooling Resources

Strategies for Joint Defense Groups, Joint Defense Agreements, and Privilege Issues

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

David A. Segal, Partner, **Gibson Dunn & Crutcher**, Irvine, Calif.
Eric R. Lamison, Partner, **Kirkland & Ellis LLP**, San Francisco

Thursday, August 19, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

You can access the audio portion of the conference on the telephone or by using your computer's speakers.
Please refer to the dial in/ log in instructions emailed to registrations.

SAMPLE #1

COMMUNITY OF INTEREST AND JOINT DEFENSE AGREEMENT

This written Community of Interest and Joint Defense Agreement (“Agreement”) is presently between [SIGNATORIES], including any relevant affiliates recited in Paragraph B below, and confirms the parties’ community of interest and joint defense agreement. This Agreement is in addition to any existing written agreements already recognizing any of the parties’ common legal interests with each other and/or with other entities in relation to [PLAINTIFF] (“[PLAINTIFF]”) and its affiliates.

RECITALS

- A. [PLAINTIFF] purports to own U.S. Patents [_____] (collectively the “Patents”).
- B. [PLAINTIFF] has filed patent infringement lawsuits against various entities. In these actions, [PLAINTIFF] alleges infringement of one or more of the Patents. Defendants respectfully have answered [PLAINTIFF]’s complaints and denied the allegations therein, in addition to presenting other defenses.
- C. [PARTIES] (collectively referred to herein as “Vendors”) are vendors [OTHER PARTIES]. [PLAINTIFF] claims to own patents that read on [Vendors’ Products/Services]. Several of Vendors’ customers have sought indemnification from the Vendors in relation to the pending suits. Hereafter, all of the above-referenced pending actions shall be referred to as the “Consolidated Actions.”
- D. For the purposes of this Agreement, the word “Signatory” means [ALL PARTIES] (collectively “Signatories” or “Group”), either through a corporate representative or Counsel. For the purpose of this Agreement, the word “Counsel” means and includes any attorney or patent agent representing any Signatory, including in-house attorneys and patent agents, in-house members and staff working on intellectual property and legal issues, and any and all paralegals, law clerks, and all other persons employed by such Counsel and any other persons expressly agreed to in writing by the Signatories.
- E. The Signatories believe that [PLAINTIFF]’s patent assertions and claims are without merit and desire to save costs, conserve resources and facilitate the rendition of professional legal services to the Signatories by sharing information, factual materials, mental impressions, memoranda, interview reports, and communications, together with any copies of said materials related to those interests in connection with the Consolidated Actions, where the Signatories share a community of interest with each other with respect to the Consolidated Actions and defending against [PLAINTIFF]’s infringement allegations under the Patents.
- F. The Signatories acknowledge and agree that they share certain common interests with respect to [PLAINTIFF] and the claims of [PLAINTIFF] and that their interests will be best served if they and their Counsel can exchange information related to those interests subject to the continued protection of the attorney-client privilege, attorney work product doctrine, community of interest privilege and/or any other applicable privileges or protections. The Signatories also acknowledge that there exists areas of potential disagreement between the Vendors and [OTHER

PARTIES] as illustrated by the requests for indemnification, but that an overriding common interest in demonstrating invalidity and non-infringement of the Patents provides a basis for this Agreement.

G. For the purpose of this Agreement, the term “Community of Interest Materials” means communications and information embodied in any form, whether oral or written, relating to potential defenses (including actual or potential affirmative defenses or declaratory judgment claims or counterclaims of patent noninfringement, invalidity, unenforceability, etc.) that are given to or received pursuant to a voluntary exchange between and among the Signatories and their Counsel. These materials include, without limitation, documents, things, information, mental impressions, factual materials, memoranda, opinions of Counsel, communications between and among the Signatories pursuant to this Agreement, communications between and among the Signatories’ Counsel pursuant to this Agreement, communications among the Signatories and Counsel pursuant to this Agreement, or analyses of claims or defenses, analyses of legal strategy or tactics, interview reports, and experts’ reports. Community of Interest Materials include any materials that reflect or incorporate such information exchanged between and among the Signatories and their Counsel. Further definition of Community of Interest Materials is contained in covenant number 1 below. Nothing in this Agreement, however, is intended to limit the full scope of protection from disclosure afforded by the community of interest privilege as provided by law.

H. This Agreement memorializes the understanding of the Signatories concerning such cooperation and any prior cooperation as may already have occurred, and acknowledges the existence of all joint privileges, protections and immunities arising from such cooperation and the common interests of the Signatories. This Agreement shall extend to each of the Signatories, their counsel, subsidiaries, affiliates, divisions, officers, employees, agents and representatives.

COVENANTS

The Signatories covenant as follows:

1. Community of Interest Materials. The Community of Interest Materials shared by and among the Signatories and their Counsel pursuant to this Agreement may include attorney-client privilege and work product immunity materials. Materials or information need not be designated as Community of Interest Materials in order to have them be subject to this Agreement. Whenever possible, Community of Interest Materials shall be labeled as “Community of Interest Materials” or a similar designation indicating the applicability of the attorney-client and/or work product protections but failure to so label any materials shall not exclude those materials from the scope of Community of Interest Materials and shall not constitute a waiver of any evidentiary privilege, immunity, exception or protection, nor a waiver of any right or obligation provided for in this Agreement. All materials and information, including that which is subject to an attorney-client privilege or work product immunity, that are exchanged between and among the Signatories or their Counsel pursuant to this Agreement shall be deemed Community of Interest Materials.

2. No Obligation to Disclose. Nothing in this Agreement shall create any obligation on the part of any Signatory to share or disclose any materials or information whether privileged or not.

3. Community of Interest Privilege. The Signatories and their Counsel expressly agree, intend and understand that the community of interest and/or joint defense privilege applies to all communications and Community of Interest Materials. The Signatories would not disclose to each other such Community of Interest Materials but for their mutual and common interests and but for the undertakings in this Agreement. The Signatories agree that the disclosure of Community of Interest Materials is not intended to waive any applicable privilege or protection and that they intend to preserve to the maximum extent permitted by law the attorney-client privilege, the work-product protection and all other applicable privileges or protections. All work performed by the Signatories pursuant to this Agreement and communications among members of the community of interest group in connection with such representation of their respective clients shall be conducted and protected pursuant to the community of interest and joint defense doctrine recognized in such cases as *Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977); *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Company v. United States*, 330 F.2d 347 (9th Cir. 1964); and *In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981).

4. Disclosure to Less Than All Signatories. To prevent undesired disclosure of proprietary information to any Signatory that may be a competitor with any other Signatory or for other valid reasons, Community of Interest Materials may be selectively, confidentially disclosed by any Signatory only to any other subset of Signatories. Such selective, confidential disclosure should be designated as such and/or specifically identify the Signatory (or Signatories) to be excluded from such disclosures. In such case, the receiving subset of Signatories shall not disclose such Community of Interest Materials to any excluded Signatories. The failure to label any such materials as disclosed to only a subset of Signatories shall not exclude those materials from the scope of this paragraph.

5. Disclosure to Outside Counsel Only. Any Signatory may designate information it deems highly proprietary as “Outside Counsel Only,” and such information shall only be disclosed to outside counsel and their staff and shall not be disclosed to the Signatories, including their in-house counsel.

6. Privilege Continues After Adversity Arises. The Signatories and their Counsel agree that information communicated under this Agreement shall continue to be held confidentially and subject to privilege even if an adversity of interest sufficient to undermine the community of interest and/or joint defense privilege may later be discerned or arise between or among the Signatories. If such adversity arises sufficient to undermine the community of interest and/or joint defense privilege, the Signatories affected by the adversity shall be required to take steps sufficient to eliminate that adversity or withdraw from this Agreement.

7. Inadvertent Disclosure of Community of Interest Materials. The Signatories agree that the inadvertent or unintentional disclosure of privileged or work product materials supplied under this Agreement, regardless of whether the information was so designated at the

time of disclosure, shall not be deemed a waiver in whole or in part of any applicable confidentiality, privilege or immunity, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter (and none of the Signatories will assert such a waiver argument). Upon the discovery of the inadvertent error, the Signatories shall cooperate to restore the confidentiality, privilege or immunity to that disclosed material, including retrieval of all copies, if possible.

8. No Use Except With Respect to [PLAINTIFF]. Each Signatory and its Counsel agrees that Community of Interest Materials and related communications received pursuant to this Agreement may be used, subject to the limitations in paragraph 9 immediately below, solely with regard to preparing claims and defenses in relation to [PLAINTIFF]'s assertions of patent infringement and may not be used for any other purpose, including for business or commercial purposes. Each Signatory and Counsel agree that such materials and communications, unless separately and independently obtained from authorized sources, may not be used by one Signatory against any other Signatory in any (*i.e.*, existing or future) litigation, including in the Consolidated Actions, or for any other purpose and, to the extent specifically created as part of the community of interest efforts, is not discoverable in any such litigation. Each Signatory and Counsel recognize that such materials and communications may be relevant to subsequent actions by or between the Signatories, or relating to one of the Signatories and agree that such materials and communications shall not be discoverable solely because they were disclosed under this Agreement. In addition, some of these materials and communications may be subject to the protection of Rule 408 of the Federal Rules of Evidence and the corresponding or equivalent state laws. The Signatories must maintain any such protection to the extent allowed by law.

9. Obligation to Keep Confidential. The Signatories agree to maintain the confidentiality of all Community of Interest Materials. Except as provided herein, as may be required by court order, by subsequent agreement of all Signatories who have not withdrawn under paragraphs 19 or 20 below or, if the Community of Interest Materials were furnished by one Signatory, by written agreement of the furnishing Signatory, none of the Signatories will disclose Community of Interest Materials to any person or entity other than a Signatory who has not withdrawn from this Agreement. A receiving Signatory may disclose such information to its Counsel and vice versa. This Agreement shall not prohibit disclosure by a Signatory of materials that the Signatory alone has prepared or obtained, which contain no privileged, confidential or protected information obtained directly or indirectly from another Signatory, and which are Community of Interest Materials only because the Signatory has delivered them to other Signatories; nor shall this Agreement prevent a Signatory from using in connection with the defense of claims asserted in the Consolidated Actions non-privileged, non-confidential facts, documents, and theories that are learned or derived from Community of Interest Materials.

10. No Agency. This Agreement shall not create any agency or similar relationship among the Signatories. No Signatory shall have authority to waive any applicable privilege or doctrine on behalf of any other Signatory; nor shall any waiver of an applicable privilege or doctrine by the conduct of any Signatory be construed to apply to any other Signatory.

11. Advice of Counsel Regarding Agreement. Each of the Signatories acknowledges that it has been represented by Counsel of its choice in connection with the negotiation, drafting

and execution of this Agreement. Prior to entering into this Agreement, each Signatory's Counsel has fully advised his/her client that it is possible that other parties to this Agreement may later become witnesses against the client or hold a position adverse to that of the client. Each Counsel has explained fully to his/her client the limitations on the direct and derivative use of any privileged information obtained pursuant to the Agreement. Each Counsel and Signatory represent that they have considered the foregoing and believe that the benefits of being a member of this Agreement outweigh any of the limitations imposed by this Agreement.

12. Waiver of Conflicts of Interest. Each Signatory waives any claim of conflict of interest which might arise by virtue of the participation by its Counsel in this Agreement. Each Signatory waives any right to seek the disqualification of Counsel based upon a communication of Community of Interest Materials. Counsel for the respective Signatories are deemed to represent only their respective client or clients, and not any other Signatory to the Agreement. Nothing in this Agreement creates or shall be deemed or construed in any way to create an attorney-client relationship, fiduciary relationship, partnership, joint venture, principal and agent relationship, or relationship of representation or agency between any Signatory and Counsel for any other Signatory or Signatories; nor shall anything in this Agreement eliminate or be deemed or construed in any way to eliminate an attorney-client relationship, fiduciary relationship, partnership, joint venture, principal and agent relationship, or relationship of representation or agency between any Signatory and Counsel for any other Signatory or Signatories. Neither this Agreement nor the sharing of Community of Interest Materials shall be grounds for seeking disqualification of any Counsel for any Signatory in this or any other action or matter, even if such action or matter involves that Counsel being adverse to a Signatory, and by entering into this Agreement, each Signatory and its respective Counsel knowingly and intentionally waive any conflict of interest or other objection that might otherwise be available based upon the sharing of Community of Interest Materials pursuant to this Agreement. **[Notwithstanding the foregoing, any Signatory may seek disqualification of the other Signatory's Counsel in any matter for any reason other than by virtue of entering into this Agreement or sharing of Community of Interest Materials.] [Notwithstanding the foregoing, any Signatory may use participation of another Signatory's Counsel in this Agreement, or the sharing of Community of Interest Materials with that Counsel, as grounds for seeking disqualification of the other Signatory's Counsel in any matter related to apportionment of defense costs, indemnification or claims for breach of contract related to the Consolidated Actions or other actions taken by [PLAINTIFF]].** The terms of this provision shall survive any termination or withdrawal from this Agreement.

13. Agreement Relates to Defense Only. Nothing in this Agreement shall apply, or be argued to apply or relate, to the allocation of liability for any ultimate outcome, whether by settlement or otherwise, as to any Signatory, Defendant or group of Defendants that results from the Consolidated Actions.

14. Separate Settlement Authority. Nothing in this Agreement shall limit or interfere with the right and ability of any Signatory to enter into individual settlements, conduct separate settlement negotiations or make individual settlement offers without prior notice to the other Signatories; provided, however that the Signatories shall at all times comply with the obligations set forth in this Agreement to maintain the privileged and/or confidential nature of any Community of Interest Materials which a Signatory receives pursuant to this Agreement. As

such, the privilege and immunity that exists at common law and is confirmed in this Agreement shall not be waived and shall be deemed to continue in full force and effect. Nothing in this Agreement shall authorize any Signatory to bind other Signatories to any such individual settlement, separate settlement negotiations or individual settlement offers.

15. Separate and Independent Judgment. It is understood that each Signatory retains its separate and independent judgment with respect to the exercise of the rights and obligations of this Agreement, and nothing herein is intended to provide any Signatory or Signatories with control over any other Signatory. It is further understood and agreed that each Signatory may continue to exercise its own judgment as to the strategy and course of the Consolidated Actions, subject to obligations in any relevant indemnification agreement.

16. No Obligation to Assist. Nothing in this Agreement shall obligate any Signatory in any way to assist another Signatory. Each Signatory expressly reserves the right to make its own independent judgments in all matters and on all issues. No Signatory has effective control over another Signatory, except that S-A is a wholly-owned subsidiary of Cisco. Nothing in this Agreement shall obligate any Signatory to undertake the defense of any other Signatory, or to participate in any such defense, or to indemnify any other Signatory to the Agreement. Nothing in this Agreement shall relieve any Signatory from undertaking the defense of any other Signatory, or to participate in any such defense, or indemnify any other Signatory to the Agreement to the extent any such obligation exists independent of this Agreement. Counsel for the respective Signatories is deemed to represent only their respective client or clients, and not any other Signatory to the Agreement.

17. Disclosures Made Pursuant to this Agreement. Disclosures and exchanges of Community of Interest Materials as of the date of the execution of this Agreement will be made pursuant to this Agreement. This Agreement confirms that, to the extent the Signatories or their Counsel have already communicated with each other prior to the execution of this Agreement concerning any aspect of the Consolidated Actions, their communications and work product were and are subject to any applicable community of interest privilege, remain protected by the attorney-client privilege and work product doctrine, and now are subject to this Agreement, as well the protections and preservations of any previously existing written agreement.

18. Attempted Discovery of Community of Interest Materials. If any other person or entity not a Signatory to this Agreement requests or demands, by subpoena or otherwise, any document or other communication received pursuant to this Agreement from any Signatory or its Counsel, the Signatory and/or Counsel receiving such request or demand will (1) immediately notify the Signatory and Counsel who originally conveyed the requested Community of Interest Materials or all Counsel if the Community of Interest Materials was developed jointly, and (2) assert to the full extent provided by law the community of interest privilege, the attorney-client privilege and work product immunity with respect to the requested material, unless the privilege or immunity is waived in writing by the Signatory or Counsel who originally conveyed the requested material or by agreement of all Signatories in the event the Community of Interest Materials were jointly developed. Each Signatory and Counsel will take all steps reasonable and necessary (including, without limitation, making all appropriate objections and motions) to maintain the assertion of all applicable rights and privileges with respect to all Community of Interest Materials, and shall cooperate fully with the other Signatories and Counsel in any

judicial proceeding relating to the possible disclosure of any portion of the Community of Interest Materials.

19. Withdrawal. Any Signatory to this Agreement desiring to withdraw from the Agreement may do so “at will” and at any time by providing written notice of withdrawal to the Signatories to the Agreement. In addition, it is understood that circumstances may change such that a conflict of interest or irreconcilable differences may arise as between Signatories. Withdrawal from this Agreement shall become effective immediately upon receipt of the written notice by the other Signatories or their Counsel. Receipt shall be presumed if the sender receives a successful (*e.g.*, “O.K.” or “good” or the like) facsimile receipt specifically linked to a suitable written notice or by sending such notice by first class mail.

20. Withdrawal Upon Settlement. In the event that a Signatory resolves any dispute or potential dispute with [PLAINTIFF] in the Consolidated Actions or reaches an actual agreement or agreement in principle (1) to resolve any dispute or potential dispute with [PLAINTIFF] in the Consolidated Actions or (2) in any way related to the Patents or any related patents, it must give notice to all other Signatories by e-mail or facsimile as soon as practicable and in any event within 24 hours. The Signatory’s participation in this Agreement will be terminated. In the event a Signatory withdraws from or terminates its participation in the Agreement, each Signatory and its Counsel shall: (a) promptly return all tangible things, documents or other written communications or information provided pursuant to this Agreement to the Signatory that originally provided such material, or alternatively shall destroy the same and notify Counsel for the other Signatory that it has done so except that a Signatory’s Counsel may maintain its own attorney notes and one set of its attorney files stored in the Counsel’s central file repository with appropriate safeguards to maintain its confidentiality pursuant to this Agreement; and (b) unless prohibited by law, or the rules governing ethical responsibility that pertain to the parties, their in-house or outside counsel, maintain as confidential or privileged any and all confidential or privileged information exchanged under this Agreement.

21. Furnishing Signatory Retains Rights. All Signatories to this Agreement reserve their confidential, proprietary and privileged interest in any confidential, proprietary or privileged documents, things or other information furnished by the Signatory in accordance with this Agreement. Nothing in this Agreement shall be construed as a waiver of any right of any Signatory to the Agreement to claim that any confidential, proprietary or privileged documents, things or other information furnished by the Signatory in accordance with this Agreement are confidential, proprietary or privileged. This Agreement shall not be construed to prevent any Signatory from voluntarily waiving any privilege or doctrine protecting its own communications, documents, or information from disclosure provided that the communications, documents, or information disclosed do not incorporate or otherwise reflect Community of Interest Materials of the Group or of another Signatory.

22. Use of Public or Independent Information. Notwithstanding the foregoing, this Agreement shall not restrict any Signatory from using (in any manner) or disclosing information which: (a) was or becomes publicly available, provided such public availability was not the result of a breach of this Agreement, or (b) was or is discovered independently by the receiving Signatory (including by legal discovery such as document production processes in litigation), or (c) was or is originated by the Signatory and does not incorporate Community of Interest

Materials received from another Signatory or jointly developed by the Signatories or Counsel, or (d) the disclosing Signatory has agreed may be disclosed, or (e) the receiving Signatory can show was in its rightful possession at the time of disclosure, or (f) the receiving Signatory receives at a later date from a third party who rightfully received it without restriction as to disclosure, or (g) the receiving Signatory can show was obtained as a result of independent development by the receiving Signatory unrelated to the joint defense effort or the materials supplied under this Agreement. However, the fact of communication by one Signatory to any other Signatory of such information shall be privileged.

23. Limited Disclosure of Existence of Agreement. Except for limited confidential disclosures made by mutual agreement of the Signatories to a potential new Signatory, the existence and terms of this Agreement are confidential and shall not be disclosed to any non-signatory to this Agreement without the prior written consent of the other Signatories. If pursuant to due legal process, however, it becomes necessary to disclose the existence of this Agreement (*e.g.*, in response to litigation discovery processes where a log of privileged documents must be submitted), then the mere existence of this Agreement may be disclosed without disclosure of any terms hereof. If it becomes necessary to disclose the terms of this Agreement in order to maintain the privilege or immunity of Community of Interest Materials, the Signatory intending to disclose shall notify the other Signatories prior to such disclosure.

24. No Notice Regarding Prior Art. The Signatories each agree that the disclosure by one Signatory of prior art, in the form of a patent owned by that Signatory, does not constitute notice of such patent to the other Signatory, and that failure to assert such patent against the Signatory to whom such patent is disclosed does not constitute a waiver of any rights.

25. Binding Agreement. This Agreement shall be binding on the Signatories hereto, their Counsel, officers, directors and employees as well as their respective successors and assigns.

26. Authority to Execute. Counsel signing this Agreement on behalf of a Signatory represent that they have received authority from the Signatory to execute this Agreement on their respective Signatory's behalf (including affiliates), that they have fully informed the respective Signatory of the terms of this Agreement, and that the Signatory has agreed to be bound by all the terms of this Agreement. Any other entity sharing a common interest against [PLAINTIFF] as set forth herein may join this Agreement provided that it executes the Agreement and each Signatory who has not withdrawn at that time consents in writing.

27. No Admission of Liability. No admission of liability by any of the Signatories is intended by this Agreement, and this Agreement shall not be used as evidence of liability by any of the Signatories.

28. No Liability for Special Damages. No Signatory shall be liable to any other Signatory for indirect, special, incidental, exemplary, or consequential damages for breach of this Agreement.

29. Irreparable Harm if Breached. The Signatories agree that a breach of the provisions of this Agreement by a party will cause irreparable harm and therefore agree that injunctive relief is the appropriate means to enforce this Agreement.

30. Partial Unenforceability. If any provision of this Agreement is invalid or unenforceable, any court or arbitration panel having jurisdiction over the Agreement and the Signatories shall have the power to modify such provision so that it will be valid and enforceable, and in any case the balance of this Agreement shall remain in full force and effect. Any clause in this Agreement that is prohibited under applicable state law shall be deemed not to be in effect in those States in which it is prohibited.

31. Severability. If any provision of this Agreement is found or deemed to be invalid or unenforceable by law, or to extend for too long a period of time, then such provision will be deemed stricken from this Agreement, or reformed to extend for a shorter period of time, and the remaining provisions of this Agreement will continue in full force and effect.

32. Counterparts. This Agreement may be executed in counterparts, all of which comprise one agreement. Facsimiles of signature pages shall be binding as original signature pages.

33. Interaction with Other Agreements. Entry into this Agreement shall not affect or alter any other obligations or agreements between or among any of the Signatories hereto which now exist or which will come into existence in the future except as specifically noted herein.

34. Choice of Law. This Agreement shall be construed and enforced in accordance with the laws of the State of [STATE], except that United States federal law governing attorney-client communications and work product protection shall control in interpreting the scope of protection afforded the Signatories by this Agreement.

35. Survival of Terms. Should this Agreement be terminated, the terms of this Agreement shall survive as to all information that had been disclosed, exchanged, and/or protected under this Agreement.

36. Jointly Drafted. The language used in this Agreement shall be deemed language chosen and drafted by all Signatories to express their mutual intent and no rule of strict construction shall be applied against any Signatory.

37. Headings Not Part of Agreement. The headings contained in this Agreement are inserted for convenience of reference and are not intended to be part of or to affect the meaning or interpretation of the Agreement.

SAMPLE #2

JOINT DEFENSE

COMMON INTEREST AND CONFIDENTIALITY AGREEMENT

This Joint Defense/Common Interest and Confidentiality Agreement (“Agreement”) is made by and among the undersigned parties, hereinafter referred to collectively as “the Parties” and individually as “Party,” which shall include any parent companies, subsidiaries, divisions or other entities associated with a Party, effective as of _____.

Recitals

WHEREAS, [PLAINTIFF] has brought [ACTIONS]. In these actions, [PLAINTIFF] avers, *inter alia*, that the Parties to this Agreement are infringing at least one of U.S. Patent Nos. [PATENTS] (the “[PLAINTIFF] Patents”) that [PLAINTIFF] claims to own or hold and seeks an award of damages for infringement, pre- and post- judgment interest, damages for willful infringement, injunctive relief, and findings of an exceptional case, (hereinafter the “Claims” refer to the existing claims by [PLAINTIFF], any additional claims [PLAINTIFF] may assert in the Suits.

WHEREAS, the Parties recognize that by virtue of the assertion of the [PLAINTIFF] Patents against the products published or sold by each of the Parties, they have a common interest in researching, developing, and pursuing defenses, including affirmative defenses and counterclaims, with respect to the Claims. Each of the Parties further recognizes that the Parties’ common interest will best be served if, without waiving any otherwise applicable privilege or protection, each Party can share with other Parties confidential information and materials relating to the Claims.

WHEREAS, the Parties to this Agreement include those companies named as defendants in the Suits, those companies that sell products to the defendants that have been alleged to infringe one or more [PLAINTIFF] Patents, or those companies that are adverse parties to [PLAINTIFF] or have been threatened with litigation or are under a reasonable apprehension of becoming adverse parties to [PLAINTIFF] in litigation involving one or more [PLAINTIFF] Patents.

WHEREAS, the Parties wish by this Agreement to confirm their understanding and to provide, to the fullest extent permitted by applicable law, for sharing such documents, information or materials that are reasonably necessary to facilitate the pursuit of matters of common interest, and that such sharing of documents, information or materials not be interpreted as a waiver of, or deemed to diminish in any way, the confidentiality or privileged nature of such documents, information or materials, or any other protection to which such documents, information or materials are or may be subject.

NOW THEREFORE, in consideration of the foregoing premises and the promises and mutual covenants of the Parties hereinafter set forth, the Parties agree as follows:

Definitions

1. “Suits” shall refer collectively to the [LITIGATION] referenced above.
2. “Counsel” shall mean the Parties’ respective in-house and outside counsel involved in defending the Claims, including counsel jointly representing one or more of the Parties in connection with the defense of the Suits.
3. “Shared Information” means oral, written, or electronically stored and communicated information relating to the Claims that is provided by any Party or Counsel to any other Party or Counsel in confidence and in furtherance of the Parties’ common interests. Shared Information shall be all information exchanged between or among the Parties or Counsel that is useful to the Parties or Counsel in analyzing, evaluating, and defending the alleged Claims including but not limited to factual information; legal research; legal, engineering, and scientific analyses; risk analyses, information, and communications; interview reports, memoranda and records; reports, records and memoranda of experts, consultants, or investigators; and all other communications related to the subject matter of the Claims and Suits or defense of the Claims and Suits. Notwithstanding the above, Shared Information does not include information that was in the public domain before being provided by any Party or Counsel to any other Party or Counsel pursuant to this Agreement, although any communications between or among the Parties or Counsel concerning that public domain information shall remain Shared Information.
4. Community of Interest Privilege. The Parties shall avail themselves to the maximum extent possible of all applicable legal privileges. Shared Information that would otherwise be subject to one or more legal privileges or protections is and shall be subject to those same privileges and protections despite the fact that it has been developed by or exchanged between or among two or more Parties or their Counsel. Shared Information is and shall be subject to the joint defense doctrine and common interest rule recognized in such cases as *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989), on remand, 738 F. Supp. 654 (E.D.N.Y. 1990), *aff’d*, 924 F.2d 443 (2d Cir. 1991); *In re Grand Jury Subpoenas, 89-3 and 89-4*, 902 F.2d 244 (4th Cir. 1990); *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987); *United States v. McParlin*, 595 F.2d 1321, 1336-37 (7th Cir.), *cert. denied*, 444 U.S. 833, 100 S. Ct. 65 (1979); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Company v. United States*, 330 F.2d 347 (9th Cir. 1964). The Parties do not waive or limit the application of any applicable legal privileges or protections by providing to one another or to Counsel, or by jointly creating, Shared Information. The Parties agree and acknowledge that the legal privileges and protections pertaining to Shared Information are held jointly by all Parties, and that no individual Party is authorized to waive any such privilege or protection, unless said Party generated or independently discovered the contents of the Shared Information.
5. No Waiver Privilege. This Agreement is not intended to, and it is understood will not, void or waive the protections afforded under the attorney-client privilege and work product immunity, or other applicable privileges or immunities.
6. Experts. Some or all of the Parties or Counsel may jointly retain experts and consultants to assist in connection with the defense of the Suits or the Claims. Information provided to or obtained from such jointly retained experts and consultants shall be deemed

Shared Information; provided, however, that prior to receiving any such Shared Information, the jointly retained experts or consultants shall, in writing, acknowledge in the form attached hereto as Exhibit A that Shared Information is confidential and protected by legal privileges. Each of the Parties or Counsel may also separately retain experts or consultants to assist in connection with the defense of the Suits or the Claims. The Parties agree that Shared Information may be disclosed to such experts or consultants separately-retained by a Party or Counsel, provided, however, that prior to receiving any such Shared Information, the separately-retained experts or consultants shall, in writing, acknowledge in the form attached hereto as Exhibit A that the Shared Information is confidential and protected by legal privileges.

7. Waiver of Conflicts. Some or all of the Parties may, by themselves or through their counsel, cooperate with each other in pursuit of their common interests and undertake joint activities in furtherance of the defense of the Claims or Suits. Any agreement to cooperate or undertake joint activities, any individual and joint communications with counsel, and such counsel's work product shall be deemed Shared Information. This Agreement is not intended nor shall it be deemed to affect the independent and separate representation of any Party by the Parties' respective counsel, nor does it require any disclosure of information by any Party or disclosure of information to all Parties to this Agreement. Nothing contained herein shall be deemed to create an attorney-client relationship between any party and any other Party's Counsel. The fact that any Counsel has had access to or used Shared Information, or has acted for its respective Party, shall not in any way preclude that Counsel from representing any interest that may be construed to be adverse to any other Party to this Agreement in the Claims or Suits, or any future legal matters, or used as a basis for seeking to disqualify that Counsel from representing its respective Party or from examining or cross-examining any representative of any Party who testifies in the Suits or in any future legal matter. By entering into this Agreement, each Party hereby waives any right he, she or it may otherwise have to seek the disqualification of Counsel to another Party in this or any other matter based upon activities undertaken pursuant to this Agreement.

8. Prior Disclosures. Prior to the execution of this Agreement, some or all of the Parties and Counsel, after agreeing that there was a commonality of interest among them relating to the Claims or the Suits and that their communications would be privileged, may have shared information and materials with one another that would be deemed Shared Information as defined in and governed by this Agreement. The Parties agree and acknowledge that such Information is subject to (a) the same legal privileges and protections as though it had been shared after the execution of this Agreement and (b) all terms and conditions of this Agreement.

9. Confidentiality. Each Party shall keep any Shared Information received from another Party confidential and shall not disclose such Shared Information except to (a) attorneys and other persons in the Party's legal and intellectual property departments (including their secretarial and clerical staff, paralegals, and legal assistants) directly employed by a Party with direct responsibility for defense of the Claims or Suits on behalf of their employer; (b) outside counsel for a Party representing the Party's interests in the Suits (including their secretarial and clerical staff, paralegals, and legal assistants); (c) expert witnesses or litigation support experts engaged to consult or testify on behalf of a Party; and (d) at any one time, no more than a total of [NUMBER] ([#]) additional persons who are employed by each Party (with Party in this Section 8(d) collectively including all the parent companies, subsidiaries, divisions or other entities

associated with the Party) and who are engaged to consult on behalf of the Party regarding the Claims. All persons permitted access to Shared Information under sections 8(a) through (d) above, shall be specifically advised that the Shared Information is privileged and confidential and subject to the terms of this Agreement. Each Party, and all others for whom access to the Shared Information is permitted under the terms of this Agreement, shall take all reasonable steps to assure that Shared Information it obtains from another Party, or that it participates in developing jointly with one or more other Parties, is not revealed, intentionally or unintentionally, to any person or firm not a Party to this Agreement. A Party that provides to one or more other Parties Shared Information that it has created or discovered without the participation or assistance of any other Party is not thereby required to keep such information confidential or otherwise be bound as to use of that information under the terms of this Agreement.

10. Additional Confidentiality. Any party to this Agreement may choose to place additional restrictions on the use or dissemination of any specific item of the information provided by it under this Agreement, and all other parties to this Agreement shall abide by such additional restriction(s). For example, (i) if a party wishes to limit disclosure of information solely to in-house and outside counsel and such counsel's consultants/experts, it may do so by designating such materials "For Review by Counsel and Consultants Only," or words to that effect; (ii) if a party wishes to limit disclosure of information solely to in-house and outside counsel, it may do so by designating such materials "Counsel's Eyes Only," or words to that effect; (iii) if a party wishes to limit the disclosure of information solely to outside counsel, it may do so by designating such materials "For Review by Outside Counsel Only," or words to that effect. Absent such a designation of additional restriction, a party's information may be disseminated to those entitled under paragraph 5 of this Agreement to receive such information.

11. Use of Confidential Information. Shared Information obtained from other Parties or developed jointly shall be used solely for the purposes of the Suits or defending against the Claims, as described herein and for no other purpose whatsoever. Neither this Agreement nor the disclosure of Shared Information under this Agreement shall affect the discoverability of Shared Information in any case between any of the Parties.

OR

11. Use of Confidential Information/Reexamination. Shared Information obtained from other Parties or developed jointly shall be used solely for the purposes of the Suit or defending against the Claims, as described herein and for no other purpose whatsoever. In addition, no Party may submit a prior art reference to the United States Patent and Trademark Office (PTO) in connection with a petition for reexamination or ongoing reexamination of the Patent if the prior art reference was disclosed to it by another Party to this Agreement, without first obtaining the written agreement of the Party who first disclosed the prior art. Moreover, no Party may submit a prior art reference to the United States Patent and Trademark Office (PTO) in connection with a petition for reexamination or ongoing reexamination of the Patent if the prior art reference was discovered as part of a prior art search undertaken jointly pursuant to this Agreement, without first obtaining permission to submit such reference from at least []% of the Parties to this Agreement at the time such permission is sought. Notwithstanding the

foregoing, any Party may submit a prior art reference to the PTO of which it was in possession prior to the disclosure to other Parties pursuant to this Agreement.

12. Attempted Discovery of Community of Interest Materials. In the event a Party receives an order, subpoena, request, or demand for disclosure of Shared Information from any court or governmental agency, or from a party to any litigation or administrative proceeding (a “Disclosure Demand”), that Party shall as soon as reasonably possible notify the other Parties of such Disclosure Demand to the extent that such Shared Information was not independently developed by the Party. The purpose of such notice is to provide all other Parties with the opportunity to assert their interests in opposing such Disclosure Demand. A Party receiving a Disclosure Demand must make reasonable efforts to assert all applicable privileges, including the joint-defense, work-product, and attorney-client privileges, and oppose the Disclosure Demand at its own expense; provided, however, that a Party wishing to be relieved of such duty may so state in its notice or in a subsequent notice. A Party failing to respond to such a notice within seven (7) business days after receipt waives its right to require compliance with this paragraph. The Parties agree to cooperate with each other in the assertion and enforcement of their respective and joint rights to keep confidential the Shared Information.

13. Separate Settlement Authority. Nothing in this Agreement is intended to affect the independent and separate assertion of any defense, claim, motion, or argument by any Party. Each Party retains complete and unfettered independence of action and discretion with respect to any decision to resolve the Claims or Suits by license, settlement, or otherwise. Any Party may negotiate or settle independently with [PLAINTIFF] without seeking the consent of the other Parties, and without providing notice to the other Parties. Any decision to negotiate or settle with [PLAINTIFF] shall be made by each Party in its sole and absolute discretion. Each Party agrees that it will not, however, agree with [PLAINTIFF] or any other entity to disclose Shared Information in violation of this Agreement, or otherwise to violate this Agreement. Upon settlement or dismissal from the Claims or Suits, the settling or dismissed Party shall withdraw from this Agreement as provided herein and shall provide written notice of the settlement or dismissal to all other Parties within three (3) business days.

14. No Obligation to Assist. A Party may choose to provide Shared Information to fewer than all of the other Parties, or to their outside counsel only, or to another select group of persons or person in one or more of the other Parties, and in that event, shall designate such Shared Information and limit the receiving person(s) from re-distributing such Shared Information to others. Any such selective disclosure must be clearly indicated to the receiving person(s) in writing. Nothing in this Agreement requires any Party to disclose any Shared Information or any other information to any or all of the other Parties or other persons.

15. No Admission. Nothing in this Agreement is intended to be, nor shall it constitute or be used as, evidence of any admission by any of the Parties, to any other Party or third party.

16. Additional Parties. Additional Parties may be permitted to join this Agreement upon unanimous written consent of all Parties.

17. Withdrawal. Any Party may withdraw from this Agreement at any time by providing written notice to all other Parties three (3) business days prior to their withdrawal. If a

Party determines that it no longer has a mutuality of interest in a joint defense, such Party shall promptly withdraw from this Agreement. Each Party, and its respective Counsel, has a duty to withdraw from the Agreement if, in good faith, the Party or Counsel reasonably believes that a mutuality of interest no longer exists between or among that Party and other Parties to this Agreement. Without limiting the generality of the foregoing, any Party settling with [PLAINTIFF] or dismissed from the Suits shall promptly withdraw from this Agreement. Any Party that withdraws from this Agreement shall continue to be bound by all provisions of this Agreement concerning the confidentiality of Shared Information received by the Party prior to its withdrawal, and the restrictions on the disclosure thereof. Withdrawal is effective upon receipt of notice.

18. Withdrawal Upon Settlement. In the event that any Party or former Party to this Agreement enters into any settlement, license, consent decree, or consent judgment regarding the Claims (the “Settlement”), the Party or former Party shall expressly authorize all of its non-employee experts and non-employee consultants (the “Non-Employee Experts”) to work with, and be retained by, any or all of the non-settling Parties regarding Joint Defense Issues. “Joint Defense Issues” include only issues of patent validity, including the state of the art, the scope of the prior art, and questions of anticipation and obviousness in the Suits, and does not include issues of noninfringement or alleged damages. Nothing in this Agreement shall allow any such Non-Employee Expert to disclose or use the confidential information of the settling Party or former Party without the settling Party or former Party’s permission, or to otherwise become adverse to the settling Party or former Party. Nothing in this Agreement shall be construed to oblige a Party to consent to any other Party’s use of a Non-Employee Expert that has been retained by that Party exclusively for consultation on non Joint Defense Issues. All Parties agree that a settling Party shall not be liable for any costs or expenses incurred in connection with the co-work or retention by the non-settling Parties of the Non-Employee Experts of a settling Party after the settling Party enters into the Settlement.

19. Maintenance of Shared Information. During the pendency of the Suits and any appeals arising from the Suits, each Party shall retain all Shared Information it has obtained pursuant to this Agreement in a manner reasonably calculated to protect its confidentiality. Within sixty (60) days after the Suits and any appeals arising from the Suits are finally resolved, each Party shall destroy all Shared Information it has obtained from another Party pursuant to this Agreement or, if the sharing Party indicates in writing that it wishes such Shared Information to be returned, shall return such Shared Information. Likewise, any Party that withdraws from this Agreement or that settles with [PLAINTIFF] or is dismissed from their respective Suit, shall within sixty (60) days after that event destroy all Shared Information or return such Shared Information that the sharing Party has indicated in writing that it wishes returned. Notwithstanding the foregoing, outside counsel may, after termination of the suits, retain one copy of documents constituting work product and any pleadings, deposition transcripts, and deposition or trial exhibits containing Shared Information. If there is any inconsistency between this Agreement and any protective order subsequently issued in the Suits regarding the retention or destruction of documents, then the terms of the protective order shall govern.

20. No Liability. Each Party shall have no liability or any other obligation to any other Party under this Agreement resulting from settling or negotiating with [PLAINTIFF]; voluntarily terminating its participation under this Agreement; or pursuing or participating in an

independent and/or common defense, provided, however, that there is no breach of the confidentiality provisions of this Agreement.

21. Notices. All notices permitted or required under this Agreement shall be made by facsimile with confirming letter sent by U.S. mail or overnight delivery service to the last-known address for each Party. Such notices shall be deemed to be received the first business day, but in any event no sooner than 24 hours, following the facsimile transmission, the email transmission or delivery to such service.

22. Confidentiality of Agreement. This Agreement and all information, communications, documents, or tangible things concerning this Agreement are and shall remain confidential to the Parties and nothing contained herein shall be disclosed to anyone not a Party, Counsel or their experts without the prior written consent of all Parties, or otherwise as expressly provided herein.

23. Entire Agreement. This Agreement constitutes the entire agreement among the Parties hereto relating to its subject matter.

24. Amendments. This Agreement may be amended or terminated only by a writing signed by all Parties hereto as of the time of such amendment or termination.

25. Severability. If any provision of this Agreement is invalid or unenforceable, any court or arbitration panel having jurisdiction over the Agreement and the Parties shall have the power to modify such provision so that it will be valid and enforceable but only to the extent such modification remains consistent with the intent of the Parties, and in any case the balance of this Agreement shall remain in full force and effect.

26. Survival of Obligation. The obligations of all paragraphs of this Agreement are perpetual, and shall survive any withdrawal of any Party from any of the activities contemplated by this Agreement, and shall further survive the termination of this Agreement.

27. Authority to Execute. Each Party commits and represents to the other Parties that it has full and final authority to execute this Agreement, and that no further action of the Party, its management, board of directors, or shareholders is necessary to make this Agreement a valid and binding obligation of the Party.

28. Counterparts. This Agreement may be executed in counterparts and such execution and delivery shall have the same force and effect as though each Party had signed the same copy of this Agreement. This Agreement shall become binding and enforceable between and among each signatory Party as of the date of execution without regard to the number of other parties that may elect to become Parties hereto. Signature by a Party's attorney shall be a representation by that attorney that they are authorized to enter into this Agreement on behalf of their client(s).

29. Interaction with Other Agreements. Entry into this Agreement shall not affect or alter any other obligations or agreements between any of the Parties hereto that now exist or which will come into existence in the future.

30. Choice of Law. This Agreement shall be construed and enforced in accordance with the laws of the State of [STATE] without respect to its choice of law provisions.

31. Headings Not Part of Agreement. The headings contained in this Agreement are inserted for convenience of reference and are not intended to be part of or to affect the meaning or interpretation of the Agreement.

IN WITNESS WHEREOF, the undersigned Parties and Counsel have executed this Agreement on the date or dates set below their respective lines.

[SIGNATURE BLOCKS]

Exhibit A

I have read and agree to be bound by the terms of the Joint Defense Common Interest And Confidentiality Agreement. I understand that Shared Information is confidential and shall be used only in accordance with the terms of this Agreement, and that the obligations of this Agreement remain in force even upon dismissal or settlement of the Suits.

Date: _____

By: _____

Name: _____

Title: _____

Company: _____

Phone: _____

Fax: _____

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