



IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

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In Re: Float-Sink Litigation

Hon. John A. Hutchison

Civil Action No. 11-C-5000000

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This Document Applies to all Cases

PROTECTIVE ORDER

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Pursuant to West Virginia Rule of Civil Procedure 26(c), the Court finds:

A. That pretrial discovery involving the production and disclosure of documents, data and other materials, and information, and the taking of testimony by oral deposition is anticipated; and

B. The scope of discovery will encompass the production of documents or oral testimony which may contain certain proprietary, confidential, or sensitive information that is legally protected and that should not be generally available to the public.

C. Accordingly, the Court finding good cause for the entry of this Protective Order,

IT IS HEREBY ORDERED THAT:

1. This Protective Order governs the treatment of certain documents, depositions, deposition exhibits, interrogatory answers, responses to requests for admissions and other written, recorded, computerized, electronic or graphic matter, copies, excerpts or summaries of documents ("Discovery Material") produced by a Producing Party, as defined below, in this proceeding or in any other supplementary proceeding in the above-captioned matter ("Action").

2. As used herein, "Producing Party" means any party and its outside counsel of record, including the parties to this action and non-parties, who disclose and/or produce any

Granted Judge John A Hutchison Aug 12, 2011

Discovery Material in this action. As used herein, "Receiving Party" means the party to this action, and its outside counsel of record, who receives Discovery Material from a Producing Party.

3. The Parties may designate as confidential any Discovery Material that contains non-public, legally protected information, including, but not limited to sensitive proprietary, financial, medical, and personal identity information, in accordance with Rule 26(c) of the West Virginia Rules of Civil Procedure. All Discovery Material so designated shall be referred to in this Protective Order as "Confidential Discovery Material" and shall be handled in strict accordance with the terms of this Protective Order. All Parties shall have sixty (60) days after the entry of this Order to designate any material or transcripts previously produced as "Confidential."

4. Unless otherwise agreed by the parties, all Confidential Discovery Material in the form of physical objects or documents shall be designated by stamping or affixing, in an unobtrusive manner, the legend "**CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER**" or "**CONFIDENTIAL**" on the face of the document and on each page or portion thereof so designated. Any such designation shall subject the document, its contents, or any portion thereof, to this Protective Order without any further act on the part of the Producing Party.

5. Confidential Discovery Material may be disclosed or made available without written consent from the Producing Party *only* to the following persons:

(a) The parties to this Action who are subject to this Protective Order;

- (b) In-house counsel for the defendants and their assistants, paralegals or other persons associated with in-house counsel, whose assistance is required by said attorneys in the defense of this litigation;
- (c) Counsel retained for this Action by the parties who are subject to this Protective Order, including attorneys, paraprofessionals, and employees of such law firms;
- (d) Stenographers or court reporters who record testimony taken at any time or place in the course of this Action or persons operating video recording equipment of and at such testimony;
- (e) Testifying witnesses, in preparation for a deposition or trial or in the course of questioning. Subject to the provisions of Paragraph 10, testifying witnesses in this action, must sign an Acknowledgement in the form attached hereto as Exhibit A attesting to the fact that they have read this Protective Order and agree to be bound by its terms;
- (f) Expert witnesses and consultants, including retained or independent testifying or consulting experts and their employees, retained by a party or by counsel in connection with these proceedings, to the extent that such disclosure is necessary for the prosecution or defense of this litigation, including, without limitation, any depositions, formulation of opinions, preparation of expert reports or for motions, hearings or for the trial of this case. Subject to the provisions of Paragraph 10, persons retained by a party or outside counsel to serve as expert witnesses or otherwise provide advice to counsel in connection with this action, must sign an Acknowledgement in the form attached hereto as Exhibit A attesting to the fact that they have read this Protective Order and agree to be bound by its terms;
- (g) Employees of third-party contractors involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and
- (h) The Court, Court personnel, and any other person designated by the Court in this Action in the interest of justice, upon such terms as the Court may deem proper.

6. Any confidential document or other material that a party believes should not be disclosed to a director, officer, or employee of any other party, except as provided below, may be designated "RESTRICTED CONFIDENTIAL." The parties contemplate that documents or

other materials that are marked "RESTRICTED CONFIDENTIAL" shall include particularly sensitive competitive data. All parties shall have sixty (60) days after the entry of this Order to designate any material or transcripts previously produced as "Restricted Confidential." Each party agrees that the designation of documents or other material as "RESTRICTED CONFIDENTIAL" shall be made only after a good faith determination that the material in fact constitutes restricted confidential information. Any document or other material that is marked "RESTRICTED CONFIDENTIAL" shall not be disclosed or used for any purpose except in connection with the prosecution or defense of this litigation.

7. Unless otherwise agreed by the parties, all Restricted Confidential Discovery Material in the form of physical objects or documents shall be designated by stamping or affixing, in an unobtrusive manner, the legend "**RESTRICTED CONFIDENTIAL INFORMATION SUBJECT TO PROTECTIVE ORDER**" or "**RESTRICTED CONFIDENTIAL**" on the face of the document and on each page or portion thereof, to this Protective Order without any further act on the part of the Producing Party.

8. Any document or other material that is marked "RESTRICTED CONFIDENTIAL" or the contents thereof, may be disclosed only for the purpose of this litigation to the following persons only:

- (a) In-house counsel for the defendants and their assistants, paralegals or other persons associated with in-house counsel, whose assistance is required by said attorneys in the defense of this litigation;
- (b) Counsel retained for this Action by the parties who are subject to this Protective Order, including attorneys, paraprofessionals, and employees of such law firms;
- (c) Stenographers or court reporters who record testimony taken at any time or place in the course of this Action or persons operating video recording equipment of

and at such testimony;

- (d) Testifying witnesses and their counsel, in preparation for a deposition or trial or in the course of questioning, except that such persons may not retain copies of a document or other material marked "RESTRICTED CONFIDENTIAL." Subject to the provisions of Paragraph 10, testifying witnesses in this Action must sign an Acknowledgement in the form attached hereto as Exhibit A attesting to the fact that they have read this Protective Order and agree to be bound by its terms;
- (e) Expert witnesses and consultants, including retained or independent testifying or consulting experts and their employees, retained by a party or by counsel in connection with these proceedings, to the extent that such disclosure is necessary for the prosecution or defense of this litigation, including, without limitation, any depositions, formulation of opinions, preparation of expert reports or for motions, hearings or for trial of this case. Subject to the provisions of Paragraph 10, persons retained by a party or outside counsel to serve as expert witnesses or otherwise provide advice to counsel in connection with this action, must sign an Acknowledgement in the form attached hereto as Exhibit A attesting to the fact that they have read this protective order and agree to be bound by its terms;
- (f) Employees of third-party contractors involved solely in one or more aspects of organizing, filing coding, converting, storing, or retrieving data or designating programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and
- (g) The Court, Court personnel, and any other person designated by the Court in this Action in the interest of justice, upon such terms as the Court may deem proper.

9. Nothing contained in this Protective Order shall prevent the use of any document or other material that is marked "CONFIDENTIAL" or "RESTRICTED CONFIDENTIAL" or the contents thereof, as evidence at trial, or at any deposition taken in this action.

10. Before any disclosure of Confidential Discovery Material or Restricted Confidential Discovery Material to any person retained as an independent expert and/or consultant, and any testifying witnesses, pursuant to Subparagraphs 5(e), 5(f), 8(d), and 8(e), counsel retaining or representing such person shall cause such person to read this Protective

Order and sign an Acknowledgement in the attached hereto as Exhibit A. Counsel shall retain the signed Acknowledgement and produce it to all other counsel prior to such person being permitted to testify at deposition or trial.

11. Confidential Discovery Material and Restricted Confidential Discovery Material shall be used only for the purposes of the present Action, and may be disclosed only under the circumstances and to the persons specifically provided for in this or subsequent Court Orders, or with the prior written consent of the Producing Party with respect to specifically identified Confidential Discovery Material, or pursuant to a document request, subpoena or court order in another action during the pendency of this Action provided that the party receiving such document request, court order, or subpoena gives prompt notice to the Producing Party so that they may have an opportunity to seek relief from the document request, order, or subpoena. In the event that the Producing Party does seek such relief, unless and until it is determined that the proposed disclosure is indeed required, each party will take all steps reasonable and necessary to maintain the assertion of all applicable rights and privileges with respect to all Confidential Discovery Material, and shall cooperate fully with the Producing Party in that party's efforts to oppose such discovery.

12. The inadvertent failure by the Producing Party to stamp a document, or a portion thereof, with the "Confidential" or "Restricted Confidential" designation in no way alters or waives the protected and confidential nature of the document otherwise deserving of such a designation and does not remove it from the scope of this Protective Order, provided that the Producing Party gives such notice in writing within thirty (30) days after becoming aware that the confidential information was not properly designated. Failure to provide such written notice

with the thirty (30) day period shall waive any claim of confidentiality. Such written notice shall identify with specificity the information or documents that the Producing Party is then designating to be confidential information and shall within thirty (30) days provide a replacement copy of such material with the appropriate designation thereupon.

13. The inadvertent production of Discovery Material subject to the attorney-client privilege, the attorney work-product protection or any other applicable privilege before or after the date of this Order shall not automatically constitute a waiver of any such privilege or protection that otherwise would apply to the Discovery Material. Upon a request from a party which has inadvertently produced Discovery Material which it believes should be subject to the attorney-client privilege, attorney work-product protection, or any other applicable privilege or protection, each party receiving said Discovery Material shall immediately return it and all copies to the Producing Party.

14. Any party may, on the record of a deposition, or within thirty (30) days after receipt of the transcript(s) of such deposition, designate in good faith any portion or portions of such transcript(s), including exhibits and videotape, as Confidential Discovery Material or Restricted Confidential Discovery Material under the terms of this Protective Order. Until the above-referenced 30-day period expires, the complete deposition transcript and videotape shall be treated as Confidential Discovery Material or Restricted Confidential Discovery Material unless otherwise specified in writing or on the record of the deposition. All copies of deposition transcripts that contain information or material designated as Confidential Discovery Material or Restricted Confidential Discovery Material shall be prominently marked "Confidential" or "Restricted Confidential" on the cover thereof and on each page that contains Confidential

Discovery Material or Restricted Confidential Discovery Material and, if filed with the Court, the portions of such transcripts so designated shall be filed in accordance with the provisions of paragraph 15 (*infra*).

15. If Confidential Discovery Material or Restricted Confidential Discovery Material is to be included in papers filed with or otherwise disclosed to the Court, such papers shall be labeled on the cover:

**CONFIDENTIAL INFORMATION
SUBJECT TO PROTECTIVE ORDER**

or

**RESTRICTED CONFIDENTIAL INFORMATION
SUBJECT TO PROTECTIVE ORDER**

and, unless otherwise agreed by counsel or directed by the Court, shall be filed in a sealed envelope and kept under seal and not disclosed to any person unless ordered by the Court in the Action. A motion to seal the material shall not be required.

16. If the Confidential Discovery Material or Restricted Confidential Discovery Material at issue meets the foundational requirements of the West Virginia Rules of Evidence, such Discovery Material may be offered into evidence at trial or at any court hearing in open court, subject to any restrictions set forth herein. Any party may apply for an order that evidence be received *in camera*, placed under seal, or under other less public circumstances to prevent unnecessary disclosure. Any such use shall comply with the Electronic Filing and Service Case Management Order, entered May 17, 2011 and all subsequent Court Orders.

17. Nothing in this Protective Order shall be interpreted to prohibit or prevent the Producing Party from using or discussing his/her Confidential Discovery Material or Restricted

Confidential Discovery Material in any way he/she sees fit to so use or discuss that material for any reason. Any such use or discussion of Confidential Discovery Material or Restricted Confidential Discovery Material shall not be deemed a waiver of the terms of this Protective Order.

18. This Protective Order shall not enlarge or affect the proper scope of discovery in this Action, nor shall this Protective Order imply that Discovery Material designated as Confidential or Restricted Confidential under the terms of this Protective Order is properly discoverable, relevant or admissible in this Action or in any other litigation. Discovery Material produced in this Action can only be used in conjunction with this Action. Nothing in this Protective Order shall be interpreted to require disclosure of materials that a party contends are protected from disclosure by the attorney-client privilege or the attorney work-product doctrine.

19. The following procedures shall apply to any disputes arising from the designation of Discovery Materials as confidential pursuant to this Protective Order:

- (a) If a Receiving Party in good faith disagrees with the Producing Party's Confidential or Restricted Confidential designation, that party shall inform counsel of record for the Producing Party in writing of that disagreement within thirty (30) days of production of the material so designated or within thirty (30) days after the material being designated as Confidential or Restricted Confidential pursuant to paragraphs 12 or 14, *supra*;
- (b) Upon written notification that a Receiving Party disagrees with a Confidential or Restricted Confidential designation, counsel of record for the objecting Receiving Party and counsel of record for the Producing Party will confer in a good faith effort to resolve the dispute without Court intervention;
- (c) If the dispute is not resolved within twenty (20) days of counsel of record for Producing Party's receipt of the objecting Receiving Party's written notification, the objecting Receiving Party may invoke the Court rules and procedures for raising discovery disputes. The Producing Party shall bear the burden of proving

that information has properly been designated as Confidential Discovery Material or Restricted Confidential Discovery Material; and

- (d) During the pendency of such judicial process all parties receiving Confidential Discovery Material or Restricted Confidential Discovery Material shall abide by the designation.

20. Each document, material, or other thing, or portion thereof designated as Confidential or Restricted Confidential shall retain that designation and shall remain subject to the terms of this Protective Order until such time as the parties agree to the contrary or the Court renders a decision that a particular document, material, or other thing, or portion thereof is not subject to this Protective Order, and any and all proceedings or interlocutory appeals challenging such decision have been concluded.

21. Except as otherwise agreed in writing by the parties, within forty-five (45) days after final judgment is entered by this Court in the above-captioned matter, including the exhaustion of all appeals, or within forty-five (45) days after dismissal pursuant to a settlement agreement, all Confidential Discovery Material and Restricted Confidential Discovery Material supplied by the Producing Party and all copies thereof shall be destroyed, and the Receiving Party's counsel shall certify to the Producing Party that he or she has made a good faith effort to destroy all such materials and confirm that all individuals, experts, witnesses and/or entities each party has provided materials containing confidential or restricted confidential information to, in conformance with Paragraphs 5 and 8 of this Order, have destroyed such materials. Each Producing Party shall maintain copies of all materials produced by the Producing Party during this litigation following the final termination of this litigation. This

Protective Order shall survive the final termination of this Action with respect to any such Confidential Discovery Material and Restricted Confidential Discovery Material.

22. This Protective Order shall become effective among such parties who have executed this agreement immediately upon such execution, whether or not it has yet been approved by the Court.

23. Any party may apply to this Court, upon written notice, in accordance with the Rules of this Court, for an Order amending, modifying or vacating this Protective Order. Nothing in this Protective Order shall be construed as prejudicing any party's right to seek an agreement or Court Order providing additional confidentiality or other protections to any Confidential Discovery Material or Restricted Confidential Discovery Material produced in this Action. Until such agreement or order is obtained, however, this Protective Order shall constitute the entire agreement of the parties with respect to the matters covered herein.

ENTERED: _____, 2011

SO ORDERED:

HONORABLE JOHN A. HUTCHISON

EXHIBIT A

I hereby certify: (i) my understanding that Confidential Discovery Material and/or Restricted Confidential Discovery Material is being provided to me pursuant to the terms and restrictions of the Protective Order (“Protective Order”) in the *In re: Float-Sink Litigation*, which has been entered into between the parties as defined in the Protective Order; and (ii) that I have received and read the Protective Order. I further certify that I understand the terms of the Protective Order, and that I will adhere to and agree to be fully bound by the Protective Order. I further agree that, at the conclusion of this Action, I will return any Confidential Discovery Material and Restricted Confidential Discovery Material provided to me, as well as any notes or memoranda made from such “**CONFIDENTIAL**” and “**RESTRICTED CONFIDENTIAL**” documents and information, in accordance with the terms of the Protective Order.

Date:

Signature:
