

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. FD 35799

**RAPID CITY, PIERRE & EASTERN RAILROAD, INC.
-- ACQUISITION AND OPERATION EXEMPTION
INCLUDING INTERCHANGE COMMITMENT --
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION**

STB DOCKET NO. FD 35800

**GENESEE & WYOMING INC.
- CONTINUANCE IN CONTROL EXEMPTION -
RAPID CITY, PIERRE & EASTERN RAILROAD, INC.**

MOTION FOR PROTECTIVE ORDER

(color copy included)

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Dated: January 13, 2014

Attorneys for
Rapid City, Pierre & Eastern Railroad, Inc.
and Genesee & Wyoming Inc.

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Rapid City, Pierre & Eastern Railroad, Inc. (“RCP&E”) and Genesee & Wyoming Inc. (“GWI”) hereby request that the Board enter a protective order in the above-referenced proceedings in accordance with 49 C.F.R. 1104.14(b).

On January 2, 2014, RCP&E, a non-carrier, and Dakota Minnesota & Eastern Railroad Corporation d/b/a Canadian Pacific (“DM&E”) announced that they had entered into an agreement under which RCP&E would purchase certain DM&E lines and operating rights west of Tracy, Minnesota (the “DM&E West Lines”) as generally shown on the map attached hereto as Exhibit A.¹ In order to consummate the purchase, RCP&E will require authorization or an exemption from the Board, and intends to seek an exemption for such authority in STB Docket No. FD 35799. Additionally, RCP&E’s parent GWI will need authority or an exemption to control RCP&E together with the other railroads in its corporate family when RCP&E becomes a

¹ The purchase does not include any of the rights of DM&E or its affiliates to build into the Powder River Basin.

carrier. GWI intends to seek an exemption for such authority in STB Docket No. FD 35800. Although the RCP&E and GWI proceedings will be separate, because the proceedings are related, RCP&E and GWI are hereby seeking a common protective order under 49 CFR §1104.14(b), to apply in both proceedings. Attached as an Appendix to this motion are a proposed protective order and undertakings.

RCP&E and GWI seek a protective order to protect the confidential and highly confidential information that may be disclosed in connection with the proceedings. The highly confidential information may include the Transaction Agreement, including its associated exhibits and schedules (collectively, the “Transaction Agreement”), that has been entered into between RCP&E and DM&E with respect to the acquisition of the DM&E West Lines. While the Transaction Agreement is not required under the Board’s regulations to be filed in either the RCP&E acquisition or GWI control proceedings, the parties may wish to make the Transaction Agreement available to interested parties that plan to participate in the proceedings. The parties are willing to do so if the disclosures are accorded similar confidentiality protections as have been granted by the Board in prior proceedings.

The Transaction Agreement contains proprietary commercial information that could be competitively damaging if disclosed or used for purposes outside of these proceedings. The Board has previously issued protective orders to protect the information contained in transaction agreements. *Koch Industries, Inc. – Acquisition of Control Exemption – Texas South-Eastern Railroad Company*, STB Docket No. FD 35708 (served January 11, 2013) (“*Koch*”); *Iowa Pacific Holdings, LLC and Permian Basin Railways – Control Exemption – Cape Rail, Inc. and Massachusetts Coastal Railroad LLC*, STB Docket No. FD 35684 (served October 26, 2012). Further, given the nature and amount of commercially sensitive material throughout the

Transaction Agreement it would be impractical to provide a redacted public version of the document. *See Dynegey Inc., et al – Acquisition of Control Exemption – The Coffeen and Western Railroad Company and the Joppa & Eastern Railroad Company*, STB Docket No. FD 35780 (served November 15, 2013); *Koch, supra*.

Based on the foregoing, RCP&E and GWI request that the Board issue a protective order in accordance with 49 CFR §1104.14(b), and in conformance with the proposed form attached. The form is substantially the same as the form approved by the Board in merger cases such as *Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et al.*, STB Docket No. FD 35654, Decision No. 1 (served September 5, 2012), with the following changes relevant to this proceeding: (a) the confidential information may only be used in these two proceedings, and not in any other proceedings that might be considered related by some persons²; (b) clarification that the entire Transaction Agreement is “highly confidential,” and (c) clarification that no public versions of the Transaction Agreement will be available or can be filed with the Board. *See also CSX Transp., Inc., and Delaware and Hudson Ry. Co., Inc. – Joint Use Agreement*, STB Finance Docket. 35348 (Served May 21, 2010); *Norfolk S. Ry. Co. – Joint Control and Operations*, STB Finance Docket 35147 (Served May 30, 2008).

² By way of clarification, RCP&E and GWI do not consider these proceedings as related to the Canadian Pacific Railway / DM&E merger proceeding (main docket STB Docket No. FD 35081); however, even if they were found to be related, recipients of confidential or highly confidential information provided under this protective order would not be able to use such information in the DM&E merger proceedings, or any proceedings related thereto.

The undersigned is authorized to represent that DM&E supports the request that the Board enter a protective order in the form proposed.

Respectfully submitted,



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Dated: January 13, 2014

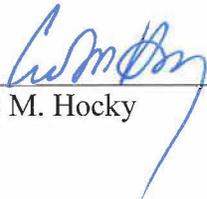
Attorneys for
Rapid City, Pierre & Eastern Railroad, Inc.
and Genesee & Wyoming Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was served on the following by electronic mail:

Terence M. Hynes
Sidley Austin LLP
1501 K Street, NW
Washington DC 20005
thynes@sidley.com

Attorneys for Dakota, Minnesota & Eastern Railroad Corporation



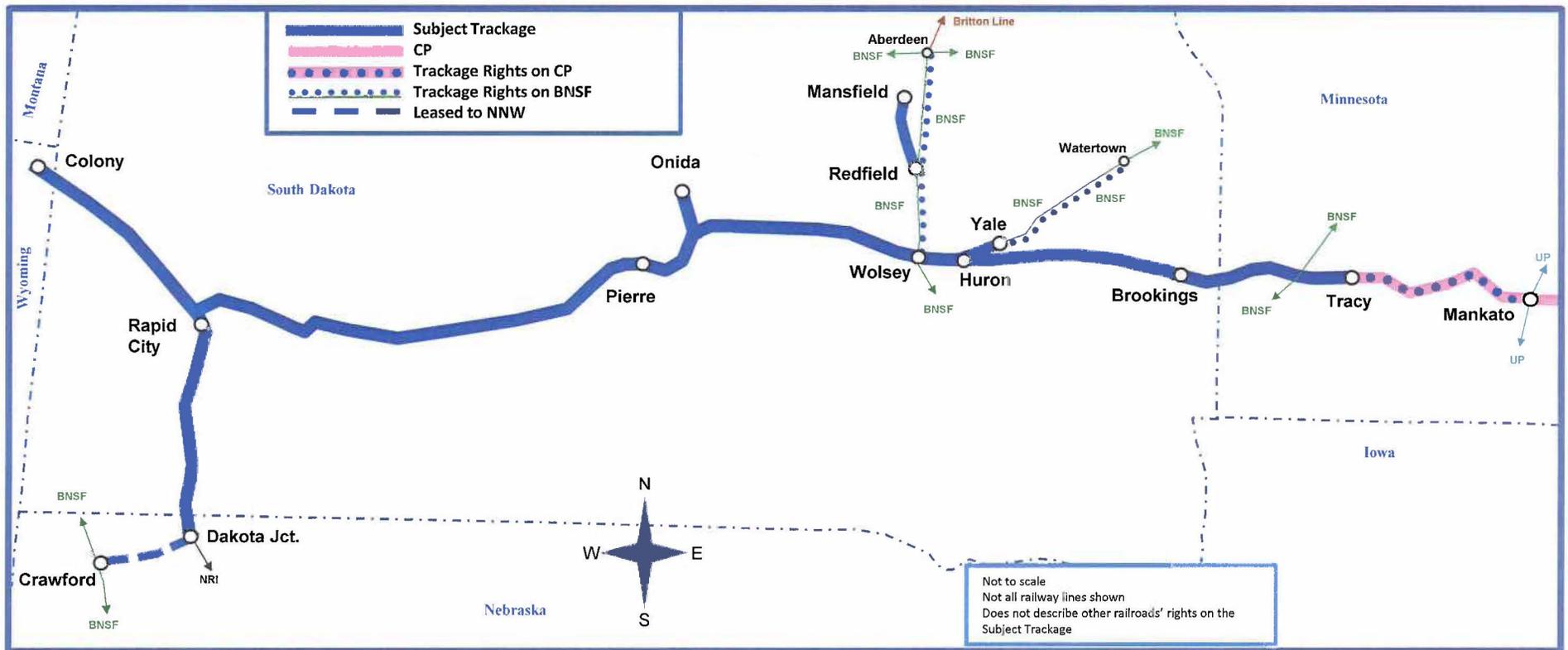
Eric M. Hocky

Dated: January 13, 2014

EXHIBIT A

MAP

Motion for Protective Order Map



APPENDIX
PROTECTIVE ORDER

APPENDIX

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets or other data bases, and cost work papers); the identification of shippers and receivers in conjunction with shipper-specific or other traffic data; the terms of the Transaction Agreement, dated January 2, 2014, between Rapid City, Pierre & Eastern Railroad, Inc. (“RCP&E”) and Dakota Minnesota & Eastern Railroad Corporation d/b/a Canadian Pacific, including all exhibits and schedules thereto (the “Transaction Agreement”); the confidential terms of contracts with shippers or carriers; confidential financial and cost data; divisions of rates, trackage rights compensation levels and other compensation between carriers; and other confidential or proprietary business or personal information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 5 or 6 of this Protective order and any Confidential Information contained in such materials.

(d) “Proceedings” means those before the Surface Transportation Board (Board) concerning the transactions in STB Docket No. FD 35799 and STB Docket No. FD 35800, and any judicial review proceedings arising from STB Docket No. FD 35799 and STB Docket No. FD 35800.

2. Confidential Information shall be provided to any party only pursuant to this Protective Order and only upon execution and delivery to RCP&E and Genesee & Wyoming Inc. (“GWI”) of the applicable Undertaking, forms of which are attached as Exhibits A and B to this Protective Order. Confidential Information shall be used solely for the purpose of the proceedings, and not for any other business, commercial, or competitive purpose, except as permitted under paragraph 3 of this Protective Order.

3. Personnel of GWI and RCP&E (collectively “Applicants”) and Canadian Pacific Railway Company and Dakota, Minnesota & Eastern Railroad Corporation (collectively, “DM&E”) and their affiliates, including outside consultants and attorneys for any of them (representatives), may exchange Confidential Information for the purpose of participating in the proceedings and pursuing the transactions that are the subject thereof, but not for any other business, commercial or other competitive purpose, unless and until the authority or exemption sought in the proceedings is approved.

4. To the extent that any meetings, conferences, exchanges of data, or other cooperative efforts between representatives of RCP&E and DM&E, or their affiliates are held and carried out for purposes of these proceedings and pursuing the transactions that are the subject thereof, such meetings, conferences, exchanges of data and other cooperative efforts are deemed essential for the conduct and disposition of such Proceedings and will not be deemed a violation of 49 U.S.C. 10901, 11323 or 11904, or any other relevant provision of the ICC Termination Act of 1995.

5. If the authority or exemption sought in the proceedings is disapproved by the Board, then all Confidential Documents (other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these proceedings) that are exchanged between RCP&E, DM&E, and their affiliates but which are not otherwise available to them as a result of their existing affiliation and pursuant to their reporting responsibilities for securities, tax and other purposes, must be destroyed or returned to the party originating the confidential Information contained or reflected in such Confidential Documents. With respect to parties other than RCP&E, DM&E and their affiliates, if the authority or exemption sought in the proceedings is disapproved by the Board, or if the authority or exemption is granted but the transactions are not consummated, or if no proceedings are commenced by RCP&E and GWI, then all Confidential Documents, other than file copies of pleadings and other documents filed with the Board and retained by outside counsel for a party to these proceedings, must be destroyed or returned to the party originating the Confidential Information contained or reflected in such Confidential documents.

6. If any party to these proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information or consists of Confidential Documents as "CONFIDENTIAL". Any information or documents designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 2 and 3 of this Protective Order.

7. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains the terms of the Transaction Agreement; shipper-specific rate or cost data; division of rates, trackage rights compensation levels, other compensation between carriers; or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter, except that no prohibition in any subsequent paragraph is applicable to an exchange of information pursuant to paragraphs 2 and 3 of this Protective Order.

8. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant or agent of a party to these Proceedings, or an employee of such

counsel, consultant or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Protective Order.

9. Information and documents designated or stamped as “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, or to any person or entity except to outside counsel or a consultant, or to an employee of such outside counsel or consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this Protective Order.

10. All parties must file simultaneously a public version of any Highly Confidential or Confidential submission filed with the Board whether the submission is designated a Highly Confidential Version or Confidential Version, except that no public version of any portion of the Transaction Agreement shall be filed with the Board. When filing Highly Confidential Version, the filing party does not need to file a Confidential Version with the Board, but must make available (simultaneously with the party’s submission to the Board of its Highly Confidential Version) a Confidential Version reviewable by any other party’s in-house counsel, except that no Confidential Version of any portion of the Transaction Agreement shall be provided. The Confidential Version may be served on other parties in electronic format only. In lieu of preparing a Confidential Version, the filing party may (simultaneously with the party’s submission to the Board of its Highly Confidential Version make available to outside counsel for any other party a list of all “highly confidential” information that must be redacted from its Highly Confidential Version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the Highly Confidential Version before permitting any clients to review the submission.

11. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the Board or with an administrative law judge or other officer to whom authority had been lawfully delegated by the Board to adjudicate such challenges.

12. Designated Material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in STB Docket No. FD 35799 and STB Docket No. FD 35800, and/or any judicial review proceedings in connection with STB Docket No. FD 35799 and STB Docket No. FD 35800.

13. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings; or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals or remands.

14. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

15. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless: (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding; or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and request that, if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

16. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer: (a) restrict attendance at the hearing during any discussion of such Designated Material; and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

17. If any part intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 13 of this Protective Order.

18. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with the paragraphs above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 10901, 11323 or 11904, or of any other relevant provision of the ICC Termination Act of 1995.

19. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated

by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

20. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit A

UNDERTAKING – CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____, 2014, governing the production and use of Confidential Information and Confidential Documents concerning STB Docket No. FD 35799 and STB Docket No. FD 35800, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any confidential Information or Confidential Documents obtained pursuant to that Protective order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 35799 and STB Docket No. FD 35800, and/or any judicial review proceedings in connection with STB Docket No. FD 35799 and STB Docket No. FD 35800. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this proceeding (including any proceeding on administrative review, judicial review or remand), I will promptly destroy all documents containing or reflecting materials designated or stamped as “CONFIDENTIAL,” other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Affiliation: _____

Dated: _____

Exhibit B

UNDERTAKING – HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on _____, 2014, governing the production and use of Confidential Information and Confidential Documents concerning STB Docket No. FD 35799 and STB Docket No. FD 35800, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Docket No. FD 35799 and STB Docket No. FD 35800, or any judicial review proceedings in connection with STB Docket No. FD 35799 and STB Docket No. FD 35800. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential Undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing or using copies of any information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” that I will take all necessary steps to ensure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said materials or information by employees of my client or its subsidiaries, affiliates, or owners, and that, at the conclusion of the proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting information or documents designated or stamped as “HIGHLY CONFIDENTIAL,” other than files copies kept by outside counsel of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing Confidential Information or Confidential Documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____
OUTSIDE [COUNSEL] [CONSULTANT]

Dated: _____