

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

**Axon Enterprise, Inc.,
a corporation,**

And

**Safariland, LLC,
a corporation.**

PUBLIC

The Honorable D. Michael Chappell

Docket No. D9389

NON-PARTY DIGITAL ALLY, INC.'S MOTION FOR *IN CAMERA* TREATMENT

Pursuant to Rule 3.45 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.45(b), non-party Digital Ally, Inc. (“**Digital Ally**”) respectfully moves the Federal Trade Commission for *in camera* treatment of the competitively-sensitive, confidential business documents, and declaration and deposition testimony listed herein (the “**Confidential Information**”). The confidential documents at issue in this Motion for *In Camera* Treatment (“**Motion**”) were produced by Digital Ally in response to two third-party *Subpoenas Duces Tecum* in this matter, one issued by The Federal Trade Commission (“**FTC**”), and the other by respondent, Axon Enterprise, Inc. (“**Axon**”). Some of the confidential documents being offered by the parties to this FTC action are comprised of highly confidential documents subject to a Protective Order issued by the United States District Court (“**Federal Court**”) in the case captioned *Digital Ally, Inc. vs Taser International, Inc.*, case no. 2:16-cv-02032 (D. Kan.) (“**Digital Ally v. Taser**”) on June 20, 2016 (“**Federal Court Protective Order**”), which is still operative, having been declared by the Federal Court on page 24 to “survive termination of this litigation” without limit (“Exhibit

A”). The Confidential Information also includes portions of the declaration and deposition testimony of Digital Ally’s Chairman and Chief Executive Officer, Stanton E. Ross, sought by both the FTC and Axon, respectively, the latter of which was given in response to the FTC’s *Subpoena Ad Testificandum* dated July 7, 2020. Digital Ally has relied upon the Protective Order Governing Confidential Material issued by Chief Administrative Judge Chappell in this FTC action on January 6, 2020 (“**FTC Protective Order**”) in submitting all the below listed Digital Ally Confidential Information to the FTC and Axon, the parties in this matter, and in also having specified unequivocally that any information to be reviewed or used by the parties from Digital Ally v. Taser be absolutely subject to all of the Federal Court Protective Order’s confidentiality requirements. (See Letter of Leslie A. Kulick dated March 10, 2020 to FTC, PX50012-002, and Letter of Leslie A. Kulick dated March 10, 2020 to Axon, PX50110-002 attached as Exhibit B.) Thus *in camera* treatment should be awarded to non-party Digital Ally’s Confidential Information in this matter.

DISCLOSURE WOULD RESULT IN SERIOUS INJURY TO DIGITAL ALLY

Digital Ally seeks *in camera* treatment for the Confidential Documents listed below, copies of which are attached to this motion as Exhibit C. The Confidential Documents all contain proprietary, secret, competitively-sensitive data regarding Digital Ally’s sales, costs, revenue, borrowings and financial standing, marketing strategies, trade secret and intellectual property information (especially regarding its patents), strictly confidential corporate merger, sale, and acquisition strategies, and other secret and competitively-sensitive information to the business of Digital Ally, such that if they were subject to public disclosure, the likely result will be a clearly defined, serious financial and competitive injury to the company and its investors, thus entitling such information to *in camera* treatment pursuant to 16 C.F.R. Section 3.45. For these reasons, as further developed in this motion, Digital Ally requests that this Court afford the Confidential

Documents *in camera* treatment. In support of this motion, Digital Ally relies on the Declaration of Stanton E. Ross, Chief Executive Officer of Digital Ally, attached as Exhibit D.

In camera treatment is appropriately granted to a company's records where it is shown that the confidential information is both material to the company's business, and is kept secret by the company. *In re Dura Lube Corp.*, 1999 F.T.C. Lexis 255, *5 (1999). *In re Bristol-Meyers Co.*, 90 F.T.C. 455, 456-457 (1977) the Commission outlined six factors to be weighed when determining materiality and secrecy: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be acquired or duplicated by others. "The likely loss of business advantages is a good example of a 'clearly defined, serious injury'". *In re Dura Lube Corp.*, supra. Also weighing in favor of *in camera* treatment is that the request is being made a non-party. *See In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (1984).

CONFIDENTIAL INFORMATION LIST

The parties to this action have now notified Digital Ally that they intend to introduce the many pages of Digital Ally information designated in their respective emails dated September 11, 2020 into evidence at the administrative trial in this matter. *See* Email Letter from the FTC dated September 11, 2020 (attached as Exhibit E) and Email Letter from Axon dated September 11, 2020 (attached as Exhibit F). FTC designated Digital Ally materials were first received on September 14, 2020 and supplemented on September 16, 2020, further narrowing the timeline for Digital Ally to fully respond in this Motion. Thus, in an attempt to address the materials in a thorough but

expeditious manner in keeping with the narrow timeline, certain documents have been grouped in accordance with their subject matter, when possible.

Digital Ally seeks *in camera* treatment for the following Digital Ally Confidential Documents:

1. PX50012, PX50068-015 (aka PX50062), PX50063, and PX60013-001.

PX50012, Responses to Complaint Council Subpoena *Duces Tecum* Paragraph 1, is a composite of a number of separate documents. Digital Ally requests *in camera* treatment for those portions of this exhibit titled Distribution Agreement, labeled PX50012-008 through PX50012-023, and Distributor Termination Agreement, labeled PX50012-053 through PX50012-060. The terms of both of these agreement are covered by an NDA between the parties dated June 21, 2017, the agreements themselves state the terms are confidential, and the documents contain competitively sensitive pricing and marketing provisions that, if revealed, could cause Digital Ally competitive injury. These documents are non-public, and only known to the parties and their employees with a need to know their terms and who have themselves agreed to maintain the confidentiality of the terms, as per the NDA, and the confidentiality provisions of the agreements.

PX50068-015, (also known as PX50062), a Memo to Digital Ally from The Safariland Group regarding VieVu, and the emails contained in **PX 50063** are confidential for the same reasons set forth above in this paragraph.

PX60013-001 is a 4 page Declaration from Stanton E. Ross submitted to the FTC on April 7, 2020. Several portions of Paragraphs 7, 8, 9, 10, 11, 12, 13, 14, and 15 were designated as Confidential when submitted to the FTC because those designated sections address the confidential business transaction between Digital Ally and VieVu covered by the NDA discussed in additional detail with regard to PX50012.

In camera treatment for PX50012, PX50068-015, PX 50063, and PX60013-001 are requested for 5 years.

2. **PX50059 and PX50068.**

PX50059 contains the Deposition of Thomas Heckman, Chief Financial Officer of Digital Ally, in the case of Digital Ally v. Taser, along with Exhibit 60 to that deposition, entitled Plaintiff Digital Ally, Inc.'s Second Supplemental Response to Defendant Taser International, Inc.'s Interrogatory No. 15. Thomas Heckman's deposition consists of approximately 278 pages of testimony, which Complaint Counsel has not narrowed in any way to provide notice to Digital Ally regarding what specific testimony it intends to introduce from that deposition. The testimony contained therein, and all of the information in the Exhibits thereto, including Exhibit 60, are highly confidential in their entirety. The deposition (including the Exhibits) are designed "**Attorneys' Eyes Only**" pursuant to the Federal Protective Order. The Federal Protective Order ("**FPO**"), which is "narrowly tailored" (see FPO pg. 1) to protect the trade secret, confidential materials and testimony produced in Digital Ally v. Taser, contains provisions that permit the "**Attorneys' Eyes Only**" designation only for "extremely sensitive 'Confidential' information whose disclosure to another party or nonparty would create a substantial risk of harm to the competitive position of the Producing Party (FPO pg.2), such as (but expressly not limited to) source code, product design specifications, product operation specifications, software requirement documents, product requirement documents, trade secrets, non-public technical information, practices or methods, non-public marketing drafts, plans or strategies, product data or projections, non-public financial data, strategic business materials, or relationships with third parties, including any agreement documenting the terms of any such relationship. (FPO pg. 3). The Deposition of Thomas Heckman (and Exhibit 60) received the "**Attorneys' Eyes Only**" designation in Digital Ally v. Taser because it was

agreed by the Federal Court and the parties to contain in its entirety such extremely sensitive intellectual property, trade secret, financial, product, and marketing confidential materials whose disclosure to another party or non-party would create a substantial risk of harm to the competitive position of Digital Ally. “**Attorneys’ Eyes Only**” was defined as limited strictly to counsel of record in that litigation, in-house counsel, certain designated independent experts, court staff, court reporters, and the persons needed to testify about such materials (FPO pgs. 9-10). Digital Ally has vigorously guarded this sensitive information, which has been made available only on the above defined “**Attorneys’ Eyes Only**” basis, and was shared with the parties in this matter with the requirement that such strict confidentiality will be maintained in this FTC action.

PX50068.¹ PX50068 (PX50068-001 through -014, PX50068-016-027²) is comprised of three documents of secret, competitively-sensitive data regarding Digital Ally’s sales, costs, revenue, borrowings, and financials, 27 pages in length, all of which were submitted to Axon as part of discovery in Digital Ally v. Taser on an “**Attorneys’ Eyes Only**” basis, as explained above. It also contains very sensitive customer/potential customer data that was and largely remains highly confidential. Because of the extremely sensitive financial nature of Pages 001014, and Pages 016-027, known only to Digital Ally, its officers, directors, auditors, and the receiving parties, on conditions of strict confidentiality, the public revelation of which would cause great harm to Digital Ally, Digital Ally seeks to keep strictly confidential, and receive *in camera* treatment for, this exhibit, including the titles, subject, and content of, these documents in their entirety.

¹ This document is a preliminary, not final, draft

² PX50068-015 is covered by the NDA discussed in Item # 1 herein and is confidential for that reason.

The public disclosure of the information contained in PX50059 and PX50068 could cause irreparable financial, business, and competitive harm to Digital Ally, it is expressly protected from public disclosure by the Federal Court on a permanent basis, and this information was only produced by Digital Ally subject to the agreement that the FTC and Axon would abide by the Digital Ally v. Taser Court's confidential "**Attorneys' Eyes Only**" designation of such material. As this is the finding of a federal court, the FTC should give full faith and credit to the highly confidential, "**Attorneys' Eyes Only**" designation. Further, the highly sensitive materials in this deposition will remain so, and pursuant to the Federal Court Protective Order, survives termination of the litigation (FPO pg. 24) and is entitled to such protection without expiration. The above discussion, and the need to receive *in camera* treatment for these documents, is further supported by the Letters contained in Exhibit B and the Declaration contained in Exhibit D.

3. **PX50060; PX50111** Deposition of Stanton E. Ross in case of Digital Ally v. Taser, (60 pages in Volume 1 designated by the FTC, and 109 pages in Volume 2 designated by Axon, without further specification as to topics or lines that the parties intend to use from these documents.) The deposition testimony in these two depositions is highly confidential in its entirety. These depositions are designed "**Attorneys' Eyes Only**" pursuant to the Federal Protective Order. The Federal Protective Order, which is "narrowly tailored" (see FPO pg. 1) to protect the trade secret, confidential materials and testimony produced in Digital Ally v. Taser, contains provisions that permit the "**Attorneys' Eyes Only**" designation only for "extremely sensitive 'Confidential' information whose disclosure to another party or nonparty would create a substantial risk of harm to the competitive position of the Producing Party (FPO pg.2), such as (but expressly not limited to) source code, product design specifications, product operation specifications, software requirement documents, product requirement documents, trade secrets,

non-public technical information, practices or methods, non-public marketing drafts, plans or strategies, product data or projections, non-public financial data, strategic business materials, or relationships with third parties, including any agreement documenting the terms

of any such relationship. (FPO pg. 3). The Deposition of Stanton E. Ross received the “**Attorneys’ Eyes Only**” designation in *Digital Ally v. Taser* because it was agreed by the Federal Court and the parties to contain in its entirety such extremely sensitive intellectual property, trade secret, financial, product, and marketing confidential materials whose disclosure to another party or non-party would create a substantial risk of harm to the competitive position of Digital Ally. The public disclosure of the information contained in this two volume deposition could cause irreparable financial and competitive harm to Digital Ally, it is expressly protected from public disclosure by the Federal Court on a permanent basis, and this information was only produced by Digital Ally subject to the agreement that the FTC and Axon would abide by the *Digital Ally v. Taser* Court’s confidential “**Attorneys’ Eyes Only**” designation of such material. As this is the finding of a federal court, the FTC should give full faith and credit to the highly confidential, “**Attorneys’ Eyes Only**” designation. Further, the highly sensitive materials in these depositions will remain so, and pursuant to the Federal Court Protective Order, survives termination of the litigation (FPO pg. 24) and is entitled to such protection without expiration. The above discussion is further supported by the Letters and Declarations contained in Exhibit B and Exhibit D.

4. PX50115; PX70053; PX50065; and PX50066

PX50115 consists of approximately 24 pages³ and is a non-public list compiled by Mitch Truelock of Roth Capital Management for Digital Ally concerning very confidential company

³ It appears to be composed of only three pages but one of those three pages includes by reference an additional 21 pages.

strategic planning information. Its circulation has been limited to the officers and directors of Digital Ally, and Digital Ally experts and advisor with a need to know of the existence and content of the document and who have themselves agreed to maintain the document's confidentiality. Due to continuing highly confidential strategic planning utilizing this information with the assistance of Mitch Truelock, (see Exhibit D) Digital Ally requests that this document and its companions, PX70053; PX50065; and PX50066, receive *in camera* protection without expiration.

PX70053, labeled "Chart by the FTC, consists of a 4 page section of PX50115 which was introduced in Digital Ally v Taser as Exhibit 58 to Thomas Heckman's Deposition which is strictly confidential pursuant to the Federal Court Protective order as explained in Item # 2 above (and incorporated herein). As with PX 50115, its circulation has been, and will continue to be, limited to the officers and directors of Digital Ally, and Digital Ally experts and advisor with a need to know of the existence and content of the document and who have themselves agreed to maintain the document's confidentiality.

PX50065 consists of 4 pages of emails between Mitch Truelock and the top officers of VieVu and Digital Ally. Page 4 of this document references the highly confidential strategic planning referenced in this paragraph, for which Digital Ally requests receive *in camera* protection without expiration. Regarding pages 1-3, these emails contain discussions covered by the NDA between Digital Ally and VieVu more fully discussed in Item # 1 above regarding PX50012, PX50068-015, and PX 50063, and as with those exhibits, *in camera* treatment is requested for pages 1-3 of this exhibit for 5 years.

PX50066, a one page document, consists of three emails, with highly confidential, competitively sensitive attachments, regarding the confidential strategic planning matter that

Mitch Trulock was undertaking for Digital Ally discussed earlier in this Item # 5. Digital Ally requests that this document, like PX50115, receive *in camera* protection without expiration.

5. **RX001204** consists of 23 pages, and is confidential in its entirety. Private treatment requested regarding its title, content and nature. This exhibit's content is only known to relevant staff of the FTC, and to top executives and board members of Digital Ally, Axon, and their attorneys, who have agreed to keep the document strictly confidential. As disclosed on page 9 of this exhibit in the section entitled "*Confidentiality*", this document is subject to an NDA between Digital Ally and Axon dated May 12, 2020, is strictly confidential, and shall not be publicly announced. The privacy of the title, subject, and content of this exhibit RX001204 is necessitated not only because of the competitively sensitive information of the most confidential nature regarding Digital Ally's future business strategies contained therein, but is also highly confidential under United States laws and regulations of the kind stated in the second paragraph of the section entitled *Confidentiality*, to protect both Digital Ally as a company, its officers, directors, and stock holders. *In camera* treatment is requested for 5 years.
6. **PX50116** consists of 30 pages. *In camera* treatment is requested for PX50116-001 (Title Page), PX50116-002 (Contents), PX50116-008 (reveals nature of the document), PX50116-016 (proprietary customer information with trademarks), PX50116-018 (reveals nature of the document), PX50116-019 (reveals nature of the document), PX50116-020 (reveals nature of the document and confidential business plans), PX50116-021 (reveals nature of the document and confidential business plans), PX50116-022 (reveals nature of the document), PX50116023 (reveals nature of the document and confidential business plans), PX50116-024 (reveals nature of the document and confidential business plans), PX50116-025 (reveals nature of the document and confidential business plans), PX50116-026 (reveals nature of the document, confidential business plans, and highly confidential employment matters), PX50116-027

(reveals nature of the document and confidential business plans), PX50116-028 (reveals nature of the document and confidential business plans), and PX50116-030 (reveals nature of the document and confidential business plans). This exhibit, prepared by Digital Ally and its attorneys, Bryan Cave Leighton Paisner, and labeled and submitted to the FTC as confidential pursuant to section 21 of the FTC Act, 15 U.S.C. Section 57b-2, and the Commission's Rules of Practice 4.10-4.11, 16 C.F.R. Sections 4.10-4:11, concerns a highly confidential business matter and is only known to relevant staff of the FTC, and to top executives and board members of Digital Ally, Axon, and their attorneys, who have agreed to keep the document strictly confidential pursuant to an NDA between Digital Ally and Axon. As with RX001204, this document is also highly confidential under United States laws applicable to a small publicly held company such as Digital Ally. Furthermore, the document contains competitively sensitive information, including those regarding Digital Ally's future business strategies, sales and marketing plans, and certain sensitive employment matters. *In camera* treatment is requested for PX50116-001, PX50116-002, PX50116-008, PX50116-018, PX50116-019, PX50116-020, PX50116-021, PX50116-022, PX50116-023, PX50116-024, PX50116-025, PX50116-027 PX50116-028, and PX50116-030 for 5 years; in camera treatment for PX50116-016 and PX50116-026 (proprietary customer information and confidential employment matters) is requested on a permanent basis.

7. **PX61002** Declaration of Stanton E. Ross dated July 10, 2020. *In camera* treatment is requested for the Declaration Paragraphs 4, 5, 6, 7, 8, and 9 as they reveal the subject and nature of the highly confidential matter discussed in Item # 6 and Item # 7, above, that should be protected for the reasons set forth in Item # 6 and Item # 7, which are incorporated herein by this reference. *In camera* treatment is requested for 5 years.

- 8. PX81038** *In camera* treatment is requested for the designated sections of Stanton E. Ross' Deposition in the Matter of Axon Enterprise, Inc., FTC No. 9389 because (1) such sections concern the highly confidential matter discussed in Items 6, 7, and 8, above contains competitively sensitive information of the most confidential nature regarding Digital Ally's future business strategies and is also highly confidential under United States laws and regulations, and/or (2) contains financial information of a confidential, proprietary and trade secret nature, and/or (3) such sections discuss matters covered by the NDA dated June 21, 2017 between Digital Ally and VieVu . *In camera* treatment is requested for 5 years.

Lines designated as confidential are as follows: 25:23-26:1; 26:20-28:9; 30:14-33:3; 33:23-34:22; 35:23-38:1; 38:21-39:16; 40:9-40:11; 40:23-43:3; 43:9-43:25; 44:7-44:15; 44:21-46:21; 47:3-47:8; 48:1-49:25; 51:7-51:19; 51:24-53:21; 54:10-55:6; 55:17-55:22; 57:15-57:19; 60:2-61:11; 64:4-65:1; 65:20-65:24; 71:5-72:19; 73:16-73:17; 73:22-75:23; 77:1978:7; 79:22-79:25; 80:14-80:16; 81:7-81:22; 82:3-82:4; 82:9-82:12; 82:17-83:6; 83:21-84:11; 84:23-85:10; 85:22-86:23; 87:7-87:20; 88:1-90:4; 91:1-93:18; 93:24-94:1; 94:13-98:4; 98:1799:18; 100:3-102:7; 103:14-104:9; 104:20-105:8; 106:6-121:17; 122:3-124:8; 124:20-126:7; 129:2-129:7; 129:15-129:22; 132:17-133:4; 133:12-133:14; 134:7-134:14; 135:5-136:14; 138:15-141:13; 142:5-143:24; 145:4-145:6; 146:2-147:10; 148:14-149:17; 150:16-150:18; 151:16-151:19; 152:7-152:11; 155:20-156:14; 156:23-157:14.

CONCLUSION

Non-parties in FTC administrative actions are assured that they can rely on the promises of confidentiality granted in Commission Protective Orders such as the one issued by the Chief Administrative Judge in this case on January 6, 2020. As Chief Administrative Judge Chappell stated in his ORDER GRANTING MOTION FOR CERTIFICATION TO THE COMMISSION

OF REQUEST FOR COURT ENFORCEMENT OF NONPARTY SUBPOENAS in this Commission Enforcement Action on September 4, 2020 (“**September 4 Order**”):

“In addition, it is well established that confidentiality concerns do not justify failure to comply with a subpoena, particularly where, as here, there is a robust protective order in place. See, e.g., *In re 1-800 Contacts, Inc.*, 2016 FTC LEXIS 193, *8-10 (Nov. 4, 2016) (rejecting nonparty’s argument that the subpoena should be quashed or limited because the document requests require production of confidential or proprietary information as without merit, where there was a protective order). See also *FTC v. Rockefeller, et al.*, 441 F. Supp. 234, 242 (S.D.N.Y. 1977), *aff’d* 591 F.2d 182 (2d Cir. 1979) (stating that an objection to a subpoena on grounds that it seeks confidential information “poses no obstacle to enforcement”).”

Digital Ally has relied on the FTC’s promise that the FTC Protective Order is indeed a “robust one” as stated in the September 4, 2020 Order and that it will protect Digital Ally’s Confidential Information as promised by granting the above *in camera* protections requested by non-party Digital Ally herein so that Digital Ally will not suffer competitive harm from Axon as well as all of the other competitors in the body worn camera and digital evidence management field because of its cooperation in responding to the subpoenas issued to it in this action.

As mentioned above, the Confidential Documents contain proprietary, secret, competitively-sensitive data regarding Digital Ally’s sales, costs, revenue, borrowings and financial standing, future business and marketing strategies, trade secret and intellectual property information, strictly confidential corporate merger, sale, and acquisition strategies, and other secret and competitively-sensitive information to the business of Digital Ally, such that if they were subject to public disclosure, the likely result will be a

clearly defined, serious financial and competitive injury to the company and its investors, thus entitling such information to *in camera* treatment pursuant to 16 C.F.R. Section 3.45.

For the foregoing reasons, and those set forth in the Ross Declaration, Digital Ally respectfully requests that this Court grant this motion for *in camera* treatment for the Confidential Documents for the periods requested with respect to each of the documents discussed herein. A copy of the proposed order is attached as Exhibit G.

Dated: September 23, 2020

Respectfully submitted,

By: /s/ Leslie A. Kulick
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(913) 451-7927
Counsel for Digital Ally, Inc.

RULE 3.22(G) STATEMENT

The undersigned counsel for Digital Ally, Inc., certifies that she spoke with Jeremy P. Morrison of Jones Day, Axon's counsel, on September 22, 2020 via telephone and email, who stated Axon would not object to this Motion for In Camera Treatment by Digital Ally, Inc. Although asked by Digital Ally, Inc.'s counsel, Digital Ally, Inc. does not know if the FTC has any objection to this Motion.

Dated: September 23, 2020

By: /s/ Leslie A. Kulick
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kulicklaw@gmail.com
Counsel for Digital Ally, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2020, I filed the foregoing document and exhibits electronically using the FTC’s E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document and exhibits to:

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EXHIBIT A

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

DIGITAL ALLY, INC.

Plaintiff,

v.

Case No. 2:16-cv-02032-CM-TJJ

TASER INTERNATIONAL, INC.

Defendant.

PROTECTIVE ORDER

In accordance with the Court’s June 17, 2016 Memorandum and Order (ECF No. 51), the Court enters the following protective order proposed by Plaintiff:

WHEREAS, Plaintiff Digital Ally, Inc. (“Digital”) and Defendant TASER International, Inc. (“TASER”) believe that certain materials, information, and things discoverable in this case, both from the Parties and Third-Parties, may consist of trade secrets, proprietary information, confidential research and development information, and/or otherwise commercially valuable information (“Protected Material”) that the respective Parties or Third Parties maintain in confidence in the ordinary course of business;

WHEREAS, the Parties reasonably believe that the public disclosure of materials, information, and things determined to be confidential could cause irreparable financial and competitive harms to the disclosing Party or Third Party;

WHEREAS, the Parties believe that good cause exists for the entry of a Protective Order that is narrowly tailored to protect the aforementioned confidential material, information, and things of the Parties and any Third Parties from whom confidential material, information, or things are sought.

By reason of the foregoing, the Parties, by their counsel, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and subject to the approval of the Court, request entry of a Protective Order in the action.

Designation of Confidential Material.

1. General. Any documents, materials, tangible things, items, testimony or other information produced or provided by any party in connection with discovery in this litigation (hereinafter, the “Producing Party” or “Designating Party”) to another party (hereinafter, the “Receiving Party”) may be designated “Confidential” or “Highly Confidential — Attorneys’ Eyes Only,” subject to the limitations and guidelines set forth herein. For purposes of this Order, “Confidential” information shall mean all information that qualifies for protection under the standards developed under Rule 26(c) of the Federal Rules of Civil Procedure. The “Highly Confidential — Attorneys’ Eyes Only” designation is reserved for extremely sensitive “Confidential” information whose disclosure to another party or nonparty would create a substantial risk of harm to the competitive position of the Producing Party. Any material constituting or containing non-public source code of a party’s software or computer applications may be designated “Highly Confidential Source Code — Attorneys’ Eyes Only.” All of the foregoing forms of information and all material derived from it, including copies, recordings, summaries, abstracts, excerpts, analyses or the like, constitute “Designated Material” under this Protective Order.

2. Designated Material shall be so designated for the purposes of protecting the Producing Party’s proprietary, confidential, commercially or competitively sensitive technical, business, financial or trade secret information, the confidential, personal or financial affairs of its employees or third parties, or other information not publicly known. Examples of properly

Designated Material include source code, product design specifications, product operation specifications, software requirements documents, product requirements documents, trade secrets, non-public technical information, practices or methods, non-public marketing drafts, plans or strategies, product data or projections, non-public financial data, strategic business materials, or relationships with third parties, including any agreement documenting the terms of any such relationship. The preceding examples are listed for exemplary purposes only and are not intended to limit or restrict a Producing Party from designating other information “Confidential,” “Highly Confidential — Attorneys’ Eyes Only,” or “Highly Confidential Source Code — Attorneys’ Eyes Only” in good faith.

3. Limits on Designated Material. No item shall be designated or deemed to be Designated Material if it is available to the public at the time of disclosure or becomes publicly known through means not constituting a breach of this Protective Order by the Receiving Party. This Protective Order shall not be construed to protect information that the Receiving Party can show was already known to it or was received by the Receiving Party after the time of disclosure hereunder from a third-party having the right to make such a disclosure.

4. Designation Procedure. Designation shall be made, where practicable, by conspicuously marking each page of a document, each separate part or component of a thing, or each separate item of other material with the legend “Confidential” “Highly Confidential— Attorneys’ Eyes Only” or “Highly Confidential Source Code — Attorneys’ Eyes Only.” If marking the Designated Material is not practicable, designation may be made on a container for or tag attached to the Designated Material. A party wishing to invoke the provisions of this Protective Order shall designate the documents, materials, items, or information, or portions thereof, prior to or at the time such information is disclosed, or when the party seeking protection

becomes aware of the nature of the information disclosed and sought to be protected. In the case of information produced for inspection but not yet provided to the inspecting party, such information shall presumptively be deemed “Highly Confidential — Attorneys’ Eyes Only,” regardless of whether so identified, until copies thereof are produced to the inspecting party, except that material constituting or reflecting source code shall be presumptively deemed “Highly Confidential Source Code — Attorneys’ Eyes Only” and treated in accordance with the procedures of Paragraph 6 below.

5. Designation Procedure for Deposition Testimony. With respect to deposition testimony, the witness under deposition, or his/her counsel, or any counsel representing any person or party at the deposition, may designate such testimony as “Confidential,” “Highly Confidential — Attorneys’ Eyes Only” or “Highly Confidential Source Code — Attorneys’ Eyes Only,” as appropriate, either on the record at the deposition or in writing to all parties within thirty (30) days after the mailing of the deposition transcript by the court reporter. The provisions of this paragraph may be invoked with respect to the witness’s entire deposition, or any portion thereof, at any time during the deposition or within thirty (30) days thereafter. Each party in receipt of a copy of a deposition transcript designated under this paragraph shall mark each copy of each portion of such Designated Material therein not already marked by the reporter “Confidential,” “Highly Confidential — Attorneys’ Eyes Only” or “Highly Confidential Source Code — Attorneys’ Eyes Only,” as provided for in Paragraph 4 above, and will thereafter destroy any unmarked copies of the transcript in its possession, custody or control. Until thirty (30) days after mailing of the transcript by the court reporter has passed, the entire transcript shall be treated as “Highly Confidential — Attorneys’ Eyes Only,” except that any portion of any

transcript reflecting material designated “Highly Confidential Source Code — Attorneys’ Eyes Only” shall be presumptively treated in accordance with the procedures of Paragraph 11 below.

6. Deposition Conduct. If Designated Material is referred to during the course of a deposition in this action, or if any question asked, answer given, or answer about to be given contains or is reasonably likely to contain Designated Material, then, in the case of material designated “Confidential,” any person who is not designated in Paragraph 9 below and is not the deponent, the deponent’s counsel (so long as deponent’s counsel is not subject to Paragraphs 9-11), or the reporter/videographer must leave the room during such portion of the deposition; in the case of material designated “Highly Confidential — Attorneys’ Eyes Only” or “Highly Confidential Source Code — Attorneys’ Eyes Only,” any person who is not designated in Paragraph 10 below with regard to “Highly Confidential — Attorneys’ Eyes Only” information or in Paragraph 11 below with regard to “Highly Confidential Source Code — Attorneys’ Eyes Only” information, and is not the deponent, the deponent’s counsel (so long as deponent’s counsel is not subject to Paragraphs 9-11), or the reporter/videographer must leave the room during such portion of the deposition. This paragraph shall not be interpreted to authorize disclosure of Designated Material to any person to whom disclosure is prohibited by this Protective Order.

Limits on Use of Designated Material.

7. Only For Purposes of This Litigation. Designated Material shall be used by a Receiving Party only for purposes of litigating or defending this action. Designated Material shall not be used for any other purpose. Specifically, Designated Material shall not be used by a Receiving Party for any other litigation, proceeding, acquisition, or any business or competitive purpose or function of any kind. No Designated Material shall, without prior written consent of

the Producing Party, be disclosed by a Receiving Party to anyone other than the personnel specified in Paragraphs 9-11 below or in any manner other than as described in this Protective Order. Designated Material shall be carefully maintained to preclude access by any persons who are not entitled to receive such information. Nothing in this Protective Order shall preclude any party or its counsel of record from disclosing or using, in any manner or for any purpose, any information or documents from the party's own files that the party itself has designated "Confidential," "Highly Confidential — Attorneys' Eyes Only" or "Highly Confidential Source Code — Attorneys' Eyes Only."

Patent Prosecution.

8. Bar From Prosecution.

(a) Absent written consent from the Producing Party, any individual representing or associated with a Party, that receives access to Designated Material, and any other individual who receives access to Designated Material, shall not be involved in the prosecution of patents or patent applications relating to the technical subject matter of patents asserted in this action and any patent or application claiming priority to or otherwise related to the patents asserted in this action, before any foreign or domestic agency, including the United States Patent Office (hereinafter, "Prosecution Bar"). For purposes of this paragraph, "prosecution" means directly or indirectly receiving invention disclosures, assessing patentability of said disclosures, or drafting, amending, advising, reviewing, or otherwise affecting the scope of patent claims.¹ To avoid any doubt, "prosecution" as used in this paragraph does not include representing a party challenging a patent before a domestic or foreign agency (including, but not limited to, a reissue

¹ Prosecution includes, for example, original prosecution, reissue and reexamination proceedings, *inter partes* review, and post-grant review.

protest, *inter partes* review (“IPR”), post-grant review (“PGR”), *ex parte* reexamination, or *inter partes* reexamination).

(b) In the event any Producing Party files a request for reexamination, *inter partes* review, covered business method review, or post grant review, or other similar proceeding before the USPTO (collectively, “USPTO Proceeding”), any individual subject to the provisions of Paragraph 8(a) shall be permitted to represent the patentee in a USPTO Proceeding only if the patentee agrees to forfeit all rights to amend the scope of any claim or to submit new claims in the USPTO Proceeding. Such forfeiture must be in writing and must be provided to the Producing Party prior to any substantive submissions to the USPTO on behalf of the patentee. Additionally, if any individual subject to the provisions of Paragraph 8(a) represents the patentee in a USPTO Proceeding pursuant to this paragraph, then patentee in said USPTO proceeding may be represented only by individuals subject to the provisions of Paragraph 8(a) and may not be represented in said USPTO proceeding by any individual who is not subject to the provisions of Paragraph 8(a).

(c) This Prosecution Bar shall begin when access to “Highly Confidential - Attorneys Eyes Only,” or “Highly Confidential Source Code – Attorneys’ Eyes Only” information is first received and shall end two (2) years after the settlement and dismissal of the Producing Party from this action or the final non-appealable termination of this action. No other provision of this protective order shall be construed as invoking a prosecution bar or prohibiting any acts taken to discharge the duty of candor and good faith.

(d) The parties may, on a case by case basis and in their sole discretion, by written agreement between the Producing Party and the Receiving Party, provide for disclosure of specified Designated Material to specified individual(s) in a manner that shall be exempt from the application of the prosecution bar of this section and/or from any additional restrictions under Paragraph 10.

Who May Access Designated Materials.

9. Access to “Confidential” Materials. Material designated “Confidential” and all information and material derived from it, including copies, recordings, summaries, abstracts, excerpts, analyses, compilations or the like, may, without the written consent of the Producing Party, be given, shown, made available or communicated in any way by the Receiving Party only to:

- a. counsel of record for the parties (each of whom is subject to the prosecution bar in Paragraph 8(a)); and professional litigation support vendors (including jury consultants) retained by them or by the parties;
- b. officers, directors, and employees (including in-house counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A).
- c. independent consultants or experts engaged by counsel or by the Parties in this litigation and their staffs, whether or not such experts are paid directly by a party, if cleared by the parties pursuant to Paragraph 13 of this Protective Order;
- d. independent persons or firms retained by any party for the purpose of producing graphic or visual aids, if cleared by the parties pursuant to Paragraph 13 of this Protective Order;

- e. professional court reporters and videographers to the extent Designated Material is disclosed at a deposition such person is transcribing or recording;
- f. at a deposition, with respect to documentary material, any deponent who authored or has previously received the particular Designated Material sought to be disclosed to that person, if the document on its face or the deponent's testimony indicates that person authored or received the document;
- g. at a deposition, any deponent employed at the time of the deposition by the party that designated the particular Designated Material;
- h. at a deposition, any person formerly employed by the Designating Party who was involved in the matters to which the Designated Material relates or refers;
- i. the Court and its staff;

10. Access to "Highly Confidential – Attorneys' Eyes Only" Materials. Material designated "Highly Confidential — Attorneys' Eyes Only" and all information and material derived from it, including copies, recordings, summaries, abstracts, excerpts, analyses, compilations or the like may, without the written consent of the Producing Party, be given, shown, made available or communicated in any way by the Receiving Party only to:

- a. counsel of record for the parties (each of whom is subject to the prosecution bar in Paragraph 8(a)); and professional litigation support vendors (including jury consultants) retained by them or by the parties;
- b. in-house counsel of the Receiving Party (i) who has no involvement in competitive decision-making, (ii) to whom disclosure is reasonably necessary for this litigation, (iii) who has signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

- c. independent consultants or experts engaged by counsel or by the parties in this litigation and their staffs, whether or not such experts are paid directly by a party, if cleared by the parties pursuant to Paragraph 13 of this Protective Order;
- d. independent persons or firms retained by any party for the purpose of producing graphic or visual aids, if cleared by the parties pursuant to Paragraph 13 of this Protective Order;
- e. professional court reporters and videographers to the extent Designated Material is disclosed at a deposition such person is transcribing or recording;
- f. at a deposition, with respect to documentary material, any deponent who authored or has previously received the particular Designated Material sought to be disclosed to that person, if the document on its face or the deponent's testimony indicates that person authored or received the document;
- g. at a deposition, any deponent employed at the time of the deposition by the party that designated the particular Designated Material;
- h. at a deposition, any person formerly employed by the Designating Party who was involved in the matters to which the Designated Material relates or refers; and
- i. the Court and its staff;

Other attorneys may be designated or added by consent of all parties.

11. Access to “Highly Confidential Source Code – Attorneys’ Eyes Only.” Protected Material designated as “Highly Confidential Source Code — Attorneys’ Eyes Only” will be subject to all of the protections afforded to “Highly Confidential — Attorneys’ Eyes Only” information and may be disclosed only to the individuals to whom “Highly Confidential — Attorneys’ Eyes Only” information may be disclosed. Nothing in this protective order shall be

construed so as to (i) obligate the parties to produce source code, (ii) serve as an admission that source code of any type is discoverable in this litigation, or (iii) waive any party's right to object on any ground to the production of source code. In the event that source code is produced in this litigation, source code designated “Highly Confidential Source Code — Attorneys’ Eyes Only” shall be afforded the following additional protections.

Disclosure and Review of Source Code.

12. Restrictions and Protections. “Source Code” means computer code, scripts, assembly, object code, source code listings and descriptions of source code, object code listings and descriptions of object code, and files that describe the hardware design of any programmable logic device (“PLD”), programmable logic array (“PLA”), application specific integrated circuit (“ASIC”), custom integrated circuit, or other similar device or integrated circuit, any of which are disclosed by a Producing Party. To the extent a Producing Party’s Source Code is discoverable in this action, it may be designated as “Highly Confidential Source Code – Attorneys’ Eyes Only,” and, in addition to the protections of Paragraph 11, shall be subject to the following additional restrictions and protections:

- a. Source Code in electronic format shall be made available for inspection in native format on a non-networked standalone computer (the “Source Code Computer”) in a secure room (the “Source Code Review Room”) at one of the following locations at the election of the Producing Party: (i) any office of the Producing Party’s outside counsel; (ii) any place of business of the Producing Party; or (iii) if mutually agreed to, any other location.
- b. Source Code will be made available so that it can be reviewed in a manner representative of how it is kept in the normal course of business.

- c. Unless a Producing Party chooses to disclose Source Code prior to request from the Receiving Party, the Receiving Party shall provide ten (10) business days' notice of the Source Code that it wishes to inspect prior to the first inspection of any Source Code.
- d. Once the Producing Party has initially made the Source Code available for inspection and review, it shall make it available for additional inspection upon three (3) business days' notice and, to the extent shorter notice is provided, the Producing Party agrees to use reasonable efforts to accommodate the Receiving Party's request. The Producing Party and the Receiving Party shall consult with one another in advance regarding particular Source Code review tools to be installed on the computer. The Producing Party agrees to make reasonable review tools available on the Source Code Computer to the Receiving Party upon reasonable request. If the requested review tools must be purchased, the Receiving Party shall be responsible for bearing the cost and for providing the installation files at least seven (7) business days in advance of the date upon which the Receiving Party wishes to have the requested review tools available for use on the Source Code Computer.
- e. No recordable media or recordable devices, including without limitation sound recorders, computers, cellular telephones, peripheral equipment, cameras, CDs, DVDs, or drives of any kind, shall be permitted into the Source Code Review Room. The taking of photographs or video shall not be permitted in the Source Code Review Room.
- f. Under no circumstances is the Source Code to be copied or transmitted in electronic form without the prior authorization of the Producing Party, except as otherwise

- provided herein. The Producing Party may enforce reasonable restrictions on the review of source code in electronic format, including making source code available on a stand-alone, non-networked computer, with input/output connections disabled such that source code cannot be removed, copied, or otherwise transferred from the Source Code Computer and the Source Code Computer cannot be connected to the Internet.
- g. The Receiving Party's expert(s) and/or consultant(s) may take notes relating to the Source Code, but may not copy the Source Code into the notes and may not take such notes electronically on the Source Code Computer itself.
 - h. The Producing Party may visually monitor the activities of the Receiving Party's representatives during any Source Code review, but only to ensure that no unauthorized electronic records of the Source Code are being created or transmitted in any way. Any observer used by the Producing Party shall be a reasonable distance away from the Receiving Party's representatives during the Source Code review to refrain from overhearing a whispered conversation (in order that the Receiving Party's representatives can quietly discuss the Source Code in the course of their review).
 - i. The Receiving Party shall identify all experts or consultants it requests be allowed to obtain access to the source code ("Proposed Recipient") at least (7) business days prior to any inspection, to permit the Producing Party time to object. The Receiving Party, as part of the identification procedure, shall provide the Producing Party with the information set forth in Paragraph 13. Outside counsel for the Receiving Party

retaining the expert or consultant shall also retain the expert's or consultant's executed Exhibit A in its files.

- j. No copies of all or any portion of the Source Code may leave the Source Code Review Room except as otherwise provided herein. Further, no other written or electronic record of the Source Code is permitted except as otherwise provided herein. The Receiving Party may request certain portions of the Producing Party's Source Code be printed to paper copies by identifying such portions to the Producing Party. The Receiving Party shall not request printed copies of the Source Code in order to review blocks of Source Code elsewhere in the first instance, i.e., as an alternative to reviewing that Source Code electronically on the Source Code Computer, as the Parties acknowledge and agree that the purpose of the protections herein would be frustrated by printing portions of code for review and analysis elsewhere. The Producing Party shall be required to print Source Code only when absolutely and directly necessary to prepare court filings or pleadings or other papers (including formal infringement contentions and a testifying expert's expert report). Within four (4) business days of a request, the Producing Party shall either (i) produce one copy of the requested pages to the Receiving Party, or (ii) inform the Requesting Party that it objects to the request as excessive or not submitted for a permitted purpose. Any request to print more than ten (10) pages of a continuous block of Source Code shall be presumed to be excessive. Any request to print more than one hundred (100) pages of Source Code, in aggregate, from any Producing Party shall be presumed to be excessive. If, after meeting and conferring, the Producing Party and the Receiving Party cannot resolve the objection, the Receiving

- Party shall be entitled to seek a Court resolution of whether the request is narrowly tailored and for a permitted purpose. The Producing Party will affix the proper Bates labeling and “Highly Confidential Source Code – Attorneys’ Eyes Only” designation to any printed copies produced to the Receiving Party.
- k. All persons viewing Source Code in the Source Code Review Room shall sign in each day they view Source Code and sign a log, if provided, that will include the names of persons who enter the Source Code Review Room to view the Source Code and when they enter and depart.
 - l. Unless otherwise agreed in advance by the Parties in writing, following each day in which inspection is done under this Order, the Receiving Party’s outside counsel and/or experts shall remove all notes, documents, and all other materials from the Source Code Review Room. The Producing Party shall not be responsible for any items left in the room following each inspection session, and the Receiving Party shall have no expectation of confidentiality for any items left in the room following each inspection session without a prior agreement to that effect.
 - m. The Receiving Party will not print, copy, remove, or otherwise transfer any Source Code from the Source Code Computer including, without limitation, copying, removing, or transferring the Source Code onto any recordable media or recordable device. The Receiving Party will not transmit any Source Code in any way from the Source Code Review Room.
 - n. The Receiving Party’s outside counsel and any person receiving a copy of any Source Code shall maintain and store any paper copies of the Source Code at their offices in a manner that prevents duplication of or unauthorized access to the Source Code,

- including, without limitation, storing the Source Code in a locked room or cabinet at all times when it is not in use.
- o. The Receiving Party's outside counsel may make no more than three (3) additional paper copies of any portions of the Source Code received from a Producing Party pursuant to Paragraph 12(j) above, not including copies attached to court filings, and shall maintain a log of all paper copies of the Source Code. The log shall include the names of the reviewers and/or recipients of paper copies and locations where the paper copies are stored. Upon seven (7) business days' advance notice to the Receiving Party by the Producing Party, the Receiving Party shall provide a copy of this log to the Producing Party.
 - p. For depositions, copies of Source Code that are marked as deposition exhibits shall not be provided to the Court Reporter or attached to deposition transcripts; rather, the deposition record will identify the exhibit by its production number(s). All paper copies of Source Code brought to the deposition shall be securely destroyed in a timely manner following the deposition.
 - q. Except as provided in this paragraph, absent express written permission from the Producing Party, the Receiving Party may not create electronic images, or any other images, or make electronic copies of the Source Code from any paper copy of Source Code for use in any manner (including by way of example only, the Receiving Party may not scan the Source Code to a PDF or photograph the code). Images or copies of Source Code shall not be included in correspondence between the Parties, and shall be omitted from pleadings and other papers whenever possible. References to production numbers shall be used instead. If a Party reasonably believes that it needs

to submit a portion of Source Code as part of a filing with the Court, the Parties shall meet and confer as to how to make such a filing while protecting the confidentiality of the Source Code and such filing will not be made absent (i) agreement from the Producing Party that the confidentiality protections will be adequate, or (ii) Court order. If a Producing Party agrees to produce an electronic copy of all or any portion of its Source Code or provide written permission to the Receiving Party that an electronic or any other copy needs to be made for a Court filing, the Receiving Party's communication and/or disclosure of electronic files or other materials containing any portion of Source Code (paper or electronic) shall at all times be limited solely to individuals who are expressly authorized to view Source Code under the provisions of this Order. Where the Producing Party has provided the express written permission required under this provision for a Receiving Party to create electronic copies of Source Code, the Receiving Party shall maintain a log of all such electronic copies of any portion of Source Code in its possession or in the possession of its retained consultants, including the names of the reviewers and/or recipients of any such electronic copies, and the locations where the electronic copies are stored. Additionally, any such electronic copies must be labeled "Highly Confidential Source Code – Attorneys' Eyes Only," as provided for in this Order.

Clearance Procedure Designated Materials to Consultants, Experts, or Graphics Firms.

13. Designated Material may be provided to an independent consultant or expert, or a firm retained for the purpose of producing graphics or other visual aids, as described in Paragraphs 9(b)-(c) and 10(b)-(c) only after ten (10) days following written notice to the Designating Party of the proposed disclosure to the consultant or expert. The written notice shall

also include a fully executed copy of the Acknowledgement attached hereto as Exhibit A, completed by the consultant, expert or graphics firm. With respect to the independent consultant or expert described in Paragraphs 9(b) and 10(b), a Receiving Party shall also provide a current resume or curriculum vitae including (i) any previous or current relationship (personal or professional) with any of the parties, (ii) a listing of all papers or articles written in the previous ten years, and (iii) a list of persons or entities by which or on behalf of which the consultant or expert has been retained in the preceding five (5) years, including a brief description of the subject matter of each such retention, the technology involved (if applicable), whether expert reports were submitted and what, if any, testimony was given. If the Designating Party objects, in writing, to disclosure of Designated Material to the consultant, expert or graphics firm within the ten (10) day period, no disclosure of Designated Material may be made to such person or firm pending resolution of the objection. If the parties cannot resolve the issue informally, the party objecting to the proposed disclosure may, within ten (10) business days of providing written objection to the party desiring to disclose Designated Materials to its expert or consultant, seek an appropriate order from the Court disqualifying the consultant or expert or protecting against the proposed disclosure to the consultant or expert. Until the Court rules on the matter, no disclosure of Designated Material to the consultant or expert shall be made.

Expert Discovery.

14. Drafts of expert reports, other writings generated by testifying experts with respect to their work in this case, and communications between outside counsel and experts relating to their work in this case are exempt from discovery in this or any other litigation, unless relied on by the expert as a basis for his or her expert testimony. Nothing in this Order shall be construed to limit the discovery or examination of expert witnesses concerning documents or

other information relied on by the expert as a basis for his or her final opinions in this case, or compensation received by such expert witness for his or her testimony, if any, including but not limited to disclosures required by Fed. R. Civ. P. 26(a)(2)(B)(vi).

Designation of Third Party Confidential Information.

15. The parties recognize that discovery of a third-party may involve receipt of that party's confidential information. Accordingly, a third party may designate confidential information produced by it "Confidential," "Highly Confidential — Attorneys' Eyes Only" or "Highly Confidential Source Code — Attorneys' Eyes Only" pursuant to the terms of this Protective Order and is subject to all applicable provisions of this Protective Order with respect to any material so designated (such Designated Material is hereinafter referred to specifically as "Third Party Confidential Information"). In order to ensure adequate protection of Third Party Confidential Information disclosed during depositions where counsel for the third party in question is not present, such as the deposition of an expert witness retained by a party, the party that issued the subpoena to the third party or otherwise requested Third Party Confidential Information from the third party may provisionally designate any portion of the deposition transcript discussing Third Party Confidential Information "Confidential," "Highly Confidential - Attorneys' Eyes Only" or "Highly Confidential Source Code - Attorneys' Eyes Only" in accordance with the procedures of Paragraph 4 and will promptly notify the third party in writing of the provisional designation, such that the third party can confirm the appropriateness of the designation and take such other measures it deems necessary to protect the confidentiality of its information.

Filing Designated Material with the Court.

16. If a party wishes to use any Designated Material in any affidavits, briefs, memorandum of law, or other papers filed in this court in this litigation, such papers or transcript may be filed under seal only upon separate, specific motion and later order of the court. The party seeking to file the Protected Material under seal in this court must follow the procedures set forth in D. Kan. Rule 5.4.6.

Inadvertent Designation.

17. A Producing Party that inadvertently fails to designate an item pursuant to this Protective Order at the time of the production shall make a correction promptly after becoming aware of such error. Such correction and notice thereof shall be made in writing accompanied by substitute copies of each item, appropriately designated. Those individuals who reviewed the documents or information prior to notice of the failure to designate by the Producing Party shall, to the extent reasonably feasible, return to the Producing Party or destroy all copies of such undesignated documents and shall honor the provisions of this Protective Order with respect to the use and disclosure of any confidential information contained in the undesignated documents, from and after the date of designation.

Improper Disclosure.

18. If information designated pursuant to this Protective Order is disclosed to any person other than in the manner authorized by this Protective Order, the party responsible for this disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the Designating Party, without prejudice to all other rights and remedies of the Designating Party, and shall make every effort to prevent further improper disclosure.

Objections to Designations.

19. If at any time during the pendency of this litigation any party claims that information is not appropriately designated (the “Objecting Party”), the Objecting Party may serve notice of objection on the Designating Party. Within ten (10) calendar days of receiving such notice, the Designating Party shall respond in writing. If the Designating Party and the Objecting Party cannot resolve the dispute, the Objecting Party may move for an order from the Court for re-designation of the disputed material. If the Objecting Party moves for an order from the Court for re-designation, the Objecting Party shall bear the burden to establish that the original designation does not comply with the guidelines and limitations described in this Order. Until or unless the parties formally agree in writing to the re-designation of such material, or until such time as the material is re-designated by order of the Court, all Designated Materials will continue to receive confidential treatment pursuant to the terms of this Protective Order in accordance with the designation chosen by the Designating Party.

Use of Designated Material at Trial or Other Court Proceedings.

20. This Protective Order, insofar as it restricts the dissemination and use of Designated Material, shall not apply to the introduction of evidence at trial or the display or discussion of Designated Material during hearings held by the Court, including but not limited to claim construction and summary judgment hearings. However, any non-disclosing party intending to use Designated Material at trial or during hearings must provide notice of its intent to the Designating Party 24 hours in advance and any party or third party may seek appropriate court orders, including without limitation, an order which restricts the use of any material covered by this Protective Order during the trial or other Court proceeding, that requests that portions of the transcript be sealed, or restricts access of the public to certain portions of the trial or other Court proceeding.

Inadmissibility of Designation.

21. Unless the Parties stipulate otherwise, evidence of the existence or nonexistence of a designation under this Protective Order shall not be admissible for any purpose, nor shall the designation or acceptance of any information designated pursuant to this Protective Order constitute an admission or acknowledgement that the material so designated is in fact proprietary, confidential, or a trade secret.

Privilege Logs.

22. The parties shall confer in good faith to reach agreement on reasonable deadline(s) for the exchange of privilege logs. The parties agree that such logs need not be produced simultaneously with the production of documents and contemplate that such logs shall instead be produced at a reasonable time thereafter. With respect to information generated after the filing of the complaint, parties are not required to include any such information in privilege logs and the absence of any reference to such materials in such logs shall not be deemed to effect a waiver of any applicable claim of privilege or attorney work product.

Inadvertent Production of Privileged Materials.

23. Counsel shall make reasonable efforts to identify materials protected by the attorney-client privilege or the work product doctrine prior to the disclosure of any such materials. The inadvertent production of any document or thing shall be without prejudice to any claim that such material is protected by the attorney-client privilege or protected from discovery as work product and no Producing Party shall be held to have waived any rights thereunder by inadvertent production. If a Producing Party discovers that materials protected by the attorney-client privilege or work product doctrine have been inadvertently produced, counsel for the Producing Party shall promptly give written notice to counsel for the Receiving Party. The

Receiving Party shall take prompt steps to ensure that all known copies of such material are returned to the Producing Party or destroyed, and any notes or summaries, other than those expressly permitted in this section, referring to or relating to any such materials are destroyed, with such destruction certified in writing. Nothing herein shall prevent the Receiving Party from preparing a record for its own use containing the date, author, address(es), and such other information as is reasonably necessary to identify the inadvertently produced material and generally describe its nature to the Court in any motion to compel production of such material. Such a record of the identity and nature of the material may not be used for any purpose other than preparation of a motion to compel in this Action. After return of the inadvertently produced material the Receiving Party may afterward contest such claims of privilege or work product as if the materials had not been produced, but shall not assert that a waiver occurred as a result of the production.

Other Proceedings.

24. By entering this order and limiting the disclosure of information in this case, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes subject to a motion to disclose another party's information designated as confidential pursuant to this order shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed.

Notification of Subpoena, Document Request, or Order in Other Litigation.

25. If a Receiving Party is served with a subpoena, document request, or order issued in other litigation that would compel disclosure of any information or items designated by another party to this action as “Confidential,” “Highly Confidential — Attorneys’ Eyes Only” or

“Highly Confidential Source Code — Attorneys’ Eyes Only,” the Receiving Party must so notify the Designating Party in writing as soon as reasonably practicable and in no event more than five (5) days after receiving the subpoena, document request, or order. Such notification must include a copy of the subpoena, document request, or order. The Designating Party shall bear the burden and expense of seeking to protect the requested material from production in the other litigation.

Final Disposition of Designated Material.

26. Within sixty (60) days following termination of this litigation by settlement or final judgment, including exhaustion of all appeals, the originals and all copies of Designated Material shall be either destroyed or turned over to the Producing Party, or to its counsel. If Designated Material is destroyed pursuant to this paragraph, counsel shall provide to opposing counsel a certification identifying when and how the destruction was performed. Notwithstanding this paragraph, outside counsel of record may retain pleadings, attorney and consultant work product, and depositions (with exhibits) for archival purposes.

Survival.

27. The terms of this Protective Order shall survive termination of this litigation.

Assent to the entry of the foregoing Protective Order is hereby given by the parties by and through their attorneys.

IT IS SO ORDERED this 20th day of June, 2016.

s/ Teresa J. James
Teresa J. James
United States Magistrate Judge

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

DIGITAL ALLY, INC.

Plaintiff,

v.

Case No. 2:16-cv-02032-CM-TJJ

TASER INTERNATIONAL, INC.

Defendant.

**ACKNOWLEDGMENT AND AGREEMENT TO BE
BOUND BY THE PROTECTIVE ORDER**

I, _____, declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the District of Kansas in this matter. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the District of Kansas for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____

EXHIBIT B

THE LAW OFFICE OF LESLIE KULICK, LLC
11117 Juniper Drive
Leawood, KS 66211
913 451-7927
913 481-7927
kulicklaw@gmail.com

March 10, 2020

BY FEDEX STANDARD OVERNIGHT

Jones Day
c/o Ryan T. Liddell
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

LETTER COPIED BY EMAIL TO:

Aaron M. Healey, ahealey@jonesday.com
Jeremy P. Morrison, jmorrison@jonesday.com

**RE: AXON SUBPOENA DUCES TECUM IN THE MATTER OF AXON
ENTERPRISE, INC. ("AXON") AND SAFARILAND, LLC, NO.
9389**

Gentlemen:

As you know, our clients are currently parties to the legal action entitled *Digital Ally, Inc. v. Taser International, Inc.*, Case 2:16-cv-02032 (D. Kan.), wherein very substantial discovery has been submitted by Digital Ally to Axon. I have checked with lead counsel for Digital Ally in that matter, and he has informed me that in that case, Axon has already requested and received nearly all of the information you are now requesting from Digital Ally in the above Subpoena.

Nonetheless, my client, at great burden of time, expense, and business disruption, has prepared the attached Response to Axon's Specifications ## 2, 3, 11, and 12, and has gathered the unprivileged documents that it can access that are responsive to your Subpoena, Specifications ## 2, 3, 11, and 12, the limit to which we have previously agreed. Digital Ally, in lieu of reproducing already produced documents, also gives you permission to use the information produced to your client by my client in *Digital Ally, Inc. v. Taser International, Inc.*, subject to appropriate confidentiality protections, including your agreement that the confidentiality of those documents will be maintained as required by the protective order in *Digital Ally, Inc. v. Taser International, Inc.*, as well as the protective order in the FTC action. Digital Ally is going to provide the FTC with a thumb drive containing the discovery Digital Ally provided to Axon in *Digital Ally, Inc. v. Taser International, Inc.*, and it is my understanding that you can obtain a copy of those materials through the FTC, as well as through your client.

THE LAW OFFICE OF LESLIE KULICK, LLC

11117 Juniper Drive

Leawood, KS 66211

913 451-7927

913 481-7927

kulicklaw@gmail.com

March 10, 2020

BY ELECTRONIC TRANSMISSION

J. Alexander Ansaldo
Federal Trade Commission
400 7th Street SW
Washington, D.C. 20024

RE: COMPLAINT COUNSEL’S SUBPOENA *DUCES TECUM* IN THE MATTER OF AXON ENTERPRISE, INC. AND SAFARILAND, LLC. NO. 9389

Dear Mr. Ansaldo:

As you know, I represent Digital Ally, Inc., a provider of BWC and DEM products to customers including law enforcement entities, to whom you have sent a non-party Subpoena *Duces Tecum* in the above action.

Although your original subpoena requests for production (“Requests”) were numerous, given the short response time, you have requested that my client provide responsive documents to Request #8 and Request #9 of the Complaint Counsel’s Subpoena. I have noted that Requests #8 and #9 seek substantially similar information to the requests for production that Axon Enterprise, Inc. is also seeking. I am therefore sending both of you the same documents, with yours to be submitted through the link you have sent to me today, March 10, 2020.

I have noted that your Request # 11 seeks all documents relating to any litigation between Axon and my client. In fact, my client is currently in litigation with Axon in the case titled *Digital Ally, Inc. v. Taser International, Inc.*, Case 2:16-cv-02032 (D. Kan.), originally containing patent and anti-trust claims. Document exchanges in that action have been numerous, and Axon has access to such information, which Digital Ally has no objection to Axon producing to the FTC, as long as confidentiality of the documents is maintained. I will also send you a thumb drive containing the discovery that Digital Ally has produced to Axon in that case by FedEx Standard Overnight, either today or tomorrow, which is hereby being designated “Confidential” pursuant to the Protective Order Paragraph 6. It is my understanding that nearly all of the information the parties in the above FTC action are now requesting from Digital Ally in their Subpoenas is included in that discovery, which we have enlarged and updated to current time in the new production being sent today.

[REDACTED]

EXHIBIT C

Redacted

EXHIBIT D

DECLARATION OF STANTON E. ROSS

I, Stanton E. Ross, declare and state as follows:

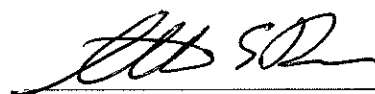
1. I am over eighteen years of age, make this Declaration on my personal knowledge and, if called as a witness, I would testify to the facts set forth herein.
2. I am the Chairman and Chief Executive Officer of Digital Ally, Inc., (“Digital Ally”), non-party movant in the above-entitled action.
3. Digital Ally received two third-party *Subpoenas Duces Tecum* and one *Subpoena Ad Testificandum* in the above entitled Commission Enforcement Action, and fully responded to and cooperated with all the subpoenas.
4. Among the many documents and testimony Digital Ally provided to the FTC and Axon in this action are the 17 competitively-sensitive, confidential business documents (the “Confidential Documents”) listed in the Motion for *In Camera* Treatment filed by counsel for Digital Ally.
5. The Confidential Documents contain proprietary, secret, competitively-sensitive data regarding Digital Ally’s sales, costs, revenue, borrowings and financial standing, marketing strategies, trade secret and intellectual property information, strictly confidential corporate merger, sale, and acquisition strategies, and other secret and competitively-sensitive information to the business of Digital Ally, such that if they were subject to public disclosure, will likely cause serious financial and competitive injury to the company and its investors.
6. The confidentiality of the Confidential Documents is closely guarded by Digital Ally, and are shared, and have been shared, only to Digital Ally’s officers, directors, auditors, and

certain receiving parties in the case of *Digital Ally, Inc. vs Taser International, Inc.*, case no. 2:16-cv-02032 (D. Kan.) (“Digital Ally v. Taser”), on conditions of strict confidentiality. If shared beyond Digital Ally’s two officers and three outside directors, they are shared only with a limited number of Digital Ally agents or business partners who have agreed, and agree, to keep the documents strictly confidential.

7. Digital Ally has exerted significant financial resources and effort to maintain the secrecy of the Confidential Information by having Non-Disclosure Agreements in place before sharing its confidential and proprietary information with other companies with whom Digital Ally does business.
8. Digital Ally has also taken great care in this FTC Enforcement Action and in Digital Ally v. Taser to mark the Confidential Documents as “Confidential” and “Attorneys’ Eyes Only” when disclosing them to the parties in those actions.
9. Finally, Digital Ally is now filing this motion for *in camera* treatment for the Confidential Documents.
10. Digital Ally has expended enormous time, energy, and financial resources in organizing, providing and maintaining the confidentiality of the Confidential Documents in this FTC Enforcement Action and in Digital Ally v. Taser, wherein significantly in excess of a thousand pages of documents have been produced by Digital Ally. Such investment of time and money is significant for a small publicly traded company such as Digital Ally.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that to the best of my knowledge, the foregoing is true and correct.

Executed on this 23th day of September, 2020.



Stanton E. Ross

EXHIBIT E

From: **Davis, Llewellyn** <ldavis@ftc.gov>
Date: Fri, Sep 11, 2020 at 1:00 PM
Subject: In Re Axon Docket No. 9389 In Camera Notice—Digital Ally
To: Leslie Kulick <kulicklaw@gmail.com>
Cc: Glover, Christian <cgllover@ftc.gov>, Verwilt, Hana <hverwilt@ftc.gov>, Ansaldo, Alexander <jansaldo@ftc.gov>

Dear Leslie:

Pursuant to the January 30 and July 10 Scheduling Orders in In the Matter of Axon Enterprise, Inc., Docket No. 9389 (attached for your reference), we are providing notice that Complaint Counsel intends to offer the documents listed on Attachment A into evidence in the administrative trial set to begin October 13, 2020. All exhibits admitted into evidence become part of the public record unless Administrative Law Judge D. Michael Chappell grants *in camera* status.

For documents or testimony that include sensitive or confidential information that you do not want on the public record, you must file a motion by **September 23, 2020** seeking *in camera* status or other confidentiality protections pursuant to 16 C.F.R. §§ 3.45 and 4.10(g). Judge Chappell may order that materials, whether admitted or not as evidence, be placed *in camera* only after finding that their public disclosure will likely result in a clearly-defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment. Motions for *in camera* treatment of evidence to be introduced at trial must meet the strict standards set forth in 16 C.F.R. § 3.45 and explained in *In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157 (Nov. 22, 2000); and *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006).

Pursuant to Additional Provision 13 of the Scheduling Order, motions for *in camera* treatment also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the material, *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004), and one copy of the documents for which *in camera* treatment is sought must be provided to the Administrative Law Judge.

You can find examples of previously filed motions for *in camera* treatment and Judge Chappell's corresponding orders in the July and August 2018 portions of the following docket: <https://www.ftc.gov/enforcement/cases-proceedings/171-0231/otto-bock-healthcarefreedom-innovations>

Sincerely,

Llew Davis

Llewellyn O. Davis

Attorney

Mergers II, Bureau of Competition

Federal Trade Commission

400 7th Street SW

Washington, DC 20024

(202) 326-3394

ldavis@ftc.gov

EXHIBIT F

From: **Bryan, Kelsey S.** <kbryan@jonesday.com>

Date: Fri, Sep 11, 2020 at 11:18 PM

Subject: In re Axon Enterprise Inc., Dkt. No. 9389 - Notice of Intent to Offer Documents

To: kulicklaw@gmail.com <kulicklaw@gmail.com>

Cc: Healey, Aaron M. <ahealey@jonesday.com>, Belott, Debra R. <dbelott@jonesday.com>, McEvoy, Julie E. <jmcevoy@jonesday.com>, Baumann, Jordan M. <jbaumann@jonesday.com>, Liddell, Ryan T. <rliddell@jonesday.com>

Leslie,

I am writing to provide formal notice, pursuant to Rule 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.45(b), that Axon intends to offer into evidence in the administrative trial in the above-captioned matter the documents and testimony referenced in the attached document (Attachment A). Please use the below link to access the documents referenced in Attachment A. The administrative trial is scheduled to begin on October 13, 2020.

All exhibits and testimony admitted into evidence become part of the public record unless in camera status is granted by Administrative Law Judge D. Michael Chappell. For documents or testimony which include sensitive or confidential information that you do not want on the public record, you must file a motion seeking in camera status or other confidentiality protections pursuant to 16 C.F.R. §§ 3.45, 4.10(g). Motions for in camera treatment must meet the strict standard set forth in 16 C.F.R. § 3.45, which provides that "[t]he Administrative Law Judge shall order that such material, whether admitted or rejected, be placed in camera only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting in camera treatment or after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45. The strict standard is further explained in *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018) and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017). Motions for in camera treatment must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians* 2004 FTC LEXIS 109, *3-4 (April 23, 2004). You must also provide one copy of the documents for which in camera treatment is sought to the Administrative Law Judge.

Under the current Scheduling Order dated July 10, 2020, the deadline for filing motions seeking in camera treatment of proposed trial exhibits is September 30, 2020.

Feel free to contact me if you have any questions.

Best,

Kelsey

Kelsey S. Bryan
Associate
JONES DAY® - One Firm Worldwide®
555 South Flower Street

Fiftieth Floor
Los Angeles, CA 90071
Office +1.213.243.2541

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EXHIBIT G

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of

**Axon Enterprise, Inc.,
a corporation,**

And

**Safariland, LLC,
a corporation.**

PUBLIC

The Honorable D. Michael Chappell

Docket No. D9389

[PROPOSED] ORDER ON NON-PARTY DIGITAL ALLY, INC.’S

MOTION FOR *IN CAMERA* TREATMENT PURSUANT TO FTC RULE 3.45

Upon consideration of non-party Digital Ally Inc’s Motion for *In Camera* Treatment, it is HEREBY ORDERED that the following documents and deposition testimony listed below are to be provided *in camera* treatment from the date of this Order, and it is further ORDERED that these documents may only be viewed by those permitted to view it under the Protective Order entered in this matter:

1. *In camera* treatment is GRANTED for PX50012, PX50068-015 (aka PX50062), PX50063, and the designated portions of PX60013-001 for five years.
2. *In camera* treatment is GRANTED for PX50059 and PX50068-001 through PX50068-014, and PX50068-016 through PX50068-027 on a permanent basis.
3. *In camera* treatment is GRANTED for PX50060 and PX50111 on a permanent basis.
4. *In camera* treatment is GRANTED for PX50115; PX70053; page 4 of PX50065; and PX50066 on a permanent basis; *in camera* treatment is GRANTED for pages 1-3 of PX50065 for five years.

5. *In camera* treatment is GRANTED for RX001204 for five years.
6. *In camera* treatment is GRANTED for PX50116-001, PX50116-002, PX50116-008, PX50116-018, PX50116-019, PX50116-020, PX50116-021, PX50116-022, PX50116-023, PX50116-024, PX50116-025, PX50116-027 PX50116-028, and PX50116-030 for 5 years; PX50116-016 and PX50116-026 (proprietary customer information and confidential employment matters) are granted *in camera* status on a permanent basis.
7. *In camera* treatment is GRANTED for PX61002, paragraphs 4-9 for five years.
8. *In camera* treatment is GRANTED for the following deposition transcript excerpts from PX81038 for five years:
- 25:23-26:1; 26:20-28:9; 30:14-33:3; 33:23-34:22; 35:23-38:1; 38:21-39:16; 40:9-40:11; 40:23-43:3; 43:9-43:25; 44:7-44:15; 44:21-46:21; 47:3-47:8; 48:1-49:25; 51:7-51:19; 51:24-53:21; 54:10-55:6; 55:17-55:22; 57:15-57:19; 60:2-61:11; 64:4-65:1; 65:20-65:24; 71:5-72:19; 73:16-73:17; 73:22-75:23; 77:19-78:7; 79:22-79:25; 80:14-80:16; 81:7-81:22; 82:3-82:4; 82:9-82:12; 82:17-83:6; 83:21-84:11; 84:23-85:10; 85:22-86:23; 87:7-87:20; 88:1-90:4; 91:1-93:18; 93:24-94:1; 94:13-98:4; 98:17-99:18; 100:3-102:7; 103:14-104:9; 104:20-105:8; 106:6-121:17; 122:3-124:8; 124:20-126:7; 129:2-129:7; 129:15-129:22; 132:17-133:4; 133:12-133:14; 134:7-134:14; 135:5-136:14; 138:15-141:13; 142:5-143:24; 145:4-145:6; 146:2-147:10; 148:14-149:17; 150:16-150:18; 151:16-151:19; 152:7-152:11; 155:20-156:14; 156:23-157:14.

IT IS SO ORDERED.

D. Michael Chappell Chief Administrative Law Judge

Dated: _____, 2020.