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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ORTHOPAEDIC HOSPITAL,
Plaintiff,
v.
DJO GLOBAL, INC. and DJO
FINANCE, LLC,
Defendants.

Case No.: 3:19-cv-00970-JLS-AHG
PROTECTIVE ORDER
[ECF No. 42]

The Court recognizes that at least some of the documents and information (“materials”) being sought through discovery in the above-captioned action are, for competitive reasons, normally kept confidential by the parties. The parties have agreed to be bound by the terms of this Protective Order (“Order”) in this action.

The materials to be exchanged throughout the course of the litigation between the parties may contain trade secret or other confidential research, technical, cost, price, marketing or other commercial information, as is contemplated by Federal Rule of Civil Procedure 26(c)(1)(G). The purpose of this Order is to protect the confidentiality of such materials to the maximum extent practical during the litigation. THEREFORE:

1 **1. DEFINITIONS**

2 **1.1. Challenging Party:** a Party or Non-Party that challenges the designation
3 of information or items under this Order.

4 **1.2. “CONFIDENTIAL” Information or Items:** information (regardless of
5 how it is generated, stored, or maintained) or tangible things that qualify for
6 protection under Federal Rule of Civil Procedure 26(c).

7 **1.3. Counsel (without qualifier):** Outside Counsel of Record and Designated
8 In-House Representatives (as well as their support staff, temporary staff, professional
9 vendors, or others supporting Counsel).

10 **1.4. Designated In-House Representative:** an individual who has been
11 qualified to receive HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY
12 information pursuant to Paragraph 7.1(a) and/or 7.1(b).

13 **1.5. Designating Party:** a Party or Non-Party that designates information or
14 items that it produces in disclosures or in responses to discovery as
15 “CONFIDENTIAL,” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
16 ONLY.”

17 **1.6. Disclosure or Discovery Material:** all items or information, regardless
18 of the medium or manner in which it is generated, stored, or maintained (including,
19 among other things, testimony, transcripts, and tangible things), that are produced or
20 generated in disclosures or responses to discovery in this matter.

21 **1.7. Expert:** a person who (1) has been retained by a Party or its counsel to
22 serve as an expert witness or as a consultant in this action, (2) is not a current
23 employee of a Party or of a Party’s competitor, and (3) at the time of retention, is not
24 anticipated to become an employee of a Party or of a Party’s competitor.

25 **1.8. “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”**
26 **Information or Items:** extremely sensitive “Confidential Information or Items,”
27 disclosure of which to another Party or Non-Party would create a substantial risk of
28 serious harm that could not be avoided by less restrictive means.

1 **1.9. Non-Party:** any natural person, partnership, corporation, association, or
2 other legal entity not named as a Party to this action.

3 **1.10. Outside Counsel of Record:** attorneys who are not employees of a party
4 to this action but are retained to represent or advise a party to this action and have
5 appeared in this action on behalf of that party or are affiliated with a law firm which
6 has appeared on behalf of that party.

7 **1.11. Party:** any party to this action, including all of its officers, directors,
8 employees, consultants, retained experts, and Outside Counsel of Record (and their
9 support staffs).

10 **1.12. Producing Party:** a Party or Non-Party that produces Disclosure or
11 Discovery Material in this action.

12 **1.13. Professional Vendors:** persons or entities that provide litigation support
13 services (*e.g.*, photocopying, videotaping, translating, preparing exhibits or
14 demonstrations, and organizing, storing, or retrieving data in any form or medium)
15 and their employees and subcontractors.

16 **1.14. Protected Material:** any Disclosure or Discovery Material that is
17 designated as “CONFIDENTIAL,” or “HIGHLY CONFIDENTIAL –
18 ATTORNEYS’ EYES ONLY.”

19 **1.15. Receiving Party:** a Party that receives Disclosure or Discovery Material
20 from a Producing Party.

21 **2. SCOPE**

22 The protections conferred by this Order cover not only Protected Material (as
23 defined above), but also (1) any information copied or extracted from Protected
24 Material; (2) all copies, excerpts, summaries, or compilations of Protected Material;
25 and (3) any testimony, conversations, or presentations by Parties or their Counsel that
26 might reveal Protected Material. However, the protections conferred by this Order
27 do not cover the following information: (a) any information that is in the public
28 domain at the time of disclosure to a Receiving Party or becomes part of the public

1 domain after its disclosure to a Receiving Party as a result of publication not
2 involving a violation of this Order, including becoming part of the public record
3 through trial or otherwise; and (b) any information known to the Receiving Party
4 prior to the disclosure or obtained by the Receiving Party after the disclosure from a
5 source who obtained the information lawfully and under no obligation of
6 confidentiality to the Designating Party. Any use of Protected Material at trial shall
7 be governed by a separate agreement or order.

8 **3. DURATION**

9 Even after final disposition of this litigation, the confidentiality obligations
10 imposed by this Order shall remain in effect until a Designating Party agrees
11 otherwise in writing or a court order otherwise directs. Final disposition shall be
12 deemed to be the later of (1) dismissal of all claims and defenses in this action, with
13 or without prejudice; and (2) final judgment herein after the completion and
14 exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,
15 including the time limits for filing any motions or applications for extension of time
16 pursuant to applicable law.

17 **4. DESIGNATING PROTECTED MATERIAL**

18 **4.1. Exercise of Restraint and Care in Designating Material for** 19 **Protection**

20 Each Party or Non-Party that designates information or items for protection
21 under this Order must take care to limit any such designation to specific material that
22 qualifies under the appropriate standards. To the extent it is practical to do so, the
23 Designating Party must designate for protection only material, documents, items, or
24 oral or written communications that qualify – so that other material, documents,
25 items, or communications for which protection is not warranted are not swept
26 unjustifiably within the ambit of this Order.

27 Mass, indiscriminate, or routinized designations are prohibited. Designations
28 that are shown to be clearly unjustified or that have been made for an improper

1 purpose (*e.g.*, to unnecessarily encumber or retard the case development process or
2 to impose unnecessary expenses and burdens on other parties) expose the
3 Designating Party to sanctions.

4 If it comes to a Designating Party's attention that information or items that it
5 designated for protection do not qualify for protection at all or do not qualify for the
6 level of protection initially asserted, that Designating Party must promptly notify all
7 other Parties that it is withdrawing the mistaken designation.

8 **4.2. Manner and Timing of Designations**

9 Except as otherwise provided in this Order (*see, e.g.*, second paragraph of
10 Paragraph 4.2(a) below), or as otherwise stipulated or ordered, Disclosure or
11 Discovery Material that qualifies for protection under this Order must be clearly so
12 designated before the material is disclosed or produced in accordance with the
13 paragraphs 4.2(a)–(d).

14 a) **Documents**

15 For information in documentary form (*e.g.*, paper or electronic documents, but
16 excluding transcripts of depositions or other pretrial or trial proceedings), that the
17 Producing Party affix the legend “CONFIDENTIAL” or “HIGHLY
18 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” to each page that contains
19 protected material.

20 A Party or Non-Party that makes original documents or materials available for
21 inspection need not designate them for protection until after the inspecting Party has
22 indicated which material it would like copied and produced. During the inspection
23 and before the designation, all of the material made available for inspection shall be
24 deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the
25 inspecting Party has identified the documents it wants copied and produced, the
26 Producing Party must determine which documents, or portions thereof, qualify for
27 protection under this Order. Then, before producing the specified documents, the
28 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or

1 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) to each page that
2 contains Protected Material.

3 **b) Testimony**

4 For testimony given in deposition or in other pretrial or trial proceedings that
5 the Designating Party identifies on the record before the close of the deposition,
6 hearing, or other proceeding as containing Protected Material, the Designating Party
7 shall identify the protected testimony and specify the level of protection being
8 asserted. When it is impractical to identify separately each portion of testimony that
9 is entitled to protection and it appears that substantial portions of the testimony may
10 qualify for protection, the Designating Party may specify that the entire transcript
11 shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
12 ATTORNEYS’ EYES ONLY.”

13 The Designating Party may also send written notice of how portions of the
14 transcript of the testimony is designated within thirty (30) days of receipt of the final
15 transcript of the testimony. Counsel shall exercise discretion in designating portions
16 of a deposition under this Protective Order, and shall only designate those portions
17 containing the disclosure of information properly entitled to protection under this
18 Protective Order. If no indication on the record is made, all information disclosed
19 during a deposition shall be deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’
20 EYES ONLY” until the time within which it may be appropriately designated as
21 provided for herein has passed. Any Party that wishes to disclose the transcript, or
22 information contained therein, may provide written notice of its intent to treat the
23 transcript as non-confidential, after which time, any Party that wants to maintain any
24 portion of the transcript as confidential must designate the confidential portions
25 within fourteen (14) days, or else the transcript may be treated as non-confidential.
26 Any Protected Material that is used in the taking of a deposition shall remain subject
27 to the provisions of this Protective Order, along with the transcript pages of the
28 deposition testimony dealing with such Protected Material. In such cases, the court

1 reporter shall be informed of this Protective Order and shall be required to operate in
2 a manner consistent with this Protective Order. In the event the deposition is
3 videotaped, the original and all copies of the videotape shall be marked by the video
4 technician to indicate that the contents of the videotape are subject to this Protective
5 Order, substantially along the lines of “SUBJECT TO PROTECTIVE ORDER”
6 along with the appropriate “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
7 ATTORNEYS’ EYES ONLY” designation. Counsel for any Producing Party shall
8 have the right to exclude from oral depositions any person who is not authorized by
9 this Protective Order to receive or access Protected Material based on the designation
10 of such Protected Material. This right of exclusion does not include the deponent,
11 deponent’s counsel, the reporter, or videographer (if any). Such right of exclusion
12 shall be applicable only during periods of examination or testimony regarding such
13 Protected Material.

14 Parties shall give the other parties notice if they reasonably expect a deposition,
15 hearing, or other proceeding to include Protected Material so that the other parties
16 can ensure that only authorized individuals permitted access to Protected Material
17 are present at those proceedings. The use of a document as an exhibit at a deposition
18 shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY
19 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

20 Transcripts containing Protected Material shall have an obvious legend on the
21 title page that the transcript contains Protected Material, and the title page shall be
22 followed by a list of all pages (including line numbers as appropriate) that have been
23 designated as Protected Material and the level of protection being asserted by the
24 Designating Party or alternatively indicate that the entire transcript is being
25 designated as Protected Material. The Designating Party shall inform the court
26 reporter of these requirements.

27 **c) Native Files**

28 Where electronic files and documents are produced in native electronic format,

1 such electronic files and documents shall be designated for protection under this
2 Order by appending to the file names or designators information indicating whether
3 the file contains “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –
4 ATTORNEYS’ EYES ONLY” Information, or shall use any other reasonable
5 method for so designating Protected Materials produced in electronic format. When
6 electronic files or documents are printed for use at deposition, in a court proceeding,
7 or for providing in printed form to a Designated In-House Representative or expert
8 or consultant pre-approved pursuant to Section 7, the party printing the electronic
9 files or documents shall affix a legend to the printed document corresponding to the
10 designation of the Designating Party and including the production number and
11 designation associated with the native file.

12 **d) Other Produced Information**

13 For information produced in some form other than documentary and for any
14 other tangible items, the Producing Party shall affix in a prominent place on the
15 exterior of the container or containers in which the information or item is stored the
16 legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
17 EYES ONLY.”

18 **4.3. Inadvertent Failures to Designate**

19 To the extent consistent with applicable law, the inadvertent or unintentional
20 disclosure of Confidential Information that should have been designated as Protected
21 Material, regardless of whether the information, document, or thing was so
22 designated at the time of disclosure, shall not be deemed a waiver in whole or in part
23 of a Party’s claim that the information, document, or thing be designated as Protected
24 Material, either as to the specific information, document, or thing disclosed or as to
25 any other material or information concerning the same or related subject matter. Such
26 inadvertent or unintentional disclosure may be rectified by the Producing Party
27 promptly notifying in writing, within a reasonable time after discovery of the
28 unintentional disclosure, counsel for all Parties to whom the material was disclosed

1 that the material should have been designated Protected Material. Such notice shall
2 constitute a designation of the information, document, or thing as Protected Material
3 under this Order. The Producing Party shall provide copies of the properly marked
4 information along with the written notice, or as soon thereafter as practicable. Upon
5 timely correction of a designation, the Receiving Party shall return or destroy said
6 undesignated Protected Material to the extent practicable and shall not retain copies
7 thereof and shall undertake a best effort to correct the disclosure of such Protected
8 Material contrary to the re-designation, including informing any unauthorized
9 recipients of the existence and terms of this Order and demanding the return of the
10 Protected Material. However, disclosure of such Protected Material prior to the
11 receipt of notice under this paragraph shall not be deemed a violation of this Order.

12 **5. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

13 **5.1. Timing of Challenges**

14 Any Party or Non-Party may challenge a designation of confidentiality at any
15 time. Unless a prompt challenge to a Designating Party's confidentiality designation
16 is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
17 burdens, or a significant disruption or delay of the litigation, a Party does not waive
18 its right to challenge a confidentiality designation by electing not to mount a
19 challenge promptly after the original designation is disclosed.

20 **a) Meet and Confer**

21 The Challenging Party shall initiate the dispute resolution process by providing
22 written notice of each designation it is challenging and describing the basis for each
23 challenge. To avoid ambiguity as to whether a challenge has been made, the written
24 notice must recite that the challenge to confidentiality is being made in accordance
25 with this specific paragraph of the Protective Order. The parties shall attempt to
26 resolve each challenge in good faith and must begin the process by conferring directly
27 (in voice to voice dialogue; other forms of communication are not sufficient) within
28 7 calendar days of the date of service of notice. In conferring, the Challenging Party

1 must explain the basis for its belief that the confidentiality designation was not proper
2 and must give the Designating Party an opportunity to review the designated material,
3 to reconsider the circumstances, and, if no change in designation is offered, to explain
4 the basis for the chosen designation. A Challenging Party may proceed to the next
5 stage of the challenge process only if it has engaged in this meet and confer process
6 first or establishes that the Designating Party is unwilling to participate in the meet
7 and confer process in a timely manner.

8 **b) Judicial Intervention**

9 If the Parties cannot resolve a challenge as to the designation of a Disclosure
10 or Discovery Item, Protected Material, or deposition transcript, or any portions
11 thereof without court intervention, the Challenging Party shall present the dispute to
12 the Court initially by filing a formal motion for an order regarding the challenged
13 designation within 21 calendar days of the initial notice of challenge or within 14
14 calendar days of the parties agreeing that the meet and confer process will not resolve
15 their dispute, whichever is earlier. Any motion brought pursuant to this provision
16 must be accompanied by a competent declaration affirming that the movant has
17 complied with the meet and confer requirements imposed by the preceding
18 paragraph.

19 Frivolous challenges and those made for an improper purpose (*e.g.*, to harass
20 or impose unnecessary expenses and burdens on other parties) may expose the
21 Challenging Party to sanctions. All parties shall continue to afford the material in
22 question the level of protection to which it is entitled under the Producing Party's
23 designation until the court rules on the challenge.

24 **6. ACCESS TO AND USE OF PROTECTED MATERIAL**

25 **6.1. Basic Principles**

26 A Receiving Party may use Protected Material that is disclosed or produced by
27 another Party or by a Non-Party in connection with this case only for prosecuting,
28 defending, or attempting to settle this litigation. Such Protected Material may be

1 disclosed only to the categories of persons and under the conditions described in this
2 Order. When the litigation has been terminated, a Receiving Party must comply with
3 the provisions of Section 15 below. It is, however, understood that counsel for a
4 Party may give advice and opinions to his or her client solely relating to the above-
5 captioned Action based on his or her evaluation of Protected Material, provided that
6 such advice and opinions shall not directly or indirectly reveal the content of such
7 Protected Material.

8 Protected Material must be stored and maintained by a Receiving Party at a
9 location and in a secure manner that ensures that access is limited to the persons
10 authorized under this Order.

11 **6.2. Disclosure of “CONFIDENTIAL” Information or Items**

12 Unless otherwise ordered by the Court or permitted in writing by the
13 Designating Party, a Receiving Party may disclose any information or item
14 designated “CONFIDENTIAL” only to:

- 15 a) the Receiving Party’s Outside Counsel of Record in this action;
- 16 b) the officers, directors, and employees of the Receiving Party to whom
17 disclosure is reasonably necessary for this litigation;
- 18 c) Experts (as defined in this Order) of the Receiving Party to whom
19 disclosure is reasonably necessary for this litigation and who have signed the
20 “Acknowledgment and Agreement to Be Bound” (Exhibit A);
- 21 d) secretarial, paralegal, clerical, duplicating, and data processing
22 personnel of sub-categories (a)–(c);
- 23 e) the Court and its personnel;
- 24 f) court reporters and their staff, professional jury or trial consultants,
- 25 g) Professional Vendors to whom disclosure is reasonably necessary for
26 this litigation;
- 27 h) during their depositions, witnesses in the action to whom disclosure is
28 reasonably necessary; and

1 i) the author or recipient of a document containing the information or a
2 custodian or other person who otherwise possessed or knew the information or
3 reasonably had access to the information.

4 **6.3. Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES**
5 **ONLY” Information or Items**

6 Unless otherwise ordered by the Court or permitted in writing by the
7 Designating Party, a Receiving Party may disclose any information or item
8 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

9 a) the Receiving Party’s Outside Counsel of Record in this action;

10 b) Designated In-House Representatives (1) to whom disclosure is
11 reasonably necessary for this litigation, (2) who have signed the “Acknowledgment
12 and Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth
13 in Paragraph 7.1(a) have been followed or who have been designated in Paragraph
14 7.1(b);

15 c) Experts of the Receiving Party (1) to whom disclosure is reasonably
16 necessary for this litigation, (2) who have signed the “Acknowledgment and
17 Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in
18 Section 7.2, below, have been followed;

19 d) secretarial, paralegal, clerical, duplicating, and data processing
20 personnel of sub-categories (a)–(c);

21 e) the Court and its personnel;

22 f) court reporters and their staff, professional jury or trial consultants,

23 g) Professional Vendors to whom disclosure is reasonably necessary for
24 this litigation;

25 h) during their depositions, witnesses in the action to whom disclosure is
26 reasonably necessary;

27 i) the author or recipient of a document containing the information or a
28 custodian or other person who otherwise possessed or knew the information or

1 reasonably had access to the information.

2 **7. PROCEDURES FOR APPROVING OR OBJECTING TO**
3 **DISCLOSURE OF “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES**
4 **ONLY” INFORMATION**

5 **7.1. Procedures for Qualifying Designated In-House Representatives**

6 a) Unless otherwise ordered by the Court or agreed to in writing by the
7 Designating Party, a Party that seeks to disclose to an attorney who is an employee
8 of the Party any information or item that has been designated “HIGHLY
9 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to Section 6.3 first
10 must make a written request to the Designating Party that (1) sets forth the full name
11 of the individual and the city and state of his or her residence; and (2) describes the
12 individual’s current and reasonably foreseeable future primary job duties and
13 responsibilities in sufficient detail to determine if the individual is involved, or may
14 become involved, in any competitive decision-making.

15 b) Notwithstanding the requirements of Paragraph 7.1(a), the Parties agree
16 that:

17 1. The following individuals may receive “HIGHLY
18 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information: For Orthopaedic
19 Hospital, Joel Bernstein. For DJO, Brad Tandy, Jason Maxwell and Susan Payne.

20 2. Orthopaedic Hospital’s CEO, Anthony Scaduto, may receive the
21 following kinds of documents, even if they contain “HIGHLY CONFIDENTIAL –
22 ATTORNEYS’ EYES ONLY” information:

23 (i) Attorney-generated litigation documents intended to be filed
24 or served in this litigation, whether in draft or final form,
25 along with any accompanying exhibits; and

26 (ii) DJO financial information that does not contain projections
27 of financial performance.

28 **7.2. Procedures For Qualifying Experts**

Unless otherwise ordered by the Court or agreed to in writing by the

1 Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order)
2 any information or item that has been designated “HIGHLY CONFIDENTIAL –
3 ATTORNEYS’ EYES ONLY” must first make a written request to the Designating
4 Party that (1) sets forth the full name of the Expert and the city and state of his or her
5 primary residence, (2) attaches a copy of the Expert’s current resume, (3) identifies
6 the Expert’s current employer(s), (4) identifies (by name and number of the case,
7 filing date, and location of court) any litigation in connection with which the Expert
8 has offered expert testimony, including through a declaration, report, or testimony at
9 a deposition or trial, during the preceding five years, and (5) such other information
10 regarding the Expert’s professional activities reasonably requested by the
11 Designating Party for it to evaluate whether grounds exists to object to the disclosure
12 of Protected Material to the Person.

13 **7.3. Approval of Designated In-House Representative or Expert**

14 A Party that makes a request and provides the information specified in Section
15 7.2, may, 7 calendar days after delivering the request, disclose the subject Protected
16 Material to the identified Designated In-House Representative or Expert unless,
17 within those 7 calendar days of delivering the request, the Party receives a written
18 objection from the Designating Party. Any such objection must set forth in detail the
19 grounds on which it is based.

20 **7.4. Objections to Designated In-House Representative or Expert**

21 a) A Party that receives a timely written objection must meet and confer
22 with the Designating Party (through direct voice to voice dialogue) to try to resolve
23 the matter by agreement within 7 calendar days of the written objection. If no
24 agreement is reached, the Party objecting to the disclosure will have 14 calendar days
25 from the date of the meet and confer to seek relief from the Court. If relief is not
26 sought from the Court within that time, the objection shall be deemed withdrawn. If
27 relief is sought, Protected Material shall not be disclosed to the Designated In-House
28 Representative or Expert until the Court resolves the objection. Any motion seeking

1 relief from the Court must describe the circumstances with specificity, and set forth
2 in detail the Designating Party's objectively reasonable concern that the Person will,
3 advertently or inadvertently, use or disclose Protected Material in a way or ways that
4 are inconsistent with the provisions contained in this Order.

5 b) An initial failure to object to a Designated In-House Representative or
6 Expert under this Section shall not preclude the non-objecting Party from later
7 objecting to continued access by such Person for good cause. If an objection is made,
8 the Parties shall meet and confer via telephone or in person within 7 calendar days
9 following the objection and attempt in good faith to resolve the dispute informally.
10 If the dispute is not resolved, the Party objecting to the disclosure will have 14
11 calendar days from the date of the meet and confer to seek relief from the Court. The
12 Designated In-House Representative or Expert may continue to have access to
13 information that was provided to such person prior to the date of the objection. If a
14 later objection is made, no further Protected Material shall be disclosed to the
15 Designated In-House Representative or Expert until the Court resolves the matter or
16 the Producing Party withdraws its objection. Notwithstanding the foregoing, if the
17 Producing Party fails to move for a protective order within 14 calendar days after the
18 meet and confer, further Protected Material may thereafter be provided to the
19 Designated In-House Representative or Expert.

20 c) In any such proceeding, the Party opposing disclosure to the Designated
21 In-House Representative or Expert shall bear the burden of proving that the risk of
22 harm that the disclosure would entail (under the safeguards proposed) outweighs the
23 Receiving Party's need to disclose the Protected Material to its Designated In-House
24 Representative or Expert.

25 **8. PROSECUTION BAR**

26 **8.1. Basic Principles**

27 All Protected Material shall be used solely for this litigation or any related
28 appellate proceeding, and not for any other purpose whatsoever, including without

1 limitation any other litigation, patent prosecution or acquisition, patent
2 reexamination, reissue or inter partes review proceedings, or any business or
3 competitive purpose or function. Protected Material shall not be distributed,
4 disclosed, or made available to anyone except as expressly provided in this Order.

5 **8.2. Patent Prosecution Bar**

6 No individual retained by or associated with a Party (including in-house or
7 outside counsel, and/or outside experts or consultants) who has been given access to
8 any a) Protected Material relating to technical or engineering information about the
9 proprietary technology of Defendants and designated by Defendants as “HIGHLY
10 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or b) Protected Material relating
11 to technical or engineering information about the proprietary technology of Plaintiff
12 or its licensee, designated as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
13 ONLY” and specifically further designated as “PATENT PROSECUTION BAR
14 MATERIAL,” may, without written consent of the Party that produced the Protected
15 Material, engage in any Prosecution Activity (as defined below) involving claims
16 relating to human orthopedic joint implants and components thereof, from the time
17 said individual first receives such designated Protected Material and shall end one
18 (1) year after (i) the complete resolution of the above-captioned through entry of final
19 non-appealable judgments or orders for which appeal has been exhausted; (ii) the
20 complete settlement of all claims against all Producing Parties in this Action; or (iii)
21 the individual person(s) cease to represent or be associated with Plaintiff. For
22 purposes of this section, “Prosecution Activity” shall mean directly or indirectly
23 drafting, amending, advising, or otherwise affecting the scope or maintenance of
24 claims (for any person or entity) in any patent application or patent, either as part of
25 an original prosecution in the United States or elsewhere, or as part of a reissue, ex
26 parte reexamination, inter partes reexamination, inter partes review, or any other
27 post-grant review proceeding in the United States or elsewhere where the submission,
28 or amendment of patent claims is allowed and available. Prosecution Activity does

1 not include routine management of maintenance fees. Notwithstanding this
2 paragraph, litigation counsel for Plaintiff may participate in any inter partes review
3 filed by Defendants against the Asserted Patents, but may not participate in any
4 activity related to the amendment of claims. Further, an attorney subject to this
5 section may forward to counsel participating in the types of proceedings described
6 above any references identified as prior art during the course of the above-captioned
7 cases and nothing in this section shall prevent any attorney from sending prior art to
8 an attorney involved in any prosecution for purposes of ensuring that such prior art
9 is submitted to the U.S. Patent and Trademark Office (or any similar agency of a
10 foreign government) to assist a patent applicant in complying with its duty of candor.
11 For further clarity and avoidance of doubt, the patents asserted in this action,
12 presently including U.S. Patent Nos. 8,658,710; 8,796,347; 9,155,817; 9,242,025;
13 and 9,302,028, as well as any divisions, reissues, continuations, continuations-in-
14 part, renewals, and extensions thereof, for purposes of defining the scope of this
15 prosecution bar, shall be deemed to relate to human orthopedic joint implants and
16 components thereof.

17 **9. FILING DOCUMENTS UNDER SEAL**

18 No document shall be filed under seal unless counsel secures a court order allowing
19 the filing of a document, or portion thereof, under seal. An application to file a
20 document under seal shall be served on opposing counsel, and on the person or entity
21 that has custody and control of the document, if different from opposing counsel. If
22 opposing counsel, or the person or entity who has custody and control of the
23 document, wishes to oppose the application, they must contact the chambers of the
24 judge who will rule on the application to notify the judge's staff that an opposition to
25 the application will be filed.

26 **10. PROTECTED MATERIAL SUBPOENAED OR ORDERED**
27 **PRODUCED IN OTHER LITIGATION**

28 If a Party is served with a subpoena or a court order issued in other litigation

1 that compels disclosure of any information or items designated in this action as
2 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
3 ONLY,” that Party must:

4 (a) promptly notify in writing the Designating Party. Such notification shall
5 include a copy of the subpoena or court order;

6 (b) promptly notify in writing the party who caused the subpoena or order
7 to issue in the other litigation that some or all of the material covered by the subpoena
8 or order is subject to this Protective Order. Such notification shall include a copy of
9 this Protective Order; and

10 (c) cooperate with respect to all reasonable procedures sought to be pursued
11 by the Designating Party whose Protected Material may be affected.¹

12 If the Designating Party timely seeks a protective order, the Party served with
13 the subpoena or court order shall not produce any information designated in this
14 action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
15 EYES ONLY” before a determination by the Court from which the subpoena or order
16 issued, unless the Party has obtained the Designating Party’s permission. The
17 Designating Party shall bear the burden and expense of seeking protection in that
18 court of its confidential material – and nothing in these provisions should be
19 construed as authorizing or encouraging a Receiving Party in this action to disobey a
20 lawful directive from another court.

21 **11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE**
22 **PRODUCED IN THIS LITIGATION**

23 (a) The terms of this Order are applicable to information produced by a
24 Non-Party in this action and designated as “CONFIDENTIAL” or “HIGHLY
25 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” Such information produced by

26 _____
27 ¹ The purpose of imposing these duties is to alert the interested parties to the existence
28 of this Protective Order and to afford the Designating Party in this case an opportunity
to try to protect its confidentiality interests in the court from which the subpoena or
order issued.

1 Non-Parties in connection with this litigation is protected by the remedies and relief
2 provided by this Order. Nothing in these provisions should be construed as
3 prohibiting a Non-Party from seeking additional protections.

4 (b) In the event that a Party is required, by a valid discovery request, to
5 produce a Non-Party's confidential information in its possession, and the Party is
6 subject to an agreement with the Non-Party not to produce the Non-Party's
7 confidential information, then the Party shall:

8 1. promptly notify in writing the Requesting Party and the
9 Non-Party that some or all of the information requested is subject to a confidentiality
10 agreement with a Non-Party;

11 2. promptly provide the Non-Party with a copy of the Protective
12 Order in this litigation, the relevant discovery request(s), and a reasonably specific
13 description of the information requested; and

14 3. make the information requested available for inspection by the
15 Non-Party.

16 (c) If the Non-Party fails to object or seek a protective order from this court
17 within 14 calendar days of receiving the notice and accompanying information, the
18 Receiving Party may produce the Non-Party's confidential information responsive to
19 the discovery request. If the Non-Party timely seeks a protective order, the Receiving
20 Party shall not produce any information in its possession or control that is subject to
21 the confidentiality agreement with the Non-Party before a determination by the
22 Court.² Absent a court order to the contrary, the Non-Party shall bear the burden and
23 expense of seeking protection in this court of its Protected Material.

24 **12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

25 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
26

27 ² The purpose of this provision is to alert the interested parties to the existence of
28 confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to
protect its confidentiality interests in this court.

1 Protected Material to any person or in any circumstance not authorized under this
2 Protective Order, Counsel for the Receiving Party must immediately (a) notify in
3 writing the Designating Party of the unauthorized disclosures and all pertinent facts
4 relating to the unauthorized disclosure including, without limitation, an identification
5 of the Protected Material disclosed and the person(s) to whom the unauthorized
6 disclosure was made, (b) use its best efforts to retrieve all unauthorized copies of the
7 Protected Material, (c) inform the person or persons to whom unauthorized
8 disclosures were made of all the terms of this Order, and (d) request such person or
9 persons to execute the “Acknowledgment and Agreement to Be Bound” that is
10 attached hereto as Exhibit A.

11 **13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
12 **PROTECTED MATERIAL**

13 When a Producing Party gives notice to Receiving Parties that certain
14 inadvertently produced material is subject to a claim of privilege or other protection,
15 the obligations of the Receiving Parties are those set forth in Federal Rule of Civil
16 Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure
17 may be established in an e-discovery order that provides for production without prior
18 privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the
19 parties reach an agreement on the effect of disclosure of a communication or
20 information covered by the attorney-client privilege or work product protection, the
21 parties may incorporate their agreement in a stipulated protective order submitted to
22 the Court.

23 **14. MISCELLANEOUS**

24 The restrictions and obligations set forth within this order will not apply to any
25 information that: (a) the parties agree should not be designated confidential
26 information; (b) the parties agree, or the Court rules, is already public knowledge; (c)
27 the parties agree, or the Court rules, has become public knowledge other than as a
28 result of disclosure by the receiving party, its employees, or its agents in violation of

1 this Order; or (d) has come or will come into the receiving party's legitimate
2 knowledge independently of the production by the designating party. Prior
3 knowledge must be established by pre-production documentation.

4 The restrictions and obligations within this order will not be deemed to prohibit
5 discussions of any confidential information with anyone if that person already has or
6 obtains legitimate possession of that information.

7 Transmission by email or some other currently utilized method of transmission
8 is acceptable for all notification purposes within this Order.

9 **15. FINAL DISPOSITION**

10 Within 60 calendar days after the final disposition of this action, as defined in
11 Section 3, each Receiving Party must return all Protected Material to the Producing
12 Party or destroy such material. As used in this subdivision, "all Protected Material"
13 includes all copies, abstracts, compilations, summaries, and any other format
14 reproducing or capturing any of the Protected Material. Whether the Protected
15 Material is returned or destroyed, the Receiving Party must submit a written
16 certification to the Producing Party (and, if not the same person or entity, to the
17 Designating Party) by the 60-day deadline that (1) identifies (by category, where
18 appropriate) all the Protected Material that was returned or destroyed, and (2) affirms
19 that the Receiving Party has not retained any copies, abstracts, compilations,
20 summaries or any other format reproducing or capturing any of the Protected
21 Material. Notwithstanding this provision, Counsel are entitled to retain an archival
22 copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal
23 memoranda, correspondence, deposition and trial exhibits, expert reports, attorney
24 work product, and consultant and expert work product, even if such materials contain
25 Protected Material. Any such archival copies that contain or constitute Protected
26 Material remain subject to this Protective Order as set forth in Section 3.

27 **16. MODIFICATION OF THIS ORDER**

28 This Order may be modified by agreement of the parties, subject to approval

1 by the Court. The Court may modify the protective order *sua sponte* in the interests
2 of justice or for public policy reasons. The parties prefer that the Court provide them
3 with notice of the Court's intent to modify the Order and the content of those
4 modifications prior to entry of such an order.

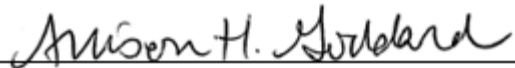
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6 **IT IS SO ORDERED.**

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8 Dated: October 29, 2019

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Honorable Allison H. Goddard
United States Magistrate Judge

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