

Proposed~~Default~~ Protective Order

This protective order governs the treatment and filing of confidential information, including documents and testimony.

1. Confidential information shall be clearly marked “CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or “CONFIDENTIAL BUSINESS INFORMATION.” ~~“PROTECTIVE ORDER MATERIAL.”~~

2. Confidential information is information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either (i) impairing the PTAB's ability to obtain such information as is necessary to perform its statutory functions; or (ii) causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the PTAB is required by law to disclose such information.

~~3.~~ Access to confidential information is limited to the following individuals who have executed the acknowledgment appended to this order:

~~(A) Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.~~

~~(A.B) Party—RepresentativesOutside Counsel. Representatives—Outside counsel of record for a party in the proceeding.~~

~~(B.C) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.~~

~~No less than 10 days prior to the initial disclosure to an expert of any confidential information, the party proposing to use such expert shall submit in writing the name of such expert and his or her educational and detailed employment history to the supplier. If the producing party objects to the disclosure of such confidential business information to such expert as inconsistent with the language or intent of this order or on other grounds, it shall notify the other party in writing of its objection and the grounds therefore prior to the initial disclosure. If the dispute is not resolved on an informal basis within ten days of receipt of such notice of objections, the party seeking access to the confidential information shall arrange for a conference call with the PTAB to resolve the dispute. Absent an order from the PTAB, the expert shall not have access to the confidential information.~~

~~(D) In-house counsel. In-house counsel of a party.~~

~~(C.E)~~ Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

~~(D.F)~~ The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

~~3. Employees (e.g., corporate officers), consultants, or other persons performing work for a party, other than those persons identified above in (d)(2)(A) (E), shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person and after signing the Acknowledgment. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.~~

4. Prosecution and Development Bar.

A. “Relevant Technology” means technology related to non-invasive monitoring of pulse oximetry, total hemoglobin, oxygen content, carboxyhemoglobin, and/or methemoglobin.

B. Unless otherwise permitted in writing between the parties, any individual who personally receives from the other party, any material showing or describing the technical functionality of the other party’s products designated as CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO PROTECTIVE ORDER or CONFIDENTIAL BUSINESS INFORMATION under this Protective Order shall not prepare, prosecute, supervise, advise, counsel, or assist in the preparation or prosecution of any patent application seeking a patent on behalf of the party receiving the material or its acquirer, successor, or predecessor in the Relevant Technology during the pendency of this proceeding and for two years after final termination of this proceeding or, alternatively, for two years after the time the individual person(s) formally withdraws from the proceeding. In addition, any such person is prohibited from having any involvement in the prosecution of any patent, patent application or re-examination in the Relevant Technology that was filed, or that claims priority from

any application that was filed, for up to one year following the final termination of this proceeding (including any appeals). To avoid any doubt, “prosecution” as used in this paragraph does not include representing or advising a Party before a domestic or foreign agency in connection with a reissue, ex parte reexamination, inter partes review, opposition, cancelation, or similar proceeding; though in connection with any such agency proceeding involving the patent-at-issue, outside counsel of a party receiving confidential information shall not: (i) participate in the preparation, prosecution, supervision, advice, counsel, or assistance of any amended claims; (ii) reveal a confidential information to any prosecuting reexamination counsel or agent; or (iii) use a the other party’s confidential information for any purpose prohibited by this Protective Order. The applicability of this provision is to be determined on an individual-by- individual basis such that an individual attorney who has not received confidential information is not restricted from undertaking any activities by virtue of this provision even if said individual attorney is employed by or works for the same firm or organization as an individual who has received such material.

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