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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Lisa St. Clair and Richard Poulin,  
10 individually and as parents and guardians  
of H.P., their minor child,

No. CV-10-1275-PHX-LOA

11 Plaintiff,

**ORDER**

12 vs.

13 Nellcor Puritan Bennett LLC,

14 Defendants.

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16 This matter arises on Defendant Nellcor Puritan Bennett LLC's Unopposed  
17 Motion to File Exhibits Under Seal, filed on August 19, 2011. (Doc. 66) Defendant requests  
18 that the Court file under seal Exhibits 6-8, 15, 17, 18, 27, 30, 31, 33, 35-41, and 43, which  
19 were lodged as a part of Plaintiffs' Response to Defendant Nellcor Puritan Bennett LLC's  
20 Motion for Partial Summary Judgment. (*Id.*) Plaintiff does not oppose sealing the exhibits.  
21 (*Id.*) Previously, the Court denied without prejudice the parties' joint motion requesting the  
22 filing of 18 specific exhibits under seal, attached to Plaintiffs' Response to Defendant's  
23 dispositive motion. (Doc. 65) Explaining that in the Ninth Circuit "compelling reasons" are  
24 required to seal documents used in dispositive motions, the Court gave Defendant a fair  
25 opportunity to make such a showing while the exhibits were temporarily sealed and the  
26 Court conducted an *in camera* inspection of the exhibits. (*Id.*; doc. 67)

27 As already mentioned, the Ninth Circuit has held that "compelling reasons" are  
28 required to seal documents used in dispositive motions, such as, motions for summary

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1 judgment, just as compelling reasons would be needed to justify a closure of a courtroom  
2 during trial. *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). “Unless a  
3 particular court record is one ‘traditionally kept secret,’ a strong presumption in favor of  
4 access is the starting point.” *Id.* at 1178. “The public has a ‘general right to inspect and copy  
5 public records and documents, including judicial records and documents.’” *MMI, Inc. v.*  
6 *Baja, Inc.*, 743 F.Supp.2d 1101, 1105 (D.Ariz. 2010) (quoting *Nixon v. Warner Comm., Inc.*,  
7 435 U.S. 589, 597 (1978)). This right protects the public interest in understanding both the  
8 judicial process and significant public events. (*Id.*) The party moving to seal bears the  
9 burden of proof for each particular document it wishes to seal. *Foltz v. State Farm Mutual*  
10 *Auto. Ins.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

11           Nellcor asserts that the enumerated exhibits contain confidential business  
12 information and trade secrets, which meet the “compelling reasons” standard. (Doc. 66)  
13 Indeed, “compelling reasons . . . exist when such court files might have become a vehicle for  
14 improper purposes, such as the use of records to . . . release trade secrets.” *Kamakana*, 447  
15 F.3d at 1179 (citation omitted). However, Nellcor offers little information or justification  
16 other than a one-sentence-fits-all explanation why the so-called confidential information  
17 deserves trade secret status and should be sealed. (Doc. 66)

18           The Ninth Circuit Court of Appeals and the district courts throughout the Circuit  
19 define a “trade secret” as “any formula, pattern, device or compilation of information which  
20 is used in one’s business, and which gives him an opportunity to obtain an advantage over  
21 competitors who do not know or use it.” *In re Electronic Arts Inc.*, 298 Fed.Appx. 568, 569  
22 (9th Cir. 2008); *Bowser, Inc. v. Filters, Inc.*, 398 F.2d 7, 9 (9th Cir. 1968) (adopting the  
23 definition of trade secret stated in Restatement of Torts, § 757, Comment b (1939)); *accord*  
24 *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972) (finding that “a detailed plan for the  
25 creation, promotion, financing, and sale of contracts” constitutes a trade secret); *Ultimate*  
26 *Timing, L.L.C. v. Simms*, 2010 WL 786021, \* 2 (W.D.Wash. March 4, 2010); *Navarro v.*  
27 *Eskanos & Adler*, 2007 WL 902550, \* 4 (N.D.Cal. March 22, 2007). Thus, information is  
28 not regarded as a trade secret if it is “fully disclosed by issued patents; generally known to

1 those skilled in the industry or trade; or consist[s] of information easily acquired by persons  
2 in the industry from patents, literature or known processes freely available.” *Motorola, Inc.*  
3 *v. Fairchild Camera & Instrument Corp.*, 366 F.Supp. 1173, 1186 (D.Ariz. 1973); *Bowser*,  
4 398 F.2d at 9 (“The subject matter of a trade secret must be secret. Matters of public  
5 knowledge or of general knowledge in an industry cannot be appropriated by one as his  
6 secret.”).

7           Although Nellcor asserts that the exhibits contain confidential business informa-  
8 tion, confidentiality alone does not transform business information into a trade secret.

9           [A trade secret] differs from other secret information in a business in that it is not  
10 simply information as to single or ephemeral events in the conduct of the business,  
11 as, for example, the amount or other terms of a secret bid for a contract or the  
12 salary of certain employees, or the security investments made or contemplated, or  
the date fixed for the announcement of a new policy or for bringing out a new  
model or the like. A trade secret is a process or device for continuous use in the  
operation of the business.

13 Restatement of Torts, § 757, Comment b. “The mere fact that the production of records may  
14 lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not,  
15 without more, compel the court to seal its records.” *Kamakana*, 447 F.3d at 1179 (citing  
16 *Foltz*, 331 F.3d at 1136).

17           To determine whether an exhibit is a trade secret, the Court measures it against the  
18 Ninth Circuit’s definition; that is, whether it is a “formula, pattern, device or compilation of  
19 information which is used in one’s business, and which gives him an opportunity to obtain  
20 an advantage over competitors who do not know or use it.” *Bowser*, 398 F.2d at 9. After an  
21 *in camera* inspection of all the exhibits, the Court finds that Exhibit 36 meets this definition  
22 and this exhibit will be sealed. The Court also finds that Exhibits 6-8, 15, 17, 18, 27, 30, 31,  
23 33, 35, 37-41, and 43 do not meet this definition.

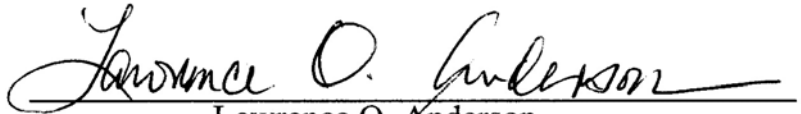
24           Nellcor having failed to demonstrate that compelling reasons exist to seal most of  
25 the subject exhibits,

26           **IT IS ORDERED** that, **except for Exhibit 36** (doc. 59, attachment 13, pages  
27 3-97), the Clerk is kindly directed to file all other exhibits presently lodged under seal at  
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1 docket 59, in the public record and not under seal.

2 **IT IS FURTHER ORDERED** that Exhibit 36, (doc. 59, attachment 13, pages  
3 3-97), shall remain sealed as a trade secret until further order of the Court.

4 Dated this 7<sup>th</sup> day of November, 2011

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7 Lawrence O. Anderson  
8 United States Magistrate Judge  
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