

1 **McGUIREWOODS LLP**
 Matthew C. Kane, Esq. (SBN 171829)
 2 Email: mkane@mcguirewoods.com
 Sara E. Willey, Esq. (SBN 249701)
 3 Email: swilley@mcguirewoods.com
 Sylvia J. Kim, Esq. (SBN 258363)
 4 Email: skim@mcguirewoods.com
 1800 Century Park East, 8th Floor
 5 Los Angeles, California 90067
 Telephone: (310) 315-8200
 6 Facsimile: (310) 315-8210

7 Attorneys for Defendant
 BSN MEDICAL, INC.

8 **HENDERSON HUMPHREY LLP**
 9 J. Scott Humphrey (SBN 150476)
 Email: scott@hendersonhumphrey.com
 10 Mark J. Henderson (SBN 138424)
 Email: markjhenderson@email.com
 11 6664 Vista Del Mar
 Playa Del Rey, California 90293
 12 Telephone: (424) 228-5049
 Facsimile: (424) 228-5209

13 Attorneys for Plaintiffs
 14 THOMAS L. KELLEY & ASSOCIATES, INC. AND VINCENT ORTEGA

15
 16 **UNITED STATES DISTRICT COURT**
 17 **CENTRAL DISTRICT OF CALIFORNIA**
 18 **CENTRAL DIVISION**
 19

20 THOMAS L. KELLEY &
 ASSOCIATES, INC., a California
 21 Corporation; VINCENT ORTEGA, an
 individual,

22 Plaintiffs,

23 vs.

24 BSN MEDICAL INC., a Delaware
 25 Corporation; and DOES 1 through 100,
 inclusive,

26 Defendants.
 27

CASE NO: CV08-4419 GW (AGR_x)

**STIPULATION AND PROTECTIVE
 ORDER REGARDING
 CONFIDENTIAL DOCUMENTS
 AND INFORMATION**

1 **I. PURPOSE.**

2 This Protective Order (the “Order”) shall apply to the above-captioned action
3 (hereafter “this action”). The parties recognize that preparation and trial of this
4 action may require the discovery of certain business records and other materials
5 from parties and various non-parties, which may be claimed to contain confidential
6 business, commercial, or financial information, as well as confidential personal
7 information. The parties desire to litigate this action without jeopardizing any
8 party’s or non-party’s respective interests, if any, in the confidentiality of
9 information produced in connection with this litigation.

10 **II. MATERIALS COVERED.**

11 Any party or other person may designate all or any part of a document,
12 discovery response, deposition, or other discovery material, including electronic
13 data, which that person or party produces, serves, or provides in connection with this
14 action as “Confidential” or “Confidential – Attorneys’ Eyes Only,” as described
15 below. The “Confidential” or “Confidential – Attorneys’ Eyes Only” designation
16 shall include not only material designated as “Confidential” or “Confidential –
17 Attorneys’ Eyes Only,” but also the information contained therein, including any
18 extract, chart, summary, note, or copy made of or from the “Confidential” or
19 “Confidential – Attorneys’ Eyes Only” material.

20 The party or person designating material as “Confidential” or “Confidential –
21 Attorneys’ Eyes Only” shall do so in writing and in doing so thereby represents that
22 the material constitutes a trade secret, confidential research, development, financial
23 or commercial information, or confidential personal information.

24 **III. DISCLOSURE OF DISCOVERY MATERIALS.**

25 1. All materials produced in discovery, including, but not limited to, that
26 which is designated “Confidential” or “Confidential – Attorneys’ Eyes Only,” shall
27 be disclosed only to those individuals as set forth below, shall be used solely in
28 furtherance of the prosecution or defense of this litigation, shall not be used at any

1 time for any other purpose whatsoever, and shall not be disclosed to or made
2 accessible to any person except as specifically permitted by this Order. Materials
3 produced in discovery which are used at trial will become public absent a separate
4 court order upon written motion and sufficient cause shown.

5 2. Each person to whom “Confidential” material is disclosed, except the
6 persons identified in §§IV.2(a) and (b) below, shall execute an undertaking in the
7 form annexed hereto as Exhibit A and shall agree to be bound by this Order. Copies
8 of this executed undertaking shall be retained by counsel disclosing the
9 “Confidential” material to such person.

10 **IV. DISCLOSURE OF “CONFIDENTIAL” MATERIALS.**

11 1. The attorneys of record are responsible for employing reasonable
12 measures, consistent with this order, to control duplication of, access to, and
13 distribution of copies of “Confidential” or “Confidential – Attorneys’ Eyes Only”
14 materials.

15 2. Subject to the limitations set forth in §IV.3 and 4, disclosure of
16 “Confidential” materials may be made only to:

17 a. the Court, its secretaries, clerks, and law clerks in the manner set
18 forth herein;

19 b. attorneys in the law firms representing a party and in-house
20 counsel for any such party who are actively working on this action, and their
21 secretaries, law clerks, paralegals and legal assistants (this category hereinafter
22 referred to as “Attorneys”);

23 c. any experts, including consultants, who are retained by counsel
24 for any of the parties in this action to assist counsel in this action and any employee
25 of such an expert, provided that the person to whom the “Confidential” material is
26 disclosed has first executed an undertaking in the form annexed hereto as Exhibit A,
27 and shall agree to be bound by this Order (this category hereinafter referred to as
28 “Experts”).

1 d. any executives, officers and key employees of the respective
2 parties to this litigation (or their designated representatives) who are assisting in the
3 prosecution or defense of this litigation, provided that the person to whom the
4 “Confidential” material is disclosed has first executed an undertaking in the form
5 annexed hereto as Exhibit A, and shall agree to be bound by this Order (this
6 category hereinafter referred to as “Key Employees”);

7 e. any person or individual who (i) is testifying as a witness either
8 at a deposition or court proceeding in this action, (ii) is expected to testify as a
9 witness either at a deposition or court proceeding in this action, or (iii) is a witness
10 whose examination the disclosing attorney believes in good faith is necessary for the
11 prosecution or defense of this matter, provided however that such disclosure may
12 only occur for the purpose of assisting the preparation or examination of the witness
13 and after the person to whom the “Confidential” material is to be disclosed has
14 executed an undertaking in the form annexed hereto as Exhibit A, agreeing to be
15 bound by this Order (this category hereinafter referred to as “Witnesses”); and

16 f. employees of parties involved in one or more aspects of
17 organizing, filing, coding, converting, storing, or retrieving data or designing
18 programs for handling data connected with this action, including the performance of
19 such duties in relation to a computerized litigation support system; and to employees
20 of third-party contractors performing one or more of these functions; provided
21 however that such disclosure may only occur after the person to whom the
22 “Confidential” material is disclosed has executed an undertaking in the form
23 annexed hereto as Exhibit A, and shall agree to be bound by this Order.

24 3. Subject to the limitations set forth in §IV.3 and 4, disclosure of
25 “Confidential – Attorneys’ Eyes Only” materials may be made only to:

26 a. the Court, its secretaries, clerks, and law clerks in the manner set
27 forth herein;

1 b. attorneys in the law firms representing a party and in-house
2 counsel for any such party who are actively working on this action, and their
3 secretaries, law clerks, paralegals and legal assistants (this category hereinafter
4 referred to as “Attorneys”);

5 4. No party who receives “Confidential” or “Confidential – Attorneys’
6 Eyes Only” information shall disclose it to any competitor of the producing party
7 without leave of the Court.

8 **V. INVOCATION OF THIS ORDER.**

9 The protection of this Order may be invoked with respect to any covered
10 material by the party producing or disclosing such material in the following manner.
11 With respect to documents, the copy of the document when produced shall bear the
12 clear and legible designation “Confidential” or “Confidential – Attorneys’ Eyes
13 Only.” Documents marked “Highly Confidential” shall be accorded the same
14 protection as those marked “Confidential.” With respect to answers to
15 interrogatories or requests for admission, each page of these responses containing
16 “Confidential” or “Confidential – Attorneys’ Eyes Only” information shall be so
17 marked. With respect to any deposition, including the deposition transcript and
18 corresponding audio or video tape, such treatment may be invoked by: (1) declaring
19 the same on the record at the deposition or (2) designating specific pages or
20 paragraphs as “Confidential” or “Confidential – Attorneys’ Eyes Only” and serving
21 such designations within 45 days of receipt of the official transcript of the
22 deposition in which the designations are made. All deposition transcripts shall be
23 treated as “Confidential” for 45 days following receipt of the transcript. The 45-day
24 period may be extended by agreement of the parties. With respect to any
25 “Confidential” or “Confidential – Attorneys’ Eyes Only” material, including the
26 categories of materials set forth in this paragraph, the party producing or disclosing
27 such material may designate it as “Confidential” or “Confidential – Attorneys’ Eyes
28 Only” in an accompanying cover letter or in a subsequent written letter.

1 **VI. CHALLENGE TO DESIGNATION.**

2 Any party wishing to challenge the “Confidential” or “Confidential –
3 Attorneys’ Eyes Only” designation assigned by any party or other person with
4 respect to any material shall give written notice of such objection to counsel for the
5 designating party. The parties shall confer in good faith in an attempt to resolve any
6 such objection. If the dispute is not resolved by agreement of counsel, the
7 challenging party may file a motion with the Court to challenge the designation in
8 compliance with Local Rule 37. Any papers filed in support of or in opposition to
9 said motion shall, to the extent necessary, be filed under seal to preserve the claimed
10 confidentiality of the materials. The burden rests upon the party seeking the
11 “Confidential” or “Confidential – Attorneys’ Eyes Only” designation to demonstrate
12 the materials are to be afforded such protection.

13 **VII. NO WAIVER.**

14 1. Review of the “Confidential” or “Confidential – Attorneys’ Eyes Only”
15 materials and information by counsel, experts, or consultants for the litigants in this
16 action shall not waive the confidentiality of such material.

17 2. A producing party that inadvertently fails to designate discovery
18 material “Confidential” or “Confidential – Attorneys’ Eyes Only” pursuant to this
19 Order at the time of production shall be entitled to make a correction within a
20 reasonable amount of time of discovering the error. Such correction and notice
21 thereof shall be made in writing, accompanied by substitute copies of each item of
22 discovery material, appropriately designated. Those individuals who received the
23 discovery material prior to notice of the misdesignation by the producing party shall
24 within five days of receipt of the substitute copies, destroy or return to the law firm
25 representing the producing party all copies of such misdesignated documents.
26 Those individuals who reviewed the misdesignated discovery material prior to
27 notice of the misdesignation by the producing party shall abide by the provisions of
28 this Order with respect to the use and disclosure of any information contained in the

1 misdesignated materials. Nothing in this subsection shall waive a party’s right to
2 assert that the producing party has waived any claim of confidentiality by failing to
3 make its correction seasonably.

4 3. The inadvertent production of documents subject to work product
5 immunity, the attorney-client privilege, or any other immunity or privilege shall not
6 constitute a waiver of the immunity or privilege. No party to this action shall
7 thereafter assert that such inadvertent disclosure waived any privilege or immunity.
8 No use shall be made of such documents during deposition or at trial. The receiving
9 party promptly will return such inadvertently produced item or items of information
10 and all copies thereof within 10 days of the earliest of (a) discovery by the receiving
11 party of its inadvertent production, or (b) receiving a written request from the
12 producing party for the return of such item or items of information. Nothing in this
13 Order shall be construed to require the production of any information, document, or
14 thing that a party contends is protected from disclosure by the attorney-client
15 privilege and/or the work product doctrine.

16 **VIII. INFORMATION FROM THIRD-PARTY SOURCES.**

17 This Order shall also apply to discovery directed to non-parties to this action,
18 unless the non-party waives the protection of this Order on written notice to all
19 counsel of record. This Order shall not apply to information in the public domain or
20 lawfully obtained from other sources not in violation of this Order or any other
21 agreement regardless of whether or not such information is also contained in
22 discovery materials designated as “Confidential” or “Confidential – Attorneys’ Eyes
23 Only” in this action.

24 **IX. USE IN COURT PROCEEDINGS.**

25 If any Party desires to file with the Court any document, brief, transcript,
26 memoranda or other document containing “Confidential” or “Confidential –
27 Attorneys’ Eyes Only” information, that Party shall file and/or lodge such document
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1 under seal in accordance with the Court's applicable rules and/or procedures for
2 doing so.

3 **X. OTHER ACTIONS.**

4 If any person or entity possessing “Confidential” or “Confidential –
5 Attorneys’ Eyes Only” material is subpoenaed in another action or proceeding or
6 served with a document demand, and such subpoena or document demand requires
7 the production of “Confidential” or “Confidential – Attorneys’ Eyes Only” material,
8 the person receiving the subpoena or document demand shall give prompt written
9 notice to counsel for the producing party, and shall, to the extent permitted by law,
10 court rule, and court order, (1) withhold production of the requested “Confidential”
11 or “Confidential – Attorneys’ Eyes Only” material until the producing party permits
12 production, or until a court of competent jurisdiction orders otherwise and (2) seek
13 to enable the producing party to move to quash or limit the subpoena or document
14 demand.

15 **XI. NO PROBATIVE VALUE.**

16 The fact that information is designated, or is not designated, as “Confidential”
17 or “Confidential – Attorneys’ Eyes Only” under this Order will not be considered to
18 be determinative of what a trier of fact may determine to be confidential or
19 proprietary. The fact that any information is disclosed, used, or produced in
20 discovery or at trial in this action will not be construed to be admissible or offered in
21 any action or proceeding before any court, agency, or tribunal as evidence that the
22 information:

23 (a) is or is not relevant, material, or otherwise permissible;

24 (b) is or is not confidential or proprietary to any party;

25 (c) is or is not entitled to particular protection; or

26 (d) embodies or does not embody trade secrets or confidential research,
27 development, or commercial information of any party.

28 ///

1 **XII. FINAL DISPOSITION.**

2 Upon the final disposition of this action, (which shall mean the entry of a
3 final, non-appealable judgment or dismissal), the attorneys for the parties and non-
4 parties shall within sixty (60) days of the final disposition return all material
5 designated “Confidential” or “Confidential – Attorneys’ Eyes Only” to the party,
6 non-party, or witness from whom it was obtained. In addition, upon the final
7 disposition of this action, counsel of record shall furnish copies of all executed
8 acknowledgments (as contained at Exhibit A hereto) obtained in accordance with
9 the provisions of this Order to all other counsel of record.

10 **XIII. TERMINATION.**

11 The termination of this action shall not terminate the effectiveness of this
12 Order and persons subject to this Order shall be bound by the confidentiality
13 obligations of this Order until the designating party agrees otherwise in writing or
14 this Court (or any other court of competent jurisdiction) orders otherwise.

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1 **XI. RESERVATION OF RIGHTS.**

2 By designating any material “Confidential” or “Confidential – Attorneys’
3 Eyes Only” the parties do not acknowledge that any such material is relevant or
4 discoverable in this action. All parties reserve the right to seek discovery of, or
5 alternatively to resist discovery of, such material in this action.

6
7 DATED: January __, 2009

HENDERSON HUMPHREY LLP

8

9

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By: _____

11

J. Scott Humphrey

12

Attorneys for Plaintiffs

13

Thomas L. Kelley & Associates, Inc. and

14

Vincent Ortega

15

DATED: January __, 2009

MCGUIREWOODS LLP

16

17

By: _____

18

Matthew C. Kane

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Sara E. Willey

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Sylvia J. Kiim

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Attorneys for Defendant

BSN Medical, Inc.

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ORDER

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GOOD CAUSE HAVING BEEN SHOWN.

24

IT IS SO ORDERED.

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26

Dated: January 26, 2009

By: _____

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Hon. Alicia G. Rosenberg

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United States Magistrate Judge

1 **EXHIBIT A**

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3 I, _____, declare as follows:

4 1. I have received a copy of the STIPULATION AND PROTECTIVE
5 ORDER REGARDING CONFIDENTIAL DOCUMENTS AND INFORMATION
6 ("Order") entered in the case of Thomas L. Kelley & Associates, Inc., et. al. v. BSN
7 Medical, Inc., U.S. District Court, Central District of California (the "Court"), Case
8 No. CV08-4419 GW (AGRx). I will comply with all of the provisions of the Order.
9 I will hold in confidence, will not disclose to anyone not qualified under the Order,
10 and will use only for the purposes expressly set forth in the Order, any
11 CONFIDENTIAL material, including the substance and any copy, summary,
12 abstract, excerpt, index or description of such material, that is disclosed to me.

13 2. I will return all CONFIDENTIAL material that comes into my
14 possession, and all documents and things that I have prepared relating thereto, to
15 counsel for the party by whom I am employed or retained or from whom I received
16 such material, or I will certify destruction thereof.

17 3. I hereby submit to the jurisdiction of the Court for the purpose of the
18 enforcement of the Order in this action.

19 I declare that the statements made by me above are true. I understand that if
20 any of the statements made by me are willfully false, I am subject to punishment.
21

22
23 Dated: _____

By: _____

(Signature)