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 NEUROVISION MEDICAL PRODUCTS, INC.

18 UNITED STATES DISTRICT COURT
 19 CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

20 NEUROVISION MEDICAL
 21 PRODUCTS, INC.,

22 Plaintiff,

23 v.

24 NUVASIVE, INC. and DOES 1
 25 THROUGH 10, INCLUSIVE,

26 Defendants.

Case No. 2:09-cv-6988-R(JEMx)

**STIPULATED PROTECTIVE
 ORDER**

27 AND RELATED COUNTERCLAIMS
 28

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve
3 production of confidential, proprietary, or private information for which special
4 protection from public disclosure and from use for any purpose other than
5 prosecuting this litigation would be warranted. Accordingly, the parties hereby
6 stipulate to and petition the court to enter the following Stipulated Protective Order.
7 The parties acknowledge that this Order does not confer blanket protections on all
8 disclosures or responses to discovery and that the protection it affords extends only
9 to the limited information or items that are entitled under the applicable legal
10 principles to treatment as confidential. The parties further acknowledge, as set
11 forth in Section 10, below, that this Stipulated Protective Order creates no
12 entitlement to file confidential information under seal; Local Rule 79-5 sets forth
13 the procedures that must be followed when a party seeks permission from the court
14 to file material under seal.

15 2. DEFINITIONS

16 2.1 Party: any party to this action, including all of its officers,
17 directors, employees, consultants, retained experts, and outside counsel (and their
18 support staff).

19 2.2 Disclosure or Discovery Material: all items or information,
20 regardless of the medium or manner generated, stored, or maintained (including,
21 among other things, testimony, transcripts, or tangible things) that are produced or
22 generated in disclosures or responses to discovery in this matter.

23 2.3 “Confidential” Information or Items: information (regardless of
24 how generated, stored or maintained) or tangible things that qualify for protection
25 under standards developed under F.R.Civ.P. 26(c).

26 2.4 “Highly Confidential -- Outside Counsel Only” Information or
27 Items: extremely sensitive “Confidential Information or Items” whose disclosure to
28

1 another Party or nonparty would create a substantial risk of serious injury that could
2 not be avoided by less restrictive means.

3 2.5 Receiving Party: a Party that receives Disclosure or Discovery
4 Material from a Producing Party.

5 2.6 Producing Party: a Party or non-party that produces Disclosure
6 or Discovery Material in this action.

7 2.7. Designating Party: a Party or non-party that designates
8 information or items that it produces in disclosures or in responses to discovery as
9 “Confidential” or “Highly Confidential -- Outside Counsel Only.”

10 2.8 Protected Material: any Disclosure or Discovery Material that is
11 designated as “Confidential” or as “Highly Confidential -- Outside Counsel Only.”

12 2.9 Outside Counsel: Attorneys who are retained to represent or
13 advise a Party in this action (as well as their support staffs).

14 2.10 Expert: a person with specialized knowledge or experience in a
15 matter pertinent to the litigation who has been retained by a Party or its counsel to
16 serve as an expert witness or as a consultant in this action. This definition includes
17 a professional jury or trial consultant retained in connection with this litigation.
18 The expert witness or consultant may not be a past or a current employee of the
19 Party (including any affiliates or related entities) adverse to the Party engaging the
20 expert witness or consultant, or someone who at the time of retention is anticipated
21 to become an employee of the Party (including any affiliates or related entities)
22 adverse to the Party engaging the expert witness or consultant. Moreover, the expert
23 witness or consultant may not be a current employee or anticipated to become an
24 employee of any entity who is a Competitor of the Party adverse to the Party
25 engaging the expert witness or consultant.

26 2.11 Competitor: For purposes of this Stipulation and Order, the
27 following companies (as well as their affiliates and related entitles) constitute
28 competitors of NuVasive: Medtronic Sofamor Danek, Johnson & Johnson,

1 Synthes, Stryker and Zimmer. For purposes of this Stipulation and Order, the
2 following companies (as well as their affiliates and related entities) constitute
3 competitors of Neurovision Medical Products, Inc.: Medtronic – Surgical
4 Technologies Division, Magstim International, Sense Medical, Inomed, and
5 Cadwell Laboratories.

6 2.12 Professional Vendors: persons or entities that provide litigation
7 support services (e.g., photocopying; videotaping; translating; preparing exhibits or
8 demonstrations; organizing, storing, retrieving data in any form or medium; etc.)
9 and their employees and subcontractors.

10 3. SCOPE

11 The protections conferred by this Stipulation and Order cover not only
12 Protected Material (as defined above), but also any information copied or extracted
13 therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus
14 testimony, conversations, or presentations by parties or counsel to or in court or in
15 other settings that might reveal Protected Material.

16 4. DURATION

17 Even after the termination of this litigation, the confidentiality obligations
18 imposed by this Order shall remain in effect until a Designating Party agrees
19 otherwise in writing or a court order otherwise directs.

20 5. DESIGNATING PROTECTED MATERIAL

21 5.1 Exercise of Restraint and Care in Designating Material for
22 Protection. Each Party or non-party that designates information or items for
23 protection under this Order must take care to limit any such designation to specific
24 material that qualifies under the appropriate standards. A Designating Party must
25 take care to designate for protection only those parts of material, documents, items,
26 or oral or written communications that qualify – so that other portions of the
27 material, documents, items, or communications for which protection is not
28 warranted are not swept unjustifiably within the ambit of this Order.

1 Mass, indiscriminate, or routinized designations are prohibited.
2 Designations that are shown to be clearly unjustified, or that have been made for an
3 improper purpose (e.g., to unnecessarily encumber or retard the case development
4 process, or to impose unnecessary expenses and burdens on other parties), expose
5 the Designating Party to sanctions.

6 If it comes to a Party's or a non-party's attention that information or
7 items that it designated for protection do not qualify for protection at all, or do not
8 qualify for the level of protection initially asserted, that Party or non-party must
9 promptly notify all other parties that it is withdrawing the mistaken designation.

10 5.2 Manner and Timing of Designations. Except as otherwise
11 provided in this Order (see, e.g., second paragraph of section 5.2(a), below), or as
12 otherwise stipulated or ordered, material that qualifies for protection under this
13 Order must be clearly so designated before the material is disclosed or produced.

14 Designation in conformity with this Order requires:

15 (a) for information in documentary form (apart from
16 transcripts of depositions or other pretrial or trial proceedings), that the Producing
17 Party affix the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL --
18 OUTSIDE COUNSEL ONLY" at the top or bottom of each page that contains
19 protected material. If only a portion or portions of the material on a page qualifies
20 for protection, the Producing Party also must clearly identify the protected
21 portion(s) (e.g., by making appropriate markings in the margins) and must specify,
22 for each portion, the level of protection being asserted (either "CONFIDENTIAL"
23 or "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL ONLY").

24 A Party or non-party that makes original documents or materials
25 available for inspection need not designate them for protection until after the
26 inspecting Party has indicated which material it would like copied and produced.
27 During the inspection and before the designation, all of the material made available
28 for inspection shall be deemed "HIGHLY CONFIDENTIAL -- OUTSIDE

1 COUNSEL ONLY.” After the inspecting Party has identified the documents it
2 wants copied and produced, the Producing Party must determine which documents,
3 or portions thereof, qualify for protection under this Order, then, before producing
4 the specified documents, the Producing Party must affix the appropriate legend
5 (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL
6 ONLY”) at the top or bottom of each page that contains Protected Material. If only
7 a portion or portions of the material on a page qualifies for protection, the
8 Producing Party also must clearly identify the protected portion(s) (e.g., by making
9 appropriate markings in the margins) and must specify, for each portion, the level
10 of protection being asserted (either “CONFIDENTIAL” or “HIGHLY
11 CONFIDENTIAL -- OUTSIDE COUNSEL ONLY”).

12 (b) for testimony given in deposition or in other pretrial or
13 trial proceedings, that the Party or non-party offering or sponsoring the testimony
14 identify on the record, before the close of the deposition, hearing, or other
15 proceeding, all protected testimony, and further specify any portions of the
16 testimony that qualify as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL --
17 OUTSIDE COUNSEL ONLY.” When it is impractical to identify separately each
18 portion of testimony that is entitled to protection, and when it appears that
19 substantial portions of the testimony may qualify for protection, the Party or non-
20 party that sponsors, offers, or gives the testimony may invoke on the record (before
21 the deposition or proceeding is concluded) a right to have up to 20 days to identify
22 the specific portions of the testimony as to which protection is sought and to specify
23 the level of protection being asserted (“CONFIDENTIAL” or “HIGHLY
24 CONFIDENTIAL -- OUTSIDE COUNSEL ONLY”). Only those portions of the
25 testimony that are appropriately designated for protection within the 20 days shall
26 be covered by the provisions of this Stipulated Protective Order.

27 Transcript pages containing Protected Material must be
28 separately bound by the court reporter, who must affix to the top of each such page

1 the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL -- OUTSIDE
2 COUNSEL ONLY,” as instructed by the Party or nonparty offering or sponsoring
3 the witness or presenting the testimony.

4 (c) for information produced in some form other than
5 documentary, and for any other tangible items, that the Producing Party affix in a
6 prominent place on the exterior of the container or containers in which the
7 information or item is stored the legend “CONFIDENTIAL” or “HIGHLY
8 CONFIDENTIAL -- OUTSIDE COUNSEL ONLY.” If only portions of the
9 information or item warrant protection, the Producing Party, to the extent
10 practicable, shall identify the protected portions, specifying whether they qualify as
11 “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL
12 ONLY.”

13 5.3 Inadvertent Failures to Designate. If timely corrected, an
14 inadvertent failure to designate qualified information or items as
15 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL
16 ONLY” does not, standing alone, waive the Designating Party’s right to secure
17 protection under this Order for such material. If material is appropriately designated
18 as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL
19 ONLY” after the material was initially produced, the Receiving Party, on timely
20 notification of the designation, must make reasonable efforts to assure that the
21 material is treated in accordance with the provisions of this Order.

22 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

23 6.1 Timing of Challenges. Unless a prompt challenge to a
24 Designating Party’s confidentiality designation is necessary to avoid foreseeable
25 substantial unfairness, unnecessary economic burdens, or a later significant
26 disruption or delay of the litigation, a Party does not waive its right to challenge a
27 confidentiality designation by electing not to mount a challenge promptly after the
28 original designation is disclosed.

1 6.2 Procedure For Challenging Designation. A Party that elects to
2 initiate a challenge to a Designating Party’s confidentiality designation must do so
3 by the procedure set forth in Local Rule 37.. The burden of persuasion in any such
4 challenge proceeding shall be on the Designating Party. Until the Court rules on
5 the challenge, all parties shall continue to afford the material in question the level of
6 protection to which it is entitled under the Producing Party’s designation.

7 6.3 Procedure—Requesting Permission to Disclosure HIGHLY
8 CONFIDENTIAL – OUTSIDE COUNSEL ONLY Materials to Party. If a Party's
9 Outside Counsel determines that his or her ability to provide the Party with a full
10 and robust representation in this matter has been hindered because the Outside
11 Counsel is unable to disclose information that has been designated HIGHLY
12 CONFIDENTIAL -- OUTSIDE COUNSEL ONLY to that Party, Outside Counsel
13 may seek permission to disclose the information to that Party by the procedure set
14 forth in Local Rule 37. Until the Court rules on the challenge, all parties shall
15 continue to afford the material in question the level of protection to which it is
16 entitled under the Producing Party’s designation.

17 7. ACCESS TO AND USE OF PROTECTED MATERIAL

18 7.1 Basic Principles. A Receiving Party may use Protected Material
19 that is disclosed or produced by another Party or by a non-party in connection with
20 this case only for prosecuting, defending, or attempting to settle this litigation. Such
21 Protected Material may be disclosed only to the categories of persons and under the
22 conditions described in this Order. When the litigation has been terminated, a
23 Receiving Party must comply with the provisions of section 11, below (FINAL
24 DISPOSITION).

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

1 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
2 otherwise ordered by the court or permitted in writing by the Designating Party, a
3 Receiving Party may disclose any information or item designated
4 CONFIDENTIAL only to:

5 (a) the Receiving Party’s Outside Counsel and in-house
6 counsel, as well as employees of said Outside Counsel and in-house counsel to
7 whom it is reasonably necessary to disclose the information for this litigation;

8 (b) Board members, officers and directors of the Receiving
9 Party who have signed the “Agreement to Be Bound by Protective Order” (Exhibit
10 A);

11 (c) Other employees of the Receiving Party to whom
12 disclosure is reasonably necessary for this litigation and who have signed the
13 “Agreement to Be Bound by Protective Order” (Exhibit A);

14 (d) Experts (as defined in this Order) of the Receiving Party
15 to whom disclosure is reasonably necessary for this litigation and who have signed
16 the “Agreement to Be Bound by Protective Order” (Exhibit A);

17 (e) the Court and its personnel;

18 (f) court reporters, their staffs, and professional vendors to
19 whom disclosure is reasonably necessary for this litigation and who have signed the
20 “Agreement to Be Bound by Protective Order” (Exhibit A);

21 (g) during their depositions, witnesses in the action to whom
22 disclosure is reasonably necessary and who have signed the “Agreement to Be
23 Bound by Protective Order” (Exhibit A). Pages of transcribed deposition testimony
24 or exhibits to depositions that reveal Protected Material must be separately bound
25 by the court reporter and may not be disclosed to anyone except as permitted under
26 this Stipulated Protective Order.

27 (h) the author and recipients of the document or the original
28 source of the information.

1 7.3 Disclosure of “HIGHLY CONFIDENTIAL -- OUTSIDE
2 COUNSEL ONLY” Information or Items. Unless otherwise ordered by the court or
3 permitted in writing by the Designating Party, a Receiving Party may disclose any
4 information or item designated “HIGHLY CONFIDENTIAL -- OUTSIDE
5 COUNSEL ONLY” only to:

6 (a) the Receiving Party’s Outside Counsel, as well as
7 employees of said Outside Counsel to whom it is reasonably necessary to disclose
8 the information for this litigation;

9 (c) Experts (as defined in this Order) of the Receiving Party
10 to whom disclosure is reasonably necessary for this litigation and who have signed
11 the “Agreement to Be Bound by Protective Order” (Exhibit A);

12 (d) the Court and its personnel;

13 (e) court reporters, their staffs, and professional vendors to
14 whom disclosure is reasonably necessary for this litigation and who have signed the
15 “Agreement to Be Bound by Protective Order” (Exhibit A); and

16 (f) the author and recipients of the document or the original
17 source of the information.

18 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED
19 PRODUCED IN OTHER LITIGATION.

20 If a Receiving Party is served with a subpoena or an order issued in
21 other litigation that would compel disclosure of any information or items
22 designated in this action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL --
23 OUTSIDE COUNSEL ONLY,” the Receiving Party must so notify the Designating
24 Party, in writing (by fax, if possible) immediately and in no event more than three
25 court days after receiving the subpoena or order. Such notification must include a
26 copy of the subpoena or court order. The Receiving Party also must immediately
27 inform in writing the Party who caused the subpoena or order to issue in the other
28 litigation that some or all the material covered by the subpoena or order is the

1 subject of this Protective Order. In addition, the Receiving Party must deliver a
2 copy of this Stipulated Protective Order promptly to the Party in the other action
3 that caused the subpoena or order to issue.

4 The purpose of imposing these duties is to alert the interested parties to
5 the existence of this Protective Order and to afford the Designating Party in this
6 case an opportunity to try to protect its confidentiality interests in the court from
7 which the subpoena or order issued. The Designating Party shall bear the burdens
8 and the expenses of seeking protection in that court of its confidential material –
9 and nothing in these provisions should be construed as authorizing or encouraging a
10 Receiving Party in this action to disobey a lawful directive from another court.

11 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

12 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
13 Protected Material to any person or in any circumstance not authorized under this
14 Stipulated Protective Order, the Receiving Party must immediately (a) notify in
15 writing the Designating Party of the unauthorized disclosures, (b) use its best
16 efforts to retrieve all copies of the Protected Material, (c) inform the person or
17 persons to whom unauthorized disclosures were made of all the terms of this Order,
18 and (d) request such person or persons to execute the “Acknowledgment and
19 Agreement to Be Bound” that is attached hereto as Exhibit A.

20 10. FILING PROTECTED MATERIAL. Without written permission from
21 the Designating Party or a court order secured after appropriate notice to all
22 interested persons, a Party may not file in the public record in this action any
23 Protected Material. A Party that seeks to file under seal any Protected Material must
24 comply with Local Rule 79-5.

25 11. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing
26 by the Producing Party, within sixty days after the final termination of this action,
27 each Receiving Party must return all Protected Material to the Producing Party. As
28 used in this subdivision, “all Protected Material” includes all copies, abstracts,

1 compilations, summaries or any other form of reproducing or capturing any of the
2 Protected Material. With permission in writing from the Designating Party, the
3 Receiving Party may destroy some or all of the Protected Material instead of
4 returning it. Whether the Protected Material is returned or destroyed, the Receiving
5 Party must submit a written certification to the Producing Party (and, if not the
6 same person or entity, to the Designating Party) by the sixty day deadline that
7 identifies (by category, where appropriate) all the Protected Material that was
8 returned or destroyed and that affirms that the Receiving Party has not retained any
9 copies, abstracts, compilations, summaries or other forms of reproducing or
10 capturing any of the Protected Material.

11 Notwithstanding this provision, Counsel are entitled to retain an archival
12 copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence
13 or attorney work product, even if such materials contain Protected Material. Any
14 such archival copies that contain or constitute Protected Material remain subject to
15 this Protective Order as set forth in Section 4 (DURATION), above.

16 12. MISCELLANEOUS

17 12.1 Right to Further Relief. Nothing in this Order abridges the right
18 of any person to seek its modification by the Court in the future.

19 12.2 Right to Assert Other Objections. By stipulating to the entry of
20 this Protective Order no Party waives any right it otherwise would have to object to
21 disclosing or producing any information or item on any ground not addressed in
22 this Stipulated Protective Order. Similarly, no Party waives any right to object on
23 any ground to use in evidence of any of the material covered by this Protective
24 Order.

25 12.3 Inadvertent Production of Privileged Documents. If a party,
26 through inadvertence, produces any document or information that it believes is
27 immune from discovery pursuant to an attorney-client privilege, the work product
28 privilege, or any other privilege, such production shall not be deemed a waiver of

1 any privilege, and the producing party may give written notice to the receiving
2 party that the document or information produced is deemed privileged and that
3 return of the document or information is requested. Upon receipt of such notice, the
4 receiving party shall immediately gather the original and all copies of the document
5 or information of which the receiving party is aware, in addition to any abstracts,
6 summaries, or descriptions thereof, and shall immediately return the original and all
7 such copies to the producing party. Nothing stated herein shall preclude a party
8 from challenging an assertion by the other party of privilege or confidentiality.
9

10 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

11 Dated: March , 2010

ANTHONY L. PRESS
JENNIFER LEE TAYLOR
SCOTT C. MOORE
MORRISON & FOERSTER LLP

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13
14
15 By: _____
Scott C. Moore

16 Attorneys for Defendant and
17 Counterclaimant
NUVASIVE, INC.

18 Dated: March , 2010

BROWNE WOODS GEORGE LLP

19
20 By: _____
Keith J. Wesley

21 Attorneys for Plaintiff and Counter-
22 Defendant
23 NEUROVISION MEDICAL
24 PRODUCTS, INC.
25
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27
28

1 PURSUANT TO STIPULATION, IT IS SO ORDERED.

2 Dated: March 29, 2010

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4 By: 

Hon. Manuel L. Real

5 UNITED STATES DISTRICT
6 JUDGE
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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print full name], of _____
[print full address], 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 Central District of California on [date] in the case of
Neurovision Medical Products, Inc. v. NuVasive, Inc., Case No. 2:09-cv-6988-
R(JEMx). 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 Central District of California for the purpose of enforcing the terms of this
Stipulated Protective Order, even if such enforcement proceedings occur after
termination of this action.

I hereby appoint _____ [print full name] of
_____ [print full address and telephone
number] as my California agent for service of process in connection with this action
or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____
City and State where sworn and signed: _____
Printed name: _____
Signature: _____