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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 **ADVANCED ORTHOPAEDIC**  
11 **SOLUTIONS, INC., a California**  
12 **corporation,**

12 **Plaintiff/**  
13 **Counter-Defendant,**

13 **vs.**

14 **BIOMET, INC., an Indiana corporation,**

15 **Defendant/**  
16 **Counterclaimant.**

Case No. 2:14-cv-06354-ODW-MAN

**PROTECTIVE ORDER  
ENTERED PURSUANT  
TO THE STIPULATION  
OF THE PARTIES**

17  
18 Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and based on the  
19 parties' Stipulation To Entry Of Protective Order ("Stipulation") filed on May 11,  
20 2015, the terms of the protective order to which the parties have agreed are adopted as  
21 a protective order of this Court (which generally shall govern the pretrial phase of this  
22 action) except to the extent, as set forth below, that those terms have been  
23 substantively modified by the Court's amendment of paragraphs 1, 2.2, 2.2.2, 3, 4.4.4,  
24 5.2, 5.3, 8, and 9 of, and Exhibit E-1 to, the Stipulation.

25 The parties are expressly cautioned that the designation of any information,  
26 document, or thing as Confidential, Highly Confidential – Attorneys' Eyes Only, or  
27 other designation(s) used by the parties, does not, in and of itself, create any  
28 entitlement to file such information, document, or thing, in whole or in part, under

1 seal. Accordingly, reference to this Protective Order (“Order”) or to the parties’  
2 designation of any information, document, or thing as Confidential, Highly  
3 Confidential – Attorneys’ Eyes Only, or other designation(s) used by the parties, is  
4 wholly insufficient to warrant a filing under seal.

5       There is a strong presumption that the public has a right of access to judicial  
6 proceedings and records in civil cases. In connection with non-dispositive motions,  
7 good cause must be shown to support a filing under seal. The parties’ mere  
8 designation of any information, document, or thing as Confidential, Highly  
9 Confidential – Attorneys’ Eyes Only, or other designation(s) used by parties, does not  
10 -- **without the submission of competent evidence, in the form of a declaration or**  
11 **declarations, establishing that the material sought to be filed under seal qualifies**  
12 **as confidential, privileged, or otherwise protectable** -- constitute good cause.

13       Further, if sealing is requested in connection with a dispositive motion or trial,  
14 then compelling reasons, as opposed to good cause, for the sealing must be shown,  
15 and the relief sought shall be narrowly tailored to serve the specific interest to be  
16 protected. *See Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 677-79 (9th Cir.  
17 2010). For each item or type of information, document, or thing sought to be filed or  
18 introduced under seal in connection with a dispositive motion or trial, the party  
19 seeking protection must articulate compelling reasons, supported by specific facts and  
20 legal justification, for the requested sealing order. **Again, competent evidence**  
21 **supporting the application to file documents under seal must be provided by**  
22 **declaration.**

23       Any document that is not confidential, privileged, or otherwise protectable in its  
24 entirety will not be filed under seal if the confidential portions can be redacted. If  
25 documents can be redacted, then a redacted version for public viewing, omitting only  
26 the confidential, privileged, or otherwise protectable portions of the document, shall  
27 be filed. Any application that seeks to file documents under seal in their entirety  
28 should include an explanation of why redaction is not feasible.

1 Notwithstanding any other provision of this Order, in the event that this case  
2 proceeds to trial, all information, documents, and things discussed or introduced into  
3 evidence at trial will become public and available to all members of the public,  
4 including the press, unless sufficient cause is shown in advance of trial to proceed  
5 otherwise.

6 Further, notwithstanding any other provision of this Order, no obligation is  
7 imposed on the Court or its personnel beyond those imposed by the Court's general  
8 practices and procedures.

9 **THE PARTIES ARE DIRECTED TO REVIEW CAREFULLY AND ACT**  
10 **IN COMPLIANCE WITH ALL ORDERS ISSUED BY THE HONORABLE**  
11 **OTIS D. WRIGHT III, UNITED STATES DISTRICT JUDGE, INCLUDING**  
12 **THOSE APPLICABLE TO FILINGS UNDER SEAL.**

13  
14 **AGREED TERMS OF THE PROTECTIVE ORDER AS ADOPTED AND**  
15 **MODIFIED BY THE COURT**<sup>1</sup>  
16

17 **1. LIMITS OF THIS ORDER**

18 Discovery in this action may involve confidential, proprietary, or private  
19 information requiring special protection from public disclosure and from use for any  
20 purpose other than this litigation. This Order does not confer blanket protections on  
21 all disclosures or responses to discovery, and the protection it gives from public  
22 disclosure and use extends only to the specific material that is entitled to confidential  
23 treatment under the applicable legal principles. This Order does not automatically  
24 authorize the filing under seal of material designated under this Order. Instead, the  
25 parties must comply with Local Rule 79-5.1 and this Court's Order Re Pilot Program  
26 for Under Seal Documents (*See* Exhibit F) if they seek to file anything under seal.

27 <sup>1</sup> The Court's substantive modifications of the agreed terms of the Protective  
28 Order are generally indicated in bold typeface.

1 This Order does not govern the use at trial of material designated under this Order.

2 **2. DESIGNATING PROTECTED MATERIAL**

3 **2.1 Over-Designation Prohibited.** Any party or non-party who designates  
4 information or items for protection under this Order as “CONFIDENTIAL” or  
5 “HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY” (a “designator”) must  
6 only designate specific material that qualifies under the appropriate standards. To the  
7 extent practicable, only those parts of documents, items, or oral or written  
8 communications that require protection shall be designated. Designations with a  
9 higher confidentiality level when a lower level would suffice are prohibited. Mass,  
10 indiscriminate, or routinized designations are prohibited. Unjustified designations  
11 expose the designator to sanctions, including the Court’s striking all confidentiality  
12 designations made by that designator. Designation under this Order is allowed only if  
13 the designation is necessary to protect material that, if disclosed to persons not  
14 authorized to view it, would cause competitive or other recognized harm. Material  
15 may not be designated if it has been made public, or if designation is otherwise  
16 unnecessary to protect a secrecy interest. If a designator learns that information or  
17 items that it designated for protection do not qualify for protection at all or do not  
18 qualify for the level of protection initially asserted, that designator must promptly  
19 notify all parties that it is withdrawing the mistaken designation.

20 **2.2 Manner and Timing of Designations.** Designation under this Order requires  
21 the designator to affix the applicable legend (“CONFIDENTIAL” or “HIGHLY  
22 CONFIDENTIAL – ATTORNEY EYES ONLY”) to each page that contains  
23 protected material. For testimony given in deposition, the designator shall specify all  
24 protected testimony and the level of protection being asserted. It may make that  
25 designation during the deposition, or may invoke, on the record or by written notice to  
26 all parties on or before the next business day, a right to have up to 21 days from  
27 receipt of the deposition transcript to make its designation.

28 **2.2.1** A party or non-party that makes original documents or materials available for

1 inspection need not designate them for protection until after the inspecting party has  
2 identified which material it would like copied and produced. During the inspection  
3 and before the designation, all material shall be treated as **HIGHLY CONFIDENTIAL**  
4 – **ATTORNEY EYES ONLY**. After the inspecting party has identified the documents  
5 it wants copied and produced, the producing party must designate the documents, or  
6 portions thereof, that qualify for protection under this Order.

7 **2.2.2** Parties shall give advance notice if they expect a deposition to include  
8 designated material so that the other parties can ensure that only authorized  
9 individuals are present at **depositions during which** such material is disclosed or  
10 used. The use of a document as an exhibit at a deposition shall not in any way affect  
11 its designation. Transcripts containing designated material shall have a legend on the  
12 title page noting the presence of designated material, and the title page shall be  
13 followed by a list of all pages (including line numbers as appropriate) that have been  
14 designated, and the level of protection being asserted. The designator shall inform the  
15 court reporter of these requirements. Before the expiration of the 21-day period for  
16 designation, **deposition** transcripts shall be treated as if they had been designated  
17 **HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY** unless otherwise agreed.  
18 After the expiration of the 21-day period, a transcript shall be treated only as actually  
19 designated.

20 **2.3 Inadvertent Failures to Designate.** An inadvertent failure to designate does  
21 not, standing alone, waive protection under this Order. Upon timely assertion or  
22 correction of a designation, all recipients must make reasonable efforts to ensure that  
23 the material is treated according to this Order.

### 24 **3. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

25 All challenges to confidentiality designations shall proceed under Local Rule 37-1  
26 through Local Rule 37-4. **The designator shall bear the burden and expense of**  
27 **establishing the propriety of the designation.**

### 28 **4. ACCESS TO DESIGNATED MATERIAL**

1 **4.1 Basic Principles.** A receiving party may use designated material only for this  
2 litigation. Designated material may be disclosed only to the categories of persons and  
3 under the conditions described in this Order.

4 **4.2 Disclosure of CONFIDENTIAL Material Without Further Approval.**

5 Unless otherwise ordered by the Court or permitted in writing by the designator, a  
6 receiving party may disclose any material designated CONFIDENTIAL only to:

7 **4.2.1** The receiving party's outside counsel of record in this action and employees of  
8 outside counsel of record to whom disclosure is reasonably necessary;

9 **4.2.2** The officers, directors, and employees of the receiving party to whom  
10 disclosure is reasonably necessary, and who have signed the Agreement to Be Bound  
11 (Exhibit E-1);

12 **4.2.3** Experts retained by the receiving party's outside counsel of record to whom  
13 disclosure is reasonably necessary, and who have signed the Agreement to Be Bound  
14 (Exhibit E-1);

15 **4.2.4** The Court and its personnel;

16 **4.2.5** Outside court reporters and their staff, professional jury or trial consultants, and  
17 professional vendors to whom disclosure is reasonably necessary, and who have  
18 signed the Agreement to Be Bound (Exhibit E-1);

19 **4.2.6** During their depositions, witnesses in the action to whom disclosure is  
20 reasonably necessary and who have signed the Agreement to Be Bound (Exhibit E-1);  
21 and

22 **4.2.7** The author or recipient of a document containing the material, or a custodian or  
23 other person who otherwise possessed or knew the information.

24 **4.3 Disclosure of HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY**  
25 **Material Without Further Approval.** Unless permitted in writing by the designator,  
26 a receiving party may disclose material designated HIGHLY CONFIDENTIAL –  
27 ATTORNEY EYES ONLY without further approval only to:

28 **4.3.1** The receiving party's outside counsel of record in this action and employees of

1 outside counsel of record to whom it is reasonably necessary to disclose the  
2 information;

3 **4.3.2** The Court and its personnel;

4 **4.3.3** Outside court reporters and their staff, professional jury or trial consultants, and  
5 professional vendors to whom disclosure is reasonably necessary, and who have  
6 signed the Agreement to Be Bound (Exhibit E-1); and

7 **4.3.4** The author or recipient of a document containing the material, or a custodian or  
8 other person who otherwise possessed or knew the information.

9 **4.4 Procedures for Approving or Objecting to Disclosure of HIGHLY**  
10 **CONFIDENTIAL – ATTORNEY EYES ONLY Material to In-House Counsel or**  
11 **Experts.** Unless agreed to in writing by the designator:

12 **4.4.1 A party seeking to disclose to in-house counsel any material designated**  
13 **HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY must first make a**  
14 **written request to the designator** providing the full name of the in-house counsel,  
15 the city and state of such counsel's residence, and such counsel's current and  
16 reasonably foreseeable future primary job duties and responsibilities in sufficient  
17 detail to determine present or potential involvement in any competitive decision-  
18 making.

19 **4.4.2** A party seeking to disclose to an expert retained by outside counsel of record  
20 any information or item that has been designated HIGHLY CONFIDENTIAL –  
21 ATTORNEY EYES ONLY must first make a written request to the designator that (1)  
22 identifies the general categories of HIGHLY CONFIDENTIAL – ATTORNEY EYES  
23 ONLY information that the receiving party seeks permission to disclose to the expert,  
24 (2) sets forth the full name of the expert and the city and state of his or her primary  
25 residence, (3) attaches a copy of the expert's current resume, (4) identifies the expert's  
26 current employer(s), (5) identifies each person or entity from whom the expert has  
27 received compensation or funding for work in his or her areas of expertise (including  
28 in connection with litigation) in the past five years, and (6) identifies (by name and



1 number of the case, filing date, and location of court) any litigation where the expert  
2 has offered expert testimony, including by declaration, report, or testimony at  
3 deposition or trial, in the past five years. If the expert believes any of this information  
4 at (4) - (6) is subject to a confidentiality obligation to a third party, then the expert  
5 should provide whatever information the expert believes can be disclosed without  
6 violating any confidentiality agreements, and the party seeking to disclose the  
7 information to the expert shall be available to meet and confer with the designator  
8 regarding any such confidentiality obligations.

9 **4.4.3** A party that makes a request and provides the information specified in  
10 paragraphs 4.4.1 or 4.4.2 may disclose the designated material to the identified in-  
11 house counsel or expert unless, within seven days of delivering the request, the party  
12 receives a written objection from the designator providing detailed grounds for the  
13 objection.

14 **4.4.4** All challenges to objections from the designator shall proceed under Local Rule  
15 37-1 through Local Rule 37-4. **The designator shall bear the burden and expense**  
16 **of establishing the propriety of the challenged designation.**

17 **5. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED**  
18 **IN OTHER LITIGATION**

19 **5.1 Subpoenas and Court Orders.** This Order in no way excuses noncompliance  
20 with a lawful subpoena or court order. The purpose of the duties described in this  
21 section is to alert the interested parties to the existence of this Order and to give the  
22 designator an opportunity to protect its confidentiality interests in the court where the  
23 subpoena or order issued.

24 **5.2 Notification Requirement.** If a party is served with a subpoena or a court order  
25 issued in other litigation that compels disclosure of any information or items received  
26 by that party in this action and designated in this action as CONFIDENTIAL or  
27 HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY, that party must do the  
28 following.



1 **5.2.1** Promptly notify the designator in writing. Such notification shall include a copy  
2 of the subpoena or court order.

3 **5.2.2** Promptly notify in writing the party who caused the subpoena or order to issue  
4 in the other litigation that some or all of the material covered by the subpoena or order  
5 is subject to this Order. Such notification shall include a copy of this Order.

6 **5.2.3** Cooperate with all reasonable procedures sought by the designator whose  
7 material may be affected. **Nothing in this Order authorizes a party in this action to**  
8 **disobey a lawful directive from another court.**

9 **5.3 Wait For Resolution of Protective Order.** If the designator promptly seeks a  
10 protective order, the party served with the subpoena or court order shall not produce  
11 any information designated in this action as CONFIDENTIAL or HIGHLY  
12 CONFIDENTIAL – ATTORNEY EYES ONLY before a determination by the court  
13 where the subpoena or order issued, unless the party has obtained the designator's  
14 permission. The designator shall bear the burden and expense of seeking protection of  
15 its confidential material in that court. **Nothing in this Order authorizes a party in**  
16 **this action to disobey a lawful directive from another court.**

17 **6. UNAUTHORIZED DISCLOSURE OF DESIGNATED MATERIAL**

18 If a receiving party learns that, by inadvertence or otherwise, it has disclosed  
19 designated material to any person or in any circumstance not authorized under this  
20 Order, it must immediately (1) notify in writing the designator of the unauthorized  
21 disclosures, (2) use its best efforts to retrieve all unauthorized copies of the designated  
22 material, (3) inform the person or persons to whom unauthorized disclosures were  
23 made of all the terms of this Order, and (4) use reasonable efforts to have such person  
24 or persons execute the Agreement to Be Bound (Exhibit E-1).

25 **7. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**  
26 **PROTECTED MATERIAL**

27 When a producing party gives notice that certain inadvertently produced material is  
28 subject to a claim of privilege or other protection, the obligations of the receiving

1 parties are those set forth in Fed. R. Civ. P. 26(b)(5)(B). This provision is not intended  
2 to modify whatever procedure may be established in an e-discovery order that  
3 provides for production without prior privilege review pursuant to Fed. R. Evid.  
4 502(d) and (e).

5 **8. FILING UNDER SEAL**

6 Without written permission from the designator or a Court order, a party may not file  
7 in the public record in this action any designated material. **If any party should desire**  
8 **to include designated material in any papers filed with the Court, the party shall**  
9 **file an application, in accordance with the requirements of Local Rule 79-5, and**  
10 **provide the requisite showing based on competent evidence of “good cause” or**  
11 **“compelling reasons,” for a Court order allowing such designated material to be**  
12 **filed under seal.** The fact that a document has been designated under this Order is  
13 insufficient to justify filing under seal. Instead, parties must explain the basis for  
14 confidentiality of each document sought to be filed under seal. Because a party other  
15 than the designator will often be seeking to file designated material, cooperation  
16 between the parties in preparing, and in reducing the number and extent of, requests  
17 for under seal filing is essential. If a *receiving party’s* request to file designated  
18 material under seal pursuant to Local Rule 79-5.1 is denied by the Court, then the  
19 receiving party *may file the material in the public record* unless (1) *the designator*  
20 seeks reconsideration within four days of the denial, or (2) as otherwise instructed by  
21 the Court.

22 **9. ATTORNEY ADVICE BASED ON DISCLOSURE** Nothing in this Order  
23 shall bar or otherwise restrict any attorney from rendering advice to his or her client  
24 with respect to this litigation and, in the course of rendering advice, referring to or  
25 relying generally on the examination of Confidential Information produced or  
26 exchanged; provided however, that in rendering such advice and in otherwise  
27 communicating with his or her client, the attorney shall not disclose the specific  
28 contents of any Confidential Information if that disclosure would be contrary to the

1 terms of this Order. Further, nothing in this Order prevents any outside attorney from  
2 advising his or her clients regarding general strategy so long as the attorney does not  
3 disclose the contents of any Confidential Information in any manner contrary to the  
4 terms of this Order. The parties reserve the right to contest a designation or obtain a  
5 waiver of the provisions of this Order from the Court for the purpose of rendering  
6 advice to his or her client if the parties cannot work out a suitable resolution.

7 **10. FINAL DISPOSITION**

8 Within 60 days after the final disposition of this action, each party shall return all  
9 designated material to the designator or destroy such material, including all copies,  
10 abstracts, compilations, summaries, and any other format reproducing or capturing  
11 any designated material. The receiving party must submit a written certification to the  
12 designator by the 60-day deadline that (1) identifies (by category, where appropriate)  
13 all the designated material that was returned or destroyed, and (2) affirms that the  
14 receiving party has not retained any copies, abstracts, compilations, summaries, or any  
15 other format reproducing or capturing any of the designated material. This provision  
16 shall not prevent counsel from retaining an archival copy of all pleadings, motion  
17 papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence,  
18 deposition and trial exhibits, expert reports, attorney work product, and consultant and  
19 expert work product, even if such materials contain designated material. Any such  
20 archival copies remain subject to this Order.

21  
22 **IT IS SO ORDERED.**

23  
24 Dated: June 19, 2015

25   
26 MARGARET A. NAGLE  
27 UNITED STATES MAGISTRATE JUDGE  
28

1 EXHIBIT E-1

2 AGREEMENT TO BE BOUND

3 I, \_\_\_\_\_ [print or type full name], of  
4 \_\_\_\_\_ [print or type full address],  
5 declare under penalty of perjury that I have read in its entirety and understand the  
6 Protective Order that was issued by the United States District Court for the Central  
7 District of California on June 19, 2015 in the case of Advanced Orthopaedic  
8 Solutions, Inc. v Biomet, Inc., Case No. 2:14-cv-06354-ODW-MAN.

9 I agree to comply with and to be bound by all the terms of this Protective Order,  
10 and I understand and acknowledge that failure to so comply could expose me to  
11 sanctions and punishment for contempt. I solemnly promise that I will not disclose in  
12 any manner any information or item that is subject to this Protective Order to any  
13 person or entity except in strict compliance with this Order.

14 I further agree to submit to the jurisdiction of the United States District Court  
15 for the Central District of California for the purpose of enforcing this Order, even if  
16 such enforcement proceedings occur after termination of this action. I hereby appoint  
17 \_\_\_\_\_ [print or type full name]  
18 of \_\_\_\_\_ [print or  
19 type full address and telephone number] as my California agent for service of process  
20 in connection with this action or any proceedings related to enforcement of this Order.

21  
22 Signature: \_\_\_\_\_

23  
24 Printed name: \_\_\_\_\_

25  
26 Date: \_\_\_\_\_

27  
28 City and State where sworn and signed: \_\_\_\_\_