

1 Kevin A. Dorse (State Bar No. 146942)
 kdorse@tocounsel.com
 2 Scott K. Behrendt (State Bar No. 200217)
 sbehrendt@tocounsel.com
 3 Edward E. Johnson (State Bar No. 241065)
 ejohnson@tocounsel.com
 4 THEODORA ORINGHER PC
 1840 Century Park East, Suite 500
 5 Los Angeles, California 90067-2120
 Telephone: (310) 557-2009
 6 Facsimile: (310) 551-0283

7 David Donahue (admitted *pro hac vice*)
 ddonahue@fzlz.com
 8 Leo Kittay (admitted *pro hac vice*)
 lkittay@fzlz.com
 9 FROSS ZELNICK LEHRMAN & ZISSU, P.C.
 4 Times Square, 17th Floor
 10 New York, New York 10036
 Telephone: (212) 813-5900
 11 Facsimile: (212) 813-5901

12 *Attorneys for Plaintiff Peloton*
Interactive, Inc.

13
 14 **UNITED STATES DISTRICT COURT**
 15 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

16 PELOTON INTERACTIVE, INC.,
 17 Plaintiff,
 18 v.
 19 JEFF WIMMER’S STUDIOCYCLES and
 20 TOTAL BODY EXPERTS LLC,
 21 Defendants.
 22

2:17-cv-08007-GW-MRW x
 Magistrate Judge Michael R.
 Wilner

**STIPULATED PROTECTIVE
 ORDER**

23 MICHAEL R. WILNER, U.S. Magistrate Judge:
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1 1. INTRODUCTION

2 1.1 PURPOSES AND LIMITATIONS

3 Discovery in this action is likely to involve production of confidential,
4 proprietary, or private information for which special protection from public
5 disclosure and from use for any purpose other than prosecuting this litigation may
6 be warranted. Accordingly, the parties hereby stipulate to and petition the Court to
7 enter the following Stipulated Protective Order. The parties acknowledge that this
8 Order does not confer blanket protections on all disclosures or responses to
9 discovery and that the protection it affords from public disclosure and use extends
10 only to the limited information or items that are entitled to confidential treatment
11 under the applicable legal principles. The parties further acknowledge, as set forth
12 in Section 12.3, below, that this Stipulated Protective Order does not entitle them to
13 file confidential information under seal; Civil Local Rule 79-5 sets forth the
14 procedures that must be followed and the standards that will be applied when a party
15 seeks permission from the court to file material under seal.

16 1.2 GOOD CAUSE STATEMENT

17 Discovery in this action likely will include confidential and proprietary
18 materials and information consist of, among other things, confidential business or
19 financial information, information regarding confidential business practices, or other
20 confidential research, development, or commercial information (including
21 information implicating privacy rights of third parties), information otherwise
22 generally unavailable to the public, or which may be privileged or otherwise
23 protected from disclosure under state or federal statutes, court rules, case decisions,
24 or common law. Accordingly, to expedite the flow of information, to facilitate the
25 prompt resolution of disputes over confidentiality of discovery materials, to
26 adequately protect information the parties are entitled to keep confidential, to ensure

1 that the parties are permitted reasonable necessary uses of such material in
2 preparation for and in the conduct of trial, to address their handling at the end of the
3 litigation, and serve the ends of justice, a protective order for such information is
4 justified in this matter. It is the intent of the parties that information will not be
5 designated as confidential for tactical reasons and that nothing be so designated
6 without a good faith belief that it has been maintained in a confidential, non-public
7 manner, and there is good cause why it should not be part of the public record of this
8 case.

9 Moreover, discovery in this action may also involve highly confidential and
10 commercially sensitive business and proprietary information such as revenue
11 information, advertising budgets, profit margins, trade secrets, customer and pricing
12 lists and other valuable research, development, commercial, financial, technical
13 and/or proprietary information. Because the parties are direct competitors selling at-
14 home stationary bikes and this action likely will involve the disclosure of
15 competitively sensitive material, good cause also exists for a “HIGHLY
16 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” confidentiality designation. *See,*
17 *e.g., Satmodo, LLC v. Whenever Comms., LLC*, No.: 3:17-cv-192-AJB-NLS, 2018
18 WL 1071707, at *2 (S.D. Cal. Feb. 27, 2018) (“The potential for prejudice and/or
19 harm are high when producing marketing, financial, or other confidential and
20 proprietary information to a direct competitor.”); *Nutratch, Inc. v. Syntech (SSPF)*
21 *Intern., Inc.*, 242 F.R.D. 552, 555 (finding that defendant demonstrated good cause
22 for protective order limiting disclosure of certain information to “Attorney’s Eyes
23 Only” where it feared it would “suffer competitive harm if its customer and supplier
24 lists [we]re disclosed to [plaintiff]”).

1 2. DEFINITIONS

2 2.1 Action: This pending federal lawsuit: *Peloton Interactive, Inc. v. Jeff*
3 *Wimmer's StudioCycles and Total Body Experts LLC*, No. 2:17-cv-08007-GW-
4 MRW.

5 2.2 Challenging Party: a Party or Non-Party that challenges the designation
6 of information or items under this Order.

7 2.3 "CONFIDENTIAL" Information or Items: information (regardless of
8 how it is generated, stored or maintained) or tangible things that qualify for
9 protection under Federal Rule of Civil Procedure 26(c), and as specified above in
10 the Good Cause Statement.

11 2.4 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"
12 Information or Items: information (regardless of how it is generated, stored or
13 maintained) or tangible things that the Producing Party believes in good faith to
14 include private, proprietary, personal, or trade secret (as such term is defined in
15 California Civil Code § 3426.11¹) information that has not been made generally
16 available to the public, and is highly sensitive such that its disclosure would harm a
17 Party's competitive position and give the other Party or a Non-Party an unfair
18 competitive advantage over that Party.

19 2.5 Counsel: Outside Counsel of Record and House Counsel (as well as
20 their support staff).
21

22 _____
23 ¹ California Civil Code § 3426.1 provides that trade secret "means information,
24 including a formula, pattern, compilation, program, device, method, technique, or
25 process, that: (1) Derives independent economic value, actual or potential, from not
26 being generally known to the public or to other persons who can obtain economic
27 value from its disclosure or use; and (2) Is the subject of efforts that are reasonable
28 under the circumstances to maintain its secrecy."

1 2.6 Designating Party: a Party or Non-Party that designates information or
2 items that it produces in disclosures or in responses to discovery as
3 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
4 ONLY.”

5 2.7 Disclosure or Discovery Material: all items or information, regardless
6 of the medium or manner in which it is generated, stored, or maintained (including,
7 among other things, testimony, transcripts, and tangible things), that are produced or
8 generated in disclosures or responses to discovery in this matter.

9 2.8 Expert: a person with specialized knowledge or experience in a matter
10 pertinent to the litigation who has been retained by a Party or its counsel to serve as
11 an expert witness or as a consultant in this Action.

12 2.9 House Counsel: attorneys who are employees of a party to this Action.
13 House Counsel does not include Outside Counsel of Record or any other outside
14 counsel.

15 2.10 Non-Party: any natural person, partnership, corporation, association, or
16 other legal entity not named as a Party to this action.

17 2.11 Outside Counsel of Record: attorneys who are not employees of a party
18 to this Action but are retained to represent or advise a party to this Action and have
19 appeared in this Action on behalf of that party or are affiliated with a law firm which
20 has appeared on behalf of that party, and includes support staff.

21 2.12 Party: any party to this Action, including all of its officers, directors,
22 employees, consultants, retained experts, and Outside Counsel of Record (and their
23 support staffs).

24 2.13 Producing Party: a Party or Non-Party that produces Disclosure or
25 Discovery Material in this Action.

1 including the time limits for filing any motions or applications for extension of time
2 pursuant to applicable law.

3
4 5. DESIGNATING PROTECTED MATERIAL

5 5.1 Exercise of Restraint and Care in Designating Material for Protection.

6 Each Party or Non-Party that designates information or items for protection under
7 this Order must take care to limit any such designation to specific material that
8 qualifies under the appropriate standards. The Designating Party must designate for
9 protection only those parts of material, documents, items, or oral or written
10 communications that qualify so that other portions of the material, documents,
11 items, or communications for which protection is not warranted are not swept
12 unjustifiably within the ambit of this Order.

13 Mass, indiscriminate, or routinized designations are prohibited. Designations
14 that are shown to be clearly unjustified or that have been made for an improper
15 purpose (e.g., to unnecessarily encumber the case development process or to impose
16 unnecessary expenses and burdens on other parties) may expose the Designating
17 Party to sanctions.

18 If it comes to a Designating Party's attention that information or items that it
19 designated for protection do not qualify for protection, that Designating Party must
20 promptly notify all other Parties that it is withdrawing the inapplicable designation.

21 5.2 Manner and Timing of Designations. Except as otherwise provided in
22 this Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise
23 stipulated or ordered, Disclosure or Discovery Material that qualifies for protection
24 under this Order must be clearly so designated before the material is disclosed or
25 produced.

26 Designation in conformity with this Order requires:

1 (a) for information in documentary form (e.g., paper or electronic documents,
2 but excluding transcripts of depositions or other pretrial or trial proceedings), that
3 the Producing Party affix at a minimum, the legend “CONFIDENTIAL” or
4 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” (hereinafter
5 “CONFIDENTIALITY Legend”), to each page that contains protected material. If
6 only a portion or portions of the material on a page qualifies for protection, the
7 Producing Party also must clearly identify the protected portion(s) (e.g., by making
8 appropriate markings in the margins).

9 A Party or Non-Party that makes original documents available for inspection
10 need not designate them for protection until after the inspecting Party has indicated
11 which documents it would like copied and produced. During the inspection and
12 before the designation, all of the material made available for inspection will be
13 deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the
14 inspecting Party has identified the documents it wants copied and produced, the
15 Producing Party must determine which documents, or portions thereof, qualify for
16 protection under this Order. Then, before producing the specified documents, the
17 Producing Party must affix the “CONFIDENTIALITY legend” or the “HIGHLY
18 CONFIDENTIAL – ATTORNEYS’ EYES ONLY legend,” as appropriate, to each
19 page that contains Protected Material. If only a portion or portions of the material
20 on a page qualifies for protection, the Producing Party also must clearly identify the
21 protected portion(s) (e.g., by making appropriate markings in the margins).

22 (b) for testimony given in depositions that the Designating Party identify the
23 Disclosure or Discovery Material on the record, before the close of the deposition all
24 protected testimony; Failure of counsel to designate testimony or exhibits at a
25 deposition, however, shall not waive the protected status of the testimony or
26 exhibits. Counsel may designate specific testimony or exhibits as Protected
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1 Material within thirty (30) calendar days after receiving the transcript of the
2 deposition. If counsel for the deponent or Party fails to designate the transcript or
3 exhibits as Protected Material within the above-described thirty-day period, any
4 Party shall be entitled to treat the transcript or exhibits as containing no Protected
5 Material; and

6 (c) for information produced in some form other than documentary and for
7 any other tangible items, that the Producing Party affix in a prominent place on the
8 exterior of the container or containers in which the information is stored the legend
9 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
10 ONLY,” as appropriate. If only a portion or portions of the information warrants
11 protection, the Producing Party, to the extent practicable, will identify the protected
12 portion(s).

13 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
14 failure to designate qualified information or items does not, standing alone, waive
15 the Designating Party’s right to secure protection under this Order for such material.
16 Upon timely correction of a designation, the Receiving Party must make reasonable
17 efforts to assure that the material is treated in accordance with the provisions of this
18 Order.

19
20 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

21 6.1 Timing of Challenges. Any Party or Non-Party may challenge a
22 designation of confidentiality at any time that is consistent with the Court’s
23 Scheduling Order.

24 6.2 Meet and Confer. The Challenging Party will initiate the dispute
25 resolution process (and, if necessary, file a discovery motion) under Local Rule 37.1
26 et seq.

1 (a) the Receiving Party's Outside Counsel of Record in this Action, as
2 well as employees of said Outside Counsel of Record to whom it is reasonably
3 necessary to disclose the information for this Action;

4 (b) the officers, directors, and employees (including House Counsel) of
5 the Receiving Party to whom disclosure is reasonably necessary for this Action;

6 (c) Experts (as defined in this Order) of the Receiving Party to whom
7 disclosure is reasonably necessary for this Action and who have signed the
8 "Acknowledgment and Agreement to Be Bound" (Exhibit A);

9 (d) the Court and its personnel;

10 (e) court reporters and their staff;

11 (f) professional jury or trial consultants, mock jurors, and Professional
12 Vendors to whom disclosure is reasonably necessary for this Action and who have
13 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

14 (g) the author or recipient of a document containing the information or
15 a custodian or other person who otherwise possessed or knew the information;

16 (h) during their depositions, witnesses, and attorneys for witnesses, in
17 the Action to whom disclosure is reasonably necessary provided: (1) the deposing
18 party requests that the witness sign the form attached as Exhibit A hereto; and (2)
19 they will not be permitted to keep any confidential information, unless otherwise
20 agreed by the Designating Party or ordered by the court. Pages of transcribed
21 deposition testimony or exhibits to depositions that reveal Protected Material may
22 be separately bound by the court reporter and may not be disclosed to anyone except
23 as permitted under this Stipulated Protective Order; and

24 (i) any mediator or settlement officer, and their supporting personnel,
25 mutually agreed upon by any of the parties engaged in settlement discussions.

1 bound by the Court reporter and may not be disclosed to anyone except as permitted
2 under this Order; and

3 (g) any mediator or settlement officer, and their supporting personnel,
4 mutually agreed upon by any of the parties engaged in settlement discussions and
5 who, if not members or employees of the Court, have signed the “Acknowledgment
6 and Agreement to Be Bound” (Exhibit A).

7 Notwithstanding any of the foregoing, the Parties may mutually agree
8 in writing to allow one or more identified employees of the Receiving Party to
9 access information or items designated “HIGHLY CONFIDENTIAL-ATTORNEYS’
10 EYES ONLY” subject to the conditions, restrictions, and obligations set forth in this
11 Order and any other agreed upon conditions, restrictions, and obligations on a case
12 by case basis without having to seek leave of court.

13
14 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED
15 IN OTHER LITIGATION

16 If a Party is served with a subpoena or a court order issued in other litigation
17 that compels disclosure of any information or items designated in this Action as
18 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY”
19 that Party must:

20 (a) promptly notify in writing the Designating Party. Such notification will
21 include a copy of the subpoena or court order;

22 (b) promptly notify in writing the party who caused the subpoena or order to
23 issue in the other litigation that some or all of the material covered by the subpoena
24 or order is subject to this Protective Order. Such notification will include a copy of
25 this Stipulated Protective Order; and

1 (c) cooperate with respect to all reasonable procedures sought to be pursued
2 by the Designating Party whose Protected Material may be affected.

3 If the Designating Party timely seeks a protective order, the Party served with
4 the subpoena or court order will not produce any information designated in this
5 action as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL-ATTORNEYS’
6 EYES ONLY” before a determination by the court from which the subpoena or
7 order issued, unless the Party has obtained the Designating Party’s permission. The
8 Designating Party will bear the burden and expense of seeking protection in that
9 court of its confidential material and nothing in these provisions should be construed
10 as authorizing or encouraging a Receiving Party in this Action to disobey a lawful
11 directive from another court.

12
13 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE
14 PRODUCED IN THIS LITIGATION

15 (a) The terms of this Order are applicable to information produced by a Non-
16 Party in this Action and designated as “CONFIDENTIAL” or “HIGHLY
17 CONFIDENTIAL-ATTORNEYS’ EYES ONLY.” Such information produced by
18 Non-Parties in connection with this litigation is protected by the remedies and relief
19 provided by this Order. Nothing in these provisions should be construed as
20 prohibiting a Non-Party from seeking additional protections.

21 (b) In the event that a Party is required, by a valid discovery request, to
22 produce a Non-Party’s confidential information in its possession, and the Party is
23 subject to an agreement with the Non-Party not to produce the Non-Party’s
24 confidential information, then the Party will:

1 (1) promptly notify in writing the Requesting Party and the Non-Party
2 that some or all of the information requested is subject to a confidentiality
3 agreement with a Non-Party;

4 (2) promptly provide the Non-Party with a copy of the Stipulated
5 Protective Order in this Action, the relevant discovery request(s), and a reasonably
6 specific description of the information requested; and

7 (3) make the information requested available for inspection by the Non-
8 Party, if requested.

9 (c) If the Non-Party fails to seek a protective order from this court within 14
10 days of receiving the notice and accompanying information, the Receiving Party
11 may produce the Non-Party's confidential information responsive to the discovery
12 request. If the Non-Party timely seeks a protective order, the Receiving Party will
13 not produce any information in its possession or control that is subject to the
14 confidentiality agreement with the Non-Party before a determination by the court.
15 Absent a court order to the contrary, the Non-Party will bear the burden and expense
16 of seeking protection in this court of its Protected Material.

17
18 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

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11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). Pursuant to Federal Rule of Evidence 502(d) and (e), the inadvertent disclosure of a communication or information covered by the attorney-client privilege or work product protection does not effect a waiver in connection with the Action or any other federal or state proceeding.

12. MISCELLANEOUS

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

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

12.3 Filing Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. If a Party's request to file Protected Material under seal is denied by the court, then the Receiving Party may file the information in the public record unless otherwise instructed by the court.

1 13. FINAL DISPOSITION

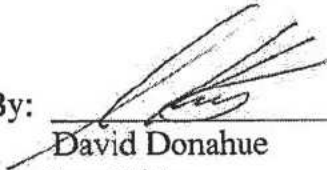
2 After the final disposition of this Action, as defined in paragraph 4, within 60
3 days of a written request by the Designating Party, each Receiving Party must return
4 all Protected Material to the Producing Party or destroy such material. As used in
5 this subdivision, "all Protected Material" includes all copies, abstracts, compilations,
6 summaries, and any other format reproducing or capturing any of the Protected
7 Material. Whether the Protected Material is returned or destroyed, the Receiving
8 Party must submit a written certification to the Producing Party (and, if not the same
9 person or entity, to the Designating Party) by the 60 day deadline that (1) identifies
10 (by category, where appropriate) all the Protected Material that was returned or
11 destroyed and (2) affirms that the Receiving Party has not retained any copies,
12 abstracts, compilations, summaries or any other format reproducing or capturing any
13 of the Protected Material. Notwithstanding this provision, Counsel are entitled to
14 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing
15 transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert
16 reports, attorney work product, and consultant and expert work product, even if such
17 materials contain Protected Material. Any such archival copies that contain or
18 constitute Protected Material remain subject to this Protective Order as set forth in
19 Section 4 (DURATION).

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21 14. Any willful violation of this Order may be punished by civil or criminal
22 contempt proceedings, financial or evidentiary sanctions, reference to disciplinary
23 authorities, or other appropriate action at the discretion of the Court.

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1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 Dated: New York, New York FROSS ZELNICK LEHRMAN & ZISSU, P.C.
3 July 27, 2018

4
5 By: 
6 David Donahue
7 Leo Kittay
8 4 Times Square
9 17th Floor
10 New York, New York 10036
11 (212) 813-5900

12 Attorneys for Plaintiff Peloton Interactive, Inc.

13 Dated: San Jose, California ROPERS, MAJESKI, KOHN & BENTLEY
14 July 27, 2018

15 By: 
16 Michael J. Iaonnou
17 Curtis R. Tingley
18 Kevin W. Isaacson
19 Clark A. Waldon
20 50 West San Francisco Street, Suite 1400
21 San Jose, California 95113
22 (408) 287-6262

23 Attorneys for Defendants Total Body Experts
24 LLC and Jeff Wimmer's StudioCycles

25 FOR GOOD CAUSE SHOWN, IT IS SO ORDERED.

26 DATED: July 30, 2018
27 
28 HON. MICHAEL R. WILNER
United States Magistrate Judge

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

6
7
8 Date: _____

9 City and State where sworn and signed: _____

10
11 Printed name: _____

12 Signature: _____

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