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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL BUSTAMANTE,
Plaintiff,
v.
INVACARE CORPORATION,
Defendant.

~~PROPOSED~~ PROTECTIVE ORDER

By and through their attorneys of record, the parties entered into a joint stipulation and request that this court enter the following protective order:

1. PURPOSE AND LIMITS OF THIS ORDER

Discovery in this action is likely to involve confidential, proprietary, or private information requiring special protection from public disclosure and from use for any purpose other than this litigation. Thus, the Court enters this Protective Order. This Order does not confer blanket protections on all disclosures or responses to discovery, and the protection it gives from public disclosure and use extends only to the specific material entitled to confidential

1 treatment under the applicable legal principles. This Order does not
2 automatically authorize the filing under seal of material designated under this
3 Order. Instead, the parties must comply with L.R. 79-5.1 if they seek to file
4 anything under seal. This Order does not govern the use at trial of material
5 designated under this Order.

6
7 **2. DESIGNATING PROTECTED MATERIAL**

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

1 **2.2 Manner and Timing of Designations.** Designation under this
2 Order requires the designator to affix the applicable legend (“CONFIDENTIAL,”
3 “HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY,” or “HIGHLY
4 CONFIDENTIAL – SOURCE CODE”) to each page that contains protected
5 material. For testimony given in deposition or other proceeding, the designator
6 shall specify all protected testimony and the level of protection being asserted. It
7 may make that designation during the deposition or proceeding, or may invoke, on
8 the record or by written notice to all parties on or before the next business day, a
9 right to have up to 21 days from the deposition or proceeding to make its
10 designation.

11 **2.2.1** A party or non-party that makes original documents or
12 materials available for inspection need not designate them for protection
13 until after the inspecting party has identified which material it would like
14 copied and produced. During the inspection and before the designation, all
15 material shall be treated as HIGHLY CONFIDENTIAL – ATTORNEY
16 EYES ONLY. After the inspecting party has identified the documents it
17 wants copied and produced, the producing party must designate the
18 documents, or portions thereof, that qualify for protection under this Order.

19 **2.2.2** Parties shall give advance notice if they expect a deposition
20 or other proceeding to include designated material so that the other parties
21 can ensure that only authorized individuals are present at those proceedings
22 when such material is disclosed or used. The use of a document as an
23 exhibit at a deposition shall not in any way affect its designation.

24 Transcripts containing designated material shall have a legend on the title
25 page noting the presence of designated material, and the title page shall be
26 followed by a list of all pages (including line numbers as appropriate) that
27 have been designated, and the level of protection being asserted. The
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1 designator shall inform the court reporter of these requirements. Any
2 transcript that is prepared before the expiration of the 21-day period for
3 designation shall be treated during that period as if it had been designated
4 HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY unless
5 otherwise agreed. After the expiration of the 21-day period, the transcript
6 shall be treated only as actually designated.

7 **2.3 Inadvertent Failures to Designate.** An inadvertent failure to
8 designate does not, standing alone, waive protection under this Order. Upon
9 timely assertion or correction of a designation, all recipients must make
10 reasonable efforts to ensure that the material is treated according to this Order.

11
12 **3. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

13 All challenges to confidentiality designations shall proceed under L.R.
14 37-1 through L.R. 37-4.

15
16 **4. ACCESS TO DESIGNATED MATERIAL**

17 **4.1 Basic Principles.** A receiving party may use designated material
18 only for this litigation. Designated material may be disclosed only to the
19 categories of persons and under the conditions described in this Order.

20 **4.2 Disclosure of CONFIDENTIAL Material Without Further**
21 **Approval.** Unless otherwise ordered by the Court or permitted in writing by the
22 designator, a receiving party may disclose any material designated
23 CONFIDENTIAL only to:

24 **4.2.1** The receiving party’s outside counsel of record in this action
25 and employees of outside counsel of record to whom disclosure is
26 reasonably necessary;

1 **4.2.2** The officers, directors, and employees of the receiving party to
2 whom disclosure is reasonably necessary, and who have signed the
3 Agreement to Be Bound (Exhibit A);

4 **4.2.3** Experts retained by the receiving party's outside counsel of
5 record to whom disclosure is reasonably necessary, and who have signed the
6 Agreement to Be Bound (Exhibit A);

7 **4.2.4** The Court and its personnel;

8 **4.2.5** Outside court reporters and their staff, professional jury or
9 trial consultants, and professional vendors to whom disclosure is
10 reasonably necessary, and who have signed the Agreement to Be Bound
11 (Exhibit A);

12 **4.2.6** During their depositions, witnesses in the action to whom
13 disclosure is reasonably necessary and who have signed the Agreement to
14 Be Bound (Exhibit A); and

15 **4.2.7** The author or recipient of a document containing the material,
16 or a custodian or other person who otherwise possessed or knew the
17 information.

18 **4.3 Disclosure of HIGHLY CONFIDENTIAL – ATTORNEY**
19 **EYES ONLY and HIGHLY CONFIDENTIAL – SOURCE CODE Material**
20 **Without Further Approval.** Unless permitted in writing by the designator, a
21 receiving party may disclose material designated HIGHLY CONFIDENTIAL –
22 ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL – SOURCE CODE
23 without further approval only to:

24 **4.3.1** The receiving party's outside counsel of record in this action
25 and employees of outside counsel of record to whom it is reasonably
26 necessary to disclose the information;

27 **4.3.2** The Court and its personnel;

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

5 **4.3.4** The author or recipient of a document containing the material,
6 or a custodian or other person who otherwise possessed or knew the
7 information.

8 **4.4 Procedures for Approving or Objecting to Disclosure of**
9 **HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY**
10 **CONFIDENTIAL – SOURCE CODE 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
13 designated HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY
14 must first make a written request to the designator providing the full name
15 of the in-house counsel, the city and state of such counsel’s residence, and
16 such counsel’s current and reasonably foreseeable future primary job duties
17 and responsibilities in sufficient detail to determine present or potential
18 involvement in any competitive decision-making. In-house counsel are not
19 authorized to receive material designated HIGHLY CONFIDENTIAL –
20 SOURCE CODE.

21 **4.4.2** A party seeking to disclose to an expert retained by outside
22 counsel of record any information or item that has been designated
23 HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
24 CONFIDENTIAL – SOURCE CODE must first make a written request to
25 the designator that (1) identifies the general categories of HIGHLY
26 CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
27 CONFIDENTIAL – SOURCE CODE information that the receiving party
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1 seeks permission to disclose to the expert, (2) sets forth the full name of
2 the expert and the city and state of his or her primary residence, (3)
3 attaches a copy of the expert's current resume, (4) identifies the expert's
4 current employer(s), (5) identifies each person or entity from whom the
5 expert has received compensation or funding for work in his or her areas
6 of expertise (including in connection with litigation) in the past five years,
7 and (6) identifies (by name and number of the case, filing date, and location
8 of court) any litigation where the expert has offered expert testimony,
9 including by declaration, report, or testimony at deposition or trial, in the
10 past five years. If the expert believes any of this information at (4) - (6) is
11 subject to a confidentiality obligation to a third party, then the expert should
12 provide whatever information the expert believes can be disclosed without
13 violating any confidentiality agreements, and the party seeking to disclose
14 the information to the expert shall be available to meet and confer with the
15 designator regarding any such confidentiality obligations.

16 **4.4.3** A party that makes a request and provides the information
17 specified in paragraphs 4.4.1 or 4.4.2 may disclose the designated material
18 to the identified in-house counsel or expert unless, within seven days of
19 delivering the request, the party receives a written objection from the
20 designator providing detailed grounds for the objection.

21 **4.4.4** All challenges to objections from the designator shall proceed
22 under L.R. 37-1 through L.R. 37-4.

23 24 **5. SOURCE CODE**

25 **5.1 Designation of Source Code.** If production of source code is
26 necessary, a party may designate it as HIGHLY CONFIDENTIAL – SOURCE
27 CODE if it is, or includes, confidential, proprietary, or trade secret source code.
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1 **5.2 Location and Supervision of Inspection.** Any HIGHLY
2 CONFIDENTIAL – SOURCE CODE produced in discovery shall be made
3 available for inspection, in a format allowing it to be reasonably reviewed and
4 searched, during normal business hours or at other mutually agreeable times, at an
5 office of the designating party’s counsel or another mutually agreeable location.
6 The source code shall be made available for inspection on a secured computer in a
7 secured room, and the inspecting party shall not copy, remove, or otherwise transfer
8 any portion of the source code onto any recordable media or recordable device.
9 The designator may visually monitor the activities of the inspecting party’s
10 representatives during any source code review, but only to ensure that there is
11 no unauthorized recording, copying, or transmission of the source code.

12 **5.3 Paper Copies of Source Code Excerpts.** The inspecting party
13 may request paper copies of limited portions of source code that are reasonably
14 necessary for the preparation of court filings, pleadings, expert reports, other
15 papers, or for deposition or trial. The designator shall provide all such source
16 code in paper form, including Bates numbers and the label “HIGHLY
17 CONFIDENTIAL – SOURCE CODE.”

18 **5.4 Access Record.** The inspecting party shall maintain a record of any
19 individual who has inspected any portion of the source code in electronic or
20 paper form, and shall maintain all paper copies of any printed portions of the
21 source code in a secured, locked area. The inspecting party shall not convert any
22 of the information contained in the paper copies into any electronic format other
23 than for the preparation of a pleading, exhibit, expert report, discovery document,
24 deposition transcript, or other Court document. Any paper copies used during a
25 deposition shall be retrieved at the end of each day and must not be left with a court
26 reporter or any other unauthorized individual.

1 **6. PROSECUTION BAR**

2 Absent written consent from the designator, any individual who receives
3 access to HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
4 CONFIDENTIAL – SOURCE CODE information shall not be involved in the
5 prosecution of patents or patent applications concerning the field of the invention
6 of the patents-in-suit for the receiving party or its acquirer, successor,
7 predecessor, or other affiliate during the pendency of this action and for one year
8 after its conclusion, including any appeals. “Prosecution” means drafting,
9 amending, advising on the content of, or otherwise affecting the scope or content
10 of patent claims or specifications. These prohibitions shall not preclude counsel
11 from participating in reexamination or *inter partes* review proceedings to challenge
12 or defend the validity of any patent, but counsel may not participate in the drafting
13 of amended claims in any such proceedings.

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15 **7. PROTECTED MATERIAL SUBPOENAED OR ORDERED**
16 **PRODUCED IN OTHER LITIGATION**

17 **7.1 Subpoenas and Court Orders.** This Order in no way excuses non-
18 compliance with a lawful subpoena or court order. The purpose of the duties
19 described in this section is to alert the interested parties to the existence of this
20 Order and to give the designator an opportunity to protect its confidentiality
21 interests in the court where the subpoena or order issued.

22 **7.2 Notification Requirement.** If a party is served with a subpoena
23 or a court order issued in other litigation that compels disclosure of any
24 information or items designated in this action as CONFIDENTIAL, HIGHLY
25 CONFIDENTIAL – ATTORNEY EYES ONLY, or HIGHLY CONFIDENTIAL
26 – SOURCE CODE, that party must:

1 **7.2.1** Promptly notify the designator in writing. Such notification
2 shall include a copy of the subpoena or court order;

3 **7.2.2** Promptly notify in writing the party who caused the
4 subpoena or order to issue in the other litigation that some or all of the
5 material covered by the subpoena or order is subject to this Order. Such
6 notification shall include a copy of this Order; and

7 **7.2.3** Cooperate with all reasonable procedures sought by the
8 designator whose material may be affected.

9 **7.3 Wait For Resolution of Protective Order.** If the designator
10 timely seeks a protective order, the party served with the subpoena or court order
11 shall not produce any information designated in this action as CONFIDENTIAL,
12 HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
13 CONFIDENTIAL – SOURCE CODE before a determination by the court where
14 the subpoena or order issued, unless the party has obtained the designator’s
15 permission. The designator shall bear the burden and expense of seeking
16 protection of its confidential material in that court.

17
18 **8. UNAUTHORIZED DISCLOSURE OF DESIGNATED MATERIAL**

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

1 **9. INADVERTENT PRODUCTION OF PRIVILEGED OR**
2 **OTHERWISE PROTECTED MATERIAL**

3 When a producing party gives notice that certain inadvertently produced
4 material is subject to a claim of privilege or other protection, the obligations of the
5 receiving parties are those set forth in Federal Rule of Civil Procedure
6 26(b)(5)(B). This provision is not intended to modify whatever procedure may be
7 established in an e-discovery order that provides for production without prior
8 privilege review pursuant to Federal Rule of Evidence 502(d) and (e).

9
10 **10. FILING UNDER SEAL**


11 Without written permission from the designator or a Court order, a party
12 may not file in the public record in this action any designated material. A party
13 seeking to file under seal any designated material must comply with L.R. 79-5.1.
14 Filings may be made under seal only pursuant to a court order authorizing the
15 sealing of the specific material at issue. The fact that a document has been
16 designated under this Order is insufficient to justify filing under seal. Instead,
17 parties must explain the basis for confidentiality of each document sought to be
18 filed under seal. Because a party other than the designator will often be seeking
19 to file designated material, cooperation between the parties in preparing, and in
20 reducing the number and extent of, requests for under seal filing is
21 essential. If a *receiving party's* request to file designated material under seal
22 pursuant to L.R. 79-5.1 is denied by the Court, then the receiving party *may*
23 *file the material in the public record* unless (1) *the designator* seeks
24 reconsideration within four days of the denial, or (2) as otherwise instructed by
25 the Court.

1 **11. FINAL DISPOSITION**

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

16 IT IS SO ORDERED.

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18 DATED: April 23, 2015



Hon. Robert N. Block
United States Magistrate Judge

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EXHIBIT A

AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of
perjury that I have read in its entirety and understand the Protective Order that was
issued by the United States District Court for the Central District of California on
_____ [date] in the case of _____ [**insert formal
name of the case and the number and initials assigned to it by the court**]. I
agree to comply with and to be bound by all the terms of this Protective Order,
and I understand and acknowledge that failure to so comply could expose me to
sanctions and punishment for contempt. I solemnly promise that I will not
disclose in any manner any information or item that is subject to this Protective
Order to any person or entity except in strict compliance with 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
this Order, even if such enforcement proceedings occur after termination of this
action.

I hereby appoint _____ [print or type full
name] of _____ [print or type 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 Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____
[printed name]

Signature: _____
[signature]