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

DERMFX, INC., a California corporation,

Plaintiff,

v.

OBAGI MEDICAL PRODUCTS, INC., a  
Delaware corporation; and DOES 1 through  
10, inclusive,

Defendants.

Case No. SACV15-01999-JVS-DFMx  
Hon. Magistrate Douglas F. McCormick

**~~[PROPOSED]~~ STIPULATED  
PROTECTIVE ORDER**

Pursuant to the Parties' Stipulation, **IT IS ORDERED** as follows:

**STIPULATED PROTECTIVE ORDER**

1. **Method of Designation.** Any documents, materials, tangible things, items, testimony or other information filed with the Court, or produced or provided in connection with this litigation by any party ("**Producing Party**" or "**Designating Party**") to another party ("**Receiving Party**"), may be designated as "Confidential Information" or

1 “Confidential – Attorneys’ Eyes Only Information.” The Designated Party shall designate  
2 such information (“**Designated Material**”) as follows:

3 A. For documents, by placing the notation “**Confidential**” or “**Highly**  
4 **Confidential – Attorneys’ Eyes Only**” on every page of each document or portion thereof  
5 containing Confidential or Highly Confidential – Attorneys’ Eyes Only Information. In the  
6 case of Confidential or Highly Confidential – Attorneys’ Eyes Only Information produced  
7 in a form other than paper or an electronic image that allows for the affixation of a  
8 designation on the document, itself (e.g., a .pdf or .tiff), the appropriate notation shall be  
9 affixed to the outside of the medium, its container, or a cover or transmittal sheet so as to  
10 clearly give notice of the designation.

11 B. For deposition testimony, by identifying which portions of the  
12 testimony are designated Confidential or Highly Confidential – Attorneys’ Eyes Only  
13 within 30 days after receiving a final copy of the deposition transcript. Any testimony not  
14 designated within 30 days following receipt of the transcript will be deemed not to include  
15 Confidential or Highly Confidential – Attorneys’ Eyes Only Information. Prior to the  
16 expiration of 30 days following receipt of the transcript for any particular deposition, the  
17 transcript and all testimony presented at that deposition shall be considered Highly  
18 Confidential – Attorneys’ Eyes Only.

19 2. **Restrictions on Disclosure of Confidential Information.** “**Confidential**  
20 **Information**” shall mean and refer to any information that has not been made public and is  
21 or contains confidential information, including without limitation, technical, research,  
22 development, private, financial, or commercial information of the Designating Party. The  
23 designation made by a party or non-party shall be a certification to the other parties that  
24 such information is believed in good faith to be confidential within the meaning of this  
25 Protective Order.

26 Material properly designated as containing Confidential Information may be  
27 disclosed only to the following persons:  
28

1 i. Outside counsel to any party to the litigation and those employees  
2 of the parties' counsel who need to see such Confidential Information in order to perform  
3 their jobs, including the paralegals, clerical staff, secretarial staff, and other support  
4 personnel employed or otherwise hired by such counsel;

5 ii. One in-house attorney for Defendant, who is not involved in  
6 commercial decision making related to any products at issue in this dispute, who is a  
7 member of good standing of one or more state bars, who is directly involved in supervising  
8 outside counsel in this case, and who has complied with paragraph 4, below;

9 iii. Officers or employees of the parties to this litigation, who are  
10 reasonably necessary to assist counsel in this litigation;

11 iv. Any persons who appear on the face of the Confidential  
12 Information as an author, addressee or prior recipient thereof;

13 v. Expert witnesses or consultants retained or employed by the  
14 parties or their respective attorneys solely for the purpose of assisting counsel in the  
15 prosecution, defense or settlement of this Action who have complied with paragraph 4,  
16 below, and the employees of such experts or consultants who are assisting them;

17 vi. The United States District Court for the Central District of  
18 California and its personnel, the United States Court of Appeals for the Ninth Circuit and  
19 its personnel, and any other court of competent jurisdiction having involvement in this  
20 matter and its personnel.

21 vii. Court reporters, stenographers, and video reporters/  
22 videographers who are retained to transcribe or videotape testimony, including depositions,  
23 in the action;

24 viii. Any designated arbitrator who is assigned to hear and adjudicate  
25 the above-captioned Action, or any mediator who is assigned to mediate the above-  
26 captioned Action or consulted by agreement of the parties in any attempt to settle this  
27 matter, and any of their respective personnel;

1 ix. Witnesses at any deposition or other proceeding in this action,  
2 wherein for purposes of the witnesses' testimony it is necessary to show Confidential  
3 Information to the witness during the course of their testimony and the witness being  
4 advised of the need to keep the records confidential and agreeing to comply with paragraph  
5 4 below; and/or

6 x. Any other person to whom the parties agree in writing.

7 3. **Restrictions on Disclosure of Highly Confidential – Attorneys' Eyes Only**  
8 **Information.** "Confidential – Attorneys' Eyes Only Information" shall mean and refer  
9 to any Designated Material that is or contains highly confidential information, including  
10 without limitation financial, commercial, proprietary, marketing or technical information  
11 (including, but not limited to, detailed nonpublic financial information), or trade secret  
12 information (as defined in California Civil Code § 3426.1), the disclosure of which, to  
13 persons other than those described in Paragraph 1(e) below, the Designating Party in good  
14 faith believes to be so highly sensitive that disclosure to persons other than limited and  
15 specified individuals could cause undue risk of substantial and immediate injury to the  
16 business of the producing party. The designation made by a disclosing party or non-party  
17 shall be a certification to the other parties that such information is believed to be highly  
18 sensitive Confidential Information and subject to this more restrictive classification within  
19 the meaning of this Protective Order.

20 Material properly designated as containing Highly Confidential – Attorneys' Eyes  
21 Only Information may be disclosed only to the individuals listed in Paragraph 2(d)(i)–(ii)  
22 and (iv)–(ix) above.

23 4. **Written Undertaking Required for Certain Receiving Parties.** Prior to  
24 receiving information designated as Confidential Information or Confidential – Attorneys'  
25 Eyes Only Information, all persons identified in Paragraph 2(d), subparagraphs (ii), (v), (ix)  
26 or (x), shall be provided with a copy of the Protective Order and shall sign a Written  
27 Undertaking of the form attached here as **Exhibit A**. The original of the executed written  
28 assurance shall remain in the possession of the attorney who makes the disclosure of the

1 Confidential Information or the Confidential – Attorneys’ Eyes Only Information until the  
2 parties agree in writing to the contrary.

3 5. **No Effect on Privacy/Confidentiality Rights.** The production of any material  
4 or information during discovery in this action shall be without prejudice to any claim that  
5 such is privileged as a trade secret or confidential and proprietary business information, or  
6 protected by the right of privacy, and no party shall be held to have waived these privileges  
7 or right by such production.

8 6. **Inadvertent Failure to Designate.** Inadvertent failure to designate material as  
9 “Confidential Information” or “Confidential” – For Attorneys’ Eyes Only Information”  
10 under this Order shall not operate as waiver of the Party’s right to subsequently designate  
11 such material as “Confidential Information” or “Confidential – For Attorneys’ Eyes Only  
12 Information.” A Producing Party that inadvertently fails to designate an item pursuant to  
13 this Protective Order at the time of the production shall make a correction promptly after  
14 becoming aware of such error. Such correction and notice thereof shall be made in writing  
15 accompanied by substitute copies of each item, appropriately designated. Those  
16 individuals who reviewed the documents or information prior to notice of the failure to  
17 designate by the Producing Party shall return to the Producing Party or destroy all copies of  
18 such undesignated documents.

19 7. **Limitations on Use of Designated Material.** Absent a specific order by this  
20 Court, Designated Material shall be used by a Receiving Party solely for purposes of this  
21 litigation, and not for any other litigation, business, competitive, or governmental purpose  
22 or function, and such information shall not be disclosed to anyone except as provided under  
23 this Protective Order. Notwithstanding the foregoing, nothing in this Protective Order shall  
24 prevent or limit the ability of either party to disclose Confidential Information or  
25 Confidential – Attorneys’ Eyes Only Information lawfully obtained by such Party  
26 independent of discovery in this action, whether or not such material is also obtained  
27 through discovery in this action, or from disclosing its own Confidential Information or  
28 Confidential – Attorneys’ Eyes Only Information to any person as it deems appropriate.

1           8.     **Inadvertent Disclosure.** If information designated pursuant to the Protective  
2 Order is inadvertently disclosed to any person other than in the manner authorized by this  
3 Protective Order, the party responsible for such disclosure, upon learning of the same, must  
4 immediately take reasonable steps to prevent further such inadvertent disclosures.

5           9.     **Disclosure of Designated Material to Third Parties Pursuant to Subpoena.**  
6 If any Party or their counsel is served with a subpoena requiring production of any  
7 Confidential Information or Confidential – Attorneys’ Eyes Only Information such Party  
8 shall send via email, within five (5) business days, a copy of the subpoena to the attorney  
9 for the Producing Party. The Parties agree that the Producing Party shall have five (5)  
10 business days from receipt of the email within which to file a motion objecting to the  
11 subpoena or to seek other relief after receiving the notice referred to above. If a motion  
12 objecting to the subpoena is timely filed, the subpoenaed Party shall not produce the  
13 material until after the court rules on such motion, unless required to do so pursuant to  
14 court order (other than the subpoena itself) or other applicable law.

15           10.    **Filing of Designated Materials.** When briefs, memoranda or other documents  
16 or things containing Confidential Information or Confidential – Attorneys’ Eyes Only  
17 Information are filed with the Court, the parties shall follow the procedure stated in L.R.  
18 79-5.2 and the Court’s Guide to Electronically Filing Under-Seal Documents in Civil  
19 Cases, referenced therein. Should any document(s) containing Confidential Information or  
20 Confidential – Attorneys’ Eyes Only Information be inadvertently filed without the  
21 designation referred to in paragraph 1, the Party filing the document(s) shall, upon  
22 discovering the error or upon written notification of the error, promptly ask the Court to  
23 allow it to withdraw the documents, and will then follow the procedures required by this  
24 paragraph.

25           11.    **Challenges to Designations.** Agreement to this protective order is not a  
26 consent or admission as to the actual confidentiality of any material. Should any party  
27 desire to challenge the designation of any material or information as Confidential  
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1 Information or Confidential – Attorneys’ Eyes Only Information, such party may challenge  
2 the designation as follows:

3           A.     A Receiving Party seeking to challenge a confidentiality designation  
4 must send a written request to the Designating Party clearly and specifically identifying the  
5 documents sought to be de-designated and the basis for the de-designation. The parties  
6 must then endeavor to meet and confer in good faith about the de-designation within the  
7 next fourteen (14) days.

8           B.     If the Designating Party does not engage in the meet and confer within  
9 that time period, or if the meet and confer does not resolve the issue, the Receiving Party  
10 may file a motion seeking de-classification of the Designated Material.

11           C.     The Court, upon notice to the parties and upon a showing of good cause,  
12 may at any time order removal of the Confidential or Confidential – Attorneys’ Eyes Only  
13 designation from any materials or information. However, until any such order is issued by  
14 the Court, the material or information must continue to be treated as Confidential or  
15 Confidential – Attorneys’ Eyes Only according to its designation. In all instances, the  
16 ultimate burden of persuasion for such a challenge shall be on the party designating the  
17 discovery material as Confidential Information or Confidential – Attorneys’ Eyes Only  
18 Information.

19           12.    **Designations Not Admissible.** Unless the parties stipulate otherwise,  
20 evidence of the existence or nonexistence of a designation under this Protective Order shall  
21 not be admissible for any purpose, nor shall the designation or acceptance of any  
22 information designated pursuant to this Protective Order constitute an admission or  
23 acknowledgement that the material so designated is in fact proprietary, confidential or a  
24 trade secret.

25           13.    **Disposition of Designated Materials at Conclusion of Litigation.** Upon  
26 termination of this litigation following settlement or final judgment (including exhaustion  
27 of all appeals), the originals and all copies of Designated Material shall be either destroyed  
28 or turned over to the Producing Party, or to its counsel, within sixty (60) days. However,

1 attorneys of record may retain documents filed or lodged with the court in connection with  
2 this litigation, attorney and consultant work product, and depositions (with exhibits) for  
3 archival purposes.

4 14. **No Prohibition on Additional Protective Orders.** This Order shall be  
5 without prejudice to the right of the Parties to present a motion to the Court under Federal  
6 Rule of Civil Procedure 26(c) for a separate protective order as to any particular document  
7 or information, including restrictions differing from those as specified herein.

8 15. **Clawback for Inadvertent Production of Privileged Information.** Pursuant  
9 to Federal Rule of Evidence 502, if a Party inadvertently produces material that it considers  
10 to be protected by the attorney-client privilege, the work product doctrine or any other  
11 privileges or doctrines of similar effect, in whole or in part, or learns of the production of  
12 such material by a third party, the Parties shall follow Federal Rule of Civil Procedure  
13 26(b)(5)(B).

14 16. **Designation by Third Parties.** Third parties who produce documents or  
15 materials or provide testimony in connection with this action, whether in response to a  
16 subpoena or otherwise, may produce such documents or materials and/or testify pursuant to  
17 the protections afforded by this Order by complying with paragraph 4 above.

18 17. **Modification.** Each party reserves the right to request that the Court modify  
19 the terms of this Protective Order in the event that the party believes that a modification is  
20 necessary. If such an application is made, all signatories of copies of the Acknowledgment,  
21 as well as persons described herein, shall remain bound by this Protective Order unless and  
22 until it is modified by the Court.

23 18. **Survival.** The terms of this Protective Order shall survive termination of this  
24 litigation.

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19. **No Effect on Existing Court Rules.** Without separate and subsequent Court order, this Protective Order does not change, amend, or circumvent any Court rule or Local Rule.

Dated: March 14, 2016



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Hon. Douglas F. McCormick  
United States Magistrate Judge

1 **EXHIBIT A**

2 **PROTECTIVE ORDER UNDERTAKING**

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4 I, \_\_\_\_\_, hereby acknowledge that any information  
5 provided to me is subject to the terms and conditions of the Protective Order in Case No.  
6 8:15-cv-01999-JVS (DFMx) pending in the United States District Court for the Central  
7 District of California.

8 Having been given a copy of the Protective Order, and having read and understood  
9 its contents, I hereby expressly agree to be bound by and comply with the terms and  
10 provisions thereof. I further agree that I will not disclose documents or information  
11 designed Confidential Information or Confidential – Attorneys’ Eyes Only Information  
12 except as specifically permitted by the terms of the Protective Order, and that I will use the  
13 documents or information solely for the purposes of this litigation in accordance with the  
14 Protective Order. I hereby consent to the jurisdiction of the United States District Court for  
15 the Central District of California for purposes of enforcing the aforesaid Protective Order.

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18 Dated:

By: \_\_\_\_\_

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22 Printed Name  
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