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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**

G.I. SPORTZ INC., and GI SPORTZ
DIRECT LLC,

Plaintiffs,

v.

APX GEAR, LLC (a/k/a APX
PAINT CO.),

Defendants.

CASE NO. 8:16-cv-02038-AG-KES

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

1 **2. DESIGNATING PROTECTED MATERIAL**

2 **2.1 Over-Designation Prohibited.** Any party or non-party who designates
3 information or items for protection under this Order as “CONFIDENTIAL,” “HIGHLY
4 CONFIDENTIAL – ATTORNEY EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE
5 CODE” (a “designator”) must only designate specific material that qualifies under the appropriate
6 standards. To the extent practicable, only those parts of documents, items, or oral or written
7 communications that require protection shall be designated. Designations with a higher
8 confidentiality level when a lower level would suffice are prohibited. Mass, indiscriminate, or
9 routinized designations are prohibited. Unjustified designations expose the designator to
10 sanctions, including the Court’s striking all confidentiality designations made by that designator.
11 Designation under this Order is allowed only if the designation is necessary to protect material
12 that, if disclosed to persons not authorized to view it, would cause competitive or other
13 recognized harm. Material may not be designated if it has been made public, or if designation is
14 otherwise unnecessary to protect a secrecy interest. If a designator learns that information or
15 items that it designated for protection do not qualify for protection at all or do not qualify for the
16 level of protection initially asserted, that designator must promptly notify all parties that it is
17 withdrawing the mistaken designation.

18 **2.2 Manner and Timing of Designations.** Designation under this Order requires the
19 designator to affix the applicable legend (“CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –
20 ATTORNEY EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE”) to each page
21 that contains protected material. For testimony given in deposition or other proceeding, the
22 designator shall specify all protected testimony and the level of protection being asserted. It may
23 make that designation during the deposition or proceeding, or may invoke, on the record or by
24 written notice to all parties on or before the next business day, a right to have up to 21 days from
25 the deposition or proceeding to make its designation.

26 **2.2.1** A party or non-party that makes original documents or materials available
27 for inspection need not designate them for protection until after the inspecting party has
28 identified which material it would like copied and produced. During the inspection and
before the designation, all material shall be treated as HIGHLY CONFIDENTIAL –
ATTORNEY EYES ONLY. After the inspecting party has identified the documents it
wants copied and produced, the producing party must designate the documents, or
portions thereof, that qualify for protection under this Order.

1 **2.2.2** Parties shall give advance notice if they expect a deposition or other
2 proceeding to include designated material so that the other parties can ensure that only
3 authorized individuals are present at those proceedings when such material is disclosed or
4 used. The use of a document as an exhibit at a deposition shall not in any way affect its
5 designation. Transcripts containing designated material shall have a legend on the title
6 page noting the presence of designated material, and the title page shall be followed by a
7 list of all pages (including line numbers as appropriate) that have been designated, and the
8 level of protection being asserted. The designator shall inform the court reporter of these
9 requirements. Any transcript that is prepared before the expiration of the 21-day period
10 for designation shall be treated during that period as if it had been designated HIGHLY
11 CONFIDENTIAL – ATTORNEY EYES ONLY unless otherwise agreed. After the
12 expiration of the 21-day period, the transcript shall be treated only as actually designated.

13 **2.3 Inadvertent Failures to Designate.** An inadvertent failure to designate does not,
14 standing alone, waive protection under this Order. Upon timely assertion or correction of a
15 designation, all recipients must make reasonable efforts to ensure that the material is treated
16 according to this Order.

17 **3. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

18 All challenges to confidentiality designations shall proceed under L.R. 37-1 through L.R.
19 37-4.

20 **4. ACCESS TO DESIGNATED MATERIAL**

21 **4.1 Basic Principles.** A receiving party may use designated material only for this
22 litigation. Designated material may be disclosed only to the categories of persons and under the
23 conditions described in this Order.

24 **4.2 Disclosure of CONFIDENTIAL Material Without Further Approval.** Unless
25 otherwise ordered by the Court or permitted in writing by the designator, a receiving party may
26 disclose any material designated CONFIDENTIAL only to:

27 **4.2.1** The receiving party's outside counsel of record in this action and
28 employees of outside counsel of record to whom disclosure is reasonably necessary;

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

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

11 **4.2.6** During their depositions, witnesses in the action to whom disclosure is
12 reasonably necessary and who have signed the Agreement to Be Bound (Exhibit A); and

13 **4.2.7** The author or recipient of a document containing the material, or a
14 custodian or other person who otherwise possessed or knew the information.

15 **4.3 Disclosure of HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY and**
16 **HIGHLY CONFIDENTIAL – SOURCE CODE Material Without Further Approval.**
17 Unless permitted in writing by the designator, a receiving party may disclose material designated
18 **HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY** or **HIGHLY CONFIDENTIAL –**
19 **SOURCE CODE** without further approval only to:

20 **4.3.1** The receiving party's outside counsel of record in this action and
21 employees of outside counsel of record to whom it is reasonably necessary to disclose the
22 information;

23 **4.3.2** The Court and its personnel;

24 **4.3.3** Outside court reporters and their staff, professional jury or trial consultants,
25 and professional vendors to whom disclosure is reasonably necessary, and who have
26 signed the Agreement to Be Bound (Exhibit A); and

27 **4.3.4** The author or recipient of a document containing the material, or a
28 custodian or other person who otherwise possessed or knew the information.

4.4 Procedures for Approving or Objecting to Disclosure of HIGHLY
CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL – SOURCE
CODE Material to Experts. Unless agreed to in writing by the designator:

1 **4.4.1** A party seeking to disclose to an expert retained by outside counsel of
2 record any information or item that has been designated HIGHLY CONFIDENTIAL –
3 ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL – SOURCE CODE must first
4 make a written request to the designator that (1) identifies the general categories of
5 HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
6 CONFIDENTIAL – SOURCE CODE information that the receiving party seeks
7 permission to disclose to the expert, (2) sets forth the full name of the expert and the city
8 and state of his or her primary residence, (3) attaches a copy of the expert’s current
9 resume, (4) identifies the expert’s current employer(s), (5) identifies each person or entity
10 from whom the expert has received compensation or funding for work in his or her areas
11 of expertise (including in connection with litigation) in the past five years, and (6)
12 identifies (by name and number of the case, filing date, and location of court) any
13 litigation where the expert has offered expert testimony, including by declaration, report,
14 or testimony at deposition or trial, in the past five years. If the expert believes any of this
15 information at (4) - (6) is subject to a confidentiality obligation to a third party, then the
16 expert should provide whatever information the expert believes can be disclosed without
17 violating any confidentiality agreements, and the party seeking to disclose the information
18 to the expert shall be available to meet and confer with the designator regarding any such
19 confidentiality obligations.

18 **4.4.2** A party that makes a request and provides the information specified in
19 paragraph 4.4.1 may disclose the designated material to the identified expert unless,
20 within seven days of delivering the request, the designating party contacts the requesting
21 party to schedule a Rule 37-1 conference and provides a draft component of the
22 designating party’s joint stipulation prepared in accordance with L.R. 37-2.

22 **4.4.3** The requesting party shall send courtesy copies of any request made under
23 Section 4.4.1 to counsel for disclosing party via email to their email addresses on record
24 with PACER on the same date they send the official request.

25 **5. SOURCE CODE**

26 **5.1 Designation of Source Code.** If production of source code is necessary, a party
27 may designate it as HIGHLY CONFIDENTIAL – SOURCE CODE if it is, or
28 includes, confidential, proprietary, or trade secret source code.

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

11 **5.3 Paper Copies of Source Code Excerpts.** The inspecting party may request paper
12 copies of limited portions of source code that are reasonably necessary for the preparation of
13 court filings, pleadings, expert reports, other papers, or for deposition or trial. The designator
14 shall provide all such source code in paper form, including Bates numbers and the label
15 “HIGHLY CONFIDENTIAL – SOURCE CODE.”

16 **5.4 Access Record.** The inspecting party shall maintain a record of any individual
17 who has inspected any portion of the source code in electronic or paper form, and shall maintain
18 all paper copies of any printed portions of the source code in a secured, locked area. The
19 inspecting party shall not convert any of the information contained in the paper copies into any
20 electronic format other than for the preparation of a pleading, exhibit, expert report, discovery
21 document, deposition transcript, or other Court document. Any paper copies used during a
22 deposition shall be retrieved at the end of each day and must not be left with a court reporter or
23 any other unauthorized individual.

24 **6. PROSECUTION BAR**

25 Absent written consent from the designator, any individual who receives access to HIGHLY
26 CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
27 CONFIDENTIAL – SOURCE CODE information shall not be involved in the prosecution of
28 patents or patent applications concerning the field of the invention of the patents-in-suit for the
receiving party or its acquirer, successor, predecessor, or other affiliate during the pendency of
this action and for one year after its conclusion, including any appeals. “Prosecution” means
drafting, amending, advising on the content of, or otherwise affecting the scope or content of

1 patent claims or specifications. These prohibitions shall not preclude counsel from participating
2 in reexamination or inter partes review proceedings to challenge or defend the validity of any
3 patent, but counsel may not participate in the drafting of amended claims in any such
4 proceedings.

5 **7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**
6 **OTHER LITIGATION**

7 **7.1 Subpoenas and Court Orders.** This Order in no way excuses non-compliance
8 with a lawful subpoena or court order. The purpose of the duties described in this section is to
9 alert the interested parties to the existence of this Order and to give the designator an opportunity
10 to protect its confidentiality interests in the court where the subpoena or order issued.

11 **7.2 Notification Requirement.** If a party is served with a subpoena or a court order
12 issued in other litigation that compels disclosure of any information or items designated in this
13 action as CONFIDENTIAL, HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY, or
14 HIGHLY CONFIDENTIAL – SOURCE CODE, that party must:

15 **7.2.1** Promptly notify the designator in writing. Such notification shall include a
16 copy of the subpoena or court order;

17 **7.2.2** Promptly notify in writing the party who caused the subpoena or order to
18 issue in the other litigation that some or all of the material covered by the subpoena or
19 order is subject to this Order. Such notification shall include a copy of this Order; and

20 **7.2.3** Cooperate with all reasonable procedures sought by the designator
21 whose material may be affected.

22 **7.3 Wait For Resolution of Protective Order.** If the designator timely seeks a
23 protective order, the party served with the subpoena or court order shall not produce any
24 information designated in this action as CONFIDENTIAL, HIGHLY CONFIDENTIAL –
25 ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL – SOURCE CODE before a
26 determination by the court where the subpoena or order issued, unless the party has obtained the
27 designator’s permission. The designator shall bear the burden and expense of seeking protection
28 of its confidential material in that court.

1 **8. UNAUTHORIZED DISCLOSURE OF DESIGNATED MATERIAL**

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

9 **9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
10 **PROTECTED MATERIAL**

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

16 **10. FILING UNDER SEAL**

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

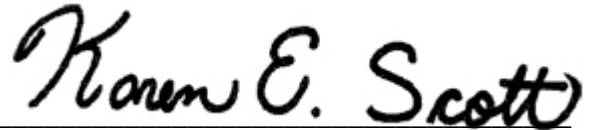
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11. FINAL DISPOSITION

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

IT IS SO ORDERED.

DATED: August 21, 2017



Karen E. Scott, 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 _____ G.I. SPORTZ, INC. v. APX GEAR, LLC, NO. 8:16-cv-02038-AG-KES. 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]

Dated: August _____, 2017