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Attorneys for Plaintiff
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN FRANKEN, an individual,
Plaintiff,

v.

DR. MARK T. ESPER, Acting Secretary of the
Department of the Army,
Defendant.

Civ. No. 2:17-cv-001128-JAM-KJN

**STIPULATED PROTECTIVE ORDER FOR
PROTECTED HEALTH INFORMATION**

1. PURPOSES AND LIMITATIONS

Discovery in this action involves production of confidential medical information for which special protection is warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order.

"PHI" MATERIAL

"Protected Health Information" material (PHI) shall include all records relating to Plaintiff's physical and psychological health.

2. SCOPE

The protections conferred by this Stipulated Protective Order cover not only PHI (as defined above), but also (1) any information copied or extracted from PHI; (2) all copies, excerpts, summaries, or compilations of PHI; and (3) any testimony, conversations, or presentations by parties or their counsel that might reveal PHI. However, the protections conferred by this Stipulation and Order do not cover the following information: (a) any PHI that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; (b) any PHI known to the Receiving Party prior to the disclosure pursuant to this Stipulation and Order; and (c) any PHI obtained by the Receiving Party after the disclosure pursuant to this Stipulation and Order from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party.

4. ACCESS TO AND USE OF PHI

4.1 Basic Principles. A receiving party may use PHI that is disclosed or produced by another party or by a non-party in connection with this case only for prosecuting, defending, or

1 attempting to settle this litigation. PHI may be disclosed only to the categories of persons and
2 under the conditions described in this Stipulated Protective Order. PHI must be stored and
3 maintained by a receiving party at a location and in a secure manner that ensures that access is
4 limited to the persons authorized under this Stipulated Protective Order.

5 4.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
6 ordered by the court or permitted in writing by the designating party, a receiving party may
7 disclose any PHI only to:

8 (a) the receiving party's counsel of record in this action, as well as employees of counsel
9 to whom it is reasonably necessary to disclose the information for this litigation;

10 (b) the officers and employees (including counsel) of the receiving party to whom
11 disclosure is reasonably necessary for this litigation, unless the parties agree that a particular
12 document or material produced is for Attorney of Record's Eyes Only and is so designated;

13 (c) experts and consultants to whom disclosure is reasonably necessary for this litigation
14 and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

15 (d) the court, court personnel, and court reporters and their staff;

16 (e) copy or imaging services retained by counsel to assist in the duplication of PHI,
17 provided that counsel for the party retaining the copy or imaging service instructs the service not
18 to disclose any PHI to third parties and to immediately return all originals and copies of any PHI;

19 (f) during their depositions, witnesses in the action to whom disclosure is reasonably
20 necessary and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A),
21 unless otherwise agreed by the designating party or ordered by the court;

22 (g) the author or recipient of a document containing the information or a custodian or
23 other person who otherwise possessed or knew the information.

1 4.3 Publicly Filing PHI Designated Confidential Before Trial. Before publicly filing
2 PHI that has been designated confidential and whose confidential designation has not been
3 challenged before trial, the filing party shall either (1) submit a Request to Seal pursuant to Local
4 Rule 141, or (2) confer with the designating party to determine whether the designating party
5 will remove the confidential designation. Local Civil Rule 141 sets forth the procedures that
6 must be followed and the standards that will be applied when a party seeks permission from the
7 court to file material under seal. The parties understand that just because information has been
8 designated confidential by a party does not mean that the Court will grant the request to seal the
9 information designated confidential.

10 5. DESIGNATING PROTECTED MATERIAL

11 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
12 or Non-Party that designates information or items for protection under this Order must take care
13 to limit any such designation to specific material that qualifies under the appropriate standards.
14 The Designating Party must designate for protection only those parts of material, documents,
15 items, or oral or written communications that qualify – so that other portions of the material,
16 documents, items, or communications for which protection is not warranted are not swept
17 unjustifiably within the ambit of this Order.

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

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

4 5.2 Manner and Timing of Designations. Except as otherwise provided in this
5 Stipulated Protective Order (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise
6 stipulated or ordered, disclosure or discovery material provided by a party that qualifies for
7 protection under this Stipulated Protective Order must be clearly so designated before or when
8 the material is disclosed or produced.

9 (a) Information in documentary form: (*e.g.*, paper or electronic documents and
10 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings),
11 the designating party must affix the word "CONFIDENTIAL" to each page that contains such
12 material. If only a portion or portions of the material on a page qualifies for protection, the
13 producing party also must clearly identify the protected portion(s) (*e.g.*, by making appropriate
14 markings in the margins).

15 A party may designate documentary information received from another party as
16 confidential within 15 days of receipt.

17 (b) Testimony given in deposition or in other pretrial or trial proceedings: the
18 parties must identify on the record, before the close of the deposition, hearing, or other
19 proceeding, all protected testimony.

20 (c) Other tangible items: the producing party must affix in a prominent place on
21 the exterior of the container or containers in which the information or item is stored the word
22 "CONFIDENTIAL." If only a portion or portions of the information or item warrant protection,
23 the producing party, to the extent practicable, shall identify the protected portion(s).

1 (d) A party that receives documents and tangible items containing PHI that is
2 produced from a non-party, such as through a subpoena, before it may publicly file PHI, the
3 receiving party must wait fifteen (15) days or must wait until the other party has indicated that it
4 does not designate the PHI to be filed as confidential, whichever time period is shorter; this time
5 frame is intended to permit the other party an opportunity to review the documents and tangible
6 things for potentially "CONFIDENTIAL" information.

7 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
8 designate qualified information or items does not, standing alone, waive the designating party's
9 right to secure protection under this Stipulated Protective Order for such material. Upon timely
10 correction of a designation, the receiving party must make reasonable efforts to ensure that the
11 material is treated in accordance with the provisions of this Stipulated Protective Order.

12 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

13 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
14 confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality
15 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
16 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
17 challenge a confidentiality designation by electing not to mount a challenge promptly after the
18 original designation is disclosed.

19 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
20 regarding confidential designations without court involvement. Any motion regarding
21 confidential designations or for a protective order must include a certification, in the motion or in
22 a declaration or affidavit, that the movant has engaged in a good faith meet and confer
23 conference with other affected parties in an effort to resolve the dispute without court action.

1 The certification must list the date, manner, and participants to the conference. A good faith
2 effort to confer requires a face-to-face meeting or a telephone conference.

3 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
4 intervention, the designating party may file and serve a motion to retain confidentiality under and
5 in compliance with Local Civil Rule 251 and if applicable, Local Civil Rule 141.1. The burden
6 of persuasion in any such motion shall be on the designating party. Frivolous challenges, and
7 those made for an improper purpose (*e.g.*, to harass or impose unnecessary expenses and burdens
8 on other parties) may expose the challenging party to sanctions. All parties shall continue to
9 maintain the material in question as confidential until the court rules on the challenge.

10 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
11 OTHER LITIGATION

12 If a party is served with a subpoena or a court order issued in other litigation that compels
13 disclosure of any information or items designated in this action as "CONFIDENTIAL," that
14 party must:

15 (a) promptly notify the designating party in writing and include a copy of the subpoena or
16 court order;

17 (b) promptly notify in writing the party who caused the subpoena or order to issue in the
18 other litigation that some or all of the material covered by the subpoena or order is subject to this
19 Stipulated Protective Order. Such notification shall include a copy of this Stipulated Protective
20 Order; and

21 (c) cooperate with respect to all reasonable procedures sought to be pursued by the
22 designating party whose PHI may be affected.

1 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

2 If a receiving party learns that, by inadvertence or otherwise, it has disclosed PHI to any
3 person or in any circumstance not authorized under this Stipulated Protective Order, the
4 receiving party must immediately (a) notify in writing the designating party of the unauthorized
5 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material,
6 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of
7 this Stipulated Protective Order, and (d) request that such person or persons execute the
8 "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

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

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

17 10. TERMINATION AND RETURN OF DOCUMENTS

18 Within 60 days after the termination of this action, including all appeals, each receiving
19 party must return all PHI to the producing party, including all copies, extracts and summaries
20 thereof. Alternatively, the parties may agree upon appropriate methods of destruction.

21 Notwithstanding this provision, counsel are entitled to retain one archival copy of all
22 documents filed with the court, trial, deposition, and hearing transcripts, legal memoranda,
23

1 correspondence, deposition and trial exhibits, expert reports, attorney work product, and
2 consultant and expert work product, even if such materials contain PHI.

3 The confidentiality obligations imposed by this Stipulated Protective Order shall remain
4 in effect until a designating party agrees otherwise in writing or a court orders otherwise.

5 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

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7 DATED: July 17, 2018

s/ Micah D. Fargey
Micah D. Fargey
Attorney for Plaintiff

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11 DATED: July 17, 2018

/s Chi Soo Kim
Chi Soo Kim
Attorney for Defendant

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14 PURSUANT TO STIPULATION, IT IS SO ORDERED.

15 Dated: July 18, 2018

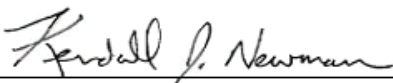
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17 
KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

EXHIBIT A

ACKNOWLEDGMENT AND 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 Stipulated Protective Order that was issued by the United States District Court for the Eastern District of California on _____ [date] in the case of ***Franken v. Esper, Case No. 2:17-cv-001128-JAM-KJN***. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of the Order.

I further agree to submit to the jurisdiction of the United States District Court for the Eastern District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____.

Printed name: _____

Signature: _____