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16 **UNITED STATES DISTRICT COURT**

17 **NORTHERN DISTRICT OF CALIFORNIA**

18 NANOENTEK, INC. AND DIGITAL-BIO  
 TECHNOLOGY CO., LTD.

19 Plaintiff,

20 vs.

21 BIO-RAD LABORATORIES, INC.,

22 Defendant.

Case No. 3:11-CV-06237-JSW

~~PROPOSED~~ STIPULATED  
 PROTECTIVE ORDER

24 WHEREAS, Plaintiffs NanoEnTek, Inc. and Digital-Bio Technology Co., Ltd.

25 (collectively "Plaintiffs") and Defendant Bio-Rad Laboratories, Inc. ("Defendant"), by and

26 through their respective counsel of record, hereby **STIPULATE AND AGREE** that the Court

27 may enter the following order:  
 28

~~PROPOSED~~ STIPULATED  
 PROTECTIVE ORDER

1     **1.     PURPOSES AND LIMITATIONS**

2           Disclosure and discovery activity in this action are likely to involve production of  
3 confidential, proprietary, or private information for which special protection from public  
4 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.  
5 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated  
6 Protective Order. The parties acknowledge that this Order does not confer blanket protections on  
7 all disclosures or responses to discovery and that the protection it affords from public disclosure  
8 and use extends only to the limited information or items that are entitled to confidential treatment  
9 under the applicable legal principles. The parties further acknowledge, as set forth in Section  
10 14.4 below, that this Stipulated Protective Order does not entitle them to file confidential  
11 information under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that  
12 must be followed and the standards that will be applied when a party seeks permission from the  
13 court to file material under seal.  
14

15  
16     **2.     DEFINITIONS**

17           2.1     Challenging Party: a Party or Non-Party that challenges the designation of  
18 information or items under this Order.

19           2.2     “CONFIDENTIAL” Information or Items: information (regardless of how it is  
20 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule  
21 of Civil Procedure 26(c).  
22

23           2.3     Counsel (without qualifier): Outside Counsel of Record.

24           2.4     Designating Party: a Party or Non-Party that designates information or items  
25 that it produces in disclosures or in responses to discovery as “CONFIDENTIAL,” or “HIGHLY  
26 CONFIDENTIAL – ATTORNEYS' EYES ONLY.”  
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1           2.5    Disclosure or Discovery Material: all items or information, regardless of the  
2 medium or manner in which it is generated, stored, or maintained (including, among other things,  
3 testimony, transcripts, and tangible things), that are produced or generated in disclosures or  
4 responses to discovery in this matter.

5           2.6    Expert: a person with specialized knowledge or experience in a matter pertinent to  
6 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or  
7 as a consultant in this action, (2) is not a past or current employee of a Party or of a Party's  
8 competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party  
9 or of a Party's competitor.

10           2.7    “HIGHLY CONFIDENTIAL - ATTORNEYS’ EYES ONLY” Information or  
11 Items: extremely sensitive “Confidential Information or Items,” disclosure of which to another  
12 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by  
13 less restrictive means.

14           2.8    “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items:  
15 extremely sensitive “Confidential Information or Items” representing computer code and  
16 associated comments and revision histories, formulas, engineering specifications, or schematics  
17 that define or otherwise describe in detail the algorithms or structure of software or hardware  
18 designs, disclosure of which to another Party or Non-Party would create a substantial risk of  
19 serious harm that could not be avoided by less restrictive means.

20           2.9    Non-Party: any natural person, partnership, corporation, association, or other legal  
21 entity not named as a Party to this action.

22           2.10 Outside Counsel of Record: attorneys who are not employees of a party to this  
23 action but are retained to represent or advise a party to this action and have appeared in this action  
24 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

1           2.11 Party: any party to this action, including all of its officers, directors, employees,  
2 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

3           2.12 Producing Party: a Party or Non-Party that produces Disclosure or Discovery  
4 Material in this action.

5           2.13 Professional Vendors: persons or entities that provide litigation support services  
6 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
7 organizing, storing, or retrieving data in any form or medium) and their employees and  
8 subcontractors.

9           2.14 Protected Material: any Disclosure or Discovery Material that is designated as  
10 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or  
11 “HIGHLY CONFIDENTIAL – SOURCE CODE.”  
12

13           2.15 Receiving Party: a Party that receives Disclosure or Discovery Material from a  
14 Producing Party.  
15

16 **3. SCOPE**

17           The protections conferred by this Stipulation and Order cover not only Protected Material  
18 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)  
19 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,  
20 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.  
21 However, the protections conferred by this Stipulation and Order do not cover the following  
22 information: (a) any information that is in the public domain at the time of disclosure to a  
23 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as  
24 a result of publication not involving a violation of this Order, including becoming part of the  
25 public record through trial or otherwise; and (b) any information known to the Receiving Party  
26 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who  
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1 obtained the information lawfully and under no obligation of confidentiality to the Designating  
2 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

3 **4. DURATION**

4 Even after final disposition of this litigation, the confidentiality obligations imposed by  
5 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court  
6 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all  
7 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after  
8 the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,  
9 including the time limits for filing any motions or applications for extension of time pursuant to  
10 applicable law.

11 **5. DESIGNATING PROTECTED MATERIAL**

12 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party  
13 or Non-Party that designates information or items for protection under this Order must take care  
14 to limit any such designation to specific material that qualifies under the appropriate  
15 standards. To the extent it is practical to do so, the Designating Party must designate for  
16 protection only those parts of material, documents, items, or oral or written communications that  
17 qualify – so that other portions of the material, documents, items, or communications for which  
18 protection is not warranted are not swept unjustifiably within the ambit of this Order.  
19  
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21

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

26 If it comes to a Designating Party's attention that information or items that it designated  
27 for protection do not qualify for protection at all or do not qualify for the level of protection  
28

1 initially asserted, that Designating Party must promptly notify all other Parties that it is  
2 withdrawing the mistaken designation.

3           5.2    Manner and Timing of Designations. Except as otherwise provided in this Order  
4 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
5 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
6 designated before the material is disclosed or produced.  
7

8           Designation in conformity with this Order requires:

9           (a) for information in documentary form (e.g., paper or electronic documents, but  
10 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing  
11 Party affix the legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’  
12 EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE” to each page that contains  
13 protected material. If only a portion or portions of the material on a page qualifies for protection,  
14 the Producing Party also must clearly identify the protected portion(s) (e.g., by making  
15 appropriate markings in the margins) and must specify, for each portion, the level of protection  
16 being asserted.  
17

18           A Party or Non-Party that makes original documents or materials available for inspection  
19 need not designate them for protection until after the inspecting Party has indicated which  
20 material it would like copied and produced. During the inspection and before the designation, all  
21 of the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –  
22 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants  
23 copied and produced, the Producing Party must determine which documents, or portions thereof,  
24 qualify for protection under this Order. Then, before producing the specified documents, the  
25 Producing Party must affix the appropriate legend (“CONFIDENTIAL,” “HIGHLY  
26 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE  
27  
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1 CODE” to each page that contains Protected Material. If only a portion or portions of the  
2 material on a page qualifies for protection, the Producing Party also must clearly identify the  
3 protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for  
4 each portion, the level of protection being asserted.

5  
6 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
7 Designating Party identify on the record, before the close of the deposition, hearing, or other  
8 proceeding, all protected testimony and specify the level of protection being asserted. When it is  
9 impractical to identify separately each portion of testimony that is entitled to protection and it  
10 appears that substantial portions of the testimony may qualify for protection, the Designating  
11 Party may invoke on the record (before the deposition, hearing, or other proceeding is concluded)  
12 a right to have up to 21 days to identify the specific portions of the testimony as to which  
13 protection is sought and to specify the level of protection being asserted. Only those portions of  
14 the testimony that are appropriately designated for protection within the 21 days shall be covered  
15 by the provisions of this Stipulated Protective Order. Alternatively, a Designating Party may  
16 specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the  
17 entire transcript shall be treated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –  
18 ATTORNEYS’ EYES ONLY.”  
19

20  
21 Parties shall give the other parties notice if they reasonably expect a deposition, hearing,  
22 or other proceeding to include Protected Material so that the other parties can ensure that only  
23 authorized individuals who have signed the “Acknowledgment and Agreement to Be Bound”  
24 (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition  
25 shall not in any way affect its designation as “CONFIDENTIAL” or “HIGHLY  
26 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”  
27  
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1 Transcripts containing Protected Material shall have an obvious legend on the title page  
2 that the transcript contains Protected Material, and the title page shall be followed by a list of all  
3 pages (including line numbers as appropriate) that have been designated as Protected Material and  
4 the level of protection being asserted by the Designating Party. The Designating Party shall  
5 inform the court reporter of these requirements. Any transcript that is prepared before the  
6 expiration of a 21-day period for designation shall be treated during that period as if it had been  
7 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless  
8 otherwise agreed. After the expiration of that period, the transcript shall be treated only as  
9 actually designated.  
10

11 (c) for information produced in some form other than documentary and for any other  
12 tangible items, that the Producing Party affix in a prominent place on the exterior of the container  
13 or containers in which the information or item is stored the legend “CONFIDENTIAL,”  
14 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL  
15 – SOURCE CODE.” If only a portion or portions of the information or item warrant protection,  
16 the Producing Party, to the extent practicable, shall identify the protected portion(s) and specify  
17 the level of protection being asserted.  
18

19 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to  
20 designate qualified information or items does not, standing alone, waive the Designating Party’s  
21 right to secure protection under this Order for such material. Upon timely correction of a  
22 designation, the Receiving Party must make reasonable efforts to assure that the material is  
23 treated in accordance with the provisions of this Order.  
24

## 25 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

26 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of  
27 confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality  
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1 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic  
2 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to  
3 challenge a confidentiality designation by electing not to mount a challenge promptly after the  
4 original designation is disclosed.

5  
6 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution  
7 process by providing written notice of each designation it is challenging and describing the basis  
8 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written  
9 notice must recite that the challenge to confidentiality is being made in accordance with this  
10 specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in  
11 good faith and must begin the process by conferring directly (in voice to voice dialogue; other  
12 forms of communication are not sufficient) within 14 business days of the date of service of  
13 notice. In conferring, the Challenging Party must explain the basis for its belief that the  
14 confidentiality designation was not proper and must give the Designating Party an opportunity to  
15 review the designated material, to reconsider the circumstances, and, if no change in designation  
16 is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to  
17 the next stage of the challenge process only if it has engaged in this meet and confer process first  
18 or establishes that the Designating Party is unwilling to participate in the meet and confer process  
19 in a timely manner.  
20

21  
22 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court  
23 intervention, the Designating Party shall file and serve a motion to retain confidentiality within 21  
24 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and  
25 confer process will not resolve their dispute, whichever is earlier. Each such motion must be  
26 accompanied by a competent declaration affirming that the movant has complied with the meet  
27 and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to  
28

1 make such a motion including the required declaration within 21 days (or 14 days, if applicable)  
2 shall automatically waive the confidentiality designation for each challenged designation. In  
3 addition, the Challenging Party may file a motion challenging a confidentiality designation at any  
4 time if there is good cause for doing so, including a challenge to the designation of a deposition  
5 transcript or any portions thereof. Any motion brought pursuant to this provision must be  
6 accompanied by a competent declaration affirming that the movant has complied with the meet  
7 and confer requirements imposed by the preceding paragraph.  
8

9 The burden of persuasion in any such challenge proceeding shall be on the Designating  
10 Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or impose  
11 unnecessary expenses and burdens on other parties) may expose the Challenging Party to  
12 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to  
13 file a motion to retain confidentiality as described above, all parties shall continue to afford the  
14 material in question the level of protection to which it is entitled under the Producing Party's  
15 designation until the court rules on the challenge.  
16

## 17 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

18 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed  
19 or produced by another Party or by a Non-Party in connection with this case only for prosecuting,  
20 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only  
21 to the categories of persons and under the conditions described in this Order. When the litigation  
22 has been terminated, a Receiving Party must comply with the provisions of section 15 below  
23 (FINAL DISPOSITION).  
24

25 Protected Material must be stored and maintained by a Receiving Party at a location and  
26 in a secure manner that ensures that access is limited to the persons authorized under this Order.  
27  
28

1           7.2    Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise  
2 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may  
3 disclose any information or item designated “CONFIDENTIAL” only to:

4           (a) the Receiving Party’s Outside Counsel of Record in this action, as well as employees  
5 of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information  
6 for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” that  
7 is attached hereto as Exhibit A;

8           (b) the officers, directors, and employees of the Receiving Party to whom disclosure is  
9 reasonably necessary for this litigation and who have signed the “Acknowledgment and  
10 Agreement to Be Bound” (Exhibit A);

11           (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
12 reasonably necessary for this litigation and who have signed the “Acknowledgment and  
13 Agreement to Be Bound” (Exhibit A);

14           (d) the court and its personnel;

15           (e) court reporters and their staff, professional jury or trial consultants, and Professional  
16 Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the  
17 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

18           (f) during their depositions, witnesses in the action to whom disclosure is reasonably  
19 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),  
20 unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed  
21 deposition testimony or exhibits to depositions that reveal Protected Material must be separately  
22 bound by the court reporter and may not be disclosed to anyone except as permitted under this  
23 Stipulated Protective Order.<sup>1</sup>

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<sup>1</sup> This Order contemplates that Designated House Counsel shall not have access to any information or items

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

3 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” and  
4 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items. Unless otherwise  
5 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may  
6 disclose any information or item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’  
7 EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” only to:

9 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as employees  
10 of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information  
11 for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” that  
12 is attached hereto as Exhibit A;

13 (b) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for this  
14 litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),  
15 and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been followed;

16 (c) the court and its personnel;

17 (d) court reporters and their staff, professional jury or trial consultants, and Professional  
18 Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the  
19 “Acknowledgment and Agreement to Be Bound” (Exhibit A); and  
20

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

24 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY  
25 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” CODE” or “HIGHLY CONFIDENTIAL –  
26 SOURCE CODE” Information or Items to Experts.  
27

28 designated “HIGHLY CONFIDENTIAL – SOURCE CODE.”

1 (a) Unless otherwise ordered by the court or agreed to in writing by the Designating  
2 Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item  
3 that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or  
4 “HIGHLY CONFIDENTIAL – SOURCE CODE” pursuant to paragraph 7.3(c) first must make a  
5 written request to the Designating Party that (1) identifies the general categories of “HIGHLY  
6 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE  
7 CODE” information that the Receiving Party seeks permission to disclose to the Expert, (2) sets  
8 forth the full name of the Expert and the city and state of his or her primary residence, (3)  
9 attaches a copy of the Expert’s current resume, (4) identifies the Expert’s current employer(s), (5)  
10 identifies each person or entity from whom the Expert has received compensation or funding for  
11 work in his or her areas of expertise or to whom the expert has provided professional services,  
12 including in connection with a litigation, at any time during the preceding five years,<sup>2</sup> and (6)  
13 identifies (by name and number of the case, filing date, and location of court) any litigation in  
14 connection with which the Expert has offered expert testimony, including through a declaration,  
15 report, or testimony at a deposition or trial, during the preceding five years.

18 (b) A Party that makes a request and provides the information specified in the preceding  
19 respective paragraphs may disclose the subject Protected Material to the identified Expert unless,  
20 within 14 days of delivering the request, the Party receives a written objection from the  
21 Designating Party. Any such objection must set forth in detail the grounds on which it is based.

23 (c) A Party that receives a timely written objection must meet and confer with the  
24 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by  
25 agreement within seven days of the written objection. If no agreement is reached, the Party  
26

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27 <sup>2</sup> If the Expert believes any of this information is subject to a confidentiality obligation to a third-party, then the  
28 Expert should provide whatever information the Expert believes can be disclosed without violating any  
confidentiality agreements, and the Party seeking to disclose to the Expert shall be available to meet and confer with  
the Designating Party regarding any such engagement.

1 seeking to make the disclosure to the Expert may file a motion seeking permission from the court  
2 to do so. Any such motion must describe the circumstances with specificity, set forth in detail the  
3 reasons why disclosure to the Expert is reasonably necessary, assess the risk of harm that the  
4 disclosure would entail, and suggest any additional means that could be used to reduce that risk.  
5 In addition, any such motion must be accompanied by a competent declaration describing the  
6 parties' efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and  
7 confer discussions) and setting forth the reasons advanced by the Designating Party for its refusal  
8 to approve the disclosure.  
9

10 In any such proceeding, the Party opposing disclosure to the Expert shall bear the burden  
11 of proving that the risk of harm that the disclosure would entail (under the safeguards proposed)  
12 outweighs the Receiving Party's need to disclose the Protected Material to its Expert.  
13

#### 14 **8. PROSECUTION BAR**

15 Absent written consent from the Producing Party, any individual who receives access to  
16 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL  
17 – SOURCE CODE" information shall not be involved in the prosecution of patents or patent  
18 applications relating to the subject matter of the complaint, before any foreign or domestic  
19 agency, including the United States Patent and Trademark Office ("the Patent Office"). To avoid  
20 any doubt, "prosecution" as used in this paragraph does not include representing a party  
21 challenging a patent before a domestic or foreign agency (including, but not limited to, a reissue  
22 protest, *ex parte* reexamination or *inter partes* reexamination). For purposes of this paragraph,  
23 "prosecution" includes directly or indirectly drafting, amending, advising, or otherwise affecting  
24 the scope or maintenance of patent claims. This Prosecution Bar shall begin upon receipt of  
25 information designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or  
26  
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28

1 “HIGHLY CONFIDENTIAL – SOURCE CODE” pursuant to this order and shall end two (2)  
2 years after final termination of this action.

3 **9. SOURCE CODE**

4 (a) To the extent production of source code becomes necessary in this case, a Producing  
5 Party may designate source code “HIGHLY CONFIDENTIAL – SOURCE CODE” if it  
6 comprises or includes confidential, proprietary or trade secret source code.  
7

8 (b) Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE CODE”  
9 shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL –  
10 ATTORNEYS’ EYES ONLY” information, including the Prosecution Bar set forth in Paragraph  
11 8, and may be disclosed only to the individuals to whom “HIGHLY CONFIDENTIAL –  
12 ATTORNEYS’ EYES ONLY” information may be disclosed, as set forth in Paragraphs 7.3 and  
13 7.4.  
14

15 (c) Any source code produced in discovery shall be made available for inspection, in a  
16 format allowing it to be reasonably reviewed and searched, during normal business hours or at  
17 other mutually agreeable times, at an office of the Producing Party’s counsel or another mutually  
18 agreeable location. The source code shall be made available for inspection on a secured computer  
19 in a secured room without Internet access or network access to other computers, and the  
20 Receiving Party shall not copy, remove, or otherwise transfer any portion of the source code onto  
21 any recordable media or recordable device. The Producing Party may visually monitor the  
22 activities of the Receiving Party’s representatives during any source code review, but only to  
23 ensure that there is no unauthorized recording, copying, or transmission of the source code.  
24

25 (d) The Receiving Party may request paper copies of limited portions of source code that  
26 are reasonably necessary for the preparation of court filings, pleadings, expert reports, or other  
27 papers, or for deposition or trial, but shall not request paper copies for the purpose of reviewing  
28

1 the source code other than electronically as set forth in paragraph (c) in the first instance. The  
2 Producing Party shall provide all such source code in paper form, including bates numbers and  
3 the label “HIGHLY CONFIDENTIAL – SOURCE CODE.” The Producing Party may challenge  
4 the amount of source code requested in hard copy form pursuant to the dispute resolution  
5 procedure and timeframes set forth in Paragraph 6 whereby the Producing Party is the  
6 “Challenging Party” and the Receiving Party is the “Designating Party” for purposes of dispute  
7 resolution.  
8

9 (e) The Receiving Party shall maintain a record of any individual who has inspected any  
10 portion of the source code in electronic or paper form. The Receiving Party shall maintain all  
11 paper copies of any printed portions of the source code in a secured, locked area. The Receiving  
12 Party shall not create any electronic or other images of the paper copies and shall not convert any  
13 of the information contained in the paper copies into any electronic format. The Receiving Party  
14 shall only make additional paper copies if such additional copies are (1) necessary to prepare  
15 court filings, pleadings, or other papers (including a testifying expert’s expert report), (2)  
16 necessary for deposition, or (3) otherwise necessary for the preparation of its case. Any paper  
17 copies used during a deposition shall be retrieved by the Producing Party at the end of each day  
18 and must not be given to or left with a court reporter or any other unauthorized individual.  
19

20 **10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**  
21 **OTHER LITIGATION**

22 If a Party is served with a subpoena or a court order issued in other litigation that compels  
23 disclosure of any information or items designated in this action as “CONFIDENTIAL,”  
24 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL  
25 – SOURCE CODE” that Party must:  
26

27 (a) promptly notify in writing the Designating Party. Such notification shall include a  
28 copy of the subpoena or court order;



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

4 (c) cooperate with respect to all reasonable procedures sought to be pursued by the  
 5 Designating Party whose Protected Material may be affected.<sup>3</sup>  
 6

7 If the Designating Party timely seeks a protective order, the Party served with the  
 8 subpoena or court order shall not produce any information designated in this action as  
 9 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or  
 10 “HIGHLY CONFIDENTIAL – SOURCE CODE” before a determination by the court from  
 11 which the subpoena or order issued, unless the Party has obtained the Designating Party’s  
 12 permission. The Designating Party shall bear the burden and expense of seeking protection in  
 13 that court of its confidential material – and nothing in these provisions should be construed as  
 14 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from  
 15 another court.  
 16

17 **11. A NON-PARTY’S PROTECTED MATERIALS SOUGHT TO BE PRODUCED IN**  
 18 **THIS LITIGATION**

19 (a) The terms of this Order are applicable to information produced by a Non-Party in this  
 20 action and designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’  
 21 EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” Such information  
 22 produced by Non-Parties in connection with this litigation is protected by the remedies and relief  
 23 provided by this Order. Nothing in these provisions should be construed as prohibiting a Non-  
 24 Party from seeking additional protections.  
 25

26  
 27  
 28 <sup>3</sup> The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order issued.

1 (b) In the event that a Party is required, by a valid discovery request, to produce a Non-  
2 Party's confidential information in its possession, and the Party is subject to an agreement with  
3 the Non-Party not to produce the Non-Party's confidential information, then the Party shall:

4 1. promptly notify in writing the Requesting Party and the Non-Party that some or all  
5 of the information requested is subject to a confidentiality agreement with a Non-Party;

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

9 3. make the information requested available for inspection by the Non-Party.

10 (c) If the Non-Party fails to object or seek a protective order from this court within 14  
11 days of receiving the notice and accompanying information, the Receiving Party may produce the  
12 Non-Party's confidential information responsive to the discovery request. If the Non-Party timely  
13 seeks a protective order, the Receiving Party shall not produce any information in its possession  
14 or control that is subject to the confidentiality agreement with the Non-Party before a  
15 determination by the court.<sup>4</sup> Absent a court order to the contrary, the Non-Party shall bear the  
16 burden and expense of seeking protection in this court of its Protected Material.

17 **12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

18 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected  
19 Material to any person or in any circumstance not authorized under this Stipulated Protective  
20 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the  
21 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the  
22 Protected Material, (c) inform the person or persons to whom unauthorized disclosures were  
23  
24  
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27

28 <sup>4</sup> The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.

1 made of all the terms of this Order, and (d) request such person or persons to execute the  
2 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

3 **13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**  
4 **PROTECTED MATERIAL**

5 When a Producing Party gives notice to Receiving Parties that certain inadvertently  
6 produced material is subject to a claim of privilege or other protection, the obligations of the  
7 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This  
8 provision is not intended to modify whatever procedure may be established in an e-discovery  
9 order that provides for production without prior privilege review. Pursuant to Federal Rule of  
10 Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a  
11 communication or information covered by the attorney-client privilege or work product  
12 protection, the parties may incorporate their agreement in the stipulated protective order  
13 submitted to the court.  
14

15 **14. MISCELLANEOUS**

16 14.1 Right to Further Relief. Nothing in this Order abridges the right of any person to  
17 seek its modification by the court in the future.

18 14.2 Right to Assert Other Objections. By stipulating to the entry of this Protective  
19 Order no Party waives any right it otherwise would have to object to disclosing or producing any  
20 information or item on any ground not addressed in this Stipulated Protective Order. Similarly,  
21 no Party waives any right to object on any ground to use in evidence of any of the material  
22 covered by this Protective Order.  
23

24 14.3 Export Control. Disclosure of Protected Material shall be subject to all applicable  
25 laws and regulations relating to the export of technical data contained in such Protected Material,  
26 including the release of such technical data to foreign persons or nationals in the United States or  
27  
28

1 elsewhere. The Producing Party shall be responsible for identifying any such controlled technical  
2 data, and the Receiving Party shall take measures necessary to ensure compliance.

3           14.4 Filing Protected Material. Without written permission from the Designating Party  
4 or a court order secured after appropriate notice to all interested persons, a Party may not file in  
5 the public record in this action any Protected Material. A Party that seeks to file under seal any  
6 Protected Material must comply with Civil Local Rule 79-5 and General Order 62. Protected  
7 Material may only be filed under seal pursuant to a court order authorizing the sealing of the  
8 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5 and General Order 62, a  
9 sealing order will issue only upon a request establishing that the Protected Material at issue is  
10 privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a  
11 Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-  
12 5(d) and General Order 62 is denied by the court, then the Receiving Party may file the Protected  
13 Material in the public record pursuant to 79-5(e) unless otherwise instructed by the court.  
14  
15

16 **15. FINAL DISPOSITION**

17           Within 60 days after the final disposition of this action, as defined in paragraph 4, each  
18 Receiving Party must return all Protected Material to the Producing Party or destroy such  
19 material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,  
20 compilations, summaries, and any other format reproducing or capturing any of the Protected  
21 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must  
22 submit a written certification to the Producing Party (and, if not the same person or entity, to the  
23 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all  
24 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has  
25 not retained any copies, abstracts, compilations, summaries or any other format reproducing or  
26 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to  
27  
28

1 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,  
2 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work  
3 product, and consultant and expert work product, even if such materials contain Protected  
4 Material. Any such archival copies that contain or constitute Protected Material remain subject to  
5 this Protective Order as set forth in Section 4 (DURATION).  
6

7  
8 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.  
9

10 DATED: April 13, 2012

11 /s/ David Cotta

David Cotta

12  
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25 Attorneys for Plaintiffs  
26 NANOENTEK, INC. AND DIGITAL-BIO  
TECHNOLOGY CO., LTD.  
27  
28



**EXHIBIT A**  
**ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

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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 Northern District of California on \_\_\_\_\_ [date] in the case of *NanoEnTek, Inc., et al. v. Bio-Rad Laboratories, Inc.*, Case No. 3:11-cv-06237-JSW. 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 this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Northern 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.

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 Stipulated Protective Order.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_  
[printed name]

Signature: \_\_\_\_\_  
[signature]