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2 UNITED STATES DISTRICT COURT  
3 NORTHERN DISTRICT OF CALIFORNIA

4 Jeffery Brossman, M.D.

5 Plaintiff,

6 v.

7 Provident Life and Accident Ins. Co., *et al.*

8 Defendant.

Case No. 13-cv-04922 JD

PROTECTIVE ORDER RE: TREATMENT  
OF MATERIALS DESIGNATED AS  
CONFIDENTIAL

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11 1. PURPOSES AND LIMITATIONS

12 Disclosure and discovery activity in this action are likely to involve production of  
13 confidential, proprietary, or private information for which special protection from public disclosure  
14 and from use for any purpose other than prosecuting this litigation may be warranted. The parties not  
15 having been able to agree on the terms of a stipulated protective order, the court enters the following  
16 Protective Order. This Order does not confer blanket protections on all disclosures or responses to  
17 discovery. The protection it affords from public disclosure and use extends only to the limited  
18 information or items that are entitled to confidential treatment under the applicable legal principles.  
19 As set forth in Section 12.3, below, this Protective Order does not entitle the parties to file  
20 confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be  
21 followed and the standards that will be applied when a party seeks permission from the court to file  
22 material under seal.

23 2. DEFINITIONS

24 2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or  
25 items under this Order.

26 2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is  
27 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of  
28 Civil Procedure 26(c).

1           2.3    Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well  
2 as their support staff).

3           2.4    Designating Party: a Party or Non-Party that designates information or items that it  
4 produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

5           2.5    Disclosure or Discovery Material: all items or information, regardless of the medium  
6 or manner in which it is generated, stored, or maintained (including, among other things, testimony,  
7 transcripts, and tangible things), that are produced or generated in disclosures or responses to  
8 discovery in this matter.

9           2.6    Expert: a person with specialized knowledge or experience in a matter pertinent to  
10 the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a  
11 consultant in this action.

12          2.7    House Counsel: attorneys who are employees of a party to this action. House  
13 Counsel does not include Outside Counsel of Record or any other outside counsel.

14          2.8    Non-Party: any natural person, partnership, corporation, association, or other legal  
15 entity not named as a Party to this action.

16          2.9    Outside Counsel of Record: attorneys who are not employees of a party to this action  
17 but are retained to represent or advise a party to this action and have appeared in this action on  
18 behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

19          2.10   Party: any party to this action, including all of its officers, directors, employees,  
20 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

21          2.11   Producing Party: a Party or Non-Party that produces Disclosure or Discovery  
22 Material in this action.

23          2.12   Professional Vendors: persons or entities that provide litigation support services  
24 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing,  
25 storing, or retrieving data in any form or medium) and their employees and subcontractors.

26          2.13   Protected Material: any Disclosure or Discovery Material that is designated as  
27 “CONFIDENTIAL.”

28          2.14   Receiving Party: a Party that receives Disclosure or Discovery Material from a

1 Producing Party.

2 3. SCOPE

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

15 4. DURATION

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

22 5. DESIGNATING PROTECTED MATERIAL

23 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or  
24 Non-Party that designates information or items for protection under this Order must take care to  
25 limit any such designation to specific material that qualifies under the appropriate standards. The  
26 Designating Party must designate for protection only those parts of material, documents, items, or  
27 oral or written communications that qualify – so that other portions of the material, documents,  
28 items, or communications for which protection is not warranted are not swept unjustifiably within

1 the ambit of this Order.

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

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

9 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order  
10 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
11 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
12 designated before the material is disclosed or produced.

13 Designation in conformity with this Order requires:

14 (a) for information in documentary form (e.g., paper or electronic documents, but  
15 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party  
16 affix the legend "CONFIDENTIAL" to each page that contains protected material. If only a portion  
17 or portions of the material on a page qualifies for protection, the Producing Party also must clearly  
18 identify the protected portion(s) (e.g., by making appropriate markings in the margins).

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

1 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
2 Designating Party identify on the record, before the close of the deposition, hearing, or other  
3 proceeding, all protected testimony.

4 (c) for information produced in some form other than documentary and for any other  
5 tangible items, that the Producing Party affix in a prominent place on the exterior of the container or  
6 containers in which the information or item is stored the legend "CONFIDENTIAL." If only a  
7 portion or portions of the information or item warrant protection, the Producing Party, to the extent  
8 practicable, shall identify the protected portion(s).

9 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to  
10 designate qualified information or items does not, standing alone, waive the Designating Party's  
11 right to secure protection under this Order for such material. Upon timely correction of a  
12 designation, the Receiving Party must make reasonable efforts to assure that the material is treated in  
13 accordance with the provisions of this Order.

14 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

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

21 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process  
22 by providing written notice of each designation it is challenging and describing the basis for each  
23 challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must  
24 recite that the challenge to confidentiality is being made in accordance with this specific paragraph  
25 of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must  
26 begin the process by conferring directly (in voice to voice dialogue; other forms of communication  
27 are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging  
28 Party must explain the basis for its belief that the confidentiality designation was not proper and

1 must give the Designating Party an opportunity to review the designated material, to reconsider the  
2 circumstances, and, if no change in designation is offered, to explain the basis for the chosen  
3 designation. A Challenging Party may proceed to the next stage of the challenge process only if it  
4 has engaged in this meet and confer process first or establishes that the Designating Party is  
5 unwilling to participate in the meet and confer process in a timely manner.

6       6.3     Judicial Intervention. If the Parties cannot resolve a challenge without court  
7 intervention, the Designating Party shall file and serve a motion to retain confidentiality under Civil  
8 Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of the  
9 initial notice of challenge or within 14 days of the parties agreeing that the meet and confer process  
10 will not resolve their dispute, whichever is earlier. Each such motion must be accompanied by a  
11 competent declaration affirming that the movant has complied with the meet and confer  
12 requirements imposed in the preceding paragraph. Failure by the Designating Party to make such a  
13 motion including the required declaration within 21 days (or 14 days, if applicable) shall  
14 automatically waive the confidentiality designation for each challenged designation. In addition, the  
15 Challenging Party may file a motion challenging a confidentiality designation at any time if there is  
16 good cause for doing so, including a challenge to the designation of a deposition transcript or any  
17 portions thereof. Any motion brought pursuant to this provision must be accompanied by a  
18 competent declaration affirming that the movant has complied with the meet and confer  
19 requirements imposed by the preceding paragraph.

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

## 27     7.     ACCESS TO AND USE OF PROTECTED MATERIAL

28       7.1     Basic Principles. A Receiving Party may use Protected Material that is disclosed or

1 produced by another Party or by a Non-Party in connection with this case only for prosecuting,  
2 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to  
3 the categories of persons and under the conditions described in this Order. When the litigation has  
4 been terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL  
5 DISPOSITION).

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

8 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by  
9 the court or permitted in writing by the Designating Party, a Receiving Party may disclose any  
10 information or item designated “CONFIDENTIAL” only to:

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

15 (b) the officers, directors, and employees (including House Counsel) of the Receiving  
16 Party to whom disclosure is reasonably necessary for this litigation and who have signed the  
17 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

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

21 (d) the court and its personnel;

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

25 (f) during their depositions, witnesses in the action to whom disclosure is reasonably  
26 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),  
27 unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed  
28 deposition testimony or exhibits to depositions that reveal Protected Material must be separately

1 bound by the court reporter and may not be disclosed to anyone except as permitted under this  
2 Protective Order.

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

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

7 If a Party is served with a subpoena or a court order issued in other litigation that compels  
8 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party  
9 must:

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

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

15 (c) cooperate with respect to all reasonable procedures sought to be pursued by the  
16 Designating Party whose Protected Material may be affected.

17 If the Designating Party timely seeks a protective order, the Party served with the subpoena  
18 or court order shall not produce any information designated in this action as “CONFIDENTIAL”  
19 before a determination by the court from which the subpoena or order issued, unless the Party has  
20 obtained the Designating Party’s permission. The Designating Party shall bear the burden and  
21 expense of seeking protection in that court of its confidential material – and nothing in these  
22 provisions should be construed as authorizing or encouraging a Receiving Party in this action to  
23 disobey a lawful directive from another court.

24 9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS  
25 LITIGATION

26 (a) The terms of this Order are applicable to information produced by a Non-Party in this  
27 action and designated as “CONFIDENTIAL.” Such information produced by Non-Parties in  
28 connection with this litigation is protected by the remedies and relief provided by this Order.



1 Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional  
2 protections.

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

6 (1) promptly notify in writing the Requesting Party and the Non-Party that some or  
7 all of the information requested is subject to a confidentiality agreement with a Non-Party;

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

11 (3) make the information requested available for inspection by the Non-Party.

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

19 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

20 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected  
21 Material to any person or in any circumstance not authorized under this Protective Order, the  
22 Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized  
23 disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c)  
24 inform the person or persons to whom unauthorized disclosures were made of all the terms of this  
25 Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to  
26 Be Bound" that is attached hereto as Exhibit A.

27 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED  
28 MATERIAL

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

9       12.    MISCELLANEOUS

10           12.1    Right to Further Relief. Nothing in this Order abridges the right of any person to seek  
11 its modification by the court in the future.

12           12.2    Right to Assert Other Objections. No Party waives any right it otherwise would have  
13 to object to disclosing or producing any information or item on any ground not addressed in this  
14 Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of  
15 any of the material covered by this Protective Order.

16           12.3    Filing Protected Material. Without written permission from the Designating Party or a  
17 court order secured after appropriate notice to all interested persons, a Party may not file in the  
18 public record in this action any Protected Material. A Party that seeks to file under seal any Protected  
19 Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal  
20 pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant  
21 to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the  
22 Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to  
23 protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant  
24 to Civil Local Rule 79-5(d) is denied by the court, then the Receiving Party may file the information  
25 in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the court.

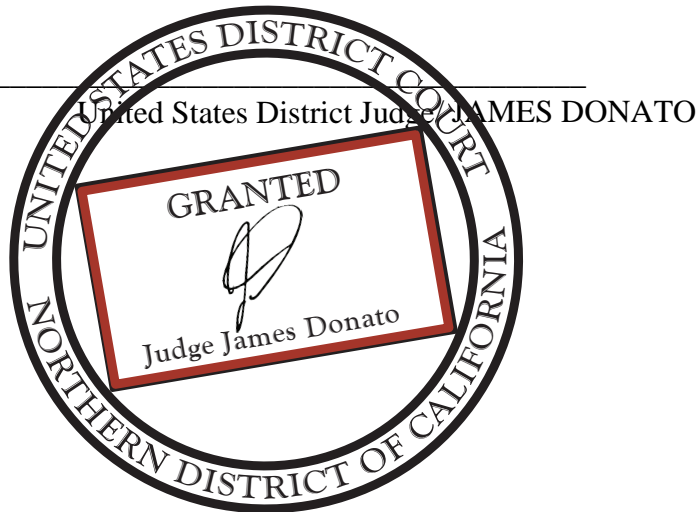
26       13.    FINAL DISPOSITION

27           Within 60 days after the final disposition of this action, as defined in paragraph 4, each  
28 Receiving Party must return all Protected Material to the Producing Party or destroy such material.

1 As used in this subdivision, “all Protected Material” includes all copies, abstracts, compilations,  
2 summaries, and any other format reproducing or capturing any of the Protected Material. Whether  
3 the Protected Material is returned or destroyed, the Receiving Party must submit a written  
4 certification to the Producing Party (and, if not the same person or entity, to the Designating Party)  
5 by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected Material  
6 that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies,  
7 abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected  
8 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all  
9 pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda,  
10 correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant  
11 and expert work product, even if such materials contain Protected Material. Any such archival copies  
12 that contain or constitute Protected Material remain subject to this Protective Order as set forth in  
13 Section 4 (DURATION).

14 IT IS SO ORDERED.

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16 DATED: May 23, 2014



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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 Protective Order that was issued by the United States District Court for the Northern District of California on [date] in the case of *Broffman v. Provident Life and Accident Ins. Co., et al.*, Case No. 13-cv-04922 JD. 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 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 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 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 Protective Order.

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

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

Printed name: \_\_\_\_\_

Signature: \_\_\_\_\_