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8 **IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN JOSE DIVISION**
11

12 MALEM MEDICAL, LTD. and ENURESIS)
ASSOCIATES, LLC,)
13 *Plaintiffs,*)
v.)
14 THEOS MEDICAL SYSTEMS, INC. and)
15 SAKET BHATIA,)
Defendants.)
16 _____)
17 AND RELATED COUNTERCLAIMS.)
18 _____)

No. 3:13-cv-05236-EMC
STIPULATED PROTECTIVE
ORDER FOR LITIGATION
INVOLVING PATENTS,
HIGHLY SENSITIVE
CONFIDENTIAL INFORMATION
AND/OR TRADE SECRETS

19 1. PURPOSES AND LIMITATIONS

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

5 2. DEFINITIONS

6 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
7 information or items under this Order.

8 2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is
9 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
10 of Civil Procedure 26(c).

11 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well
12 as their support staff).

13 2.4 Designated House Counsel: House Counsel who seek access to "HIGHLY
14 CONFIDENTIAL - ATTORNEYS' EYES ONLY" information in this matter.

15 2.5 Designating Party: a Party or Non-Party that designates information or items that it
16 produces in disclosures or in responses to discovery as "CONFIDENTIAL" or "HIGHLY
17 CONFIDENTIAL - ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL - SOURCE
18 CODE."

19 2.6 Disclosure or Discovery Material: all items or information, regardless of the medium
20 or manner in which it is generated, stored, or maintained (including, among other things, testimony,
21 transcripts, and tangible things), that are produced or generated in disclosures or responses to
22 discovery in this matter.

23 2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to
24 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or as
25 a consultant in this action, (2) is not a past or current employee of a Party or of a Party's competitor,
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1 and (3) at the time of retention, is not anticipated to become an employee of a Party or of a Party's
2 competitor.

3 2.8 "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" Information or
4 Items: extremely sensitive "Confidential Information or Items," disclosure of which to another Party
5 or Non-Party would create a substantial risk of serious harm that could not be avoided by less
6 restrictive means.

7 2.9 "HIGHLY CONFIDENTIAL - SOURCE CODE" Information or Items: extremely
8 sensitive "Confidential Information or Items" representing computer code and associated comments
9 and revision histories, formulas, engineering specifications, or schematics that define or otherwise
10 describe in detail the algorithms or structure of software or hardware designs, disclosure of which
11 to another Party or Non-Party would create a substantial risk of serious harm that could not be
12 avoided by less restrictive means.

13 2.10 House Counsel: attorneys who are employees of a party to this action. House Counsel
14 does not include Outside Counsel of Record or any other outside counsel.

15 2.11 Non-Party: any natural person, partnership, corporation, association, or other legal
16 entity not named as a Party to this action.

17 2.12 Outside Counsel of Record: attorneys who are not employees of a party to this action
18 but are retained to represent or advise a party to this action and have appeared in this action on
19 behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

20 2.13 Party: any party to this action, including all of its officers, directors, employees,
21 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

22 2.14 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
23 Material in this action.

24 2.15 Professional Vendors: persons or entities that provide litigation support services (e.g.,
25 photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing,
26 storing, or retrieving data in any form or medium) and their employees and subcontractors.
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1 2.16 Protected Material: any Disclosure or Discovery Material that is designated as
2 "CONFIDENTIAL," or as "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY or as
3 "HIGHLY CONFIDENTIAL - SOURCE CODE."

4 2.17 Receiving Party: a Party that receives Disclosure or Discovery Material from a
5 Producing Party.

6 3. SCOPE

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

19 4. DURATION

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

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1 5. DESIGNATING PROTECTED MATERIAL

2 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
3 or Non-Party that designates information or items for protection under this Order must take care
4 to limit any such designation to specific material that qualifies under the appropriate standards. To
5 the extent it is practical to do so, the Designating Party must designate for protection only those parts
6 of material, documents, items, or oral or written communications that qualify - so that other portions
7 of the material, documents, items, or communications for which protection is not warranted are not
8 swept unjustifiably within the ambit of this Order.

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

13 If it comes to a Designating Party's attention that information or items that it designated for
14 protection do not qualify for protection at all or do not qualify for the level of protection initially
15 asserted, that Designating Party must promptly notify all other parties that it is withdrawing the
16 mistaken designation.

17 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see,
18 e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure or
19 Discovery.

20 Material that qualifies for protection under this Order must be clearly so designated before
21 the material is disclosed or produced.

22 Designation in conformity with this Order requires:

23 (a) for information in documentary form (e.g., paper or electronic documents,
24 but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
25 Party affix the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS'
26 EYES ONLY" Or "HIGHLY CONFIDENTIAL - SOURCE CODE" to each page that contains
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1 protected material. If only a portion or portions of the material on a page qualifies for protection,
2 the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
3 markings in the margins) and must specify, for each portion, the level of protection being asserted.
4 A Party or Non-Party that makes original documents or materials available for inspection need not
5 designate them for protection until after the inspecting Party has indicated which material it would
6 like copied and produced. During the inspection and before the designation, all of the material made
7 available for inspection shall be deemed "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES
8 ONLY." After the inspecting Party has identified the documents it wants copied and produced, the
9 Producing Party must determine which documents, or portions thereof, qualify for protection under
10 this Order. Then, before producing the specified documents, the Producing Party must affix the
11 appropriate legend ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES
12 ONLY" or "HIGHLY CONFIDENTIAL - SOURCE CODE) to each page that contains Protected
13 Material. If only a portion or portions of the material on a page qualifies for protection, the
14 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
15 markings in the margins) and must specify, for each portion, the level of protection being asserted.

16 (b) for testimony given in deposition or in other pretrial or trial proceedings, that
17 the Designating Party identify on the record, before the close of the deposition, hearing, or other
18 proceeding, all protected testimony and specify the level of protection being asserted. When it is
19 impractical to identify separately each portion of testimony that is entitled to protection and it
20 appears that substantial portions of the testimony may qualify for protection, the Designating Party
21 may invoke on the record (before the deposition, hearing, or other proceeding is concluded) a right
22 to have up to 21 days to identify the specific portions of the testimony as to which protection is
23 sought and to specify the level of protection being asserted. Only those portions of the testimony that
24 are appropriately designated for protection within the 21 days shall be covered by the provisions of
25 this Stipulated Protective Order. Alternatively, a Designating Party may specify, at the deposition
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1 or up to 21 days afterwards if that period is properly invoked, that the entire transcript shall be
2 treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY."

3 Parties shall give the other parties notice if they reasonably expect a deposition, hearing or
4 other proceeding to include Protected Material so that the other parties can ensure that only
5 authorized individuals who have signed the "Acknowledgment and Agreement to Be Bound"
6 (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition
7 shall not in any way affect its designation as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL
8 - ATTORNEYS' EYES ONLY."

9 Transcripts containing Protected Material shall have an obvious legend on the title page that
10 the transcript contains Protected Material, and the title page shall be followed by a list of all pages
11 (including line numbers as appropriate) that have been designated as Protected Material and the
12 level of protection being asserted by the Designating Party. The Designating Party shall inform the
13 court reporter of these requirements. Any transcript that is prepared before the expiration of a
14 21-day period for designation shall be treated during that period as if it had been designated
15 "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" in its entirety unless otherwise
16 agreed. After the expiration of that period, the transcript shall be treated only as actually designated.

17 (c) for information produced in some form other than documentary and for any
18 other tangible items, that the Producing Party affix in a prominent place on the exterior of the
19 container or containers in which the information or item is stored the legend "CONFIDENTIAL"
20 or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" or "HIGHLY
21 CONFIDENTIAL - SOURCE CODE." If only a portion or portions of the information or item
22 warrant protection, the Producing Party, to the extent practicable, shall identify the protected
23 portion(s) and specify the level of protection being asserted.

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

3 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

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

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

23 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
24 intervention, the Designating Party shall file and serve a motion to retain confidentiality under Civil
25 Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of the
26 initial notice of challenge or within 14 days of the parties agreeing that the meet and confer process
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1 will not resolve their dispute, whichever is earlier. Each such motion must be accompanied by a
2 competent declaration affirming that the movant has complied with the meet and confer
3 requirements imposed in the preceding paragraph. Failure by the Designating Party to make such
4 a motion including the required declaration within 21 days (or 14 days, if applicable) shall
5 automatically waive the confidentiality designation for each challenged designation. In addition, the
6 Challenging Party may file a motion challenging a confidentiality designation at any time if there
7 is good cause for doing so, including a challenge to the designation of a deposition transcript or any
8 portions thereof. Any motion brought pursuant to this provision must be accompanied by a
9 competent declaration affirming that the movant has complied with the meet and confer
10 requirements imposed by the preceding paragraph.

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

18 7. ACCESS TO AND USE OF PROTECTED MATERIAL

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

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.
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1 7.3 Disclosure of "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" and
2 "HIGHLY CONFIDENTIAL - SOURCE CODE" Information or Items. Unless otherwise ordered
3 by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any
4 information or item designated "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" or
5 "HIGHLY CONFIDENTIAL - SOURCE CODE" only to:

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

10 (b) Designated House Counsel of the Receiving Party (1) who has no involvement
11 in competitive decision-making, (2) to whom disclosure is reasonably necessary for this litigation, (3)
12 who has signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), and (4) as to whom
13 the procedures set forth in paragraph 7.4(a)(1), below, have been followed;

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

17 (d) the court and its personnel;

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

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

23 7.4 Procedures for Approving or Objecting to Disclosure of "HIGHLY
24 CONFIDENTIAL - ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL - SOURCE
25 CODE" Information or Items to Designated House Counsel or Experts.

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1 (a)(1) Unless otherwise ordered by the court or agreed to in writing by the
2 Designating Party, a Party that seeks to disclose to Designated House Counsel any information or
3 item that has been designated "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY"
4 pursuant to paragraph 7.3(b) first must make a written request to the Designating Party that (1) sets
5 forth the full name of the Designated House Counsel and the city and state of his or her residence,
6 and (2) describes the Designated House Counsel's current and reasonably foreseeable future primary
7 job duties and responsibilities in sufficient detail to determine if House Counsel is involved, or may
8 become involved, in any competitive decision-making.

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

24 (b) A Party that makes a request and provides the information specified in the
25 preceding respective paragraphs may disclose the subject Protected Material to the identified
26 Designated House Counsel or Expert unless, within 14 days of delivering the request, the Party
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1 receives a written objection from the Designating Party. Any such objection must set forth in detail
2 the grounds on which it is based.

3 (c) A Party that receives a timely written objection must meet and confer with
4 the Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
5 agreement within seven days of the written objection. If no agreement is reached, the Party seeking
6 to make the disclosure to Designated House Counsel or the Expert may file a motion as provided
7 in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) seeking
8 permission from the court to do so. Any such motion must describe the circumstances with
9 specificity, set forth in detail the reasons why the disclosure to Designated House Counsel or the
10 Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and suggest
11 any additional means that could be used to reduce that risk. In addition, any such motion must be
12 accompanied by a competent declaration describing the parties' efforts to resolve the matter by
13 agreement (i.e., the extent and the content of the meet and confer discussions) and setting forth the
14 reasons advanced by the Designating Party for its refusal to approve the disclosure.

15 In any such proceeding, the Party opposing disclosure to Designated House Counsel or the
16 Expert shall bear the burden of proving that the risk of harm that the disclosure would entail (under
17 the safeguards proposed) outweighs the Receiving Party's need to disclose the Protected Material to
18 its Designated House Counsel or Expert.

19 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
20 LITIGATION

21 If a Party is served with a subpoena or a court order issued in other litigation that
22 compels disclosure of any information or items designated in this action as "CONFIDENTIAL" or
23 "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL
24 - SOURCE CODE" that Party must:

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

1 (b) promptly notify in writing the party who caused the subpoena or order to issue
2 in the other litigation that some or all of the material covered by the subpoena or order is subject to
3 this 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
5 the Designating Party whose Protected Material may be affected.

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

14 9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN
15 THIS LITIGATION

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

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

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

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

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

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

16 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

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1 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
2 MATERIAL

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

11 12. MISCELLANEOUS

12 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek
13 its modification by the court in the future.

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

19 12.3 Export Control. Disclosure of Protected Material shall be subject to all applicable
20 laws and regulations relating to the export of technical data contained in such Protected Material,
21 including the release of such technical data to foreign persons or nationals in the United States or
22 elsewhere. The Producing Party shall be responsible for identifying any such controlled technical
23 data, and the Receiving Party shall take measures necessary to ensure compliance.]

24 12.4 Filing Protected Material. Without written permission from the Designating Party or
25 a court order secured after appropriate notice to all interested persons, a Party may not file in the
26 public record in this action any Protected Material. A Party that seeks to file under seal any
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1 Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed
2 under seal pursuant to a court order authorizing the sealing of the specific Protected Material at
3 issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing
4 that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled
5 to protection under the law. If a Receiving Party's request to file Protected Material under seal
6 pursuant to Civil Local Rule 79-5(e) is denied by the court, then the Receiving Party may file the
7 Protected Material in the public record pursuant to Civil Local Rule 79-5(e)(2) unless otherwise
8 instructed by the court.

9 13. FINAL DISPOSITION

10 Within 60 days after the final disposition of this action, as defined in paragraph 4,
11 each Receiving Party must return all Protected Material to the Producing Party or destroy such
12 material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,
13 compilations, summaries, and any other format reproducing or capturing any of the Protected
14 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit
15 a written certification to the Producing Party (and, if not the same person or entity, to the
16 Designating Party) by the 60-day deadline that (1) identifies (by category, where appropriate) all the
17 Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not
18 retained any copies, abstracts, compilations, summaries or any other format reproducing or
19 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
20 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
21 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
22 product, and consultant and expert work product, even if such materials contain Protected Material.
23 Any such archival copies that contain or constitute Protected Material remain subject to this
24 Protective Order as set forth in Section 4 (DURATION).

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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 Northern District of California on [date] in the case of *Malem Medical, Ltd., et al. v. Theos Medical Systems, Inc., et al.*, Case No. 3:13-cv-05236-EMC. 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]