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10
 11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **SAN FRANCISCO DIVISION**

15 LIZA GERSHMAN, SEAN PORTER,)
 MATTHEW KAPLAN, and)
 16 CHANDRA LAW, On Behalf of Themselves)
 and All Others Similarly Situated,)

17 Plaintiffs,)

18 v.)

19 BAYER HEALTHCARE, LLC, a Delaware)
 20 Limited Liability Company,)

21 Defendant.)

) Case No. 3:14-cv-05332-HSG

) **JOINT PROPOSED CONFIDENTIALITY**
) **ORDER**

) Judge: Hon. Haywood S. Gilliam, Jr.

1 burden of establishing that such Discovery Materials are entitled to confidential treatment under this
2 Order.

3 **3. DESIGNATION OF CONFIDENTIAL MATERIALS**

4 **A.** Any Designating Party shall have the right to designate as Confidential any Discovery
5 Material that contains or discloses information relating to trade secrets or other non-
6 public and confidential technical, commercial, financial, personal, or business
7 information, or other valuable information covered by a legitimate privacy right or
8 interest, including but not limited to: business plans; marketing plans and strategies;
9 financial statements; product, customer, or market research; customer lists and
10 information; business relationships; design, engineering, or technical documents and
11 specifications; sales volume, pricing, profits, costs, or margins; personal financial or
12 other personally sensitive information; and any other material that is confidential
pursuant to applicable law.

13 **B.** Copies or excerpts of information contained within, or summaries, notes, or charts
14 containing any information from, a document or thing designated as Confidential shall
15 also be treated respectively as Confidential.

16 **C.** Confidential Discovery Materials shall not include information that at the time of the
17 disclosure hereunder is available to the public, or after disclosure hereunder becomes
18 available to the public through no act, or failure to act, by a Non-Designating Party.

19 **D.** The Parties shall make Confidential designations in good faith to insure that only
20 those documents that merit Confidential treatments are so designated.

21 **E.** In the interests of comity, Parties who produce documents or information subject to
22 the laws of a state, country, or union other than the United States may designate as
23 Confidential those documents in any form (including electronic or paper form)
24 containing “personal data” within the meaning of the data protection laws of such
25 states, countries, or unions. “Personal data” may include, but is not limited to, any
26 and all data that concerns an identified person or a person who is identifiable with
27 recourse to additional information available to the data processor (*e.g.*, reference to an

1 individual by his/her title or position within the company whose identity is specified
2 in other available sources of information). This includes, without limitation, the
3 following documents:

- 4 i. Any correspondence (electronic or on paper) that identifies, or through
5 recourse to other sources of information available to the data processor allows
6 identification of, its author(s)/sender(s) and/or its addresses/recipients (e.g., all
7 email correspondence, letters, and faxes, including transmission reports);
- 8 ii. Any document such as memoranda, notes, and presentations, if it identifies, or
9 allows identification through recourse to other information available to the
10 data processor of, its author/sender and/or its addressee/recipient;
- 11 iii. Minutes of internal or external meetings as far as they include information
12 about which individual(s) did or did not attend the meeting; and
- 13 iv. Personnel records and information.

14 **4. MARKING DOCUMENTS “CONFIDENTIAL”**

15 The Designating Party shall designate Confidential Information by physically or
16 electronically marking copies of the Discovery Material produced to a Party with the legend
17 “CONFIDENTIAL.” Any such marking shall not cover up, overlap upon, obscure, or otherwise
18 conceal any text, picture, drawing, graph, or other communication or depiction in the Discovery
19 Material. As reasonably practicable, to the extent that Discovery Material contains both
20 Confidential Information and non-confidential information, the Designating Party shall delineate the
21 particular portions that constitute each designation. The Parties shall meet and confer and agree
22 upon a method for designating as Confidential Information documents produced in native file form,
23 or in any other medium that cannot be designated by electronic or physical marking as set forth
24 above.

25 **5. TIMING OF CONFIDENTIALITY DESIGNATIONS**

26 Except for Discovery Materials produced for inspection, designation of Discovery Materials
27 as Confidential shall be made before, or at the time of, production or disclosure. If Discovery
28 Materials are produced for inspection, such Discovery Materials may be produced for inspection

1 before being marked as Confidential, and at the option of the Producing Party, before they are
2 reviewed for privilege, work product, or other applicable privilege, pursuant to a “Quick Peek”
3 agreement among the parties as contemplated by Fed. R. Civ. P. 26(f) and Fed. R. Evid. 502(d).
4 There will be no waiver of privilege, work product, or other applicable privileges or objections in
5 this or other proceedings by virtue of an inspection of Discovery Materials that proceeds before they
6 are reviewed for the existence of such privileges. There will also be no waiver of confidentiality by
7 the inspection of Discovery Materials before they are copied and marked Confidential pursuant to
8 this procedure. Once specific Discovery Materials have been designated for copying, any Discovery
9 Materials containing Confidential Information will then be marked as provided for above before
10 delivery to the Party who inspected and designated the Discovery Materials. Any Discovery
11 Materials designated for copying that are protected by privilege, work product, or other applicable
12 privileges or objections may be removed before copying, but shall be maintained by the Producing
13 Party and described in a privilege log conforming to the applicable federal rules.

13 **6. DESIGNATING DEPOSITIONS AS CONFIDENTIAL**

14 With respect to any deposition, confidential treatment under this Order may be invoked by
15 designating specific pages and/or lines as Confidential on the record at the deposition, or by serving
16 such designations within 30 days after receipt of the final transcript of the deposition from the court
17 reporter. Unless the Parties agree otherwise, all deposition transcripts shall be treated as
18 Confidential for 30 days following receipt of the transcript (and during the period, if any, when the
19 transcript is available in “rough” form) regardless of whether designations of any portions thereof
20 have been designated as Confidential before that time.

21 **7. USE OF ALL DISCOVERY MATERIALS**

22 Regardless of designation, all Discovery Materials produced in this Action may only be used
23 for purposes of preparation, trial, and appeal of this Action, and not for any other purpose.

24 **8. QUALIFIED PERSONS FOR CONFIDENTIAL INFORMATION**

25 Discovery Materials designated as Confidential may be disclosed only to the following
26 Qualified Persons:
27
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1 that such person is bound by the terms of this Order. Copies of the executed Exhibit A shall be
2 retained by counsel disclosing Confidential Information to such person.

3 **10. NON-PARTY DISCOVERY MATERIALS**

4 The existence of this Order shall be disclosed to any Non-Party producing documents,
5 tangible things, or testimony in this Action who may reasonably be expected to desire Confidential
6 treatment for such Discovery Materials. Any such Non-Party may designate Discovery Materials as
7 Confidential pursuant to this Order.

8 **11. CHALLENGING CONFIDENTIALITY AND/OR PRIVILEGE DESIGNATIONS**

9 A Party or other person objecting to designation of any Discovery Material as Confidential
10 Information or Protected Material (as defined in Paragraph 13, below) shall give written notice to the
11 Designating Party. That notice shall provide sufficient identification (including Bates numbers) so
12 that the Designating Party can identify the Discovery Material whose designation is being
13 challenged. Objections to designations of Discovery Material as Confidential or Protected Material
14 as privileged shall be made in good faith and the Party making such objections shall confer directly
15 (in voice-to-voice dialogue) with the Designating Party. The Designating Party shall respond, in
16 good faith, to the Party challenging the designation. If the objecting Party and the Designating Party
17 cannot resolve their dispute through such good-faith meet and confer discussions within a reasonable
18 time, the Designating Party, in the instance of Confidential Information, or the Receiving Party, in
19 the instance of Protected Material, may, within 14 days after the meet and confer process is
20 complete, raise the issue with the Court in accordance with the local rules. Provided that the Party
21 raises the issue with the Court in accordance with the local rules and within the time period set forth
22 above, any Discovery Material so designated shall remain Confidential Information or Protected
23 Material, and shall be subject to all of the restrictions on its disclosure and use set forth in this Order,
24 until such time as the Court may determine otherwise. If the Court rules that challenged Discovery
25 Material is not Confidential, the Designating Party shall re-produce copies of all such materials
26 without the Confidential designation. If the Court rules that challenged Protected Material is not
27 privileged, the Designating Party shall re-produce all such materials.

1 **12. FAILURE TO DESIGNATE**

2 The failure to designate Discovery Materials as Confidential shall not be deemed a waiver in
3 whole or in part of a Party’s claim of protection under this Order, either as to the specific Discovery
4 Material or as to any other Discovery Material concerning the same or related subject matter. Such
5 failure to designate may be rectified by notifying in writing counsel for all Parties to whom the
6 Discovery Material was disclosed, advising them that the Discovery Material should have been
7 designated Confidential Information, within a reasonable time after discovery of the failure to
8 designate. Such notice shall constitute a designation of the information, document, or thing as
9 Confidential under this Order. Upon such designation, the Parties and other persons subject to this
10 Order shall take reasonable and appropriate action to notify any and all recipients of the Discovery
11 Material about the protected status of the newly-designated Confidential Information, and to retrieve
12 the newly-designated Confidential Information from any person who would not be permitted by this
13 Order to have such information if it had been designated as Confidential Information prior to receipt.

13 **13. PRODUCTION OF PRIVILEGED DISCOVERY MATERIALS**

14 Pursuant to Federal Rule of Evidence 502(d), if a Producing Party informs another Party or
15 non-Party that a document or information received by the other Party or non-Party is protected by
16 the attorney-client privilege, work product doctrine, or other applicable privilege (“Protected
17 Material”), the recipient of such Protected Material shall, upon discovery or notification of such a
18 disclosure: (a) promptly return the Protected Material and all copies or summaries thereof in its
19 possession; (b) delete any electronic versions of the Protected Material and all copies or summaries
20 from any data source, or any database it maintains; (c) retrieve all electronic and paper copies and all
21 summaries of the Protected Material provided to any third parties, including experts; (d) destroy any
22 notes that reveal the substance of the Protected Material; and (e) make no use of the information
23 contained in the Protected Material or copies or summaries thereof. The production of Protected
24 Material shall not constitute a waiver of any privilege or protection. Instead, the Producing Party
25 shall be entitled to assert such privilege or protection in this or any other Federal, State, or other
26 proceeding, and the Protected Material and its subject matter shall be treated as if there had been no
27 such disclosure.

1 Within a reasonable time after the discovery of the disclosure, the Producing Party will
2 provide a log that describes the basis for the claim that the Protected Material is privileged or
3 otherwise protected from disclosure. The Receiving Party shall have the right to apply to this Court
4 for an order that the Protected Material is not protected from disclosure by any privilege, law, or
5 doctrine in accordance with Paragraph 11 above. The Receiving Party may not, however, assert as a
6 ground for such motion the fact or circumstances of the production or reveal the protected contents
7 of the Protected Material prior to entry of an Order from this Court that such revelation is permitted.

8 The Party to whom any Protected Material was returned shall retain the Protected Material
9 until the end of the case, including any appeals. If the substance of the Protected Material is
10 discussed in a deposition or pleading before discovery or notification of the disclosure, such
11 testimony or discussion shall be stricken and may not be used for any purpose.

12 **14. REQUEST FOR CONFIDENTIAL INFORMATION**

13 If any Party has obtained Confidential Information under the terms of this Order and receives
14 a request to produce such Confidential Information by subpoena or other compulsory process, unless
15 prohibited by applicable law, such Party shall promptly notify the Designating Party, including in
16 such notice the date set for the production of such subpoenaed information and, unless prohibited by
17 applicable law, enclosing a copy of the subpoena (or other form of process). Such notification must
18 be done in writing (by email, if practicable, as well as by overnight courier) immediately and in no
19 event later than three court days after receiving the subpoena or order. In addition, the Receiving
20 Party shall deliver a copy of this Order promptly to the Party in the other action that caused the
21 subpoena or order to issue. Nothing herein shall prevent the Receiving Party from timely complying
22 with a subpoena served by a governmental entity or court.

23 **15. FILING CONFIDENTIAL INFORMATION**

24 The Parties acknowledge that this Order creates no entitlement to file Confidential
25 Information under seal. All requests to seal documents filed with the Court shall comply with L.R.
26 79-5, Filing Documents Under Seal.
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1 **16. TRIAL OR EVIDENTIARY HEARINGS**

2 If the Action proceeds to trial or any evidentiary hearing, absent further order of the Court,
3 all Discovery Materials previously designated as Confidential Information that are admitted into
4 evidence shall become part of the public record in the Action, unless a motion is filed in advance of
5 the trial or hearing, or as soon as practicable after learning of the intent of any other Party to
6 introduce such Confidential Information into evidence.

7 **17. FINAL TERMINATION**

8 This Order shall be binding throughout and after final adjudication of this Action, including,
9 but not limited to, final adjudication of any appeals and petitions for extraordinary writs. Upon final
10 termination of the Action, including any and all appeals, counsel for each Party shall return all
11 Confidential Information, including that given to third parties, to the Producing Party within 14 days,
12 including any copies, excerpts, and summaries thereof, or shall certify destruction of same, at the
13 option of the Receiving Party, and purge all such information from all machine-readable media on
14 which it resides. Notwithstanding the foregoing, counsel for each Party may retain Discovery
15 Materials, including Confidential Information, necessary to maintain a file for a reasonable period of
16 time after the termination of the Action (including copies of any executed Certifications in the form
17 attached hereto), and such counsel will continue to be bound by this Order with respect to such
18 retained Confidential Information. Further, attorney work-product materials that contain
19 Confidential Information need not be destroyed, but, if they are not destroyed, the Party in
20 possession of the attorney work-product will continue to be bound by this Order with respect to all
21 such retained information.

22 **18. MODIFYING THIS ORDER**

23 Nothing in this Order shall be construed to prohibit the Parties from agreeing to modify any
24 provision of this Order or from seeking relief from the Court, nor shall anything in this Order or any
25 Party's compliance herewith be construed as a waiver of any Party's rights under applicable law.

26 **19. NO EFFECT ON OTHER OBLIGATIONS OR PROTECTIONS**

27 This Order shall not enlarge or affect the proper scope of discovery in this or any other
28 litigation, nor shall this Order imply that Confidential Information is properly discoverable, relevant,

1 or admissible in this or any other litigation. Each Party reserves the right to object to any disclosure
2 of information or production of any documents that the Producing Party designates as Confidential
3 Information on any other ground it may deem appropriate. Neither the entry of this Order, nor the
4 designation of any Discovery Material as Confidential, nor the failure to make such designation,
5 shall constitute evidence with respect to any issue in this or any other litigation. The entry of this
6 Order shall be without prejudice to the rights of any Party or Non-Party to assert or apply for
7 additional or different protection.

8 Dated: 7/15/2015



Hon. Haywood S. Gilliam, Jr., U.S.D.J.

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Attorneys for Plaintiffs

1 **SIGNATURE ATTESTATION**

2 I am the ECF User whose identification and password are being used to file the foregoing
3 **JOINT PROPOSED CONFIDENTIALITY ORDER** in compliance with Civil Local Rule 5.1, I
4 hereby attest that the signatory has concurred in this filing.

5 Dated: July 13, 2015

SIDLEY AUSTIN LLP

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8 By: /s/ Ryan M. Sandrock
9 Ryan M. Sandrock

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1 **EXHIBIT A**

2 **UNITED STATES DISTRICT COURT**
3 **NORTHERN DISTRICT OF CALIFORNIA**
4 **SAN FRANCISCO DIVISION**

5	LIZA GERSHMAN, SEAN PORTER,)	Case No. 3:14-cv-05332-HSG
6	MATTHEW KAPLAN, and)	
7	CHANDRA LAW, On Behalf of Themselves)	
8	and All Others Similarly Situated,)	
9	Plaintiffs,)	CERTIFICATION TO
10	v.)	AGREE TO TERMS OF
11)	CONFIDENTIALITY
12)	ORDER
13	BAYER HEALTHCARE, LLC, a Delaware)	
14	Limited Liability Company,)	Judge: Hon. Haywood S. Gilliam, Jr.
15	Defendant.)	
16)	

17 In consideration of the disclosure to me of information that is subject to the Confidentiality
18 Order in this action, I agree as follows:

- 19 1. I have read the Confidentiality Order in this action and I agree to be bound by its
20 terms.
- 21 2. I understand that if I violate the terms of the Order, I may be subject to an
22 enforcement proceeding before the District Court, Northern District of California.
- 23 3. I agree to submit myself to the personal jurisdiction of the District Court, Northern
24 District of California, in connection with any proceeding concerning the Order. I hereby also
25 consent to accept service of process in connection with this action or any proceedings related to
26 enforcement of the Order by certified letter, return receipt requested, at my principal residence, in
27 lieu of personal service of other methods of service.

28 Dated: _____, 2015 By: _____
Printed Name: _____