

1 Brian T. Hafter, Esq. (SBN: 173151)
 bhafter@linerlaw.com
 2 LINER GRODE STEIN YANKELEVITZ
 SUNSHINE REGENSTREIF & TAYLOR LLP
 3 199 Fremont Street, 20th Floor
 San Francisco, CA 94105-2255
 4 Telephone: (415) 489-7700
 Facsimile: (415) 489-7701

5 Gary Franklin, Esq. (*Pro Hac Vice*)
 6 gfranklin@ppeclaw.com
 PRIMMER PIPER EGGLESTON & CRAMER PC
 7 150 South Champlain Street
 P.O. Box 1489
 8 Burlington, VT 05402-1489
 Telephone: (802) 864-0880
 9 Facsimile: (802) 864-0328

10 Attorneys for Defendants
 AVERY LIEBERMAN and
 11 SLEEPING WELL, LLC

12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14 **OAKLAND DIVISION**

15 SLEEP SCIENCE PARTNERS, INC. a)
 California corporation,)
 16 Plaintiff,)
 17 vs.)
 18 AVERY LIEBERMAN, an individual,)
 19 SLEEPING WELL, LLC, a Vermont)
 limited liability corporation and Does 1-10)
 20 inclusive,)
 21 Defendants.)

Case No. CV09-4200 CW
 Honorable Claudia Wilken
**STIPULATED PROTECTIVE
 ORDER**

22
 23
 24
 25
 26
 27
 28

1 Plaintiff SLEEP SCIENCE PARTNERS, INC. (“Plaintiff”) and Defendants Avery
2 Lieberman and Sleeping Well, LLC (“Defendants”) (collectively the “parties”), by and through
3 their respective counsel, have agreed to the terms of this Protective Order (“Protective Order”).
4 Now, therefore, the Court having been fully advised and for good cause shown, hereby enters the
5 following **ORDER**:

6 **1. Purpose of Order.** The purpose of this Protective Order is to prevent the disclosure
7 of materials or information designated as confidential (“Confidential Information”) by one or more
8 of the parties under the terms of this Protective Order to persons or entities other than those
9 involved in the prosecution or defense of this litigation and to facilitate the exchange of
10 information between the parties pending any ruling by the Court on the ultimate confidentiality of
11 information or whether it constitutes confidential information as a matter of law. The Protective
12 Order is necessary to protect the parties’ confidential and trade secret information from disclosure
13 and to ensure that case information is not disseminated to third parties. The privacy interests in
14 such information substantially outweigh the public’s right to access to these documents. Good
15 cause exists for the issuance of this Protective Order under Fed. R. Civ. P. 26.

16 **2. Governance.** This Protective Order shall govern the treatment and handling of all
17 documents, things, answers, responses and information (“Materials”) produced or filed by, or
18 obtained from any party or any other person or entity including (without limitation) answers to
19 requests for admissions, answers to interrogatories, documents produced pursuant to a request for
20 production of documents, documents subpoenaed in connection with depositions or otherwise, and
21 deposition transcripts.

22 **3. Confidential Information.** For the purpose of this Order, the term
23 ‘CONFIDENTIAL INFORMATION’ shall mean any information that any party to this action
24 believes to contain or reflect confidential or personal information, disclosure of which would cause
25 a significant harm to a corporate party’s competitive and financial position or, if containing
26 information confidential to an individual, contain such information that is not available to opposing
27 parties outside the formal discovery process, whether memorialized in a document or otherwise
28

1 held by a party. “Confidential information” shall also mean information that a party reasonably
2 believes is subject to the confidentiality rights of a non-party that are protected by statute or rule.

3 **4. Designating Materials as Confidential or Highly Confidential – Attorneys’ Eyes**

4 **Only.** Any party to this action may designate as “Confidential” or “Highly Confidential –
5 Attorneys’ Eyes Only” any Materials, including interrogatory answers or documents produced
6 pursuant to this Order by conspicuously stamping or labeling the Materials, including documents or
7 interrogatory answers with the word “Confidential” or “Highly Confidential – Attorneys’ Eyes
8 Only”. Any non-documentary information deemed confidential that is provided in written form
9 shall be sealed in an envelope marked “Confidential” or “Highly Confidential – Attorneys’ Eyes
10 Only”. Documents or Materials produced or disclosed by either party shall not be treated as
11 confidential pursuant to this Order unless they are stamped or labeled in such a fashion except as
12 provided in this Order. The inadvertent failure to designate material as “Confidential” or “Highly
13 Confidential – Attorneys’ Eyes Only” does not preclude a party from subsequently making such a
14 designation, and, in that case, the material is treated as confidential only after being properly
15 designated. Parties to this action may also designate deposition testimony in this action as
16 “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” by advising opposing counsel of
17 record, in writing, within thirty (30) days after receipt of a copy of the transcript, or such other time
18 period as may be mutually agreed upon by the parties, of the pages and lines of the deposition
19 which the party believes to be Confidential. Alternatively, any party may, on the record at the
20 deposition, designate deposition testimony as “Confidential” or “Highly Confidential – Attorneys’
21 Eyes Only” by advising all persons present that the party believes that the portion of the deposition
22 in question falls under the scope of this Order. The court reporter or other official making a
23 transcript of the deposition will be advised to identify those pages of the transcript afforded
24 confidential treatment in the table of contents or other appropriate location at the front of the
25 transcript and shall stamp the pages containing the designation as “Confidential” or “Highly
26 Confidential – Attorneys’ Eyes Only”. In the event that opposing counsel disagrees with any such
27 designation, counsel shall comply with Local Rule 37-1 in order to resolve the dispute.
28

1 **5. Summaries and Exhibits.** All summaries and exhibits prepared from information
2 designated as Confidential Information shall be stamped “Confidential” or “Highly Confidential –
3 Attorneys’ Eyes Only” by counsel causing them to be prepared.

4 **6. Disclosure of Confidential Information.** Any discovery materials which are
5 marked as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” are to be treated as
6 such by the party receiving the discovery and shall be utilized by such party only for the
7 prosecution or defense of this case. Except as agreed upon by the parties, or ordered by the Court,
8 disclosure of such material or information contained therein shall be restricted to the following
9 persons:

- 10 a. Except when designated “Highly Confidential – Attorneys’ Eyes Only”, the parties,
11 including officers or employees of a party in this case who are assisting counsel in
12 the prosecution or defense of this case. Any discovery material designated Highly
13 Confidential – Attorneys’ Eyes Only, shall be for viewing by the parties’ respective
14 outside counsel of record only and shall not be disclosed, disseminated or
15 communicated to any party, nor to any attorney serving as an officer or shareholder
16 of a party or in a capacity as in-house counsel;
- 17 b. Counsel of record in this litigation and counsel’s legal and clerical assistants and
18 staff;
- 19 c. Experts and consultants actually retained or employed to consult with, advise, or
20 assist counsel in the preparation or trial of this litigation, provided that any such
21 expert or consultant shall first agree in writing to abide by the terms of this
22 Protective Order and shall sign a Representation of Confidentiality in the form of
23 Exhibit A attached hereto;
- 24 d. Any independent document reproduction services or document or video recording
25 and retrieval services;
- 26 e. Court personnel, including court reporters, persons operating video recording
27 equipment at depositions, and any special master or mediator appointed by the
28 Court; and

1 f. Any deponent noticed by either party during the course of the deposition; provided,
2 however, that before showing Confidential Information to a deponent, deposing
3 counsel shall first show the Confidential Information to opposing counsel. If there is
4 a dispute about whether the deponent should reasonably be exposed to, or questioned
5 about, the Confidential Information, the deponent shall not then be shown the
6 Confidential Information until counsel have fully complied with Local Rule 37-1.

7 7. Prior to disclosing Confidential Information to persons authorized to receive such
8 Confidential Information under ¶¶ 6 c. and f., counsel for receiving party shall (i) provide
9 each person who will receive such Confidential Information with a copy of this Order and (ii)
10 obtain from each such person an executed Representation of Confidentiality in the form attached
11 hereto as Exhibit A (“Representation of Confidentiality”), a copy of which shall be retained by
12 counsel for the receiving party.

13 In all cases, all persons having access to Confidential Information made available pursuant
14 to this agreement shall agree not to make any use of such Confidential Information except in
15 connection with this litigation and further shall agree not to deliver or transfer Confidential
16 Information except in connection with this litigation and further shall agree not to deliver or
17 transfer Confidential Information to any person not previously authorized by the terms of this
18 Protective Order.

19 **8. Binding Effect of This Order.** This Order is binding upon the parties, their agents
20 and employees, all counsel for the parties and their agents and employees, and all persons to whom
21 disclosure of discovery materials or testimony are limited pursuant to the terms of this Order.

22 **9. Use of Confidential Information.** The parties and their counsel shall exercise
23 reasonable care not to disclose information contained in these confidential documents by placing
24 them in the public record in this case. Any Confidential Information that is produced or disclosed,
25 including documents, shall be used only for purposes of this litigation, and not for any other claims
26 or purposes, whether such claims currently exist or may arise in the future, nor may such
27 information be used for any other existing litigation. Specifically, the parties and their counsel,
28 however, have the right to use any such information contained in these documents, or the

1 documents themselves, in the trial of this case after providing opposing counsel notice and the
2 opportunity to address the need for continued confidentiality with the Court. The parties do not
3 waive any right to object at trial to the admissibility of a document, which falls under the scope of
4 this Order, or portion thereof, or the right to file a motion *in limine* regarding the use of any such
5 documents. Any Confidential Information that is produced shall be used with respect to this
6 lawsuit only, and may not support or form the basis of any submissions, arguments, evidence, or
7 interviews in any other lawsuit. Disclosure or use of Confidential Information is prohibited except
8 as provided in paragraph 6 unless written consent from the parties or authorization of the Court is
9 obtained prior to disclosure or use.

10 **10. Motion to File Under Seal.** A party filing Confidential Information shall be
11 responsible for filing a Motion to Seal and/or redact that information as appropriate in compliance
12 with Local Rule 79-5. Such motion shall include a request for the disposition of documents
13 containing Confidential Information at the conclusion of the proceedings.

14 **11. Return of Confidential Information.** Upon the final termination of this litigation
15 (either by settlement, the expiration of time to appeal from an adverse ruling, or the exhaustion of
16 all appellate remedies), and upon written request by the other party, counsel shall forward to
17 opposing counsel all Confidential Information previously produced or disclosed. This includes,
18 but is not limited to the following: testimony concerning Confidential Information; any extract,
19 summary, or copy of such Confidential Information for which counsel is responsible under the
20 provisions of this paragraph; and any Confidential Information given to any person identified in
21 paragraph 6. Counsel may retain attorney work product concerning Confidential Information. The
22 parties, however, retain the right to keep any documents that were admitted as exhibits in this case.

23 **12.** No modification or amendment of this Protective Order is permitted except by a
24 writing signed by counsel for the parties and approved by the Court. The parties agree that it is
25 unreasonable to rely on any oral modification or amendment of this agreement.

26 **13.** By executing this Protective Order the parties certify that prior to the disclosure of
27 any Confidential Information, the proposed recipient of the Confidential Information first will be
28

1 provided a copy of this Protective Order and be required to execute a verification of their receipt of
2 the same.

3 **14.** All copies of Confidential Information disclosed under this agreement shall be
4 subject to the same restrictions as imposed on the original information.

5 **15.** Any violation of the terms of this Protective Order shall subject the violator to
6 sanctions as determined by the Court.

7 IT IS SO ORDERED:

8
9 Dated: 3/19/2010



Honorable Claudia Wilken
Judge, United States District Court

10
11
12 Dated: March 10, 2010

Respectfully submitted,

THE FLICK GROUP

13
14
15 By: /S/ Heather Flick

Heather Flick
Attorneys for Plaintiff
SLEEP SCIENCE PARTNERS, INC.
SLEEPING WELL, LLC

16
17
18
19
20 Dated: March 10, 2010

LINER GRODE STEIN YANKELEVITZ
SUNSHINE REGENSTREIF & TAYLOR LLP

21
22 By: /S/ Brian T. Hafter

Brian T. Hafter
Attorneys for Defendants
AVERY LIEBERMAN and
SLEEPING WELL, LLC