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15
 16 IN THE UNITED STATES DISTRICT COURT
 17 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 18 OAKLAND DIVISION

19 BLUE SKY NETWORKS, LLC,
 20 Plaintiff,
 21 v.
 22 FITBIT, INC.,
 23 Defendant.

Case No. 4:17-cv-06543-YGR

**STIPULATED PROTECTIVE ORDER FOR
 LITIGATION INVOLVING PATENTS,
 HIGHLY SENSITIVE CONFIDENTIAL
 INFORMATION AND/OR TRADE SECRETS**

As modified by the Court

Ctrm: 1 - 4th Floor
 Judge: Honorable Yvonne Gonzalez Rogers

1 1. PURPOSES AND LIMITATIONS

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

13 2. DEFINITIONS

14 2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or
15 items under this Order.

16 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated,
17 stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure
18 26(c).

19 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as
20 their support staff).

21 2.4 Designating Party: a Party or Non-Party that designates information or items that it
22 produces in disclosures or in responses to discovery as “CONFIDENTIAL” or “HIGHLY
23 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE
24 CODE”.

25 2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or
26 manner in which it is generated, stored, or maintained (including, among other things, testimony,
27 transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery
28 in this matter.

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

6 2.7 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items:
7 extremely sensitive “Confidential Information or Items,” disclosure of which to another Party or Non-
8 Party would create a substantial risk of serious harm that could not be avoided by less restrictive means.

9 2.8 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items: extremely
10 sensitive “Confidential Information or Items” representing computer code and associated comments and
11 revision histories, formulas, engineering specifications, or schematics that define or otherwise describe in
12 detail the algorithms or structure of software or hardware designs, disclosure of which to another Party or
13 Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive
14 means.

15 2.9 House Counsel: attorneys who are employees of a party to this action. House Counsel
16 does not include Outside Counsel of Record or any other outside counsel.

17 2.10 Non-Party: any natural person, partnership, corporation, association, or other legal entity
18 not named as a Party to this action.

19 2.11 Outside Counsel of Record: attorneys who are not employees of a party to this action but
20 are retained to represent or advise a party to this action and have appeared in this action on behalf of that
21 party or are affiliated with a law firm which has appeared on behalf of that party.

22 2.12 Party: any party to this action, including all of its officers, directors, employees,
23 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

24 2.13 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in
25 this action.

26 2.14 Professional Vendors: persons or entities that provide litigation support services (e.g.,
27 photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing, storing, or
28 retrieving data in any form or medium) and their employees and subcontractors.

1 2.15 2.16 Protected Material: any Disclosure or Discovery Material that is designated as
2 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” or as “HIGHLY
3 CONFIDENTIAL – SOURCE CODE.”

4 2.16 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing
5 Party.

6 3. SCOPE

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

19 4. DURATION

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

26 5. DESIGNATING PROTECTED MATERIAL

27 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or Non-
28 Party that designates information or items for protection under this Order must take care to limit any such

1 designation to specific material that qualifies under the appropriate standards. To the extent it is practical
2 to do so, the Designating Party must designate for protection only those parts of material, documents,
3 items, or oral or written communications that qualify – so that other portions of the material, documents,
4 items, or communications for which protection is not warranted are not swept unjustifiably within the
5 ambit of this Order.

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

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

14 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g.,
15 second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure or Discovery

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

18 Designation in conformity with this Order requires:

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

26 A Party or Non-Party that makes original documents or materials available for inspection need
27 not designate them for protection until after the inspecting Party has indicated which material it would
28 like copied and produced. During the inspection and before the designation, all of the material made

1 available for inspection shall be deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”
2 After the inspecting Party has identified the documents it wants copied and produced, the Producing
3 Party must determine which documents, or portions thereof, qualify for protection under this Order.
4 Then, before producing the specified documents, the Producing Party must affix the appropriate legend
5 (“CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY
6 CONFIDENTIAL – SOURCE CODE”) to each page that contains Protected Material. If only a portion
7 or portions of the material on a page qualifies for protection, the Producing Party also must clearly
8 identify the protected portion(s) (e.g., by making appropriate markings in the margins) and must specify,
9 for each portion, the level of protection being asserted.

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

23 Parties shall give the other parties notice if they reasonably expect a deposition, hearing or other
24 proceeding to include Protected Material so that the other parties can ensure that only authorized
25 individuals who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A) are present
26 at those proceedings. The use of a document as an exhibit at a deposition shall not in any way affect its
27 designation as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

28 Transcripts containing Protected Material shall have an obvious legend on the title page that the

1 transcript contains Protected Material, and the title page shall be followed by a list of all pages (including
2 line numbers as appropriate) that have been designated as Protected Material and the level of protection
3 being asserted by the Designating Party. The Designating Party shall inform the court reporter of these
4 requirements. Any transcript that is prepared before the expiration of a 14-day period for designation
5 shall be treated during that period as if it had been designated “HIGHLY CONFIDENTIAL –
6 ATTORNEYS’ EYES ONLY” in its entirety unless otherwise agreed. After the expiration of that period,
7 the transcript shall be treated only as actually designated.

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

14 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate
15 qualified information or items does not, standing alone, waive the Designating Party’s right to secure
16 protection under this Order for such material. Upon timely correction of a designation, the Receiving
17 Party must make reasonable efforts to assure that the material is treated in accordance with the provisions
18 of this Order.

19 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

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

26 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by
27 providing written notice of each designation it is challenging and describing the basis for each challenge.
28 To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the

1 challenge to confidentiality is being made in accordance with this specific paragraph of the Protective
2 Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by
3 conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 5
4 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its
5 belief that the confidentiality designation was not proper and must give the Designating Party an
6 opportunity to review the designated material, to reconsider the circumstances, and, if no change in
7 designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed
8 to the next stage of the challenge process only if it has engaged in this meet and confer process first or
9 establishes that the Designating Party is unwilling to participate in the meet and confer process in a
10 timely manner.

11 6.3 Judicial Intervention. **If the Parties cannot resolve a challenge without court**
12 **intervention, the parties shall follow the Court’s Standing Order in Civil Cases regarding**
13 **Discovery and Discovery Motions. The parties may file a joint letter brief regarding retaining**
14 **confidentiality within 21 days of the initial notice of challenge or within 14 days of the parties**
15 **agreeing that the meet and confer process will not resolve their dispute, whichever is earlier.**
16 **Failure by a Designating Party to file such discovery dispute letter within the applicable 21 or 14**
17 **day period (set forth above) with the Court shall automatically waive the confidentiality**
18 **designation for each challenged designation. If, after submitting a joint letter brief, the Court**
19 **allows that a motion may be filed, any such motion must be accompanied by a competent**
20 **declaration affirming that the movant has complied with the meet and confer requirements**
21 **imposed in the preceding paragraph. The Court, in its discretion, may elect to transfer the**
22 **discovery matter to a Magistrate Judge.**

23 **In addition, the parties may file a joint letter brief regarding a challenge to a confidentiality**
24 **designation at any time if there is good cause for doing so, including a challenge to the designation**
25 **of a deposition transcript or any portions thereof. If, after submitting a joint letter brief, the Court**
26 **allows that a motion may be filed, any motion brought pursuant to this provision must be**
27 **accompanied by a competent declaration affirming that the movant has complied with the meet**
28 **and confer requirements imposed by the preceding paragraph. The Court, in its discretion, may**

1 elect to refer the discovery matter to a Magistrate Judge.

2 **The burden of persuasion in any such challenge proceeding shall be on the Designating**
3 **Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose**
4 **unnecessary expenses and burdens on other parties) may expose the Challenging Party to**
5 **sanctions. Unless the Designating Party has waived the confidentiality designation by failing to file**
6 **a letter brief to retain confidentiality as described above, all parties shall continue to afford the**
7 **material in question the level of protection to which it is entitled under the Producing Party’s**
8 **designation until the court rules on the challenge.**

9 7. ACCESS TO AND USE OF PROTECTED MATERIAL

10 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
11 produced by another Party or by a Non-Party in connection with this case only for prosecuting,
12 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the
13 categories of persons and under the conditions described in this Order. When the litigation has been
14 terminated, a Receiving Party must comply with the provisions of section 15 below (FINAL
15 DISPOSITION).

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

18 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by the
19 court or permitted in writing by the Designating Party, a Receiving Party may disclose any information
20 or item designated “CONFIDENTIAL” only to:

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

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

28 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably

1 necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound”
2 (Exhibit A) and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been
3 followed;

4 (d) the court and its personnel;

5 (e) court reporters and their staff;

6 (f) professional jury or trial consultants, mock jurors, and Professional Vendors to whom
7 disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and
8 Agreement to Be Bound” (Exhibit A) or are bound by a confidentiality agreement with protections at
9 least as stringent as those in this Order;

10 (g) during their depositions, witnesses in the action to whom disclosure is reasonably necessary
11 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise
12 agreed by the Designating Party or ordered by the court. Witnesses who are current employees of the
13 producing party need not sign the Acknowledgement and Agreement to be Bound to be shown the
14 producing party’s Protected Material. Pages of transcribed deposition testimony or exhibits to
15 depositions that reveal Protected Material must be separately bound by the court reporter and may not be
16 disclosed to anyone except as permitted under this Stipulated Protective Order

17 (h) the author or recipient of a document containing the information or a custodian or other
18 person who otherwise possessed or knew the information.

19 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” and
20 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items. Unless otherwise ordered by the
21 court or permitted in writing by the Designating Party, a Receiving Party may disclose any information
22 or item designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY
23 CONFIDENTIAL – SOURCE CODE” (subject to the provisions in Section 9 of this Order) only to:

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

28 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for this

1 litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), and (3)
2 as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been followed;

3 (d) the court and its personnel;

4 (e) court reporters and their staff;

5 (f) professional jury or trial consultants, mock jurors, and Professional Vendors to whom
6 disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and
7 Agreement to Be Bound” (Exhibit A) or are bound by a confidentiality agreement with protections at
8 least as stringent as those in this Order;

9 (g) during their depositions, witnesses in the action to whom disclosure is reasonably necessary
10 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise
11 agreed by the Designating Party or ordered by the court. Witnesses who are current employees of the
12 producing party need not sign the Acknowledgement and Agreement to be Bound to be shown the
13 producing party’s Protected Material. Pages of transcribed deposition testimony or exhibits to
14 depositions that reveal Protected Material must be separately bound by the court reporter and may not be
15 disclosed to anyone except as permitted under this Stipulated Protective Order; and

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

18 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY CONFIDENTIAL –
19 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or
20 Items to or Experts.

21 a)(1) (a)Unless otherwise ordered by the court or agreed to in writing by the Designating Party, a
22 Party that seeks to disclose to an Expert (as defined in this Order) any information or item that has been
23 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY
24 CONFIDENTIAL – SOURCE CODE” pursuant to paragraph 7.3(c) first must make a written request to
25 the Designating Party that (1) identifies the general categories of “HIGHLY CONFIDENTIAL –
26 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” information that the
27 Receiving Party seeks permission to disclose to the Expert, (2) sets forth the full name of the Expert and
28 the city and state of his or her primary residence, (3) attaches a copy of the Expert’s current resume, (4)

1 identifies the Expert's current employer(s), (5) identifies each person or entity from whom the Expert has
2 received compensation or funding for work in his or her areas of expertise or to whom the expert has
3 provided professional services, including in connection with a litigation, at any time during the preceding
4 five years,¹ and (6) identifies (by name and number of the case, filing date, and location of court) any
5 litigation in connection with which the Expert has offered expert testimony, including through a
6 declaration, report, or testimony at a deposition or trial, during the preceding five years.

7 (b) A Party that makes a request and provides the information specified in the preceding
8 respective paragraphs may disclose the subject Protected Material to the identified Expert unless, within
9 7 days of delivering the request, the Party receives a written objection from the Designating Party. Any
10 such objection must set forth in detail the grounds on which it is based.

11 (c) A Party that receives a timely written objection must meet and confer with the Designating
12 Party (through direct voice to voice dialogue) to try to resolve the matter by agreement within five days
13 of the written objection. If no agreement is reached, the Party seeking to make the disclosure to the
14 Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-
15 5, if applicable) seeking permission from the court to do so. Any such motion must describe the
16 circumstances with specificity, set forth in detail the reasons why the disclosure to the Expert is
17 reasonably necessary, assess the risk of harm that the disclosure would entail, and suggest any additional
18 means that could be used to reduce that risk. In addition, any such motion must be accompanied by a
19 competent declaration describing the parties' efforts to resolve the matter by agreement (i.e., the extent
20 and the content of the meet and confer discussions) and setting forth the reasons advanced by the
21 Designating Party for its refusal to approve the disclosure.

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

25
26
27 ¹ If the Expert believes any of this information is subject to a confidentiality obligation to a third-party,
28 then the Expert should provide whatever information the Expert believes can be disclosed without
violating any confidentiality agreements, and the Party seeking to disclose to the Expert shall be
available to meet and confer with the Designating Party regarding any such engagement.

1 8. PROSECUTION BAR

2 Absent written consent from the Producing Party, any individual who receives access to Fitbit’s
3 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –
4 SOURCE CODE” information shall not be involved in the prosecution of patents or patent applications
5 relating to the functionality, operation, and design of software or hardware relating to the technology
6 disclosed in any of the patents-in-suit or relating to devices containing health, activity or fitness tracking
7 including without limitation the patents asserted in this action and any patent or application claiming
8 priority to or otherwise related to the patents asserted in this action, before any foreign or domestic
9 agency, including the United States Patent and Trademark Office (“the Patent Office”).

10 For purposes of this paragraph, “prosecution” includes directly or indirectly advising on,
11 consulting on, preparing, prosecuting, drafting, editing, and/or amending of applications, specifications,
12 claims, and/or responses to office actions, or otherwise affecting the disclosure in patent applications or
13 specifications or the scope or maintenance of patent claims.² To avoid any doubt, “prosecution” as used
14 in this paragraph does not include representing a party challenging a patent before a domestic or foreign
15 agency (including, but not limited to, a reissue protest, *ex parte* reexamination or *inter partes*
16 reexamination). This Prosecution Bar shall begin when access to “HIGHLY CONFIDENTIAL –
17 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” information is first
18 received by the affected individual and shall end two (2) years after final termination of this action.

19 9. SOURCE CODE

20 (a) To the extent production of source code becomes necessary in this case, a Producing Party
21 may designate source code as “HIGHLY CONFIDENTIAL - SOURCE CODE” if it comprises or
22 includes confidential, proprietary or trade secret source code.

23 (b) Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE CODE” shall
24 be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
25 ONLY” information including the Prosecution Bar set forth in Paragraph 8, and may be disclosed only to
26 the individuals to whom “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information may
27

28 ² Prosecution includes, for example, original prosecution, reissue and reexamination proceedings.

1 be disclosed, as set forth in Paragraphs 7.3 and 7.4.

2 (c) Any source code produced in discovery shall be made available for inspection, in a format
3 allowing it to be reasonably reviewed and searched, during normal business hours (9 am to 5:30 pm local
4 time) on weekdays or at other mutually agreeable times, at an office of the Producing Party's counsel (if
5 Fitbit is the producing party, in the San Francisco Bay Area) or another mutually agreed upon location.
6 The source code shall be made available for inspection on a secured computer in a secured room without
7 Internet access or network access to other computers, and the Receiving Party shall not copy, remove, or
8 otherwise transfer any portion of the source code onto any recordable media or recordable device. The
9 Producing Party may visually monitor (from outside the review room) the activities of the Receiving
10 Party's representatives during any source code review, but only to ensure that there is no unauthorized
11 recording, copying, or transmission of the source code. No recordable media or recordable devices,
12 including without limitation sound recorders, computers, cellular telephones, peripheral equipment,
13 cameras, CDs, DVDs, USB flashdrives, or drives of any kind, shall be permitted into the Source Code
14 Review Room, except a wireless-disabled, camera-disabled computer provided by the Receiving Party,
15 for notetaking purposes. (d) The Receiving Party shall provide seven days' notice before any inspection
16 of the persons who will review Source Code on behalf of a Receiving Party and the Source Code to be
17 reviewed, for the first time that such person reviews Source Code. The Producing Party may object in
18 writing within three court days of such notice. The Receiving Party shall provide at least three days'
19 notice for any subsequent inspections. Any expert or consultant proposed to review the Source Code
20 must have been previously qualified pursuant to paragraph 7.4 of this Order.

21 (d) The Receiving Party may request (by file name and line number) paper copies of limited
22 portions of source code that are reasonably necessary for the preparation of court filings, pleadings,
23 expert reports, or other papers, or for deposition or trial, but shall not request paper copies for the
24 purposes of reviewing the source code other than electronically as set forth in paragraph (c) in the first
25 instance. The Producing Party shall provide all such source code in paper form including bates numbers
26 and the label "HIGHLY CONFIDENTIAL - SOURCE CODE." The Receiving Party shall be
27 presumptively limited to 500 printed pages of those portions of Source Code that it, in good faith,
28 considers necessary to the preparation of its case. The Receiving Party may not request any printed copy

1 of more than 35 consecutive pages (8.5” x 11”, 12-point font) of Source Code without the express
2 consent of the Producing Party or an order from the Court. The Producing Party may challenge the
3 amount of source code requested in hard copy form pursuant to the dispute resolution procedure and
4 timeframes set forth in Paragraph 6 whereby the Producing Party is the “Challenging Party” and the
5 Receiving Party is the “Designating Party” for purposes of dispute resolution.

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

16 10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
17 LITIGATION

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

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

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

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

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

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

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

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

- 20 1. promptly notify in writing the Requesting Party and the Non-Party that some or all of the
21 information requested is subject to a confidentiality agreement with a Non-Party;
- 22 2. promptly provide the Non-Party with a copy of the Stipulated Protective Order in this
23 litigation, the relevant discovery request(s), and a reasonably specific description of the information
24 requested; and
- 25 3. make the information requested available for inspection by the Non-Party.

26 (c) If the Non-Party fails to object or seek a protective order from this court within 14 days of
27 receiving the notice and accompanying information, the Receiving Party may produce the Non-Party’s
28 confidential information responsive to the discovery request. If the Non-Party timely seeks a protective

1 order, the Receiving Party shall not produce any information in its possession or control that is subject to
2 the confidentiality agreement with the Non-Party before a determination by the court. Absent a court
3 order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court
4 of its Protected Material.

5 12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

13 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED
14 MATERIAL

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

23 14. MISCELLANEOUS

24 14.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its
25 modification by the court in the future.

26 14.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no
27 Party waives any right it otherwise would have to object to disclosing or producing any information or
28 item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any

1 right to object on any ground to use in evidence of any of the material covered by this Protective Order.

2 14.3 Filing Protected Material. Without written permission from the Designating Party or a
3 court order secured after appropriate notice to all interested persons, a Party may not file in the public
4 record in this action any Protected Material. A Party that seeks to file under seal any Protected Material
5 must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a
6 court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local
7 Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at issue
8 is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a
9 Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(e) is
10 denied by the court, then the Receiving Party may file the Protected Material in the public record
11 pursuant to Civil Local Rule 79-5(e)(2) unless otherwise instructed by the court.

12 15. FINAL DISPOSITION

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

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2
3 DATED: /s/ Marc Belloli
4 Attorneys for Plaintiff

5 DATED: /s/ Eugene Novikov
6 Attorneys for Defendant

7 PURSUANT TO STIPULATION, IT IS SO ORDERED.

8
9 DATED: March 13, 2018

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11 The Honorable Yvonne Gonzalez Rogers
12 United States District Judge
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1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of _____ [print or
4 type full address], declare under penalty of perjury that I have read in its entirety and understand the
5 Stipulated Protective Order that was issued by the United States District Court for the Northern District
6 of California on [date] in the case of _____ [**insert formal name of the case and the number**
7 **and initials assigned to it by the court**]. I agree to comply with and to be bound by all the terms of this
8 Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me
9 to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any
10 manner any information or item that is subject to this Stipulated Protective Order to any person or entity
11 except in strict compliance with the provisions of this Order.

12 I further agree to submit to the jurisdiction of the United States District Court for the Northern
13 District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if
14 such enforcement proceedings occur after termination of this action.

15 I hereby appoint _____ [print or type full name] of
16 _____ [print or type full address and telephone number] as my
17 California agent for service of process in connection with this action or any proceedings related to
18 enforcement of this Stipulated Protective Order.

19
20 Date: _____

21 City and State where sworn and signed: _____

22 Printed name: _____
23 [printed name]

24 Signature: _____
25 [signature]