

E-FILED 10/27/2008

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SAFRONI ADODD-OWENS, et al., etc.,

Plaintiff,

v.

KYPHON INC.,

Defendant.

CASE NO. CV0603988JF

~~PROPOSED~~ **STIPULATED PROTECTIVE ORDER**

(MODIFIED BY THE COURT)

1. PURPOSES AND LIMITATIONS

1.1 Disclosure and discovery activity in this action is likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted. Accordingly, the parties hereby stipulate to and petition the Court to enter the following Protective Order. The parties acknowledge that this Protective Order does not confer blanket protection on all disclosures or responses to discovery and that the protection it affords extends only to the limited information or items that are entitled under the applicable legal principles to treatment as confidential. The parties further acknowledge, as set forth in Section 13, below, that this Protective Order creates no entitlement to file confidential information under seal.

1 **2. DEFINITIONS**

2 2.1 “Party” or “Parties” – The parties to the above-captioned action.

3 2.2 “Discovery Material” – All items or information, regardless of the medium or
4 manner generated, stored, or maintained (including, among other things, testimony, transcripts, or
5 tangible things) that are produced or generated in disclosures or responses to discovery in this
6 matter.

7 2.3 “Confidential Information” – Discovery Material designated as
8 “CONFIDENTIAL” pursuant to Sections 6 and/or 7, which the Designating Party reasonably and
9 in good faith believes is sensitive and qualifies for protection under standards developed under
10 Fed. R. Civ. P. 26(c).

11 2.4 “Highly Confidential Information” – Discovery Material designated as “HIGHLY
12 CONFIDENTIAL” pursuant to Sections 6 and/or 7, which the Designating Party reasonably and
13 in good faith believes to be Confidential Information which is entitled to further protection from
14 disclosure by the fundamental right of privacy of individuals under the California or United States
15 Constitutions, and whose disclosure would create a substantial risk of serious injury that could not
16 be avoided by less restrictive means.

17 2.5 “Protected Material” – Any Discovery Material that is designated as Confidential
18 or Highly Confidential Information.

19 2.6 “Receiving Party” – A Person, as defined below, that receives Discovery Material
20 produced or disclosed in this action.

21 2.7 “Producing Party” – A Person, as defined below, that produces Discovery Material
22 in this action.

23 2.8 “Designating Party” – A Person, as defined below, that designates Discovery
24 Material as Protected Material.

25 2.9 “Disclosing Counsel” – A party’s attorney that discloses Discovery Material to
26 another Person.

27 2.10 “Outside Counsel” – Attorneys who are not employees of a Party but who are
28 retained to represent or advise a Party in this action.

- 1 2.11 “House Counsel” – Attorneys who are employees of a Party.
- 2 2.12 “Counsel” (without qualifier) – Outside Counsel and House Counsel (as well as
- 3 their support staffs).
- 4 2.13 “Expert” – A person with specialized knowledge or experience in a matter
- 5 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
- 6 witness or as a consultant in this action. This definition includes a professional jury or trial
- 7 consultant retained in connection with this litigation.
- 8 2.14 “Professional Vendors” – Persons, as defined below, that provide litigation support
- 9 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
- 10 organizing, storing, retrieving data in any form or medium) and their employees and
- 11 subcontractors.
- 12 2.15 “Person” or “Persons” – Includes a natural person, firm, association, organization,
- 13 partnership, business trust, corporation, limited liability company, or public entity.

14 **3. SCOPE**

15 3.1 This Protective Order shall cover not only Protected Material, but also any

16 information copied or extracted therefrom, as well as all copies, excerpts, summaries, or

17 compilations thereof, plus testimony, conversations, or presentations by Parties or Counsel to or

18 in court or in other settings that might reveal Protected Material.

19 3.2 This Protective Order shall apply to the Parties and any nonparty from whom

20 discovery is sought and who desires the protection of the Protective Order.

21 **4. DURATION**

22 4.1 Even after the termination of this litigation, the confidentiality obligations imposed

23 by this Protective Order shall remain in effect until a Designating Party agrees otherwise in

24 writing or a court order otherwise directs. **For a period of six months after the final termination**

of this action, this court shall retain jurisdiction to enforce the terms of this order.

25 **5. MODIFICATION**

26 5.1 This Protective Order is subject to revocation or modification by the Court upon

27 written stipulation of the Parties or upon motion pursuant to the Local Rules of the Court.

1 **6. DESIGNATION**

2 6.1 Any Producing or Receiving Party may designate Disc overy Material as
3 Confidential or Highly Confidential Information by (1) providing a copy of the document,
4 material or information so designated stamped with the legend “CONFIDENTIAL” or “HIGHLY
5 CONFIDENTIAL, or (2) furnishing a separate written notice to the undersigned counsel at the
6 time of its production or as soon thereafter as pra ctically specifically identifying the document(s),
7 material(s) or information to be so designated. If only a portion or portions of the Discovery
8 Material qualifies for protection, the Designating Party must clearly identify the protected
9 portion(s). (e.g. by making appropriate markings in the margins).

10 6.2 Each Person that designates information or items fo r protection under this
11 Protective Order must take care to limit any such d esignation to specific material that qualifies
12 under the appropriate standards. A Designating Par ty must take care to designate for protection
13 only those parts of material, documents, items, or oral or written communications that qualify so
14 that other portions of the material, documents, ite ms, or communications for which protection is
15 not warranted are not swept unjustifiably within th e ambit of this Protective Order.

16 6.3 If it comes to a Designating Party’s attention that information or items that it
17 designated for protection do not qualify for protec tion at all, or do not qualify for the level of
18 protection initially asserted, that Designating Par ty must promptly notify the other Parties that it i s
19 withdrawing the mistaken designation.

20 **7. DEPOSITION, PRETRIAL AND TRIAL PROCEDURES**

21 7.1 Any Person may designate testimony provided in a de position or in any pretrial or
22 trial proceeding by identifying on the record, befo re the close of the deposition or pretrial or trial
23 proceeding, the testimony that qualifies as Confide ntial or Highly Confidential Information.

24 7.2 When it is impractical to identify separately each portion of the testimony that is
25 entitled to protection or when it appears that subs tantial portions of the testimony may qualify for
26 protection, a Person may invoke on the record (befo re the deposition or other testimony is
27 concluded) a right to have up to twenty days from the date the transcript becomes available to
28 designate specific portions of the testimony as con stituting Confidential or Highly Confidential

Information. Until the designation is made or twenty days from the date on which the transcript is available, whichever occurs first, the entire transcript will be treated as Highly Confidential Information.

7.3 Transcript pages containing Protected Material must be separately bound by the court reporter, whom must stamp each page as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," as instructed by the Designating Party.

8. INADVERTENT FAILURE TO DESIGNATE

8.1 Inadvertent production or failure to designate any Discovery Materials as Confidential or Highly Confidential Information shall not be deemed a waiver of the claim of confidentiality as to such information. A Producing or Receiving Party that inadvertently produces or fails to designate Discovery Materials pursuant to this Protective Order may thereafter make a designation by serving notice thereof in writing, accompanied by substitute copies of each item, appropriately designated, within ten business days of discovery that the information, documents or things were not properly designated. Those individuals who reviewed the information, documents or things prior to the notice of misdesignation or failure to designate shall return to Outside Counsel for the Designating Party or destroy and certify destruction of all copies of the misdesignated information, documents or things within ten business days after receipt of such notification.

9. CHALLENGES TO DESIGNATIONS

9.1 Timing of Challenges. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

9.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating Party's designation must do so in good faith and must begin the process by conferring directly with Counsel for the Designating Party. In conferring, the challenging party must explain the basis for its belief that the confidentiality designation was not proper and must give the

Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A challenging party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first.

9.3 Judicial Intervention. A Party that elects to press a challenge to a confidentiality designation after considering the justification offered by the Designating Party may file and serve a motion under Civil Local Rule 7 that identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet and confer requirements imposed in the preceding paragraph and that sets forth with specificity the justification for the confidentiality designation that was given by the Designating Party in the meet and confer dialogue.

9.4 The burden of persuasion in any such challenge proceedings shall be on the Designating Party. Until the Court rules on the challenge, all Receiving Parties shall continue to afford the material in question the level of protection to which it is entitled under the Designating Party's designation.

10. ACCESS TO AND USE OF PROTECTED MATERIAL

10.1 Any Person obtaining access to Protected Material that is disclosed or produced by another Person in connection with this case shall only use such Discovery Material for prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the categories of Persons and under the conditions described in this Protective Order. When the litigation has been terminated, all Receiving Parties must comply with the provisions of Section 14.

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

10.3 Disclosure of Confidential Information. Unless otherwise ordered by the Court or permitted in writing by the Designating Party, Disclosing Counsel may disclose Discovery Material designated as Confidential Information only to:

- 1 (a) Their employees;
- 2 (b) Professional litigation-support vendors to whom disclosure is reasonably
3 necessary for this litigation;
- 4 (c) The named Plaintiff and the Defendant (including Defendant's House
5 Counsel, officers, directors, and employees, if disclosure to such individuals is reasonably
6 necessary for this litigation);
- 7 (d) The author of the document or the original source of the information;
- 8 (e) Any mediator(s) chosen by the parties;
- 9 (f) Court reporters or videographers, for the purpose of transcribing or
10 recording testimony;
- 11 (g) The Court and members of its staff;
- 12 (h) Subject to Section 10.6, witnesses and deponents testifying under oath,
13 where examining counsel has a good faith basis for believing that the witness or deponent has
14 information or testimony pertinent to the Confidential Information, who have signed the
15 Acknowledgement And Agreement To Be Bound By Protective Order (Exhibit A); and
- 16 (i) Subject to Section 10.5, Experts to whom disclosure is reasonably
17 necessary for this litigation and who have signed the Acknowledgement And Agreement To Be
18 Bound By Protective Order (Exhibit A).

19 10.4 Disclosure of Highly Confidential Information or Items. Unless otherwise ordered
20 by the Court or permitted in writing by the Designating Party, Disclosing Counsel may disclose
21 Discovery Material designated as Highly Confidential Information only to:

- 22 (a) Their employees;
- 23 (b) Professional litigation-support vendors to whom disclosure is reasonably
24 necessary for this litigation;
- 25 (c) House Counsel to Defendant and any officer, director, managing agent or
26 employee of Defendant if disclosure to such individuals is reasonably necessary for this
27 litigation;
- 28 (d) Any mediator(s) chosen by the parties;

(e) Court reporters or videographers, for the purpose of transcribing or recording testimony;

(f) The Court and members of its staff;

(g) Subject to Section 10.6, witnesses and deponents testifying under oath, where examining counsel has a good faith basis for believing that the witness or deponent has information or testimony pertinent to the Highly Confidential Information, who have signed the Acknowledgement And Agreement To Be Bound By Protective Order (Exhibit A); and

(h) Subject to Section 10.5, Experts to whom disclosure is reasonably necessary for this litigation and who have signed the Acknowledgement And Agreement To Be Bound By Protective Order (Exhibit A).

(i) Disclosing counsel may disclose the data contained in Discovery Material designated as Highly Confidential Information, if reasonably necessary for this litigation, to the named Plaintiffs. Disclosing counsel may not disclose any identifiable information, or any information that would permit the named Plaintiffs to associate the data with any particular individual.

10.5 If Plaintiffs retain an Expert who is currently employed by or retained as a strategic, business or legal consultant by any entity that is currently a competitor of Defendant, Plaintiffs will provide written notice to Defendant's Outside Counsel of their intention to disclose **If, after good faith meet/confer negotiations, the parties are unable to resolve any disclosure dispute** to such Expert any Protected Material. Defendants shall then have an opportunity to challenge the disclosure of such Protected Material to the Expert by filing a motion with the Court within **Defendant has the burden of proving that the risk of harm outweighs plaintiffs' need for disclosure.** twenty-one days of receiving such written notice. ~~Once Defendant has filed such a motion, =====~~ **Pending resolution of any such dispute,** Plaintiffs shall be prohibited from disclosing any Protected Material to such Expert without an order of the Court or the written consent of Defendant's Outside Counsel. If Defendant fails to file such a motion within the twenty-one day period, then Plaintiffs may disclose the Protected Material to that Expert provided that such Experts sign the Acknowledgement And Agreement To Be Bound By Protective Order (Exhibit A).

10.6 Disclosing Counsel may not disclose Protected Material to a witness or deponent pursuant to Sections 10.3(h) or 10.4(h) at a deposition without providing five days notice to the

1 Designating Party of its intent to make such a disc losure. The Designating Party will then have
2 two days after receipt of notice to inform the Disc losing Party if it objects to that disclosure and i f
3 such objection is made, the deposition will not pro ceed regarding the Protected Material until the
4 Designating Party has an opportunity to have the ma tter heard by the Court.

5 10.7 Nothing herein shall impose any restriction on the use or disclosure by a Party of
6 its own Discovery Material, including Protected Mat erial, for the purpose of and in connection
7 with this action.

8 10.8 Any copies or reproduction, excerpts, summaries or other documents or media that
9 paraphrase, excerpt or contain Protected Materials shall be treated as the Protected Material if
10 paraphrases, excerpts or contains.

11 10.9 The Parties shall serve a copy of this Protective O rders simultaneously with any
12 discovery request made to an on-party in this action .

13 **11. PROTECTED MATERIALS SUBPOENAED OR ORDERED PRODUCED I N**
14 **OTHER LITIGATION**

15 11.1 If a Receiving Party is served with a subpoena ora n order issued in other litigation
16 that would compel disclosure of any information or items designated in this action as Protected
17 Material, the Receiving Party must so notify the De signing Party in writing (by fax, if possible)
18 immediately and in no event more than three court d ays after receiving the subpoena or order.
19 Such notification must include a copy of the subpoe na or court order.

20 11.2 The Receiving Party also must immediately inform i n writing the Person who
21 caused the subpoena or order to issue in the other litigation that some or all the material covered
22 by the subpoena or order is the subject of this Pro tective Order. In addition, the Receiving Party
23 must deliver a copy of this Protective Order prompt ly to the Person in the other action that caused
24 the subpoena or order to issue.

25 11.3 The purpose of imposing these duties is to alert th e interested parties to the
26 existence of this Protective Order and to afford th e Designating Party an opportunity to protect its
27 confidentiality interests in the court from which t he subpoena or order issued. The Designating
28 Party shall bear the burden and the expense of seek ing protection in that court of its Protected

Material and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

12.1 If a Disclosing Counsel learns that, by inadvertence or otherwise, he or she has disclosed Protected Material to any Person or in any circumstance not authorized under this Protective Order, that Disclosing Counsel must immediately (a) notify the Designating Party in writing of the unauthorized disclosures; (b) use his or her best effort to retrieve all copies of the Protected Material, including any copies or reproduction, excerpts, summaries or other documents or media that paraphrase, excerpt or contain the Protected Material; (c) inform the Person or Persons to whom unauthorized disclosures were made of all the terms of this Protective Order; and (d) request such Person or Persons to execute the Acknowledgement And Agreement To Be Bound By Protective Order (Exhibit A).

13. FILING PROTECTED MATERIAL

13.1 Any Person seeking to file Protected Material with the Court, or to refer to such materials in their papers to the Court, shall comply with the procedures set forth in Civil Local Rule 79-5, including Civil Local Rules 79-5(d), providing for the conditional sealing of documents pending a court ruling regarding a motion to seal.

14. FINAL DISPOSITION

14.1 Unless otherwise ordered or agreed in writing by the Producing Party, within sixty days after the final termination of this action, each Receiving Party must return all Protected Material to the Producing Party. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries or any other form of reproducing or capturing any of the Protected Material. With permission in writing from the Designating Party, the Receiving Party may destroy some or all of the Protected Material instead of returning it. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same Person, to the Designating Party) by the sixty-day deadline that identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and that affirms that the Receiving Party has not retained any copies,

1 abstracts, compilations, summaries or other forms of reproducing or capturing any of the
2 Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival
3 copy of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney
4 work product, even if such materials contain Protected Material. Any such archival copies that
5 contain or constitute Protected Material remain subject to this Protective Order as set forth in
6 Section 4.

7 **15. MISCELLANEOUS**

8 15.1 Right to Further Relief. Nothing in this Protective Order abridges the right of any
9 Party to seek its modification by the Court in the future.

10 15.2 Right to Assert Other Objections. By stipulating to the entry of this Protective
11 Order, no Party waives any right it otherwise would have to object to disclosing or producing any
12 information or item on any ground not addressed in this Protective Order. Similarly, no Party
13 waives any right to object on any ground to use in evidence of any of the material covered by this
14 Protective Order.

15 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

16 [signatures on next page]
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1 Dated:October21,2008

DLAPIPERUSLLP
SEVERSON&WERSON

2
3 By/s/RhondaL.Nelson
RHONDAL.NELSON
4 AttorneysforDefendant
KyphonInc.
5

6
7 Dated:October21,2008

LAWOFFICESOFGRANTE.MORRIS
LITTON&GEONETTA,LLP
8 SANFORD,WITTEL&HEISEL,LLP

9
10 By/s/DavidSanford
DAVIDSANFORD
11 AttorneysforPlaintiffs

12
13 PURSUANTTOSTIPULATION, **AS MODIFIED BY THE COURT,**
14 ITISSOORDEREDthis 27 of October 2008.

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MagistrateJudgeoftheUnitedStatesDistrictCourt

17 Howard R. Lloyd
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EXHIBIT A

ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND
BY PROTECTIVE ORDER

I, _____, [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety and
understand the Protective Order that was issued by the United States District Court for the
Northern District of California on [date] in the case of *Safronia Dodd-Owens, et al., v. Kyphon*
Inc.; Case Number CV0603988JF. I agree to comply with and to be bound by all the terms of
this Protective Order and I understand and acknowledge that failure to 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 the Protective Order to any Person except
in compliance with the provisions of the Protective Order.

If 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 the Protective Order,
even if such enforcement occurs after the 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 the Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed Name: _____

Signature: _____