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 15 INTELLIGENT HEARING SYSTEMS

16 IN THE UNITED STATES DISTRICT COURT  
 17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

18 NATUS MEDICAL INCORPORATED, a )  
 Delaware corporation and BAYCREST CENTRE )  
 19 FOR GERIATRIC CARE, an Ontario, Canada )  
 corporation, )  
 20 )  
 Plaintiffs, )  
 21 )  
 v. )  
 22 )  
 INTELLIGENT HEARING SYSTEMS, a Florida )  
 23 corporation, )  
 24 )  
 Defendant. )

Civil Action No.  
 10-cv-707-RMW

~~PROPOSED~~ STIPULATED  
 PROTECTIVE ORDER  
 AS AMENDED BY THE COURT

25 )  
 26 )  
 27 )  
 28 )  
 AND RELATED COUNTERCLAIMS

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**1. PURPOSES AND LIMITATIONS**

Disclosure and discovery activity in this action are 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 may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 10 below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

and General Order 62

**2. DEFINITIONS**

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

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

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

2.4 Designated House Counsel: House Counsel who seek access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

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

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1           2.6     Disclosure or Discovery Material: all items or information, regardless of the  
2 medium or manner in which it is generated, stored, or maintained (including, among other  
3 things, testimony, transcripts, and tangible things), that are produced or generated in  
4 disclosures or responses to discovery in this matter.

5           2.7     Expert: a person with specialized knowledge or experience in a matter  
6 pertinent to the litigation who (1) has been retained by a Party or its counsel to serve as an  
7 expert witness or as a consultant in this action, (2) is not a past or current employee of a Party  
8 or of a Party's competitor, and (3) at the time of retention, is not anticipated to become an  
9 employee of a Party or of a Party's competitor.

10          2.8     “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or  
11 Items: extremely sensitive “Confidential Information or Items,” disclosure of which to  
12 another Party or Non-Party would create a substantial risk of serious harm that could not be  
13 avoided by less restrictive means.

14          2.9     “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items:  
15 extremely sensitive “Confidential Information or Items” representing computer code and  
16 associated comments and revision histories, formulas, engineering specifications, or  
17 schematics that define or otherwise describe in detail the algorithms or structure of software  
18 or hardware designs, disclosure of which to another Party or Non-Party would create a  
19 substantial risk of serious harm that could not be avoided by less restrictive means.

20          2.10    House Counsel: attorneys who are employees of a party to this action. House  
21 Counsel does not include Outside Counsel of Record or any other outside counsel.

22          2.11    Non-Party: any natural person, partnership, corporation, association, or other  
23 legal entity not named as a Party to this action.

24          2.12    Outside Counsel of Record: attorneys who are not employees of a party to this  
25 action but are retained to represent or advise a party to this action and have appeared in this  
26 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of  
27 that party.

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**4. DURATION**

Even after final disposition of this litigation, the confidentiality obligations imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and defenses in this action, with or without prejudice; and (2) final judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action, including the time limits for filing any motions or applications for extension of time pursuant to applicable law. For a period of six (6) months after the final disposition of this action, this court will retain jurisdiction to enforce the terms of this protective order.

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**5. DESIGNATING PROTECTED MATERIAL**

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

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

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

5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so designated before the material is disclosed or produced.

1 Designation in conformity with this Order requires:

2 (a) for information in documentary form (e.g., paper or electronic documents, but  
3 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing  
4 Party affix the legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’  
5 EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE” to each page that  
6 contains protected material.

7 A Party or Non-Party that makes original documents or materials available for  
8 inspection need not designate them for protection until after the inspecting Party has indicated  
9 which material it would like copied and produced. During the inspection and before the  
10 designation, all of the material made available for inspection shall be deemed “HIGHLY  
11 CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified  
12 the documents it wants copied and produced, the Producing Party must determine which  
13 documents, or portions thereof, qualify for protection under this Order. Then, before  
14 producing the specified documents, the Producing Party must affix the appropriate legend  
15 (“CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or  
16 “HIGHLY CONFIDENTIAL – SOURCE CODE”) to each page that contains Protected  
17 Material.

18 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
19 Designating Party identify on the record, before the close of the deposition, hearing, or other  
20 proceeding, all protected testimony and specify the level of protection being asserted. When it  
21 is impractical to identify separately each portion of testimony that is entitled to protection and  
22 it appears that substantial portions of the testimony may qualify for protection, the  
23 Designating Party may invoke on the record (before the deposition, hearing, or other  
24 proceeding is concluded) a right to have up to 21 days to identify the specific portions of the  
25 testimony as to which protection is sought and to specify the level of protection being  
26 asserted. Only those portions of the testimony that are appropriately designated for protection  
27 within the 21 days shall be covered by the provisions of this Stipulated Protective Order.  
28 Alternatively, a Designating Party may specify, at the deposition or up to 21 days afterwards

1 if that period is properly invoked, that the entire transcript shall be treated as  
2 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

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

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

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

25 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to  
26 designate qualified information or items does not, standing alone, waive the Designating  
27 Party’s right to secure protection under this Order for such material. Upon timely correction

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1 of a designation, the Receiving Party must make reasonable efforts to assure that the material  
2 is treated in accordance with the provisions of this Order.

3 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

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

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

24 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court  
25 intervention, the Designating Party shall file and serve a motion to retain confidentiality  
26 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within  
27 21 days of the initial notice of challenge or within 14 days of the parties agreeing that the  
28 meet and confer process will not resolve their dispute, whichever is earlier. Each such motion



1 must be accompanied by a competent declaration affirming that the movant has complied  
2 with the meet and confer requirements imposed in the preceding paragraph. Failure by the  
3 Designating Party to make such a motion including the required declaration within 21 days  
4 (or 14 days, if applicable) shall automatically waive the confidentiality designation for each  
5 challenged designation. In addition, the Challenging Party may file a motion challenging a  
6 confidentiality designation at any time if there is good cause for doing so, including a  
7 challenge to the designation of a deposition transcript or any portions thereof. Any motion  
8 brought pursuant to this provision must be accompanied by a competent declaration affirming  
9 that the movant has complied with the meet and confer requirements imposed by the  
10 preceding paragraph.

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

18 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

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

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

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1           7.2     Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise  
2 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may  
3 disclose any information or item designated “CONFIDENTIAL” only to:

4           (a) the Receiving Party’s Outside Counsel of Record in this action, as well as  
5 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose  
6 the information for this litigation;

7           (b) three (3) officers, directors, and employees (including House Counsel) of the  
8 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have  
9 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

10          (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
11 reasonably necessary for this litigation and who have signed the “Acknowledgment and  
12 Agreement to Be Bound” (Exhibit A);

13          (d) the court and its personnel;

14          (e) court reporters and their staff,

15          (f) professional jury or trial consultants, and Professional Vendors to whom disclosure  
16 is reasonably necessary for this litigation;

17          (g) during their depositions, witnesses in the action to whom disclosure is reasonably  
18 necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit  
19 A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of  
20 transcribed deposition testimony or exhibits to depositions that reveal Protected Material  
21 must be separately bound by the court reporter and may not be disclosed to anyone except as  
22 permitted under this Stipulated Protective Order.

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

25           7.3     Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”  
26 and “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items. Unless  
27 otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving

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1 Party may disclose any information or item designated “HIGHLY CONFIDENTIAL –  
2 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” only to:

3 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as  
4 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose  
5 the information for this litigation;

6 (b) Designated House Counsel of the Receiving Party (1) who has no involvement in  
7 competitive decision-making, (2) to whom disclosure is reasonably necessary for this  
8 litigation, (3) who has signed the “Acknowledgment and Agreement to Be Bound” (Exhibit  
9 A), and (4) as to whom the procedures set forth in paragraph 7.4(a)(1), below, have been  
10 followed, EXCEPT THAT Designated House Counsel shall not have access to any  
11 information or items designated “HIGHLY CONFIDENTIAL – SOURCE CODE”;

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

16 (d) the court and its personnel;

17 (e) court reporters and their staff,

18 (f) professional jury or trial consultants, and Professional Vendors to whom disclosure  
19 is reasonably necessary for this litigation; and

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

22 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY  
23 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –  
24 SOURCE CODE” Information or Items to Designated House Counsel or Experts.

25 (a)(1) Unless otherwise ordered by the court or agreed to in writing by the  
26 Designating Party, a Party that seeks to disclose to Designated House Counsel any  
27 information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’  
28 EYES ONLY” pursuant to paragraph 7.3(b) first must make a written request to the

1 Designating Party that (1) sets forth the full name of the Designated House Counsel and the  
2 city and state of his or her residence and (2) describes the Designated House Counsel's  
3 current and reasonably foreseeable future primary job duties and responsibilities in sufficient  
4 detail to determine if House Counsel is involved, or may become involved, in any  
5 competitive decision-making.

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

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

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26 <sup>1</sup> If the Expert believes any of this information is subject to a confidentiality obligation to  
27 a third-party, then the Expert should provide whatever information the Expert believes can be  
28 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 (c) A Party that receives a timely written objection must meet and confer with the  
2 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by  
3 agreement within seven days of the written objection. If no agreement is reached, the Party  
4 seeking to make the disclosure to Designated House Counsel or the Expert may file a motion  
5 as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if  
6 applicable) seeking permission from the court to do so. Any such motion must describe the  
7 circumstances with specificity, set forth in detail the reasons why disclosure to Designated  
8 House Counsel or the Expert is reasonably necessary, assess the risk of harm that the  
9 disclosure would entail, and suggest any additional means that could be used to reduce that  
10 risk. In addition, any such motion must be accompanied by a competent declaration  
11 describing the parties' efforts to resolve the matter by agreement (i.e., the extent and the  
12 content of the meet and confer discussions) and setting forth the reasons advanced by the  
13 Designating Party for its refusal to approve the disclosure.

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

## 18 **8. PROSECUTION BAR**

19 Absent written consent from the Producing Party, any individual who receives access  
20 to "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY  
21 CONFIDENTIAL – SOURCE CODE" information relating to a method or apparatus for  
22 measuring auditory evoked potentials (AEPs) and/or otoacoustic emissions (OAEs) shall not  
23 be involved in the prosecution of patents or patent applications relating to a method or  
24 apparatus for measuring AEPs and/or OAEs, including, without limitation, the '091 and '174  
25 patents asserted in this action and any patent or application claiming priority to or otherwise  
26 related to the '091 and '174 patents asserted in this action, before any foreign or domestic  
27 agency, including the United States Patent and Trademark Office ("the Patent Office"). To

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1 avoid any doubt, “apparatus for measuring AEPs and/or OAEs,” does not include ear  
2 couplers that are used with such an apparatus.

3 Absent written consent from the Producing Party, any individual who receives access  
4 to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY  
5 CONFIDENTIAL – SOURCE CODE” information relating to a method or apparatus for  
6 measuring auditory steady-state responses (ASSRs) shall not be involved in the prosecution  
7 of patents or patent applications relating to a method or apparatus for measuring ASSRs,  
8 including, without limitation, the ‘202, ‘613 and ‘282 patents asserted in this action and any  
9 patent or application claiming priority to or otherwise related to the ‘202, ‘613 and ‘282  
10 patents asserted in this action, before any foreign or domestic agency, including the United  
11 States Patent and Trademark Office (“the Patent Office”). To avoid any doubt, “apparatus for  
12 measuring ASSRs” does not include ear couplers that are used with such an apparatus.

13 Absent written consent from the Producing Party or leave of this Court, any individual  
14 who receives access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or  
15 “HIGHLY CONFIDENTIAL – SOURCE CODE” information relating to an ear coupler for  
16 conveying sound from an auditory screening or diagnostic apparatus shall not be involved in  
17 the prosecution of patents or patent applications relating to an ear coupler, including, without  
18 limitation, US 12/334770 or the ‘663 patent asserted in this action and any patent or  
19 application claiming priority to or otherwise related to US 12/334770 or the ‘663 patent  
20 asserted in this action, before any foreign or domestic agency, including the Patent Office.

21 For purposes of this section, “prosecution” includes directly or indirectly drafting,  
22 amending, advising, or otherwise affecting the scope or maintenance of patent claims.<sup>2</sup> To  
23 avoid any doubt, “prosecution” as used in this paragraph does not include representing a party  
24 challenging a patent before a domestic or foreign agency (including, but not limited to, a

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26 <sup>2</sup> Prosecution includes, for example, original prosecution, reissue and reexamination  
27 proceedings. Natus, however, reserves the right to seek permission to allow its Outside Counsel  
28 of Record to communicate with a patent attorney or patent agent regarding the content of a patent  
claim that has not issued or is the subject of reexamination proceedings. Defendant fully reserves  
its right to object to such a request by Natus.

1 reissue protest, ex parte reexamination or inter partes reexamination). This Prosecution Bar  
2 shall begin when access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or  
3 “HIGHLY CONFIDENTIAL – SOURCE CODE” information is first received by the  
4 affected individual and shall end two (2) years after final termination of this action.

5 **9. SOURCE CODE**

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

9 (b) Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE  
10 CODE” shall be subject to all of the protections afforded to “HIGHLY CONFIDENTIAL –  
11 ATTORNEYS’ EYES ONLY” information, including the Prosecution Bar set forth in  
12 Paragraph 8, and may be disclosed only to the individuals to whom “HIGHLY  
13 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information may be disclosed, as set  
14 forth in Paragraphs 7.3 and 7.4, with the exception of Designated House Counsel, who are not  
15 permitted to access or view any information designated as “HIGHLY CONFIDENTIAL –  
16 SOURCE CODE.”

17 (c) Any source code produced in discovery shall be made available for inspection, in a  
18 format allowing it to be reasonably reviewed and searched, during normal business hours or  
19 at other mutually agreeable times, at an office of the Producing Party’s counsel. Defendant  
20 shall make the source code available at the San Diego, CA office of Gordon and Rees.  
21 Plaintiff shall make source code available at an office of Knobbe Martens to be designated by  
22 Defendant. The source code shall be made available for inspection on a secured computer in  
23 a secured room without Internet access or network access to other computers, and the  
24 Receiving Party shall not copy, remove, or otherwise transfer any portion of the source code  
25 onto any recordable media or recordable device. The Producing Party may visually monitor  
26 the activities of the Receiving Party’s representatives during any source code review, but only  
27 to ensure that there is no unauthorized recording, copying, or transmission of the source code.

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1 (d) The Receiving Party may request paper copies of limited portions of source code  
2 that are reasonably necessary for the preparation of court filings, pleadings, expert reports, or  
3 other papers, or for deposition or trial, but shall not request paper copies for the purpose of  
4 reviewing the source code other than electronically as set forth in paragraph (c) in the first  
5 instance. The Producing Party shall provide all such source code in paper form, including  
6 bates numbers and the label “HIGHLY CONFIDENTIAL – SOURCE CODE.” The  
7 Producing Party may challenge the amount of source code requested in hard copy form  
8 pursuant to the dispute resolution procedure and timeframes set forth in Paragraph 6 whereby  
9 the Producing Party is the “Challenging Party” and the Receiving Party is the “Designating  
10 Party” for purposes of dispute resolution.

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

22 **10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**  
23 **OTHER LITIGATION**

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

28 ///



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

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

7 (c) cooperate with respect to all reasonable procedures sought to be pursued by the  
8 Designating Party whose Protected Material may be affected.<sup>3</sup>

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

18 **11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE**  
19 **PRODUCED IN THIS LITIGATION**

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

26 \_\_\_\_\_  
27 <sup>3</sup> The purpose of imposing these duties is to alert the interested parties to the existence  
28 of this Protective Order and to afford the Designating Party in this case an opportunity to try  
to protect its confidentiality interests in the court from which the subpoena or order issued.

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

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

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

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

11 (c) If the Non-Party fails to object or seek a protective order from this court within 14  
12 days of receiving the notice and accompanying information, the Receiving Party may produce  
13 the Non-Party's confidential information responsive to the discovery request. If the Non-  
14 Party timely seeks a protective order, the Receiving Party shall not produce any information  
15 in its possession or control that is subject to the confidentiality agreement with the Non-Party  
16 before a determination by the court.<sup>4</sup> Absent a court order to the contrary, the Non-Party  
17 shall bear the burden and expense of seeking protection in this court of its Protected Material.

18 **12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

19 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed  
20 Protected Material to any person or in any circumstance not authorized under this Stipulated  
21 Protective Order, the Receiving Party must immediately (a) notify in writing the Designating  
22 Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized  
23 copies of the Protected Material, (c) inform the person or persons to whom unauthorized  
24 disclosures were made of all the terms of this Order, and (d) request such person or persons to

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26 \_\_\_\_\_  
27 <sup>4</sup> The purpose of this provision is to alert the interested parties to the existence of  
28 confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its  
confidentiality interests in this court.

1 execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as  
2 Exhibit A.

3 **13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**  
4 **PROTECTED MATERIAL**

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

14 **14. MISCELLANEOUS**

15 14.1 Right to Further Relief. Nothing in this Order abridges the right of any person  
16 to seek its modification by the court in the future.

17 14.2 Right to Assert Other Objections. By stipulating to the entry of this Protective  
18 Order no Party waives any right it otherwise would have to object to disclosing or producing  
19 any information or item on any ground not addressed in this Stipulated Protective Order.  
20 Similarly, no Party waives any right to object on any ground to use in evidence of any of the  
21 material covered by this Protective Order.

22 14.3 Export Control. Disclosure of Protected Material shall be subject to all  
23 applicable laws and regulations relating to the export of technical data contained in such  
24 Protected Material, including the release of such technical data to foreign persons or nationals  
25 in the United States or elsewhere. The Producing Party shall be responsible for identifying  
26 any such controlled technical data, and the Receiving Party shall take measures necessary to  
27 ensure compliance.

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1 14.4 Filing Protected Material. Without written permission from the Designating  
2 Party or a court order secured after appropriate notice to all interested persons, a Party may  
3 not file in the public record in this action any Protected Material. A Party that seeks to file  
4 under seal any Protected Material must comply with Civil Local Rule 79-5. Protected  
5 Material may only be filed under seal pursuant to a court order authorizing the sealing of the  
6 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will  
7 issue only upon a request establishing that the Protected Material at issue is privileged,  
8 protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving  
9 Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is  
10 denied by the court, then the Receiving Party may file the Protected Material in the public  
11 record pursuant to Civil Local Rule 79-5(e) 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,  
14 each Receiving Party must return all Protected Material to the Producing Party or destroy  
15 such material. As used in this subdivision, "all Protected Material" includes all copies,  
16 abstracts, compilations, summaries, and any other format reproducing or capturing any of the  
17 Protected Material. Whether the Protected Material is returned or destroyed, the Receiving  
18 Party must submit a written certification to the Producing Party (and, if not the same person  
19 or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by category,  
20 where appropriate) all the Protected Material that was returned or destroyed and (2) affirms  
21 that the Receiving Party has not retained any copies, abstracts, compilations, summaries or  
22 any other format reproducing or capturing any of the Protected Material. Notwithstanding this  
23 provision, Outside Counsel are entitled to retain an archival copy of all pleadings, motion  
24 papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence,  
25 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert  
26 work product, even if such materials contain Protected Material. Any such archival copies

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1 that contain or constitute Protected Material remain subject to this Protective Order as set  
2 forth in Section 4 (DURATION).

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Respectfully submitted,  
KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: August 5, 2010 By: s/Brian C. Horne  
Brian C. Horne

Attorneys for Plaintiff  
NATUS MEDICAL, INC. and  
BAYCREST CENTRE FOR GERIATRIC CARE

GORDON & REES LLP

Dated: August 5, 2010 By: s/Mark G. Edgerton  
Richard P. Sybert  
Mark G. Edgerton

Attorneys for Defendant  
INTELLIGENT HEARING SYSTEMS

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: August 16, 2010  
  
\_\_\_\_\_  
HOWARD R. LLOYD  
United States Magistrate Judge

1 **EXHIBIT A**

2 **ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

3  
4 I, \_\_\_\_\_, of \_\_\_\_\_,  
5 declare under penalty of perjury that I have read in its entirety and understand the Stipulated  
6 Protective Order that was issued by the United States District Court for the Northern District  
7 of California on \_\_\_\_\_ in the case of *Natus Medical Incorporated and Baycrest Centre For*  
8 *Geriatric Care v. Intelligent Hearing System*, Case No. 10-cv-707-RMW. I agree to comply  
9 with and to be bound by all the terms of this Stipulated Protective Order and I understand and  
10 acknowledge that failure to so comply could expose me to sanctions and punishment in the  
11 nature of contempt. I solemnly promise that I will not disclose in any manner any  
12 information or item that is subject to this Stipulated Protective Order to any person or entity  
13 except in strict compliance with the provisions of this Order.

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

17 I hereby appoint \_\_\_\_\_ of  
18 \_\_\_\_\_ as my California agent for  
19 service of process in connection with this action or any proceedings related to enforcement of  
20 this Stipulated Protective Order.

21  
22 Date: \_\_\_\_\_

23  
24 City and State where sworn and signed: \_\_\_\_\_

25  
26 Printed name: \_\_\_\_\_

27  
28 Signature: \_\_\_\_\_