

1 THOMAS M. MCINERNEY STATE BAR NO. 162055  
 tmm@ogletreedeakins.com  
 2 MICHAEL J. NADER STATE BAR NO. 200425  
 michael.nader@ogletreedeakins.com,  
 3 OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.  
 Steuart Tower, Suite 1300  
 4 One Market Plaza  
 San Francisco, CA 94105  
 5 Telephone: 415.442.4810  
 Facsimile: 415.442.4870

6 Attorneys for Defendant  
 7 COVIDIEN

8 **UNITED STATES DISTRICT COURT**  
 9 **NORTHERN DISTRICT – SAN JOSE**

11 DAVID KOLKER,  
 12 Plaintiff,  
 13 v.  
 14 VNUS MEDICAL TECHNOLOGIES, INC.,  
 15 COVIDIEN AND DOES 1-20,  
 16 Defendants.

Case No. 5:10-cv-00900-JF  
 STIPULATED PROTECTIVE ORDER  
 Action Filed: December 1, 2009

18 1. PURPOSES AND LIMITATIONS

19 Disclosure and discovery activity in this action are likely to involve production of  
 20 confidential, proprietary, or private information for which special protection from public  
 21 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.  
 22 Accordingly, the parties hereby stipulate to and petition the court to enter the following  
 23 Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket  
 24 protections on all disclosures or responses to discovery and that the protection it affords from  
 25 public disclosure and use extends only to the limited information or items that are entitled to  
 26 confidential treatment under the applicable legal principles. The parties further acknowledge, as  
 27 set forth in Section 8, below, that this Stipulated Protective Order does not entitle them to file  
 28 confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be

1 followed and the standards that will be applied when a party seeks permission from the court to  
2 file material under seal.

3 2. DEFINITIONS

4 2.1 Challenging Party: a Party or Non-Party that challenges the designation of  
5 information or items under this Order.

6 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how  
7 it is generated, stored or maintained) or tangible things that qualify for protection under Federal  
8 Rule of Civil Procedure 26(c).

9 2.3 Counsel (without qualifier): Outside Counsel of Record and House  
10 Counsel (as well as their support staff).

11 2.4 Designating Party: a Party or Non-Party that designates information or  
12 items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

13 2.5 Disclosure or Discovery Material: all items or information, regardless of  
14 the medium or manner in which it is generated, stored, or maintained (including, among other  
15 things, testimony, transcripts, and tangible things), that are produced or generated in disclosures  
16 or responses to discovery in this matter.

17 2.6 Expert: a person with specialized knowledge or experience in a matter  
18 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert  
19 witness or as a consultant in this action.

20 2.7 House Counsel: attorneys who are employees of a party to this action.  
21 House Counsel does not include Outside Counsel of Record or any other outside counsel.

22 2.8 Non-Party: any natural person, partnership, corporation, association, or  
23 other legal entity not named as a Party to this action.

24 2.9 Outside Counsel of Record: attorneys who are not employees of a party to  
25 this 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.

28

1                   2.10 Party: any party to this action, including all of its officers, directors,  
2 employees, consultants, retained experts, and Outside Counsel of Record (and their support  
3 staffs).

4                   2.11 Producing Party: a Party or Non-Party that produces Disclosure or  
5 Discovery Material in this action.

6                   2.12 Professional Vendors: persons or entities that provide litigation support  
7 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
8 organizing, storing, or retrieving data in any form or medium) and their employees and  
9 subcontractors.

10                  2.13 Protected Material: any Disclosure or Discovery Material that is  
11 designated as “CONFIDENTIAL.”

12                  2.14 Receiving Party: a Party that receives Disclosure or Discovery Material  
13 from a Producing Party.

14                  3.     SCOPE

15                  The protections conferred by this Stipulation and Order cover not only Protected Material  
16 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)  
17 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,  
18 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.  
19 However, the protections conferred by this Stipulation and Order do not cover the following  
20 information: (a) any information that is in the public domain at the time of disclosure to a  
21 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as  
22 a result of publication not involving a violation of this Order, including becoming part of the  
23 public record through trial or otherwise; and (b) any information known to the Receiving Party  
24 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who  
25 obtained the information lawfully and under no obligation of confidentiality to the Designating  
26 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.  
27  
28

1           4.       DURATION

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

9           5.       DESIGNATING PROTECTED MATERIAL

10           5.1      Exercise of Restraint and Care in Designating Material for Protection.

11 Each Party or Non-Party that designates information or items for protection under this Order  
12 must take care to limit any such designation to specific material that qualifies under the  
13 appropriate standards. The Designating Party must designate for protection only those parts of  
14 material, documents, items, or oral or written communications that qualify – so that other  
15 portions of the material, documents, items, or communications for which protection is not  
16 warranted are not swept unjustifiably within the ambit of this Order.

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

21           If it comes to a Designating Party's attention that information or items that it designated  
22 for protection do not qualify for protection, that Designating Party must promptly notify all other  
23 Parties that it is withdrawing the mistaken designation.

24           5.2      Manner and Timing of Designations. Except as otherwise provided in this  
25 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
26 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
27 designated before the material is disclosed or produced.

28           Designation in conformity with this Order requires:

1 (a) for information in documentary form (e.g., paper or electronic documents,  
2 but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing  
3 Party affix the legend “CONFIDENTIAL” to each page that contains protected material. If only  
4 a portion or portions of the material on a page qualifies for protection, the Producing Party also  
5 must clearly identify the protected portion(s) (e.g., by making appropriate markings in the  
6 margins).

7 A Party or Non-Party that makes original documents or materials available for inspection  
8 need not designate them for protection until after the inspecting Party has indicated which  
9 material it would like copied and produced. During the inspection and before the designation, all  
10 of the material made available for inspection shall be deemed “CONFIDENTIAL.” After the  
11 inspecting Party has identified the documents it wants copied and produced, the Producing Party  
12 must determine which documents, or portions thereof, qualify for protection under this Order.  
13 Then, before producing the specified documents, the Producing Party must affix the  
14 “CONFIDENTIAL” legend to each page that contains Protected Material. If only a portion or  
15 portions of the material on a page qualifies for protection, the Producing Party also must clearly  
16 identify the protected portion(s) (e.g., by making appropriate markings in the margins).

17 (b) for testimony given in deposition or in other pretrial or trial proceedings,  
18 that the Designating Party identify on the record, before the close of the deposition, hearing, or  
19 other proceeding, all protected testimony.

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

25 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent  
26 failure to designate qualified information or items does not, standing alone, waive the  
27 Designating Party’s right to secure protection under this Order for such material. Upon timely  
28

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

3 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

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

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

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

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

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

17 7. ACCESS TO AND USE OF PROTECTED MATERIAL

18 7.1 Basic Principles. A Receiving Party may use Protected Material that is  
19 disclosed or produced by another Party or by a Non-Party in connection with this case only for  
20 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be  
21 disclosed only to the categories of persons and under the conditions described in this Order.  
22 When the litigation has been terminated, a Receiving Party must comply with the provisions of  
23 section 13 below (FINAL DISPOSITION).

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

26 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless  
27 otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving  
28 Party may disclose any information or item designated "CONFIDENTIAL" only to:

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

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

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

11 (d) the court and its personnel;

12 (e) court reporters and their staff, professional jury or trial consultants, mock  
13 jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation  
14 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

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

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

23 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN  
24 OTHER LITIGATION

25 If a Party is served with a subpoena or a court order issued in other litigation that compels  
26 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that  
27 Party must:  
28



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

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

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

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” before a determination by the court from which the subpoena or order  
12 issued, unless the Party has obtained the Designating Party’s permission. The Designating Party  
13 shall bear the burden and expense of seeking protection in that court of its confidential material –  
14 and nothing in these provisions should be construed as authorizing or encouraging a Receiving  
15 Party in this action to disobey a lawful directive from another court.

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

18 (a) The terms of this Order are applicable to information produced by a  
19 Non-Party in this action and designated as “CONFIDENTIAL.” Such information produced by  
20 Non-Parties in connection with this litigation is protected by the remedies and relief provided by  
21 this Order. Nothing in these provisions should be construed as prohibiting a Non-Party from  
22 seeking additional protections.

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

27  
28

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

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

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

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

17                   10.     UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

25  
26                   11.     INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE  
27 PROTECTED MATERIAL  
28

1           When a Producing Party gives notice to Receiving Parties that certain inadvertently  
2 produced material is subject to a claim of privilege or other protection, the obligations of the  
3 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This  
4 provision is not intended to modify whatever procedure may be established in an e-discovery  
5 order that provides for production without prior privilege review. Pursuant to

6           Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the  
7 effect of disclosure of a communication or information covered by the attorney-client privilege  
8 or work product protection, the parties may incorporate their agreement in the stipulated  
9 protective order submitted to the court.

10           12.    MISCELLANOUS

11                   12.1   Right to Further Relief. Nothing in this Order abridges the right of any  
12 person to seek its modification by the court in the future.

13                   12.2   Right to Assert Other Objections. By stipulating to the entry of this  
14 Protective Order no Party waives any right it otherwise would have to object to disclosing or  
15 producing any information or item on any ground not addressed in this Stipulated Protective  
16 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of  
17 the material covered by this Protective Order.

18                   12.3   Filing Protected Material. Without written permission from the  
19 Designating Party or a court order secured after appropriate notice to all interested persons, a  
20 Party may not file in the public record in this action any Protected Material. A Party that seeks to  
21 file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected  
22 Material may only be filed under seal pursuant to a court order authorizing the sealing of the  
23 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue  
24 only upon a request establishing that the Protected Material at issue is privileged, protectable as a  
25 trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to  
26 file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court,  
27 then the Receiving Party may file the information in the public record pursuant to Civil Local  
28 Rule 79- 5(e) unless otherwise instructed by the court.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DATED: February 10, 2011

OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, P.C.

By: /s/ Michael J. Nader  
Thomas J. McInerney  
Michael J. Nader  
Attorneys for Defendant COVIDIEN

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: March 10, 2011

Paul S. Grewal  
Hon. Paul S. Grewal

1 EXHIBIT A  
2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_  
4 \_\_\_\_\_ [print or type full address], declare under penalty of  
5 perjury that I have read in its entirety and understand the Stipulated Protective Order that was  
6 issued by the United States District Court for the Northern District of California on [date] in the  
7 case of DAVID KOLKER v. VNUS MEDICAL TECHNOLOGIES, INC., and COVIDIEN, Case  
8 No.: 5:10-CV-00900-JF . I agree to comply with and to be bound by all the terms of this  
9 Stipulated Protective Order and I understand and acknowledge that failure to so comply could  
10 expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will  
11 not disclose in any manner any information or item that is subject to this Stipulated Protective  
12 Order to any person or entity except in strict compliance with the provisions of this Order.

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

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

20  
21 Date: \_\_\_\_\_

22 City and State where sworn and signed: \_\_\_\_\_

23 Printed name: \_\_\_\_\_  
24 [printed name]

25 Signature: \_\_\_\_\_  
26 [signature]

27 9850523.1 (OGLETREE)

28