

## Exhibit B – Court’s Protective Order

Pursuant to the parties’ agreements and the Court’s resolution of the issues upon which the parties could not agree, the Court enters the following protective order.

Plaintiff Profil Institut für Stoffwechselforschung GmbH and Defendant ProSciento, Inc. (collectively referred to herein as the “Parties,” and individually as a “Party”) recognize that at least some of the documents and information being sought through discovery in the above-captioned actions are, for competitive reasons, normally kept confidential by the Parties. Accordingly, the Parties have agreed to be bound by the terms of this Protective Order (“Order” or “Protective Order”) in these Actions.

The materials to be exchanged throughout the course of the litigation between the Parties may contain trade secret or other confidential research, technical, cost, price, marketing or other commercial information, as is contemplated by Federal Rule of Civil Procedure 26(c). The purpose of this Order is to protect the confidentiality of such materials as much as practical during the litigation.

### **1. DEFINITIONS**

a. The term “Actions” means *Profil Institute für Stoffwechselforschung GmbH (“GmbH”) v. ProSciento, Inc. (“Institute”)*, Case No. 16-cv-1549-LAB BLM (filed June 20, 2016) and *Profil Institute für Stoffwechselforschung GmbH (“GmbH”) v. ProSciento, Inc. (“Institute”)*, Case No. 16-cv-2762-LAB (BLM) (filed Nov. 9, 2016).

b. The term “Materials” will include, but is not be limited to: documents; information; correspondence; memoranda; bulletins; blueprints; specifications; customer lists or other material that identify customers or potential customers; price lists or schedules or other matter identifying pricing; minutes; telegrams; letters; statements; cancelled checks; contracts; invoices; drafts; books of account; worksheets; notes of conversations; desk diaries; appointment books; expense accounts; recordings; photographs; motion

pictures; compilations from which information can be obtained and translated into reasonably usable form through detection devices; sketches; drawings; notes (including laboratory notebooks and records); reports; instructions; disclosures; other writings; models and prototypes and other physical objects.

c. The term "Discovery Material" means all Materials from any Party or non-party, regardless of the medium or manner generated, stored, or maintained (including, among other things, testimony, transcripts, or tangible things), that are produced, disclosed, or generated in connection with discovery or Fed. R. Civ. P. 26(a) disclosures in this case. Discovery Material may be used solely for the purposes of the Actions. Discovery Material may not, for example, be used for any commercial, competitive or anti-competitive purpose, including but not limited to, identification of a Party's customers or potential customers, or to facilitate communication with a Party's customers or potential customers.

d. The term "Outside Counsel" means (i) outside counsel of record, who appear on the pleadings as counsel for a Party, co-counsel, and (ii) other attorneys (partners and associates), paralegals, secretaries, and other support staff of such counsel to whom it is reasonably necessary to disclose the information for this litigation.

e. The term "Party" means any party to this case, including all of its officers, directors, employees, consultants, retained experts, in-house counsel, and outside counsel and their support staffs.

f. The term "Producing Party" means any Party that discloses or produces any Discovery Material in this case.

g. The term "Protected Personal Data" means information that a Party or non-party believes in good faith to be protected from disclosure by data privacy laws of the European Union. Examples of such data protection laws include but are not limited to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L281/31) (European Union personal information); and

the German Federal Data Protection Act (Germany personal information). Such laws are not, and shall not be asserted as, grounds to refuse to search for any relevant discovery in these Actions.

h. The term "Protected Material" means any Discovery Material that is designated as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL'S EYES ONLY," as provided for in this Order.

i. The term "Receiving Party" means any Party who receives Discovery Material from a Producing Party.

## **2. COMPUTATION OF TIME**

The computation of any period of time prescribed or allowed by this Order shall be governed by the provisions for computing time set forth in Federal Rules of Civil Procedure 6.

## **3. SCOPE**

a. The protections conferred by this Order cover not only Discovery Material governed by this Order as addressed herein, but also any information copied or extracted there from, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by Parties or their counsel in court or in other settings that might reveal Protected Material.

b. Nothing in this Protective Order shall prevent or restrict a Producing Party's own disclosure or use of its own Protected Material for any purpose, and nothing in this Order shall preclude any Producing Party from showing its Protected Material to an individual who prepared the Protected Material.

c. Pursuant to paragraph 13 regarding sealed filings, this Order shall not prejudice any Party's right to use any Protected Material in a sealed courtroom or in any sealed court filing.

d. This Order is without prejudice to the right of any Party to seek further or additional protection of any Discovery Material or to seek modification of this Order,

including, without limitation, seeking an order from the Court that certain matter not be produced at all.

#### **4. DURATION**

Even after the termination of this case, the confidentiality obligations imposed by this Order shall remain in effect until a Producing Party agrees otherwise in writing or a court order otherwise directs.

#### **5. ACCESS TO AND USE OF PROTECTED MATERIAL**

a. Basic Principles. Protected Material shall not be distributed, disclosed or made available to anyone except as expressly provided in this Order.

b. Secure Storage. Protected Material must be stored and maintained by a Receiving Party in a secure manner that ensures that access is limited to the persons authorized under this Order.

c. Legal Advice Based on Protected Material. Nothing in this Protective Order shall be construed to prevent counsel from advising their clients with respect to this case based in whole or in part upon Protected Material, provided counsel does not disclose the Protected Material or its substance to their clients, except as provided in this Order.

d. Limitations. Nothing in this Order shall restrict in any way a Producing Party's use or disclosure of its own Protected Material. Nothing in this Order shall restrict in any way the use or disclosure of Discovery Material by a Receiving Party:

i. that is or has become publicly known through no fault of the Receiving Party; (ii) that is lawfully acquired by or known to the Receiving Party independent of the Producing Party; (iii) previously produced, disclosed and/or provided by the Producing Party to the Receiving Party or a non-party without an obligation of confidentiality and not by inadvertence or mistake; (iv) with the consent of the Producing Party; or (v) pursuant to order of the Court.

#### **6. DESIGNATING PROTECTED MATERIAL**

a. Available Designations. Any Producing Party may designate Discovery Material

with any of the following designations, provided that it meets the requirements for such designations as provided for herein: "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL'S EYES ONLY."

b. Written Discovery and Documents and Tangible Things. Written discovery, documents (which include "electronically stored information," as that phrase is used in Federal Rule of Civil Procedure 34), and tangible things that meet the requirements for the confidentiality designations listed in Paragraph 6(a) may be so designated by placing the appropriate designation on every page of the written material prior to production. For digital files being produced, the Producing Party may mark each viewable page or image with the appropriate designation, and mark the medium, container, and/or communication in which the digital files were contained. In the event that original documents are produced for inspection, the original documents shall be presumed "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL'S EYES ONLY" during the inspection and re-designated, as appropriate during the copying process.

c. Native Files. Where electronic files and documents are produced in native electronic format, such electronic files and documents shall be designated for protection under this Order by appending to the file names (or designators) and to the slip-sheets representing the native documents within the imaged files (pursuant to the ESI Stipulation and Order) information indicating whether the file contains "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL'S EYES ONLY" material, or shall use any other reasonable method for so designating Protected Material produced in native electronic format. When native electronic files or documents are printed for use at deposition, in a court proceeding, or for provision in printed form to an expert or consultant preapproved pursuant to paragraph 10, the Party printing the native electronic files or documents shall affix a legend to the printed document corresponding to the designation of the Producing Party and including the production number and designation associated with the native file.

d. Depositions and Testimony. Parties or testifying persons or entities may designate depositions and other testimony with the appropriate designation by indicating such designation on the record at the time the testimony is given, or by sending written notice of how portions of the transcript of the testimony should be designated within fourteen (14) days of receipt of the certified deposition transcript. If no indication on the record is made, all information disclosed during a deposition shall be deemed "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL'S EYES ONLY" until the time within which it may be appropriately designated as provided for herein has passed. Any Protected Material that is used in the taking of a deposition shall remain subject to the provisions of this Protective Order, along with the transcript pages of the deposition testimony dealing with such Protected Material. In such cases the court reporter shall be informed of this Protective Order and shall be required to operate in a manner consistent with this Protective Order. In the event the deposition is videotaped, the original and all copies of the videotape shall be marked by the video technician to indicate that the contents of the videotape are subject to this Protective Order, substantially along the lines of "This videotape contains confidential testimony used in this case and is not to be viewed or the contents thereof to be displayed or revealed except pursuant to the terms of the operative Protective Order in this matter or pursuant to written stipulation of the parties." Counsel for any Producing Party shall have the right to exclude from oral depositions, other than the deponent, deponent's counsel, the reporter and videographer (if any), any person who is not authorized by this Protective Order to receive or access Protected Material based on the designation of such Protected Material. Such right of exclusion shall be applicable only during periods of examination or testimony regarding such Protected Material.

## **7. DISCOVERY MATERIAL DESIGNATED AS "CONFIDENTIAL"**

a. A Producing Party may designate Discovery Material as "CONFIDENTIAL" if the Producing Party believes in good faith that it contains or reflects confidential, proprietary, commercially sensitive, and/or other information the unrestricted disclosure of which could

be potentially prejudicial to the business or operation of the Producing Party.

b. Unless otherwise ordered by the Court, Discovery Material designated as "CONFIDENTIAL" may be disclosed only to the following:

i. The Receiving Party's Outside Counsel, such counsel's immediate paralegals and staff, and any copying or clerical litigation support services working at the direction of such counsel, paralegals, and staff;

ii. The Receiving Party's in-house counsel, as well as their immediate paralegals and staff, to whom disclosure is reasonably necessary provided that each such person has agreed to be bound by the provisions of the Protective Order by signing a copy of Exhibit A;

iii. Officers or employees of the Receiving Party who are required to participate in decision making for these Actions, as well as their immediate staff, to whom disclosure is reasonably necessary for this case, and technical employees of the Receiving Party with whom Counsel for the Receiving Party find it necessary to consult in prosecuting or defending these Actions, provided that each such person has agreed to be bound by the provisions of the Protective Order by signing a copy of Exhibit A;

iv. Any expert or consultant retained by the Receiving Party to assist in these Actions, provided that disclosure is only to the extent necessary to perform such work; and provided that: (a) such expert or consultant has agreed to be bound by the provisions of the Protective Order by signing a copy of Exhibit A; and (b) no unresolved objections to such disclosure exist after proper notice has been given to all Parties as set forth in Paragraph 10 below.

v. Witnesses at deposition and/or trial for the Producing Party of the Protected Material, provided that such witnesses may not retain copies of Protected Material unless permitted by other provisions of this Order;

vi. With respect to a particular document, witnesses at deposition and/or trial who are shown on the face of the document to have been an author, source, or recipient

of the document, or are otherwise identified as a custodian for such document, or who are or were an officer, director, or employee of the Producing Party of Protected Material, or the Producing Party's corporate representative, including for the purposes of a deposition provided for in Federal Rule 30(b)(6), provided that such witnesses may not retain copies of the Protected Material unless permitted by other provisions of this Order;

vii. Court reporters, stenographers and videographers retained to record testimony taken in these Actions;

viii. The Court, jury, and court personnel;

ix. Graphics, translation, design, and/or trial consulting personnel, having first agreed to be bound by the provisions of the Protective Order by signing a copy of Exhibit A;

x. Mock jurors who have signed an undertaking or agreement agreeing not to publicly disclose Protected Material and to keep any information concerning Protected Material confidential;

xi. Any mediator who is assigned to hear this matter, and his or her staff, subject to their agreement to maintain confidentiality to the same degree as required by this Protective Order; and

xii. Any other person with the prior written consent of the Producing Party.

## **8. DISCOVERY MATERIAL DESIGNATED AS "HIGHLY CONFIDENTIAL"**

a. A Producing Party may designate Discovery Material as "HIGHLY CONFIDENTIAL" if the Producing Party believes in good faith that it contains or reflects information that is extremely confidential and/or sensitive in nature such that the disclosure of such Discovery Material is likely to cause economic harm or competitive disadvantage to the Producing Party.

b. Unless otherwise ordered by the Court, Discovery Material designated as "HIGHLY CONFIDENTIAL" may be disclosed only to:

i. The Receiving Party's Outside Counsel, provided that such Outside

Counsel is not involved in competitive-decision making on behalf of a Party or a competitor of a Party, and such Outside Counsel's immediate paralegals and staff, and any copying or clerical litigation support services working at the direction of such counsel, paralegals, and staff;

ii. Not more than four (4) corporate representatives of the Receiving Party, who may be, but need not be, in-house counsel for the Receiving Party, and who have settlement authority over these Actions, as well as their immediate staff to whom disclosure is reasonably necessary, provided that: (a) each such person has agreed to be bound by the provisions of the Protective Order by signing a copy of Exhibit A;

iii. Any expert or consultant retained by the Receiving Party to assist in these Actions, provided that disclosure is only to the extent necessary to perform such work; and provided that: (a) such expert or consultant has agreed to be bound by the provisions of the Protective Order by signing a copy of Exhibit A; and (b) no unresolved objections to such disclosure exist after proper notice has been given to all Parties as set forth in Paragraph 10 below;

iv. Witnesses from the Producing Party of the Protected Material at deposition and/or trial, provided that such witnesses may not retain copies of Protected Material unless permitted by other provisions of this Order;

v. With respect to a particular document, witnesses at deposition and/or trial who are shown on the face of the document to have been an author, source, or recipient of the document, or are otherwise identified as a custodian for such document, or who are or were an officer, director, or employee of the Producing Party of Protected Material, or the Producing Party's corporate representative, including for the purposes of a deposition provided for in Federal Rule 30(b)(6), provided that such witnesses may not retain copies of the Protected Material unless permitted by other provisions of this Order;

vi. Court reporters, stenographers and videographers retained to record testimony taken in these Actions;

- vii. The Court, jury, and court personnel;
- viii. Graphics, translation, design, and/or trial consulting personnel, having first agreed to be bound by the provisions of the Protective Order by signing a copy of Exhibit A;
- ix. Any mediator who is assigned to hear this matter, and his or her staff, subject to their agreement to maintain confidentiality to the same degree as required by this Protective Order; and
- x. Any other person with the prior written consent of the Producing Party.

**9. DISCOVERY MATERIAL DESIGNATED AS “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY”**

a. A Producing Party may designate Discovery Material as “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” if the Producing Party believes in good faith that it contains or reflects trade secret(s), as defined in the Uniform Trade Secrets Act and California Civil Code 3426-3426.11, or that it contains extremely sensitive confidential information, the disclosure of which would create a substantial risk of serious harm that cannot be avoided by less restrictive means. This designation shall not apply to any information that either Party alleges was misappropriated. Nor shall any Party attempt to use this designation for such information. To resolve any doubt: information that a party alleges was misappropriated will, if designated at all, be designated as “Confidential,” or “Highly Confidential,” but may not be designated “Highly Confidential—Outside Counsel’s Eyes Only.”

b. Any party may, subject to the provisions of Paragraph 17, redact Protected Personal Data that it claims, in good faith, requires protections under the terms of this Order, or pursuant to applicable privacy laws, but only with notice to the opposing party of the nature of information redacted, and only to the extent that a “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” designation alone is insufficient to protect such data under applicable privacy laws. The right to challenge and process for challenging the designation

of redactions shall be the same as the right to challenge and process for challenging the designation of Protected Materials as set forth in paragraph 11.

c. Unless otherwise ordered by the Court, Discovery Material designated as “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” may be disclosed, subject to Paragraph 10 below, solely to:

i. The Receiving Party’s Outside Counsel, provided that such Outside Counsel is not involved in competitive-decision making on behalf of a Party or a competitor of a Party, and such Outside Counsel’s immediate paralegals and staff, and any copying or clerical litigation support services working at the direction of such counsel, paralegals, and staff;

ii. Any expert or consultant retained by the Receiving Party to assist in these Actions, provided that disclosure is only to the extent necessary to perform such work; and provided that: (a) such expert or consultant has agreed to be bound by the provisions of the Protective Order by signing a copy of Exhibit A; and (b) no unresolved objections to such disclosure exist after proper notice has been given to all Parties as set forth in Paragraph 10 below;

iii. Witnesses from the Producing Party of the Protected Material at deposition and/or trial, provided that such witnesses may not retain copies of Protected Material unless permitted by other provisions of this Order and provided that such Discovery Material does not include Protected Personal Data;

iv. With respect to a particular document, witnesses at deposition and/or trial who are shown on the face of the document to have been an author, source, or recipient of the document, or are otherwise identified as a custodian for such document, or who are or were an officer, director, or employee of the Producing Party of Protected Material, or the Producing Party’s corporative representative, including for the purposes of a deposition provided for in Federal Rule 30(b)(6), provided that such witnesses may not retain copies of the Protected Material unless permitted by other provisions of this Order;

v. Court reporters, stenographers and videographers retained to record testimony taken in these Actions;

vi. The Court, jury, and court personnel;

vii. Any mediator who is assigned to hear this matter, and his or her staff, subject to their agreement to maintain confidentiality to the same degree as required by this Protective Order; and

viii. Any other person with the prior written consent of the Producing Party.

## **10. NOTICE OF DISCLOSURE**

a. Prior to disclosing any Protected Material to any person described in Paragraphs 7(b)(iv), 8(b)(iii), or 9(d)(ii) (referenced below as "Person"), the Party seeking to disclose such information shall provide the Producing Party with written notice that includes: (i) the name of the Person; (ii) the present employer and title of the Person; (iii) an identification of all of the Person's past (up to the last five (5) years) and current employment and consulting relationships, including direct relationships and relationships through entities owned or controlled by the Person; (iv) an up-to-date curriculum vitae of the Person; (v) a list of the cases in which the Person has testified at deposition or trial within the last five (5) years; and (vi) a signed copy of Exhibit A. Said written notice shall include an identification of any individual or entity with whom, or for whom, the Person is employed or to whom the Person provides consulting services relating to the subject matter of the present action. The Party seeking to disclose Protected Material shall provide such other information regarding the Person's professional activities reasonably requested by the Producing Party for it to evaluate whether good cause exists to object to the disclosure of Protected Material to the Person. During the pendency of these Actions, including all appeals, the Party seeking to disclose Protected Material shall immediately provide written notice of any change with respect to the Person's employment or involvement in providing consulting services relating to the subject matter of the present action.

b. Within 14 days of receipt of the disclosure of the Person, the Producing Party

or Parties may object in writing to the Person for good cause. In the absence of an objection at the end of the 14 day period, the Person shall be deemed approved under this Protective Order. There shall be no disclosure of Protected Material to the Person prior to expiration of this 14 day period. If the Producing Party objects to disclosure to the Person within such 14 day period, the Parties shall meet and confer via telephone or in person within seven (7) days following the objection and attempt in good faith to resolve the dispute on an informal basis. If the dispute is not resolved, the Party objecting to the disclosure will have seven (7) days from the date of the meet and confer to seek relief from the Court. If relief is not sought from the Court within that time, the objection shall be deemed withdrawn. If relief is sought, the Protected Material shall not be disclosed to the Person in question until the Court resolves the objection.

c. For purposes of this section, "good cause" shall include an objectively reasonable concern that the Person will, advertently or inadvertently, use or disclose Protected Material in a way or ways that are inconsistent with the provisions contained in this Order.

d. Prior to receiving any Protected Material under this Order, the Person must execute a copy of the "Agreement to Be Bound by Protective Order" (Exhibit A hereto) and serve it on all Parties.

e. An initial failure to object to a Person under this Paragraph shall not preclude the non-objecting Party from later objecting to continued access by that Person for good cause. If an objection is made, the Parties shall meet and confer via telephone or in person within seven (7) days following the objection and attempt in good faith to resolve the dispute informally. If the dispute is not resolved, the Party objecting to the disclosure will have seven (7) days from the date of the meet and confer to seek relief from the Court. While such objection is pending, the designated Person may not have access to Protected Material.

## **11. CHALLENGING DESIGNATIONS OF PROTECTED MATERIAL**

a. A Party shall not be obligated to challenge the propriety of any designation of

Discovery Material under this Order at the time the designation is made, and a failure to do so shall not preclude a subsequent challenge thereto.

b. Any challenge to a designation of Discovery Material under this Order shall be written, shall be served on outside counsel for the Producing Party, shall particularly identify the documents or information that the Receiving Party contends should be differently designated, and shall state the grounds for the objection. Thereafter, further protection of such material shall be resolved in accordance with the following procedures:

i. The Receiving Party shall have the burden of conferring either in person, in writing, or by telephone with the Producing Party claiming protection (as well as any other interested party) in a good faith effort to resolve the dispute;

ii. Failing agreement, the Receiving Party may bring a motion to the Court for a ruling that the Discovery Material in question is not entitled to the status and protection of the Producing Party's designation. The Parties' entry into this Order shall not preclude or prejudice either Party from arguing for or against any designation, establish any presumption that a particular designation is valid, or alter the burden of proof that would otherwise apply in a dispute over discovery or disclosure of information;

iii. Notwithstanding any challenge to a designation, the Discovery Material in question shall continue to be treated as designated under this Order until one of the following occurs: (a) the Party who designated the Discovery Material in question withdraws such designation in writing; or (b) the Court rules that the Discovery Material in question is not entitled to the designation.

## **12. SUBPOENAS OR COURT ORDERS**

a. If at any time Protected Material is subpoenaed by any court, arbitral, administrative, or legislative body, the Party to whom the subpoena or other request is directed shall immediately give prompt written notice thereof to every Party who has produced such Protected Material and to its counsel and shall provide each such Party with an opportunity to move for a protective order regarding the production of Protected Material

implicated by the subpoena.

**13. FILING PROTECTED MATERIAL**

a. Absent written permission from the Producing Party or a court Order secured after appropriate notice to all interested persons, a Receiving Party may not file or disclose in the public record any Protected Material.

b. A Party is authorized to file under seal with the Court any brief, document or materials that are designated as Protected Material under this Order.

**14. INADVERTENT DISCLOSURE OF PRIVILEGED MATERIAL**

a. Disclosure (including production) of Materials that a Party, or non-party, later claims should not have been disclosed because of a privilege, including, but not limited to, the attorney-client privilege or work product doctrine ("Privileged Information"), shall not, for the purposes of the Actions or any other proceeding in any other court, constitute a waiver by that Party of any privilege or protection applicable to the Materials. The provisions of Fed. R. Evid. 502(b) are inapplicable to the production of documents or information under this Order. Specifically, there has been no waiver if a Party discloses privileged or protected information, inadvertently or otherwise, regardless of whether the party took reasonable steps to prevent the disclosure or to rectify the error.

b. The Receiving Party agrees to return, sequester, or destroy any Privileged Information disclosed or produced by the Producing Party, or non-party, upon request. If the Receiving Party reasonably believes that Privileged Information has been inadvertently disclosed or produced to it, it shall promptly notify the Producing Party and sequester such information until instructions as to disposition are received.

c. The failure of any Party to provide notice or instructions under this Paragraph 14 shall not constitute a waiver of, or estoppel as to, any claim of attorney-client privilege, attorney work product, or other ground for withholding production as to which the Producing Party would be entitled in these Actions or any other federal or state proceeding.

## **15. INADVERTENT FAILURE TO DESIGNATE DISCOVERY MATERIAL**

a. The inadvertent failure by a Producing Party to designate Discovery Material as Protected Material with one of the designations provided for under this Order shall not waive any such designation, and may be remedied by prompt supplemental written notice upon discovery of the inadvertent disclosure, with the effect that such Discovery Material will be subject to the protections of this Order. The Producing Party shall reproduce the Protected Material with the correct confidentiality designation upon notifying the Receiving Party. Upon receiving the Protected Material with the correct confidentiality designation, the Receiving Party shall return or securely destroy, at the Producing Party's option, all Discovery Material that was not designated properly.

b. A Receiving Party shall not be in breach of this Order for its use of such Discovery Material prior to receiving written notice of inadvertent disclosure, so long as such prior use was consistent with the Discovery Material's prior designation. To the extent Discovery Material appears as if it should have been appropriately designated with a confidentiality designation under this Order but such Discovery Material is not so marked or appears to have been inappropriately marked the Receiving Party shall make all reasonable efforts to promptly notify the Producing Party of such discrepancy. Once a Receiving Party has received notification of the correct confidentiality designation for the Protected Material with the correct confidentiality designation, the Receiving Party shall treat such Discovery Material (subject to the exception in Paragraph 15(c) below) at the appropriately designated level pursuant to the terms of this Order.

c. Notwithstanding the above, a subsequent designation of "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL'S EYES ONLY" shall apply on a going forward basis and shall not apply to anyone who reviewed "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL'S EYES ONLY" materials while the materials were not marked "HIGHLY CONFIDENTIAL," or "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL'S EYES ONLY."

## **16. ADDITIONAL PARTIES OR ATTORNEYS**

a. In the event additional parties join or intervene in these Actions, the newly joined party(ies) shall not have access to Protected Material until its/their counsel has executed and, at the request of any Party, filed with the Court the agreement of such party(ies) and such counsel to be fully bound by this Order. If any additional attorneys make appearances in this Litigation, those attorneys shall not have access to Protected Material until they execute Exhibit A attached hereto.

## **17. REDACTION**

a. Any Producing Party may redact from the documents and things it produces matter that the Producing Party claims is subject to attorney-client privilege, work product immunity, a legal prohibition against disclosure, including materials subject to federal, state or foreign data protection laws or other privacy obligations, or any other privilege or immunity. The Producing Party shall mark each thing where matter has been redacted with a legend stating "REDACTED." Where a document consists of more than one page, at least each page on which information has been redacted shall be so marked. The Producing Party shall preserve an unredacted version of each such document. The right to challenge and process for challenging the designation of redactions shall be the same as the right to challenge and process for challenging the designation of Protect Materials as set forth in paragraph 11.

## **18. INADVERTENT DISCLOSURE NOT AUTHORIZED BY ORDER**

a. In the event of a disclosure of any Discovery Material pursuant to this Order to any person or persons not authorized to receive such disclosure under this Protective Order, the Party responsible for having made such disclosure, and each Party with knowledge thereof, shall immediately notify counsel for the Producing Party whose Discovery Material has been disclosed and provide to such counsel all known relevant information concerning the nature and circumstances of the disclosure. The responsible disclosing Party shall also promptly take all reasonable measures to retrieve the improperly disclosed Discovery Material

and to ensure that no further or greater unauthorized disclosure and/or use thereof is made.

b. Unauthorized or inadvertent disclosure does not change the status of Discovery Material or waive the right to hold the disclosed document or information as Protected Material.

## **19. FINAL DISPOSITION**

a. Not later than ninety (90) days after the Final Disposition of this case, each Party shall return all Discovery Material of a Producing Party to the respective outside counsel of the Producing Party or destroy such Material, at the option of the Producing Party. For purposes of this Order, "Final Disposition" occurs after an order, mandate, or dismissal finally terminating the above-captioned action with prejudice, including all appeals.

b. All Parties that have received any such Discovery Material shall certify in writing that all such materials have been returned to the respective outside counsel of the Producing Party or destroyed. Notwithstanding the provisions for return of Discovery Material, outside counsel may retain one set of pleadings, correspondence and attorney and consultant work product (but not document productions) for archival purposes.

## **20. DISCOVERY FROM EXPERTS OR CONSULTANTS**

a. Testifying experts shall not be subject to discovery with respect to any draft of their report(s) in this case. Draft reports, notes, or outlines for draft reports developed and drafted by the testifying expert and/or his or her staff are also exempt from discovery. Discovery of materials provided to testifying experts shall be limited to those materials, facts, consulting expert opinions, and other matters actually relied upon by the testifying expert in forming the expert's final report, trial, or deposition testimony or any opinion in this case.

b. No discovery can be taken from any non-testifying expert except to the extent that such non-testifying expert has provided information, opinions, or other materials to a testifying expert relied upon by that testifying expert in forming his or her final report(s), trial, and/or deposition testimony or any opinion in this case.

c. No conversations or communications between counsel and any testifying or

consulting expert will be subject to discovery except to the extent that the communications: (i) relate to the expert's compensation for the expert's study or testimony; (ii) identify facts or data that counsel provided and the expert considered in forming the expert's opinions; or (iii) identify assumptions that counsel provided and the expert relied on in forming the expert's opinions.

d. Materials, communications, and other information exempt from discovery under the foregoing Paragraphs 20(a)-(c) shall be treated as attorney-work product for the purposes of this litigation and Order.

## **21. MISCELLANEOUS**

a. Right to Further Relief. Nothing in this Order abridges the right of any person to seek modification of the Order by the Court in the future. By stipulating to this Order, the Parties do not waive the right to argue that certain material may require additional or different confidentiality protections than those set forth herein.

b. Termination of Matter and Retention of Jurisdiction. The Parties agree that the terms of this Protective Order shall survive and remain in effect after the Final Determination of the above-captioned matter. The Court shall retain jurisdiction after Final Determination of this matter to hear and resolve any disputes arising out of this Protective Order.

c. Successors. This Order shall be binding upon the Parties hereto, their attorneys, and their successors, executors, personal representatives, administrators, heirs, legal representatives, assigns, subsidiaries, divisions, employees, agents, retained consultants and experts, and any persons or organizations over which they have direct control.

d. Right to Assert Other Objections. By stipulating to the entry of this Protective Order, no Party waives any right it otherwise would have to object to disclosing or producing any information or item. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order. This Order shall not constitute a waiver of the right of any Party to claim in these Actions or otherwise that any Discovery Material, or any portion thereof, is privileged or otherwise non-discoverable, or is

not admissible in evidence in these Actions or any other proceeding.

e. Burdens of Proof. Notwithstanding anything to the contrary above, nothing in this Protective Order shall be construed to change the burdens of proof or legal standards applicable in disputes regarding whether particular Discovery Material is confidential, which level of confidentiality is appropriate, whether disclosure should be restricted, and if so, what restrictions should apply.

f. Modification by Court. This Order is subject to further court order based upon public policy or other considerations, and the Court may modify this Order *sua sponte* in the interests of justice. The United States District Court for the Southern District of California is responsible for the interpretation and enforcement of this Order. All disputes concerning Protected Material, however designated, produced under the protection of this Order shall be resolved by the United States District Court for the Southern District of California.

g. Discovery Rules Remain Unchanged. Nothing herein shall alter or change in any way the discovery provisions of the Federal Rules of Civil Procedure, the Local Rules for the United States District Court for the Southern District of California, or the Court's own Chamber Rules and orders.

**IT IS SO ORDERED.**

Dated: 7/3/2017

  
Hon. Barbara L. Major  
United States Magistrate Judge

1 **EXHIBIT A**

2  
3 UNITED STATES DISTRICT COURT  
4 SOUTHERN DISTRICT OF CALIFORNIA

5 **PROFIL INSTITUT FÜR**  
6 **STOFFWECHSELFORSCHUNG GMBH,**  
7 Plaintiff,

Case No. 3:16-cv-01549-LAB (BLM)

8 v.  
9 PROSCIENTO, INC.,  
10 Defendant.

**AGREEMENT TO BE BOUND BY**  
**PROTECTIVE ORDER**

11 **PROSCIENTO, INC.,**  
12 Counterclaimant,

13 v.  
14 **PROFIL INSTITUT FÜR**  
15 **STOFFWECHSELFORSCHUNG GMBH,**  
16 Counterclaim-Defendant.

17 I, \_\_\_\_\_, acknowledge and declare that I have received a copy of the  
18 Protective Order ("Order") in the above captioned matter. Having read and understood the terms  
19 of the Order, I agree to be bound by the terms of the Order and consent to the jurisdiction of  
20 this Court for the purpose of any proceeding to enforce the terms of the Order.  
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