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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OAKLEY, INC., a Washington
corporation,

Plaintiff,

v.

LIOPSUN INTERNATIONAL
CORPORATION, a California
corporation,

Defendant.

CASE NO. 17CV1838 CAB (BGS)

**ORDER GRANTING JOINT
MOTION FOR ENTRY OF
STIPULATED
PROTECTIVE ORDER**

The Court GRANTS the parties Joint Motion for entry of the Stipulated Protective Order as set forth below.¹ The Court recognizes that at least some of the documents and information (“materials”) being sought through discovery in the above-captioned action are, for competitive reasons, normally kept confidential by the parties. The parties have agreed to be bound by the terms of this Protective Order (“Order”) in this action.

¹ The Court modifies the language submitted by the parties in paragraph 12 and adds an addendum, Protective Orders and Requests to File under Seal in Civil Cases, to conform the Stipulated Protective Order to the Hon. Cathy Ann Bencivengo’s Civil Case Procedures, Section V.

1 The materials to be exchanged throughout the course of the litigation between
2 the parties may contain trade secret or other confidential research, technical, cost,
3 price, marketing or other commercial information, as is contemplated by Federal
4 Rule of Civil Procedure 26(c)(7). The purpose of this Order is to protect the
5 confidentiality of such materials as much as practical during the litigation.
6 THEREFORE:

7
8 **DEFINITIONS**

9 1. The term “Confidential Information” shall mean and include
10 information contained or disclosed in any materials, including documents, portions
11 of documents, answers to interrogatories, responses to requests for admissions, trial
12 testimony, deposition testimony, and transcripts of trial testimony and depositions,
13 including data, summaries, and compilations derived therefrom that is deemed to be
14 Confidential Information by any party to which it belongs.

15 2. The term “materials” shall include, but shall not be limited to:
16 documents; correspondence; memoranda; bulletins; blueprints; specifications;
17 customer lists or other material that identify customers or potential customers; price
18 lists or schedules or other matter identifying pricing; minutes; telegrams; letters;
19 statements; cancelled checks; contracts; invoices; drafts; books of account;
20 worksheets; notes of conversations; desk diaries; appointment books; expense
21 accounts; recordings; photographs; motion pictures; compilations from which
22 information can be obtained and translated into reasonably usable form through
23 detection devices; sketches; drawings; notes (including laboratory notebooks and
24 records); reports; instructions; disclosures; other writings; models and prototypes and
25 other physical objects.

26 3. The term “Counsel” shall mean outside counsel of record, its attorneys,
27 paralegals, secretaries, and other support staff that are employed by outside counsel
28 of record or working directly for outside counsel of record.

1 ///

2 **GENERAL RULES**

3 4. Each party to this litigation that produces or discloses any materials,
4 answers to interrogatories, responses to requests for admission, trial testimony,
5 deposition testimony, and transcripts of trial testimony and depositions, or
6 information that the producing party believes should be subject to this Protective
7 Order may designate the same as “CONFIDENTIAL” or “HIGHLY
8 CONFIDENTIAL - FOR COUNSEL ONLY.”

9 a. Designation as “CONFIDENTIAL”: Any party may designate
10 information as “CONFIDENTIAL” only if, in the good faith belief of such party and
11 its counsel, the unrestricted disclosure of such information could be potentially
12 prejudicial to the business or operations of such party.

13 b. Designation as “HIGHLY CONFIDENTIAL - FOR COUNSEL
14 ONLY”: Any party may designate information as “HIGHLY CONFIDENTIAL -
15 FOR COUNSEL ONLY” only if, in the good faith belief of such party and its
16 counsel, the information is among that considered to be most sensitive by the party,
17 including but not limited to trade secret or other confidential research, development,
18 financial or other commercial information.

19 c. Mass, indiscriminate, or routinized designations are prohibited.
20 Designations that are shown to be clearly unjustified or that have been made for an
21 improper purpose (e.g., to unnecessarily encumber the case development process or
22 to impose unnecessary expenses and burdens on other parties) may expose the
23 designating party to sanctions.

24 d. If it comes to a designating party’s attention that information or
25 items that it designated for protection do not qualify for protection, that designating
26 party must promptly notify all other parties that it is withdrawing the inapplicable
27 designation.
28

1 5. In the event the producing party elects to produce materials for
2 inspection, no marking need be made by the producing party in advance of the initial
3 inspection. For purposes of the initial inspection, all materials produced shall be
4 considered as “HIGHLY CONFIDENTIAL - FOR COUNSEL ONLY,” and shall be
5 treated as such pursuant to the terms of this Order. Thereafter, upon selection of
6 specified materials for copying by the inspecting party, the producing party shall,
7 within a reasonable time prior to producing those materials to the inspecting party,
8 mark the copies of those materials that contain Confidential Information with the
9 appropriate confidentiality marking.

10 6. Whenever a deposition taken on behalf of any party involves a
11 disclosure of Confidential Information of any party:

12 a. said deposition or portions thereof shall be designated as
13 containing Confidential Information subject to the provisions of this Order; such
14 designation shall be made on the record whenever possible, but a party may designate
15 portions of depositions as containing Confidential Information after transcription of
16 the proceedings; a party shall have until thirty (30) days after receipt of the deposition
17 transcript to inform the other party or parties to the action of the portions of the
18 transcript designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - FOR
19 COUNSEL ONLY;”

20 b. the disclosing party shall have the right to exclude from
21 attendance at said deposition, during such time as the Confidential Information is to
22 be disclosed, any person other than the deponent, counsel (including their staff and
23 associates), the court reporter, and the person(s) agreed upon pursuant to paragraph
24 8 below; and

25 c. the originals of said deposition transcripts and all copies thereof
26 shall bear the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - FOR
27 COUNSEL ONLY,” as appropriate.
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1 7. All Confidential Information designated as “CONFIDENTIAL” or
2 “HIGHLY CONFIDENTIAL - FOR COUNSEL ONLY” shall not be disclosed by
3 the receiving party to anyone other than those persons designated herein and shall be
4 handled in the manner set forth below and, in any event, shall not be used for any
5 purpose other than in connection with this litigation, unless and until such designation
6 is removed either by agreement of the parties, or by order of the Court.

7 8. Information designated “HIGHLY CONFIDENTIAL - FOR
8 COUNSEL ONLY” shall be viewed only by counsel (as defined in paragraph 3) of
9 the receiving party, and by independent experts under the conditions set forth in this
10 Paragraph. The right of any independent expert to receive any Confidential
11 Information shall be subject to the advance approval of such expert by the producing
12 party or by permission of the Court. The party seeking approval of an independent
13 expert shall provide the producing party with the name and curriculum vitae of the
14 proposed independent expert, and an executed copy of the form attached hereto as
15 Exhibit A, in advance of providing any Confidential Information of the producing
16 party to the expert. Any objection by the producing party to an independent expert
17 receiving Confidential Information must be made in writing within fourteen (14) days
18 following receipt of the identification of the proposed expert. Confidential
19 Information may be disclosed to an independent expert if the fourteen (14) day period
20 has passed and no objection has been made. The approval of independent experts
21 shall not be unreasonably withheld.

22 9. Information designated “CONFIDENTIAL” shall be viewed only by
23 counsel (as defined in paragraph 3) of the receiving party, by independent experts
24 (pursuant to the terms of paragraph 8), and by the additional individuals listed below,
25 provided each such shall be bound by the terms of this Order:

26 a. Executives who are required to participate in policy decisions
27 with reference to this action;

1 b. Technical personnel of the parties with whom Counsel for the
2 parties find it necessary to consult, in the discretion of such counsel, in preparation
3 for trial of this action; and

4 ///

5 c. Stenographic and clerical employees associated with the
6 individuals identified above.

7 10. With respect to material designated “CONFIDENTIAL” or “HIGHLY
8 CONFIDENTIAL - FOR COUNSEL ONLY,” any person indicated on the face of
9 the document to be its originator, author or a recipient of a copy thereof, may be
10 shown the same.

11 11. All information which has been designated as “CONFIDENTIAL” or
12 “HIGHLY CONFIDENTIAL -FOR COUNSEL ONLY” by the producing or
13 disclosing party, and any and all reproductions thereof, shall be retained in the
14 custody of the counsel for the receiving party identified in paragraph 3, except that
15 independent experts authorized to view such information under the terms of this
16 Order may retain custody of copies such as are necessary for their participation in
17 this litigation.

18 12. No document, including materials produced in discovery, answers to
19 interrogatories, responses to requests for admissions, deposition transcripts, or other
20 documents which are designated as Confidential Information, shall be filed under
21 seal unless counsel secures a court order allowing the filing of a document under seal.
22 If a party seeks to file any document or information under seal, it must follow the
23 procedures set for in Judge Bencivengo’s Civil Case Procedures, Section V, and as
24 set forth and the conclusion of this Order.

25 13. At any stage of these proceedings, any party may object to a designation
26 of the materials as Confidential Information. The party objecting to confidentiality
27 shall notify, in writing, counsel for the designating party of the objected-to materials
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1 and the grounds for the objection. If the dispute is not resolved consensually between
2 the parties within seven (7) business days of receipt of such a notice of objections,
3 the objecting party may move the Court for a ruling on the objection. The materials
4 at issue shall be treated as Confidential Information, as designated by the designating
5 party, until the Court has ruled on the objection or the matter has been otherwise
6 resolved.

7 14. All Confidential Information shall be held in confidence by those
8 inspecting or receiving it, and shall be used only for purposes of this action. Counsel
9 for each party, and each person receiving Confidential Information shall take
10 reasonable precautions to prevent the unauthorized or inadvertent disclosure of such
11 information. If Confidential Information is disclosed to any person other than a
12 person authorized by this Order, the party responsible for the unauthorized disclosure
13 must immediately bring all pertinent facts relating to the unauthorized disclosure to
14 the attention of the other parties and, without prejudice to any rights and remedies of
15 the other parties, make every effort to prevent further disclosure by the party and by
16 the person(s) receiving the unauthorized disclosure.

17 15. No party shall be responsible to another party for disclosure of
18 Confidential Information under this Order if the information in question is not labeled
19 or otherwise identified as such in accordance with this Order.

20 16. If a party, through inadvertence, produces any Confidential Information
21 without labeling or marking or otherwise designating it as such in accordance with
22 this Order, the designating party may give written notice to the receiving party that
23 the document or thing produced is deemed Confidential Information, and that the
24 document or thing produced should be treated as such in accordance with that
25 designation under this Order. The receiving party must treat the materials as
26 confidential, once the designating party so notifies the receiving party. If the
27 receiving party has disclosed the materials before receiving the designation, the
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1 receiving party must notify the designating party in writing of each such disclosure.
2 Counsel for the parties shall agree on a mutually acceptable manner of labeling or
3 marking the inadvertently produced materials as “CONFIDENTIAL” or “HIGHLY
4 CONFIDENTIAL - FOR COUNSEL ONLY”.

5 17. Nothing herein shall prejudice the right of any party to object to the
6 production of any discovery material on the grounds that the material is protected as
7 privileged or as attorney work product.

8 18. Nothing in this Order shall bar counsel from rendering advice to their
9 clients with respect to this litigation and, in the course thereof, relying upon any
10 information designated as Confidential Information, provided that the contents of the
11 information shall not be disclosed.

12 19. This Order shall be without prejudice to the right of any party to oppose
13 production of any information for lack of relevance or any other ground other than
14 the mere presence of Confidential Information. The existence of this Order shall not
15 be used by either party as a basis for discovery that is otherwise not proper under the
16 Federal Rules of Civil Procedure.

17 20. Nothing herein shall be construed to prevent disclosure of Confidential
18 Information if such disclosure is required by law or by order of the Court.

19 21. Upon final termination of this action, including any and all appeals,
20 counsel for each party shall, upon written request of the producing party, return all
21 Confidential Information to the party that produced the information, including any
22 copies, excerpts, and summaries thereof, or shall destroy same at the option of the
23 receiving party, and shall purge all such information from all machine-readable
24 media on which it resides within sixty (60) days. Notwithstanding the foregoing,
25 counsel for each party may retain all pleadings, briefs, memoranda, motions, and
26 other documents filed with the Court that refer to or incorporate Confidential
27 Information, and will continue to be bound by this Order with respect to all such
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1 retained information. Further, attorney work product materials that contain
2 Confidential Information need not be destroyed, but, if they are not destroyed, the
3 person in possession of the attorney work product will continue to be bound by this
4 Order with respect to all such retained information. Any action by this Court must
5 be preceded by an ex parte motion for an order authorizing the return of all
6 Confidential Information to the party that produced the information or the destruction
7 thereof.

8 22. The restrictions and obligations set forth herein shall not apply to any
9 information that:

10 a. the parties agree should not be designated Confidential
11 Information;

12 b. the parties agree, or the Court rules, is already public knowledge;

13 c. the parties agree, or the Court rules, has become public
14 knowledge other than as a result of disclosure by the receiving party, its employees,
15 or its agents in violation of this Order; or

16 d. has come or shall come into the receiving party's legitimate
17 knowledge independently of the production by the designating party. Prior
18 knowledge must be established by preproduction documentation.

19 23. The restrictions and obligations herein shall not be deemed to prohibit
20 discussions of any Confidential Information with anyone if that person already has
21 or obtains legitimate possession thereof.

22 24. Transmission by facsimile is acceptable for all notification purposes
23 herein.

24 25. This Order may be modified by agreement of the parties, subject to
25 approval by the Court.

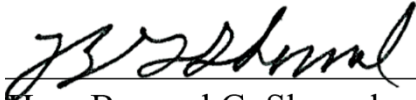
26 26. Without separate court order, the Protective Order and the parties'
27 stipulation does not change, amend, or circumvent any court rule or local rule.
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1 27. The Court may modify the terms and conditions of this Order for good
2 cause, or in the interest of justice, or on its own order at any time in these proceedings.
3 The parties prefer that the Court provide them with notice of the Court's intent to
4 modify the Order and the content of those modifications, prior to entry of such an
5 order.

6 28. Any violation of this Order may be punished by any and all appropriate
7 measures including, without limitation, contempt proceedings and/or monetary
8 sanctions.

9 **IT IS SO ORDERED.**

10 Dated: February 5, 2018

11 
12 Hon. Bernard G. Skomal
13 United States Magistrate Judge

14
15 **Protective Orders and Requests to File under Seal in Civil Cases**

16
17 Although the Court acknowledges the parties' desire to maintain the confidentiality
18 of documents produced in discovery, "[w]hen discovery material is filed with the
19 court [] its status changes." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122,
20 1134 (9th Cir. 2003). The public policy reasons behind a presumption of access to
21 judicial documents apply. *Id.* The common law and the Constitution afford the
22 public a qualified right of access to judicial records and proceedings. *Times Mirror*
23 *Co. v. U.S.*, 873 F.2d 1210, 1211 n.1 (9th Cir. 1989); *Pintos v. Pacific Creditors*
24 *Ass'n*, 605 F.3d 665, 678 (9th Cir. 2010).

25
26 In the Ninth Circuit there is a strong presumption in favor of access to court records
27 and a party must show compelling reasons to file materials under seal as part of a
28 non-discovery motion, even if they were produced subject to a discovery protective

1 order. *See Foltz*, 331 F.3d at 1135-36. Once the protected discovery documents are
2 made part of a dispositive motion, “they lose their status of being raw fruits of
3 discovery” and no longer enjoy protected status without some overriding interests
4 in favor of keeping the material confidential. *See id.*, at 1136.

5
6 Court records should be sealed to keep confidential only what must be kept secret,
7 temporarily or permanently, as the situation requires. The party seeking to file
8 under seal must provide articulable facts showing a compelling reason to limit
9 public access to court filings. That a litigant might be embarrassed or exposed to
10 additional liability or litigation, without more, is not sufficient. *Foltz*, 331 F.3d at
11 1136. A court’s decision to seal material must be based on a compelling reason and
12 the order allowing a filing under seal must articulate the factual basis for its ruling
13 without relying on hypothesis or conjecture. *Pintos*, 605 F.3d at 679. “A ‘good
14 cause’ showing will not suffice to fulfill the ‘compelling reasons’ standard that a
15 party must meet to rebut the presumption of access to dispositive pleadings and
16 attachments.” *Id.* (citing *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172,
17 1180 (9th Cir. 2006)).

18
19 Because the party that designated material as confidential should have the burden
20 (and expense) of moving to file such documents under seal, the following
21 procedures shall apply when a party intends to file a dispositive motion that cites to
22 or attaches documents designated confidential.

23 1. If the party filing the dispositive motion (or opposition thereto) intends
24 to cite or attach documents or information that it believes should be filed
25 under seal, the moving party must file a motion for permission to file under
26 seal at least **seven calendar days** prior to the date on which it intends to file
27 the dispositive motion. A courtesy copy of the motion for permission to file
28

1 under seal, along with a courtesy copy of the unredacted materials that the
2 party wants to file under seal, shall be delivered to Judge Bencivengo's
3 Chambers within 24 hours of filing. After receiving a ruling from the Court
4 on the motion for permission to file under seal, the party may file its
5 dispositive motion (or opposition) consistent with the Court's order.
6

7 2. If the party filing the dispositive motion (or opposition thereto) intends
8 to cite or attach documents or information that another party has designated
9 as confidential pursuant to a protective order entered in the case, it shall serve
10 notice to the designating party by email, no later than **eight business days**
11 prior to the date it intends to file the dispositive motion, specifically
12 identifying the documents and information it is contemplating using in
13 connection with the dispositive motion. The designating party shall then
14 have **four business days** from the date of the notice to file a motion seeking
15 permission for the documents and information to be filed under seal. A
16 courtesy copy of the motion for permission to file under seal, along with a
17 courtesy copy of the unredacted materials that the party wants to file under
18 seal, shall be delivered to Judge Bencivengo's Chambers within 24 hours of
19 filing. After receiving a ruling from the Court on the motion for permission
20 to file under seal, the party may file its dispositive motion (or opposition)
21 consistent with the Court's order. If the designating party does not timely
22 file a motion for permission to file under seal, the confidential designation
23 will be deemed waived, and the party seeking to use the documents or
24 information shall file it publicly in connection with its dispositive motion or
25 opposition.
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1 **EXHIBIT A**

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3
4 UNITED STATES DISTRICT COURT
5 SOUTHERN DISTRICT OF CALIFORNIA

6
7 OAKLEY, INC., a Washington
corporation,

8 Plaintiff,

9 v.

10 LIPOPSUN INTERNATIONAL
11 CORPORATION, a California
corporation,

12 Defendant.

CASE NO. 17CV01838-CAB BGS

**AGREEMENT TO BE BOUND
BY PROTECTIVE ORDER**

13
14 I, _____, declare and say that:

15 1. I am employed as _____
16 by _____.

17 2. I have read the Protective Order entered in Oakley, Inc. v. Lipopsun,
18 Case No. 17CV01838 CAB BGS, and have received a copy of the Protective Order.

19 3. I promise that I will use any and all “CONFIDENTIAL” or “HIGHLY
20 CONFIDENTIAL - FOR COUNSEL ONLY” information, as defined in the
21 Protective Order, given to me only in a manner authorized by the Protective Order,
22 and only to assist counsel in the litigation of this matter.

23 4. I promise that I will not disclose or discuss such “CONFIDENTIAL”
24 or “HIGHLY CONFIDENTIAL-FOR COUNSEL ONLY” information with anyone
25 other than the persons described in paragraph 3 of the Protective Order.

26 5. I acknowledge that, by signing this agreement, I am subjecting myself to the
27 jurisdiction of the United States District Court for the Southern District of California
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with respect to enforcement of the Protective Order.

6. I understand that any disclosure or use of “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL-FOR COUNSEL ONLY” information in any manner contrary to the provisions of the Protective Order may subject me to sanctions for contempt of court. I declare under penalty of perjury that the foregoing is true and correct.

Date: _____

Name: _____