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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SPENCER BUENO; and RICHARD PARKER,
Plaintiffs,
v.
MERCK & CO, INC.; MERCK SHARP &
DOHME CORP.; ORGANON & CO.;
ORAGNON LLC; and DOES 1-10, inclusive,
Defendants.

Case No.: 22cv522-H(BLM)

**ORDER GRANTING JOINT MOTION
FOR PROTECTIVE ORDER**

[ECF No. 31]

On January 6, 2023, the parties filed a Joint Motion for Determination of Dispute Regarding Proposed Stipulated Protective Order ("Motion"). ECF No. 31. The parties agree on all the terms of the Protective Order with the exception of the underlined language below:

7.1 Basic Principles. Received Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this Action only for prosecuting, defending, or attempting to settle the Action or another action involving substantially similar claims, against the same defendants (or some of the same defendants), on behalf of a plaintiff (or plaintiffs) represented by one or more of the same attorneys who represent any plaintiff in the Action. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the Action has been terminated, a Receiving Party must comply with the provisions of Section 16 below.

Motion at 2.

Plaintiffs seek entry of the Protective Order with the disputed language, which they refer

1 to as a “cross-use provision.” Id. at 3. Plaintiffs argue that the language should be included in
2 the protective order because it “furthers the interests of efficiency and judicial economy and
3 reduces cost.” Id. at 4. Plaintiffs state that without such language there would be repeated
4 requests for the same documents, different judges ruling on the same discovery dispute,¹ and
5 a need to seek multiple amendments to the Protective Order. Id. at 4-6. Plaintiffs further
6 indicate that their requested provision is not an effort to circumvent the Ninth Circuit’s holding
7 in Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122 (9th Cir. 2003); instead, Plaintiffs argue
8 that Foltz does not apply. Motion at 6. To support their position, Plaintiffs point to factual
9 differences between the above-titled case and Foltz, and they claim courts across the country
10 favor cross-use provisions in complex litigation. Id. at 6-8.

11 Defendants argue that Foltz is applicable here and Plaintiffs’ requested language
12 “impermissibly contravenes settled California procedure concerning disclosure of confidential
13 material in a ‘collateral matter.’” Motion at 9. Defendants further indicate that many of the cases
14 that Plaintiffs rely on pre-date Foltz or follow California procedure, which is inapplicable here.
15 Motion at 13-15. Defendants also argue that following Foltz’s principles is especially appropriate
16 here where there are “material differences seen throughout the Singulair cases[,]” as the various
17 Plaintiffs “arrived at the medicine with their own unique medical history; was prescribed the
18 medicine based on their own preexisting conditions . . . ; and allegedly experienced diverse
19 effect and varied injuries at different periods during their course of usage.” Id. at 15.
20 Defendants indicate that despite calling it a “cross-use provision,” Plaintiffs seek to share
21 information with collateral litigants, making Foltz further applicable. Id. at 9. Defendants
22 represent that a protective order without Plaintiffs’ requested language will not prevent the
23 sharing of discovery. Id. at 17.

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26 ¹ There are currently 357 cases, involving 363 plaintiffs, that “involve[] claims that branded or
27 generic Singulair caused neuropsychiatric injuries in plaintiffs.” Motion at 4. These pending
28 cases are being overseen by thirteen different judges and involve the same defendants. Id. Of
the 357 cases, 356 “are led by the same attorneys representing Plaintiffs here, Kimberly Beck
and Lynne Kizis.” Id.

1 While the Ninth Circuit “strongly favors access to discovery materials to meet the needs
2 of parties engaged in collateral litigation[,]” courts should not automatically approve a request
3 to share discovery. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1131 (9th Cir. 2003)
4 (citing Beckman Indus. Inc. v. Int’l Ins. Co., 966 F.2d 470, 475 (9th Cir. 1992)). Instead, under
5 Foltz, the Ninth Circuit requires that a collateral litigant “demonstrate the relevance of the
6 protected discovery materials to the collateral proceedings and its general discoverability
7 therein.” Id. This requirement aims to “prevent[] collateral litigants from gaining access to
8 discovery materials merely to subvert limitations on discovery in another proceeding.” Id. The
9 Ninth Circuit explains:

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11 Allowing the parties to the collateral litigation to raise specific relevance and
12 privilege objections to the production of any otherwise properly protected
13 materials in the collateral courts further serves to prevent the subversion of
14 limitations on discovery in the collateral proceedings. These procedures also
15 preserve the proper role for each of the courts involved: the court responsible for
16 the original protective order decides whether modifying the order will eliminate the
17 potential for duplicative discovery. If the protective order is modified, the collateral
18 courts may freely control the discovery processes in the controversies before them
19 without running up against the protective order of another court.

20 Id.

21 The Court finds that Foltz governs here. Despite Plaintiffs referring to the disputed
22 language as a “cross-use provision,” the results remain the same—sharing information with
23 collateral litigants in collateral matters. Accordingly, the reasoning and holding in Foltz dictate
24 the exclusion of Plaintiffs’ language. The Court agrees with Defendants and finds that Plaintiffs
25 have failed to establish a legal or factual basis to permit the requested cross-use provision in
26 the Protective Order. First, most of the cases Plaintiffs rely on to support their argument that
27 cross-use provisions are favored across the country pre-date Foltz.² Second, as noted by

28 ² The exceptions are Twilio, Inc. v. Telesign Corp., 2017 U.S. Dist. LEXIS 52532 (N.D. Cal. Apr. 5, 2017) and Apple, Inc. v. Samsungs Elecs. Co., Ltd, 2012 U.S. Dist. LEXIS 51884 (N.D. Cal. Apr. 12, 2012). Twilio and Apple are distinguishable here because in both cases the parties had agreed that “cross-use” language should be incorporated in the protective orders. Twilio, Inc., 2017 U.S. Dist. LEXIS 52532, at *2; Apple, Inc., 2012 U.S. Dist. LEXIS 51884, at *27.

1 Defendants, courts in the Ninth Circuit repeatedly have applied Foltz in similar situations, and
2 have determined that a cross-use, or sharing, provision violates Foltz because it allows collateral
3 litigants to circumvent Foltz's relevancy principles and procedures. See Motion at 12-13; see
4 also Kelly v. Provident Life & Accident Ins., Co., 2008 WL 5132851, at *3 (S.D. Cal. Dec 5, 2008)
5 (determining such language "interferences with the requirement in Foltz that the *collateral*
6 *litigant* demonstrate to the Court the relevance of the protected discovery to the collateral
7 proceedings.") (citation omitted); see also Nuvasive, Inc. v. Alphatec Holdings, Inc., 2019 WL
8 201440, at *2 (S.D. Cal. Jan. 15, 2019) ("The Court will not permit collateral litigants to gain
9 automatic access to Defendants' confidential materials without providing some procedural
10 safeguards regarding the dissemination of those materials, and without following proper
11 procedure[,]" as outlined in Foltz).

12 Plaintiffs make efforts to distinguish Foltz from the facts here³, but the Court is
13 unpersuaded. In Siefe v. Unum Group, 2018 WL 6340751 (C.D. Cal. June 11, 2008), plaintiff
14 sought the entry of similar "cross-use" language: "[P]laintiff requests a provision . . . permitting
15 him to use 'Protected Material produced by Defendants in any pending or subsequent action
16 filed by Plaintiff's counsel against [Defendant] and/or its subsidiary and related insurance
17 companies.'" Siefe, 2018 WL 6340751 at *3. The court entered a "non-sharing" protective
18 order, finding that incorporating a sharing provision would "interfere with [the court's] duty to
19 undertake the relevance inquiry dictated by Foltz." Id. at 4. Including Plaintiffs' requested
20 language here would have the same effect—allow collateral litigants access to confidential
21 information without establishing relevancy.

22 Plaintiffs argue the requested language could aid with resolving duplicative discovery
23 disputes in various venues. While the Court aims to avoid duplicative costs and discovery, "the
24 holding in Foltz applies to request of a collateral litigant and requires the collateral litigant to
25 demonstrate the relevance of the protected discovery to the collateral proceedings." Seife, 2018

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27 ³ Plaintiffs point out that in Foltz plaintiffs were attempting to share information with other
28 attorneys. Motion at 3 n.2. Here, Plaintiffs indicate they only seek to share information in
collateral matters against Defendant where Plaintiffs' counsel are the attorneys of record. Id.

1 WL 6340751 at *4. Further, the court in Foltz clearly indicates that any “disputes over the
2 ultimate discoverability of specific materials covered by the protective order must be resolved
3 by collateral courts.” Foltz, 331 F.3d at 1133. Thus, regardless of the inclusion of the cross-use
4 language, each separate court would have to resolve its own discovery disputes. Moreover, as
5 Defendants indicate, Plaintiffs will still be able to share discovery with collateral litigants. See
6 Motion at 18. Collateral litigants simply have to seek such information pursuant to the
7 procedures outlined in Foltz.

8 The Court, therefore, **DENIES** Plaintiffs’ request to include the language. Accordingly,
9 for good cause, the parties’ motion for a protective order is **GRANTED**, and the Court enters
10 the Protective Order attached as Exhibit 1 to this Order.

11 **IT IS SO ORDERED.**

12 Dated: 1/17/2023


13 Hon. Barbara L. Major
14 United States Magistrate Judge
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EXHIBIT 1

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SPENCER BUENO, an individual, and
RICHARD PARKER, an individual,

Plaintiffs,

vs.

MERCK & CO., INC., a New Jersey
Corporation; MERCK SHARP &
DOHME CORP., a New Jersey
Corporation; ORGANON & CO., a
Delaware Corporation; ORGANON LLC,
a Delaware Limited Liability Company;
and DOES 1-10, Inclusive,

Defendants.

Case No. 3:22-cv-00522-H-BLM

STIPULATED PROTECTIVE ORDER

Action Filed: March 3, 2022
Action Removed: April 15, 2022
Trial Date: None Set

STIPULATED PROTECTIVE ORDER

The parties in the above-captioned action, (the “Action”), by and through their respective counsel of record, have stipulated to the entry of the following protective order:

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in the Action is likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting and defending the Action may be warranted. Accordingly, the Parties hereby stipulate to, and request that the Court enter, the following Stipulated Protective Order (the “Order”).

The Parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under applicable law.

2. DEFINITIONS

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

2.2 “CONFIDENTIAL” Information or Items: Information (regardless of how it is generated, stored or maintained) or tangible things that contain confidential and non-public development, financial or commercial information or non-public personal information or any other information for which a good faith claim of need for protection from disclosure can be made under the Federal Rules of Civil Procedure or other applicable law.

2.3 Counsel: Outside Counsel of Record and In-House Counsel (as well as their support staff).

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

2.5 Disclosure or Discovery Material: All items or information, regardless

1 of the medium or manner in which they are generated, stored, or maintained (including,
2 among other things, testimony, transcripts, and tangible things), that are produced or
3 generated in disclosures or responses to discovery in the Action.

4 2.6 Expert: A person with specialized knowledge or experience in a matter
5 pertinent to the Action who has been retained by a Party or its Counsel to serve as an expert
6 witness or consultant in the Action.

7 2.7 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
8 Information or Items: Sensitive “CONFIDENTIAL Information or Items” (regardless of
9 how it is generated, stored or maintained) or tangible things that contain or otherwise
10 reference non-public trade secrets or other current or prospective confidential research,
11 development, commercial, or financial information, or other highly sensitive data, the
12 disclosure of which to another Party or Non-Party could cause a competitive disadvantage
13 to a Producing Party or could create a substantial risk of serious harm that could not be
14 avoided by less restrictive means, including, for example, strategic planning information
15 and pricing and cost data and analyses.

16 2.8 In-House Counsel: Litigation attorneys who are employees of a Party
17 to this action, including any attorney for Organon. In-House Counsel does not include
18 Outside Counsel of Record or any other outside counsel.

19 2.9 Non-Party: Any natural person, partnership, corporation, association,
20 or other legal entity not named as a Party in this Action.

21 2.10 Outside Counsel of Record: Attorneys who are not employees of a
22 Party to this action but are retained to represent or advise a Party to the Action and have
23 appeared in the Action on behalf of that Party or are affiliated with or contracted by a law
24 firm which has appeared on behalf of that Party.

25 2.11 Party: Any party to this Action, including all of its officers, directors,
26 and employees, and retained counsel of record.

27 2.12 Producing Party: Party or Non-Party that produces Disclosure or
28 Discovery Material in this Action.

1 2.13 Professional Vendors: Persons or entities that provide litigation
2 support services (e.g., photocopying, videotaping, translating, preparing exhibits or
3 demonstrations, and organizing, storing, or retrieving data in any form or medium) and
4 their employees and subcontractors.

5 2.14 Protected Material: Any Disclosure or Discovery Material that is
6 designated as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL – ATTORNEYS’
7 EYES ONLY.”

8 2.15 Privacy Information: Any documents containing an individual's social
9 security number or taxpayer identification number (other than only the last four digits
10 thereof), an individual's birth date (other than only the year of the individual's birth), the
11 name of an individual known to be a minor (other than only the minor's initials), a financial
12 account number (other than only the last four digits thereof), "Personal Data," "Personally
13 Identifiable Information," "Sensitive Private Data," or "Nonpublic Personal Information"
14 as these terms are defined under federal or state laws, regardless of whether such
15 information has been designated as "CONFIDENTIAL” or “HIGHLY CONFIDENTIAL
16 – ATTORNEYS’ EYES ONLY” (collectively “Privacy Information”).

17 2.16 Receiving Party: Party that receives Disclosure or Discovery Material
18 from a Producing Party.

19 3. SCOPE

20 The protections conferred by this Order cover Protected Material produced in
21 discovery in the Action as well as (1) any information copied or extracted from Protected
22 Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and
23 (3) any testimony, conversations, or presentations by Parties or their Counsel that might
24 reveal Protected Material. However, the protections conferred by this Order do not cover
25 the following information: (a) any information that is in the public domain at the time of
26 disclosure to a Receiving Party or becomes part of the public domain after its disclosure to
27 a Receiving Party as a result of publication not involving a violation of this Order; and (b)
28 any information obtained by the Receiving Party from a source who obtained the

1 information lawfully and under no obligation of confidentiality to the Designating Party.
2 Any use of Protected Material at trial shall be governed by a separate agreement or order.

3 4. DURATION

4 Even after Final Disposition of the Action, the confidentiality obligations imposed
5 by this Order shall remain in effect until a Designating Party agrees otherwise in writing
6 or a court order otherwise directs. “Final Disposition” shall be deemed to be the later of
7 (1) dismissal of all claims and defenses in the Action, with or without prejudice; and (2)
8 final judgment herein after the completion and exhaustion of all appeals, rehearings,
9 remands, trials, or reviews of the Action, including the time limits for filing any motions
10 or applications for extension of time pursuant to applicable law. This Court shall retain
11 jurisdiction for a period of one (1) year after the conclusion of this Action to enforce the
12 terms of the Protective Order.

13 5. DESIGNATING PROTECTED MATERIAL

14 5.1 Exercise of Care in Designating Material for Protection. Each Party or
15 Non-Party that designates information or items for protection under this Order must take
16 reasonable care to limit any such designation to specific material that qualifies for
17 protection under this Order.

18 5.2 Manner and Timing of Designations. Except as otherwise provided in
19 this Order or as otherwise stipulated or ordered, Disclosure or Discovery Material that
20 qualifies for protection under this Order must be clearly so designated before the material
21 is disclosed or produced.

22 Designation in conformity with this Order requires:

23 (a) for information in documentary form (e.g., paper or electronic
24 documents, but excluding transcripts of depositions or other pretrial proceedings),
25 that the Producing Party affix the legend “CONFIDENTIAL” or “HIGHLY
26 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” to each page that contains
27 Protected Material or, in the case of native file production, in conformity with the
28 Stipulation and Order Regarding Production of Documents and Information. A Party

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

12 (b) for testimony given in deposition or in other pretrial proceedings, that
13 all deposition testimony or testimony during other pretrial proceedings shall be
14 treated as “HIGHLY CONFIDENTIAL – ATTORNEYS EYES ONLY” for a period
15 of 30 days from the date of receipt by Outside Counsel of Record of a final transcript
16 during which a Designating Party may identify the specific portions of testimony as
17 to which protection is sought and specify the particular level of protection being
18 asserted. At the expiration of that 30-day period, only those portions that are
19 specifically identified will qualify for protection under this Order. Alternatively,
20 during that 30-day period, a Designating Party may, if appropriate, designate the
21 entire transcript as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.” Any
22 rough transcript that is generated before receipt by Outside Counsel of Record of a
23 final transcript also shall be treated during the 30-day period as if it had been
24 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its
25 entirety unless otherwise agreed. After the expiration of that period, the transcript
26 shall be treated only as actually designated.

27 Each Party shall provide notice to all other Parties if it reasonably expects to
28 reference or use Protected Material at a deposition, hearing or other proceeding so

1 that the other parties can ensure that only authorized individuals who have signed
2 the “Acknowledgment and Agreement to Be Bound” (Exhibit A) are present at those
3 proceedings. The use of a document as an exhibit at a deposition shall not in any
4 way affect its designation as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL
5 – ATTORNEYS’ EYES ONLY.”

6 (c) for information produced in some form other than documentary form
7 and for any other tangible items, that the Producing Party affix in a prominent place
8 on the exterior of the container or containers in which the information or item is
9 stored the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
10 ATTORNEYS’ EYES ONLY”. If only a portion or portions of the information or
11 item warrant protection, the Producing Party, to the extent practicable, shall identify
12 the protected portion(s) and specify the level of protection being asserted.

13 5.3 Inadvertent Failures to Designate. If corrected within a reasonable
14 period of time after production, an inadvertent failure to designate qualified information or
15 items does not, standing alone, waive the Designating Party’s right to secure protection
16 under this Order for such material. Upon correction of a designation, the Receiving Party
17 must make reasonable efforts to assure that the material is treated in accordance with the
18 provisions of this Order.

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20 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

21 6.1 Timing of Challenges. A Receiving Party must challenge a designation
22 of confidentiality within a reasonable period of time after such designation is made by the
23 Designating Party.

24 6.2 Meet and Confer. In the event of a challenge to a designation, the
25 Challenging Party shall initiate the dispute resolution process by providing written notice
26 of each designation it is challenging and describing the basis for each challenge. To avoid
27 ambiguity as to whether a challenge has been made, the written notice must recite that the
28 challenge to confidentiality is being made in accordance with this specific paragraph of the

1 Order. The Parties shall attempt to resolve each challenge in good faith and on an informal
2 basis in accordance with Civil Local Rule 26.1. The Parties must begin the process by
3 conferring directly (in person or by telephone) within 14 days of the date of service of
4 notice. In conferring, the Challenging Party must explain the basis for its belief that the
5 confidentiality designation was not proper and must give the Designating Party an
6 opportunity to review the designated material, to reconsider the circumstances, and, if no
7 change in designation is offered, to explain the basis for the chosen designation.

8 6.3 Judicial Intervention with Respect to Confidentiality Designations. If
9 the challenge cannot be resolved through the meet and confer process, the Challenging
10 Party disputing the designation may apply to the Court for a ruling that a document (or
11 category of documents) designated as Protected Material by the Designating Party is not
12 entitled to the specified level of protection. The Challenging Party’s motion must be filed
13 within 21 days of the Designating Party’s response described in paragraph 6.2 above, and
14 the Parties must comply with Judge Major’s Chambers Rules.⁴

15 The burden of persuasion in any such challenge proceeding shall be on the
16 Challenging Party. Frivolous challenges and those made for an improper purpose (e.g., to
17 harass or impose unnecessary expenses and burdens on other parties) may expose the
18 Challenging Party to sanctions.

19 While any challenge pursuant to this paragraph is pending, all Parties shall
20 continue to afford the material in question the level of protection to which it is entitled
21 under the Designating Party’s designation until the Court rules on the challenge.

22 7. ACCESS TO AND USE OF PROTECTED MATERIAL

23 7.1 Basic Principles. A Receiving Party may use Protected Material that is
24 disclosed or produced by another Party or by a Non-Party in connection with this Action
25 only for prosecuting, defending, or attempting to settle the Action. Such Protected Material
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28 ⁴ See Honorable Barbara Lynn Major U.S. Magistrate Judge, Chambers Rules-Civil Cases § V(A)-(F).

1 may be disclosed only to the categories of persons and under the conditions described in
2 this Order. When the Action has been terminated, a Receiving Party must comply with the
3 provisions of Section 16 below.

4 Protected Material must be stored and maintained by a Receiving Party at a
5 location and in a secure manner that ensures that access is limited to the persons authorized
6 under this Order. The recipient of any Protected Material that is provided under this Order
7 shall maintain such information in a reasonably secure and safe manner that ensures access
8 is limited to the persons authorized herein, and shall further exercise the same standard of
9 due and proper care with respect to the storage, custody, use, and/or dissemination of such
10 information as the recipient would use with respect to its own material of the same or
11 comparable sensitivity, but no less than the reasonable precautions set forth in Section 15
12 below.

13 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
14 otherwise ordered by the Court or permitted in writing by the Designating Party, a
15 Receiving Party may disclose any information or item designated “CONFIDENTIAL”
16 only to:

17 (a) the Receiving Party’s Outside Counsel of Record in the Action, as well
18 as employees of said Outside Counsel of Record to whom it is reasonably necessary
19 to disclose the information for purposes of the Action;

20 (b) the officers, directors, and employees (including In-House Counsel) of
21 the Receiving Party to whom it is reasonably necessary to disclose the information
22 for purposes of the Action;

23 (c) Experts (as defined in this Order) of the Receiving Party to whom
24 disclosure is reasonably necessary for purposes of the Action and who have signed
25 the “Acknowledgment and Agreement to Be Bound” (Exhibit A), which shall be
26 maintained by the Receiving Party and disclosed to the Court only in the event of a
27 notice of breach of this Order to maintain the confidentiality of undisclosed
28 consultants;

1 (d) the Court and its personnel;

2 (e) court reporters and their staff, professional jury or trial consultants,
3 mock jurors, and Professional Vendors to whom disclosure is reasonably necessary
4 for purposes of the Action and who have signed the “Acknowledgment and
5 Agreement to Be Bound” (Exhibit A);

6 (f) during their depositions, witnesses in the Action who are or were
7 employed by a Party to whom disclosure is reasonably necessary and who have
8 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

9 (g) a plaintiff in the Action, to the extent the plaintiff elects to be present
10 for any deposition, to the extent the protected document is used at the deposition,
11 and who has signed the “Acknowledgement and Agreement to Be Bound” (Exhibit
12 A); and

13 (g) the author or recipient of a document containing the information.

14 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
15 ONLY” Information or Items. Unless otherwise ordered by the Court or permitted in
16 writing by the Designating Party, a Receiving Party may disclose any information or item
17 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

18 (a) the Receiving Party’s Outside Counsel of Record in the Action, as well
19 as employees of said Outside Counsel of Record to whom it is reasonably necessary
20 to disclose the information for purposes of the Action;

21 (b) In-House Counsel of the Receiving Party to whom disclosure is
22 reasonably necessary for purposes of the Action and who have signed the
23 “Acknowledgement and Agreement to Be Bound” that is attached hereto as Exhibit
24 A, that has been designated to receive such information or item (“Designated In-
25 House Counsel”) and as to whom the Designating Party does not object to disclosure,
26 in accordance with Section 7.4 below;

27 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably
28 necessary for purposes of the Action, and (2) who have signed the

1 “Acknowledgment and Agreement to Be Bound” (Exhibit A), which shall be
2 maintained by the Receiving Party and disclosed to the Court only in the event of a
3 notice of breach of this Order to maintain the confidentiality of undisclosed
4 consultants ;

5 (d) the Court and its personnel;

6 (e) court reporters and their staff, professional jury or trial consultants, and
7 Professional Vendors to whom disclosure is reasonably necessary for this Action
8 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit
9 A); and

10 (f) the author or recipient of a document containing the information.

11 7.4 Procedures for Requesting Disclosure of Information or Items

12 Designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”

13 (a) A Party that makes a request and provides the information specified in
14 the preceding paragraphs may disclose the subject Protected Material to the
15 identified Designated In- House Counsel or a Designated Plaintiff Representative
16 after seven business days of making the request and providing the required
17 information (collectively, the “Request Date”) unless, within five business days of
18 the Request Date, the Party receives a written objection from the Designating Party
19 setting forth the grounds on which the objection is based.

20 (b) A Party that receives a timely written objection must meet and confer
21 with the Designating Party on an informal basis in accordance with Civil Local Rule
22 26.1 to try to resolve the matter by agreement within seven days of the written
23 objection. If the dispute is not resolved during the meet and confer, the parties must
24 comply with Judge Major’s Chambers Rules, as noted above in paragraph 6.3, in
25 seeking potential relief from the Court.

26 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED

27 IN OTHER LITIGATION

28 If a Party is served with a subpoena or a court order issued in other litigation that

1 compels disclosure of any information or items designated in the Action as
2 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
3 that Party must:

4 (a) promptly notify in writing the Designating Party and include in such
5 notification a copy of the subpoena or court order;

6 (b) promptly notify in writing the party who caused the subpoena or order
7 to issue in the other litigation that some or all of the material covered by the subpoena
8 or order is subject to this Order and must include a copy of this Order with the
9 notification; and

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

12 (d) counsel shall take all other reasonable steps to ensure that persons
13 receiving Protected Material do not use or disclose such information for any purpose
14 other than for the purpose stated in the subpoena or court order in that specific
15 litigation.

16 If the Designating Party timely seeks a protective order, the Party served with the
17 subpoena or court order shall not produce any information designated in this action as
18 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
19 before a determination by an appropriate court, unless the Party has obtained the
20 Designating Party’s permission, or is ordered to do so by any Court. The Designating Party
21 shall bear the burden and expense of seeking protection in that court of its confidential
22 material.

23 Nothing in these provisions should be construed as authorizing or encouraging a
24 Receiving Party in this Action to disobey a lawful directive from another court.

25 9. APPLICABILITY OF THIS STIPULATED PROTECTIVE ORDER TO
26 NON-PARTIES

27 9.1 Order Applicable to Non-Parties. The terms of this Order are
28 applicable to information produced by Non-Parties in the Action and designated as

1 “CONFIDENTIAL.” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”
2 Such information produced by Non-Parties in connection with this Action is protected by
3 the remedies and relief provided by this Order.

4 9.2 Service of Order with Non-Party Discovery Request. The Party issuing
5 any subpoena or other discovery request on any Non-Party in this Action shall include with
6 any such subpoena or discovery request a copy of this Order.

7 9.3 Request to a Party Seeking Non-Party Confidential Information. In the
8 event that a Party is required, by a valid discovery request, to produce a Non-Party’s
9 confidential information in its possession, and the Party is subject to an agreement with the
10 Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

11 (a) promptly notify in writing the Requesting Party and the Non-Party that
12 some or all of the information requested is subject to a confidentiality agreement
13 with a Non-Party;

14 (b) promptly provide the Non-Party with a copy of this Order, the relevant
15 discovery request(s), and a reasonably specific description of the information
16 requested; and

17 (c) make the information requested available for inspection by the Non-
18 Party.

19 If the Non-Party fails to object or seek a protective order from this Court within 14
20 days of receiving the notice and accompanying information, the Party that received the
21 discovery request may produce the Non-Party’s responsive confidential information. If the
22 Non- Party timely seeks a protective order, the Party that received the discovery request
23 shall not produce any information in its possession or control that is subject to the
24 confidentiality agreement with the Non-Party before a determination by the Court. Absent
25 a court order to the contrary, the Non-Party shall bear the burden and expense of seeking
26 protection in this Court of its Protected Material.

27 10. FILING OF PROTECTED MATERIAL

28 Before any materials produced in discovery, answers to interrogatories, responses to

1 requests for admissions, deposition transcripts, or other documents which are designated
2 as Protected Material are filed with the Court for any purpose, the party seeking to file such
3 material must seek permission of the Court to file the material under seal. No document
4 may be filed under seal, i.e., closed to inspection by the public except pursuant to a Court
5 order that authorizes the sealing of the particular document, or portions of it. A sealing
6 order may issue only upon a showing that the information is privileged or protectable under
7 the law. The request must be narrowly tailored to seek sealing only of the confidential or
8 privileged material. To file a document under seal,
9 the Parties must comply with the procedures explained in Section 2.j of the Electronic Case
10 Filing Administrative Policies and Procedures Manual for the United States District Court
11 for the Southern District of California and Civil Local Rule 79.2. In addition, in accordance
12 with Judge Major’s preferences, a party must file a ‘public’ version of any document that
13 it seeks to file under seal. In the public version, the party may redact only that information
14 that is deemed Protected Material. The party should file the redacted document(s)
15 simultaneously with a joint motion or an ex parte application requesting that the
16 confidential portions of the document(s) be filed under seal and setting forth good cause
17 for the request.

18 The Parties agree to the following procedure before filing a motion to seal Protected
19 Material:

- 20 (a) A Party wishing to use any Protected Material designated by another
21 Party as Confidential or Highly Confidential will provide a list of all
22 such documents to the designating party seven (7) days prior to the
23 filing due date and request that the Protected Material and any reference
24 thereto not be filed under seal.
- 25 (b) If a Party identifies one or more designated document that it intends to
26 file less than seven days prior to the filing due date, the Party shall
27 notify the Designating Party immediately upon that determination and
28 request that the Protected Material and any reference thereto not be filed

1 under seal. If the Party does not, at least forty-eight (48) hours prior to
2 the filing due date, identify the designated document and request that
3 the Protected Material and any reference thereto not be filed under seal,
4 then the Party must file a motion to seal the designated document and
5 any reference to the Protected Material pursuant to the Court’s
6 procedures.

7 (c) If the Designating Party agrees in writing that the designated material
8 need not be filed under seal, the Protected Material may be filed in the
9 public docket. If the Designating Party does not agree in writing that
10 the Protected Material may be filed in the public docket, then the Party
11 wishing to use such Protected Material must file a motion to seal the
12 Protected Material, including any designated documents and any
13 reference to the Protected Material, pursuant to the Court’s procedures.

14 11. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

22 Additionally, if the Receiving Party discovers any loss of Protected Material or a
23 breach of security, including any actual or suspected unauthorized access, relating to the
24 produced Protected Material, the Receiving Party shall:

25 (a) Promptly provide written notice to Producing Party of such breach
26 within twenty-four (24) hours of the breach discovery

27 (b) Investigate and make reasonable efforts to remediate the effects of the
28 breach, and provide Producing Party with assurances that such breach shall not recur

1 (c) Provide sufficient information about the breach that the Producing
2 Party can reasonably ascertain the size and scope of the breach. The Requesting
3 Party agrees to cooperate with the Producing Party or law enforcement in
4 investigating any such security incident.

5 (d) The Requesting Party shall promptly take all necessary and appropriate
6 corrective action to terminate the unauthorized access and/or correct the breach.

7 12. NOTIFICATION IN THE EVENT OF A SECURITY BREACH OR
8 UNAUTHORIZED ACCESS TO PRODUCED MATERIAL

9 (a) If the Receiving Party discovers any breach of security, including any
10 actual or suspected unauthorized access, relating to materials produced, the
11 Receiving Party shall:

12 (b) Promptly provide written notice to Producing Party of such breach
13 within twenty-four (24) hours of the breach discovery.

14 (c) Investigate and make reasonable efforts to remediate the effects of the
15 breach, and provide Producing Party with assurances that such breach shall not recur.

16 (d) Provide sufficient information about the breach that the Producing
17 Party can reasonably ascertain the size and scope of the breach. The Receiving Party
18 agrees to cooperate with the Producing Party or law enforcement in investigating
19 any such security incident.

20 (e) The Receiving Party shall promptly take all necessary and appropriate
21 corrective action to terminate the unauthorized access and/or correct the breach.

22 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
23 PROTECTED MATERIAL

24 Nothing in this Order shall be construed to prohibit a Producing Party from seeking
25 relief from any inadvertent or unintentional disclosure of confidential, privileged, or work-
26 product information. Nothing in this Order shall diminish the legal rights of any person
27 seeking such relief. When a Producing Party gives notice to Receiving Parties that certain
28 inadvertently produced material is subject to a claim of privilege or other protection, the

1 obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure
2 26(b)(5)(B). Pursuant to Federal Rule of Evidence 502(d), neither the attorney-client
3 privilege nor the work product protection is waived by inadvertent production in this
4 Action or any other action. This Protective Order shall be interpreted to provide the
5 maximum protection allowed by Federal Rule of Evidence 502(d).

6 14. MISCELLANEOUS

7 14.1 Right to Further Relief and Modification by the Court. Nothing in this
8 Order abridges the right of any person to seek its modification by the Court in the future.
9 The Court retains the right to allow disclosure of any subject covered by this Order or to
10 modify this Order for good cause, in the interest of justice, or on its own order at any time
11 during these proceedings.

12 14.2 Right to Assert Other Objections. No Party waives through entry of
13 this Order any right it otherwise would have to object to disclosing or producing any
14 information or item on any ground not addressed in this Order. Similarly, no Party waives
15 any right to object on any ground to use in evidence of any of the material covered by this
16 Order.

17 14.3 Right of a Party to Use Its Own Documents. Nothing in this Order shall
18 affect a Party's use or disclosure of its own documents in any way.

19 14.4 Right of a Party to Use Independently Obtained Documents. Nothing
20 in this Order shall impose any restrictions on the use or disclosure by a Party of documents,
21 material or information obtained by such Party independent of formal discovery
22 proceedings in this Action.

23 14.5 Right to Supplement or Request Deletion. If during the course of
24 litigation, a data subject with privacy rights pursuant to the Data Protection Laws identified
25 herein exercises his or her right to erasure of personal data contained within the previously
26 produced Protected Material, the Producing Party shall furnish newly redacted versions of
27 the Protected Material within a reasonable time. The Requesting Party will promptly
28 destroy the original version of the Protected Material and replace it with the redacted

1 version. The Producing Party may also require the entire document destroyed and replaced
2 with a slip-sheet indicating the Protected Material is subject to erasure pursuant to the
3 applicable Data Protection Law.

4 14.6 Personally Identifiable Information. Personally identifiable
5 information that a party has designated as Protected Material as defined herein, based on
6 its good faith belief that the information is subject to federal or state laws or other privacy
7 obligations, or any of the information contained therein, shall be handled by Counsel for
8 the Receiving Party with the highest care.

9 15. FINAL DISPOSITION

10 Within 60 days after the Final Disposition of this action, as defined in paragraph 4,
11 each Receiving Party must return all Protected Material to the Producing Party or destroy
12 such material. However, the Receiving Party may maintain its notes and coding of the
13 documents produced for use in another action averring the same allegations as this Action
14 against the same defendants in another jurisdiction until such time as all actions pending
15 in other jurisdictions reach final disposition. As used in this subdivision, “all Protected
16 Material” includes all copies, abstracts, compilations, summaries, and any other format
17 reproducing or capturing any of the Protected Material. Whether the Protected Material is
18 returned or destroyed, the Receiving Party must submit a written certification to the
19 Producing Party (and, if not the same person or entity, to the Designating Party) by the 60
20 day deadline that (1) identifies (by category, where appropriate) all the Protected Material
21 that was returned or destroyed and (2) affirms that the Receiving Party has not retained any
22 copies, abstracts, compilations, summaries or any other format reproducing or capturing
23 any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain
24 archival copies of all pleadings, motion papers, trial, deposition, and hearing transcripts,
25 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney
26 work product, and consultant and expert work product, even if such materials contain
27 Protected Material. Any such archival copies that contain or constitute Protected Material
28 remain subject to this Order as set forth in Section 4.

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EXHIBIT A

ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND

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I, _____, of _____
declare under penalty of perjury that I have read in its entirety and understand the Stipulated
Protective Order that was issued by the United States District Court for the Southern
District of California on _____ in *Spencer Bueno, et al.*
v. Merck & Co., Inc., et al., Case No. 3:22-CV-00522-H-BLM. I agree to comply with and
to be bound by all terms of this Stipulated Protective Order and I understand and
acknowledge that failure to so comply could expose me to sanctions and punishment in the
nature of contempt. I solemnly promise that I will not disclose in any manner any
information or item that is subject to this Stipulated Protective Order to any person or entity
except in strict compliance with the provisions of this Order.

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

Date: _____

City and State where signed: _____

Printed name: _____

Signature: _____