

FILED IN THE
U. S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 29, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEAN F. MCAVOY, CLERK

DANIEL GRELLNER, individually
and doing business as Venacore Inc.,

Plaintiff,

v.

RODNEY D. RAABE, individually and
on behalf of Sapheon Inc. and Sapheon
LLC, SAPHEON INC., a California
corporation, SAPHEON LLC, a
California limited liability company,
COVIDIEN HOLDING INC., a
Delaware corporation, COVIDIEN LP, a
Delaware limited partnership also known
as Tyco Healthcare Group LP and
COVIDIEN SALES LLC, a Delaware
limited liability company also known as
Covidien LLC,

Defendants.

NO. 2:15-CV-0189-SMJ

ORDER GRANTING STIPULATED
PROTECTIVE ORDER AND
PROTECTIVE UNDERTAKING

A telephonic scheduling conference was held on September 22, 2016, the
Court adopted the parties' Stipulated Protective Order and Protective Undertaking,
ECF No. 88-1.

IT IS HEREBY ORDERED:

1 1. The parties Stipulated Protective Order and Protective Undertaking, ECF
2 No. 88-1, is GRANTED.

3
4 **IT IS HEREBY STIPULATED AND AGREED THAT:**

5 **PROTECTIVE ORDER**

6 Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the following
7 order shall govern the production or provision of confidential information or things
8 by the parties in this case and any third parties (provided such third parties
9 recognize and accept the procedures herein) for the purpose of responding to
10 discovery requests or inquiries.

11 **DEFINITIONS**

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

14 B. “CONFIDENTIAL” Information or Items: information (regardless
15 of how it is generated, stored, or maintained) or tangible things that qualify for
16 protection under Federal Rule of Civil Procedure 26(c), including, but not limited
17 to, all information or material produced for or disclosed to a Receiving Party that a
18 Designating Party, including any Party and any Non-Party producing information
19 or material voluntarily or pursuant to a subpoena or court order, reasonably and in
20 good faith considers to constitute confidential research, development, financial,
21 technical or commercial information or other information the Receiving Party
22 would not have access to but for this lawsuit. Such material shall include non-
23 public information to which the Producing Party’s employees have only limited

1 access, and/or information, the dissemination or disclosure of which would present
2 a real or potential economic threat to the producing party.

3 C. Designating Party: A Party or Non-Party that designates information
4 or items that it produces in disclosures or in response to discovery as
5 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
6 ONLY.”

7 D. Disclosure or Discovery Material: all items or information,
8 regardless of the medium or manner in which it is generated, stored, or maintained
9 (including, among other things, testimony, transcripts, and tangible things), that are
10 produced or generated in disclosures or responses to discovery in this matter,
11 including but not limited to documents, data and information, answers to
12 interrogatories, answers to deposition questions (if the deposition is so designated),
13 responses to requests for admission, affidavits, expert reports, and any information
14 copied or extracted therefrom, as well as all copies, excerpts, summaries, or
15 compilations thereof, plus testimony, conversations, or presentations by parties or
16 counsel to or in court or in other settings that might reveal confidential
17 information.

18 E. “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
19 Information or Items: extremely sensitive “CONFIDENTIAL” Information or
20 Items representing material comprising or containing competitively sensitive
21 information that could be used by the Receiving Party to obtain a business (not
22 legal) advantage over the Producing Party, including, but not limited to, trade
23 secrets, highly sensitive, non-public technical information, documents disclosing

1 the past, present, or intended design, development, configuration, materials,
2 manufacture, testing or trial, and the results of such testing or trials, of the products
3 of any Party, documents or information related to damages (e.g., sales numbers or
4 profit margins), or documents or information related to pending and not yet
5 published patent applications.

6 F. Non-Party: any natural person, partnership, corporation, association,
7 or other legal entity not named as a Party to this action.

8 G. Party(ies): the named Parties in this litigation; all predecessors and
9 successors thereof; all present divisions, subsidiaries or affiliates of any of the
10 foregoing entities; and all directors, officers, employees, agents, attorneys, or other
11 representatives of any of the foregoing entities.

12 H. Producing Party: a Party or Non-Party that produces Disclosure or
13 Discovery Material in this action.

14 I. Receiving Party: a Party that receives Disclosure or Discovery
15 Material from a Producing Party.

16 **RECITALS**

17 1. Any party to this action, and any non-party from whom discovery is
18 sought in connection with this action, may designate as “CONFIDENTIAL” or
19 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” any Disclosure or
20 Discovery Material that contains “CONFIDENTIAL” or “HIGHLY
21 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information.

22 2. No “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
23 ATTORNEYS’ EYES ONLY” designation shall be made unless the Designating

1 Party reasonably believes in good faith that the designated material constitutes
2 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
3 ONLY” information.

4 3. Unless and until the Court rules otherwise, material marked as
5 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” shall be maintained
6 in confidence by the party to whom such material is produced and shall not be
7 disclosed to any person except:

8 (a) Attorneys of record in this litigation, employees of such attorneys,
9 counsel to whom it is necessary that the information be disclosed for purposes of
10 this litigation, and vendors or service providers retained by the Parties or attorneys
11 of record, including but not limited to translators and litigation support services;

12 (b) Any person hired by a party or its attorneys of record in this litigation,
13 including testifying experts, investigators, consulting experts, and any other
14 independent consultant, each of whom is not a competitor or employed by a
15 competitor of the producing party or an agent of a competitor of the producing
16 party, and who is not employed by or associated with either party, and who agrees
17 in writing to be bound by the terms of this Protective Order. Each of these
18 individuals must provide the following information: (i) the individual’s name and
19 business title; (ii) business address; (iii) business or profession; (iv) the
20 individual’s CV; (v) any previous or current relationship (personal or professional)
21 with any of the parties; (vi) a list of other cases in which the individual has testified
22 (at trial or deposition) within the last four years; (vii) a list of all companies with
23 which the individual has been employed within the last four years and a brief

1 description of the subject matter of the employment; and (viii) a complete and
2 signed Protective Order Undertaking, attached hereto as Exhibit A. The Protective
3 Order Undertaking must be served on the Producing Party before any access is
4 allowed to the Producing Party's confidential information. Attorneys for the
5 Producing Party shall have ten (10) business days from the receipt of the Protective
6 Order Undertaking to object in writing to disclosure of confidential information to
7 the identified expert or consultant. After the expiration of the 10-day period, if no
8 objection has been asserted, then the confidential information may be disclosed
9 pursuant to the terms of this Protective Order. Any objection by a Producing Party
10 must set forth in detail the grounds on which it is based. Should the parties
11 disagree with the basis for the Producing Party's objection(s), the Receiving Party
12 must first attempt in good faith to resolve the objection(s) informally with the
13 Producing Party. If the informal efforts do not resolve the dispute within five (5)
14 business days, the Receiving Party may file a motion requesting that the Producing
15 Party's objection(s) be quashed. The Producing Party shall have the burden of
16 proof by a preponderance of evidence on the issue of the sufficiency of the
17 objection(s). Pending a ruling by the Court upon any such objection(s), the
18 confidential information shall not be disclosed by the Receiving Party to the person
19 objected to by the Producing Party;

20 (c) Employees of a person qualified under paragraph 4(b) above, each of
21 whom is not a competitor or employed by a competitor of the producing party or
22 an agent of a competitor of the producing party, and who is not employed by or
23 associated with either party. Such employees must sign a Protective Order

1 Undertaking, and such Protective Order Undertaking must be retained and
2 preserved during this litigation by the attorney of record for the Receiving Party,
3 but such Protective Order Undertaking need not be disclosed to the Producing
4 Party, unless the Court for good cause orders otherwise;

5 (d) Jury consultant(s) and/or mock jurors, each of whom is not a
6 competitor or employed by a competitor of the producing party or an agent of a
7 competitor of the producing party, and who is not employed by or associated with
8 either party. Such jury consultant(s) and/or mock jurors must sign a Protective
9 Order Undertaking, and such Protective Order Undertaking must be retained and
10 preserved during this litigation by the attorney of record for the Receiving Party,
11 but such Protective Order Undertaking need not be disclosed to the Producing
12 Party, unless the Court for good cause orders otherwise;

13 (e) Defendants Sapheon Inc., Sapheon LLC, Covidien Holdings Inc.,
14 Covidien LP, and Covidien Sales LLC in-house attorneys Chad Hanson and
15 Thomas Johnston;

16 (f) The authors and original recipients of the documents;

17 (g) Persons testifying in depositions or in court proceedings provided that
18 (1) such documents or information were authored by, addressed to, or received by
19 such persons or other persons employed by the same entity as such persons, or (2)
20 such documents or information were produced by or obtained from such persons or
21 their employer;

22 (h) Court reporters employed in this litigation, including their necessary
23 stenographic, videographic and clerical personnel; and

1 (i) The Court, any juror or any other entity authorized by the Court or
2 required by law.

3 4. Unless and until the Court rules otherwise, material marked as
4 “CONFIDENTIAL” shall be maintained in confidence by the party to whom such
5 material is produced and shall not be disclosed to any person except:

6 (a) The persons identified in paragraph above;

7 (b) Plaintiff Daniel Grellner;

8 (c) Defendant Dr. Rodney D. Raabe; and

9 (d) Employees of Defendants Sapheon Inc., Sapheon LLC, Covidien
10 Holdings Inc., Covidien LP, and Covidien Sales LLC, and employees of the
11 successors, subsidiaries, parents and affiliates of Defendants Sapheon Inc.,
12 Sapheon LLC, Covidien Holdings Inc., Covidien LP, and Covidien Sales LLC, to
13 the extent necessary for purposes of this litigation.

14 5. In the event that a Producing Party elects to produce original
15 documents or other material for inspection, no markings need be made on the
16 documents or material by the Producing Party in advance of the inspection. During
17 the inspection, such documents or material shall be considered confidential
18 information to the extent and at the level designated by the Producing Party prior
19 to the inspection. After selection by the Receiving Party of specific documents or
20 material for copying, the Producing Party shall make the appropriate copies, and
21 the appropriate confidentiality designations shall be placed on the documents or
22 materials before they are provided to the Receiving Party.

1 6. Information disclosed at a deposition (or hearing), as well as through
2 resulting transcripts or exhibits, of a Party, the present or former officers, directors,
3 employees, agents, or independent experts retained by a Party for the purpose of
4 this litigation, or a Non-Party in possession of confidential information of a Party,
5 may be designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
6 ATTORNEYS’ EYES ONLY” by indicating such designation on the record,
7 subject to the Protective Order, or by following the procedure set forth in
8 paragraph 7 below. If a deposition or hearing transcript is designated as
9 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
10 ONLY” by indicating such designation on the record, the designating party has up
11 to 30 days to identify the specific portions of the testimony as to which protection
12 is sought and to specify the level of protection being asserted. Only those portions
13 of the testimony that are appropriately designated for protection within the 30 days
14 shall be covered by the provisions of this Protective Order.

15 7. If timely corrected, confidential information produced without the
16 appropriate designation of confidentiality may be properly designated subsequent
17 to the production or testimony when the Producing Party failed to make such
18 designation at the time of production or during the testimony through inadvertence
19 or error. Upon timely correction of a designation, the Receiving Party must make
20 reasonable efforts to assure the material is treated in accordance with the
21 provisions of this Order.

22 8. Absent any overriding rules of this Court or orders of this Court, no
23 Disclosure or Discovery Material designated as “CONFIDENTIAL” OR

1 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” shall be filed in the
2 public record of this action. In the event that any Disclosure or Discovery Material
3 that has been designated “CONFIDENTIAL” OR “HIGHLY CONFIDENTIAL –
4 ATTORNEYS’ EYES ONLY” is included with, or in any way disclosed in, any
5 pleading, motion, deposition transcript or other paper filed with the Court, such
6 Disclosure or Discovery Material shall be filed under seal with the Court.

7 9. Inadvertent production of privileged information shall be handled as
8 follows, but this is without prejudice to the right of any party to apply to the Court
9 for further protection or disclosure relating to discovery:

10 (a) When a Producing Party gives written notice to a Receiving Party that
11 certain inadvertently produced material (specifically described by Bates number(s)
12 and/or other sufficiently detailed description) is subject to a claim of privilege or
13 other protection, the obligations of the Receiving Party are those set forth in
14 Federal Rule of Civil Procedure 26(b)(5)(B);

15 (b) If the Receiving Party, without notice from the Producing Party,
16 determines that information subject to the attorney-client privilege or work-product
17 immunity has been inadvertently produced by a Producing Party, the Receiving
18 Party shall promptly contact the Producing Party and advise it of the inadvertent
19 disclosure. Federal Rule of Civil Procedure 26(b)(5)(B) shall govern the obligation
20 of the Receiving Party;

21 (c) If the Receiving Party believes it has a good-faith basis for challenging
22 the privilege claim asserted by the Producing Party, the Receiving Party shall
23 provide the Producing Party with a written explanation of the good-faith basis for

1 the belief that the inadvertently produced Disclosure or Discovery Material are not
2 privileged within five (5) business days of the Producing Party's request for return.
3 The Producing Party shall respond in writing to the Receiving Party's timely
4 challenge to the privilege or immunity claim within five (5) business days from
5 receipt of the challenge;

6 (d) In the event the parties cannot agree as to the privilege or immunity
7 status of the inadvertently produced Disclosure or Discovery Material, the
8 Receiving Party shall have ten (10) business days from receipt of the Producing
9 Party's written response to the privilege challenge to file a motion (in accordance
10 with any applicable standing orders or local rules) seeking an order compelling
11 production of the inadvertently produced Disclosure or Discovery Material. The
12 Receiving Party shall comply with Federal Rule of Civil Procedure 26(b)(5)(B) in
13 challenging the asserted privilege(s) concerning any inadvertently produced
14 Disclosure or Discovery Material. In the event that a motion is made, the
15 Producing Party shall have the burden of proving the inadvertently produced
16 Disclosure or Discovery Material are privileged or immune from discovery;

17 (e) Inadvertent disclosure of information subject to the attorney-client
18 privilege, work-product immunity, or any other applicable privilege or immunity
19 shall not, in and of itself, constitute a waiver of such privilege(s). Pursuant to Rule
20 502(d) of the Federal Rules of Evidence, the Court hereby orders that the attorney-
21 client privilege or work product protection is not waived by disclosure connected
22 with the above-referenced matter and any such disclosure is also not a waiver in
23 any other federal or state proceeding.

1 10. A party may challenge the correctness or propriety of a confidentiality
2 designation of a Designating Party by requesting the Court to order a different
3 designation or de-designation. The Designating Party shall bear the burden of
4 establishing a need for the designation by a preponderance of the evidence. No
5 party, however, is obligated to challenge the correctness or propriety of any
6 designation of confidentiality under this Order, and any failure to challenge a
7 designation shall not prejudice or preclude a subsequent challenge to that or any
8 other designation. A challenge to a Designating Party's confidentiality designation
9 shall follow the following provisions:

10 (a) A party that elects to initiate a challenge to a Designating Party's
11 confidentiality designation must do so in good faith and must begin the process by
12 conferring directly with counsel for the Designating Party. In conferring, the
13 Challenging Party must explain the basis for its belief that the confidentiality
14 designation was not proper and the Designating Party shall have three (3) business
15 days to review the designated Disclosure or Discovery Material, to reconsider the
16 circumstances, and if no change in designation is offered, to explain in writing to
17 the Challenging Party the basis for the chosen designation. A Challenging Party
18 may proceed to the next stage of the challenge process only if it has engaged in this
19 meet and confer process first; and

20 (b) A party that elects to press a challenge to a confidentiality designation
21 after considering the written justification offered by the Designating Party may file
22 and serve a motion that identifies the challenged Disclosure or Discovery Material
23 and sets forth in detail the basis for the challenge. Each such motion must be

1 accompanied by a competent declaration that affirms that the movant has complied
2 with the meet and confer requirements imposed in the preceding paragraph. The
3 burden of persuasion in any such challenge proceeding shall be on the Designating
4 Party. Until the Court rules on the challenge, all parties shall continue to afford the
5 material in question the level of protection to which it is entitled under the
6 Producing Party's designation.

7 11. All discovery material exchanged under this Protective Order between
8 the parties in this litigation shall be used solely for this litigation, unless otherwise
9 agreed to beforehand in writing by the Producing Party or if the Court so orders.
10 Each Party reserves its right to seek or oppose an order from the Court permitting
11 the use in other litigation of confidential discovery material.

12 12. If confidential information in the possession, custody or control of a
13 Receiving Party is sought by subpoena, request for production, interrogatory, or
14 any other form of discovery request or compulsory process of any court,
15 administrative body or legislative body, or any other person or tribunal purporting
16 to have opportunity to seek such information by compulsory process or discovery
17 request, including private parties, the Receiving Party shall: (i) within one (1)
18 calendar week after receipt thereof, give written notice by hand or facsimile or
19 electronic mail of such process or discovery request together with a copy thereof,
20 to counsel for the Producing Party; (ii) cooperate to the extent necessary to permit
21 the Producing Party to seek to quash such process or discovery request; and (iii)
22 not produce or disclose such confidential information until the Producing Party
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1 consents in writing to the production, or the Receiving Party is ordered by a court
2 of competent jurisdiction to produce or disclose the confidential information.

3 13. Within sixty (60) days after the conclusion of this litigation, including
4 any appeals, all confidential information designated and produced hereunder, and
5 all copies thereof, shall be returned to the Producing Party or be destroyed.
6 Notwithstanding the foregoing, counsel of record may retain all of their files from
7 this litigation, including, but not limited to, pleadings, correspondence, discovery
8 requests and responses, expert disclosures, and transcripts, whether or not such
9 files refer to or include any confidential information designated in this litigation.

10 14. By stipulating to the entry of this Protective Order no party waives any
11 right it otherwise would have to object to disclosing or producing any information
12 or item on any ground not addressed in this Protective Order. Similarly, no party
13 waives any right to object on any ground to use in evidence of any of the material
14 covered by this Protective Order.

15 15. Confidential information the Producing Party considers privileged, or
16 subject to the work product immunity doctrine or some other applicable immunity
17 or privilege under the Federal Rules, that is dated after the filing of this litigation,
18 is not required to be listed on any privilege log provided by the producing party to
19 the requesting party. Counsel for a Producing Party may redact material deemed
20 exempt from discovery because of the attorney-client privilege or work-product
21 immunity afforded by Rule 26(b), Fed. R. Civ. P. Any document from which
22 material is redacted must identify in the redacted area that a redaction was made.
23 The reason for any such redaction must be stated in the document itself or on a

1 privilege log provided to the Receiving Party within thirty (30) days of producing
2 the redacted document(s) to a Receiving Party. In the event of any dispute as to the
3 propriety of the redaction, the party objecting to the redaction may submit the issue
4 to the Court for review and determination.

5 16. The restrictions set forth in this Protective Order shall not apply to
6 information or material that:

7 (a) was, is, or becomes public knowledge other than by violation of this
8 Protective Order;

9 (b) is acquired by the non-Designating Party from a third party having the
10 right to disclose such information or material; or

11 (c) was lawfully possessed by the non-Designating Party prior to the entry
12 by the Court of the Protective Order.

13 17. Nothing contained in this Protective Order shall preclude a Party
14 producing confidential information from using its own confidential information in
15 any manner it sees fit without prior consent from any other Party or from the
16 Court.


17 18. Each individual who receives any confidential information so
18 designated under this Protective Order agrees to submit himself/herself to the
19 jurisdiction of this Court for the purpose of any proceedings relating to compliance
20 with the Protective Order.

21 19. This Protective Order shall remain in full force and effect after the
22 termination of this litigation, until a Designating Party agrees in writing or until
23 canceled or otherwise modified by this Court.

1 20. Any Party hereto may at any time make a motion requesting that the
2 Court modify this Protective Order to provide additional or different protection
3 where it is deemed appropriate.

4 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order
5 and provide copies to all counsel.

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7 DATED this ~~29th~~ day of September 2016.

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9 
10 SALVADOR MENDOZA, JR.
11 United States District Court Judge

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3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON

5 DANIEL GRELLNER, individually
6 and doing business as Venacore Inc.,

7 Plaintiff,

8 v.

9 RODNEY D. RAABE, individually and
10 on behalf of Sapheon Inc. and Sapheon
11 LLC, SAPHEON INC., a California
12 corporation, SAPHEON LLC, a
13 California limited liability company,
14 COVIDIEN HOLDING INC., a
15 Delaware corporation, COVIDIEN LP, a
16 Delaware limited partnership also known
17 as Tyco Healthcare Group LP and
18 COVIDIEN SALES LLC, a Delaware
19 limited liability company also known as
20 Covidien LLC,

21 Defendants.
22
23

NO. 2:15-CV-0189-SMJ

PROTECTIVE ORDER
UNDERTAKING

1 **PROTECTIVE ORDER UNDERTAKING**

2

3 I, _____, having been retained by

4 _____ in connection with the above-captioned lawsuit hereby

5 acknowledge that I am about to receive information subject to the Protective Order

6 agreed to by the parties and so ordered by the Court in this case.

7 I certify my understanding that the information subject to the Protective

8 Order is being provided to me pursuant to the terms and restrictions of the

9 Protective Order, and that I have been given a copy of and have read and

10 understand my obligations under the Protective Order. I hereby agree to be bound

11 by the terms of the Protective Order. I clearly understand that information subject

12 to the Protective Order and my copies and notes relating thereto may only be

13 disclosed to or discussed with persons allowed under the Protective Order to

14 receive such information.

15 I will return upon request all materials containing information subject to the

16 Protective Order and all copies thereof.

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I hereby submit to the jurisdiction of this Court for the purposes of enforcement of the Protective Order and waive any and all objections to jurisdiction and venue.

I make all statements above under penalty of perjury.

Printed name: _____

Company name/address/phone:
