

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ENANTA PHARMACEUTICALS, INC.,)
)
 Plaintiff,)
)
 v.) Civil Action No. 1:22-cv-10967-DJC
)
 PFIZER INC.)
)
 Defendant.)

~~PROPOSED~~ PROTECTIVE ORDER

WHEREAS, Plaintiff Enanta Pharmaceuticals, Inc. (“Enanta”) and Defendant Pfizer Inc. (“Pfizer”) (collectively, the “Parties”) expect that discovery in this action will likely encompass confidential, private, trade secret, and proprietary information of Enanta and Pfizer, including research and development, product, business, commercial, marketing, and financial information that is sensitive and proprietary;

WHEREAS, the Parties believe that the disclosure of such information may cause harm to Enanta and Pfizer, including, without limitation, because such information may be of value to an actual or potential competitor, or because the disclosure of such information may harm the competitive standing of Enanta or Pfizer;

WHEREAS, the Parties agree that a case-specific protective order is warranted in this action to protect Enanta and Pfizer from any harm that might result from the disclosure of such information;

NOW, THEREFORE, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, it is hereby **ORDERED** that:

1. Designation of Materials as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY”

Any Party in this action or any third-party person or entity producing materials or providing testimony for use in this action (hereinafter, “Producing Party”), shall have the right to designate as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” any document, information, thing, or other form of evidence or discovery the Producing Party believes, in good faith, embodies, contains, or reflects such information as defined herein.

a. “CONFIDENTIAL” information relates to all confidential or private research and development, product, business, commercial, marketing, or financial information, and all information of a trade secret or proprietary scientific or technical nature, that the Producing Party believes, in good faith, might be of value to an actual or potential competitor of the Producing Party and that the Producing Party reasonably believes should be protected from disclosure.

b. “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” information relates to all confidential or private research and development, product, business, commercial, marketing or financial information, and all information of a trade secret or proprietary scientific or technical nature, that the Producing Party believes, in good faith, to be extremely sensitive, and that the Producing Party reasonably believes disclosure of which would create a substantial risk of serious harm to the competitive position of the Producing Party.

c. Access to certain highly sensitive materials provided in electronic form may be further limited by agreement of the Parties or by order of the Court.

2. Restriction on Use and Disclosure of Designated and Non-Designated Materials

No documents, information, things, or other forms of evidence or discovery designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY,” nor any information derived therefrom, shall be disclosed to any person except as set forth in Sections 6, 7, and 8 of this Protective Order. No person shall use any material designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY,” nor any information derived therefrom, for any purpose other than to assist in the preparation and trial, or the mediation or settlement, of this action. Counsel for each Party shall take reasonable precautions to prevent the unauthorized or inadvertent disclosure of any designated material.

3. Marking of Designated Materials

A designation as to documents shall be made by placing a legend on each page of any document that a Producing Party wishes to protect against unauthorized use or disclosure prior to or at the time of the provision of a physical or electronic copy thereof to any other Party in this action or any third-party person or entity receiving such document (hereinafter, “Receiving Party”). The legend shall state “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY.” The designation as to things as to which inspection or sampling has been agreed to, or which are tangible objects containing designated information, shall be made by placing a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” legend in the form described above on the thing or the container within which it is stored.

All “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” material not reduced to documentary, tangible, or physical form, or which cannot be conveniently designated as set forth herein, including but not limited to physical objects or electronic data, may be designated by the Producing Party by informing all Receiving Parties of

the designation in writing. To the extent that the Receiving Parties generate printouts of such material (or portions thereof), the printouts must have the “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” legend properly affixed thereon.

4. Designation of Deposition Testimony

Any Party or deponent may unilaterally designate portions of a deposition transcript as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY,” provided such designation is either (a) made on the record during the deposition, in which case the transcript of the designated testimony shall be bound in a separate volume and marked either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” by the reporter, or (b) made by written notice to all counsel of record, given within thirty (30) calendar days after a copy of the official deposition transcript is received by the deponent or counsel for the deponent, in which case all counsel receiving a transcript shall be responsible for marking the copies of the designated transcript in their possession or under their control as directed by the Producing Party. Unless otherwise agreed to in writing by the Parties or ordered by the Court, all depositions shall be treated as “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” until thirty (30) calendar days after a copy of the official deposition transcript is received by the deponent or counsel for the deponent. The Producing Party shall have the right to exclude from a deposition, before the taking of testimony which the Producing Party designates “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” and subject to this Protective Order, all persons other than those persons previously qualified to receive such information pursuant to the terms of this Protective Order.

This Order shall not prevent counsel from examining a deponent in a good faith effort to determine whether such deponent authored, received, or previously had access to or knowledge

of documents designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY.”

5. Filing Designated Materials

Any materials which are filed with the Court for any purpose and which are designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” shall be filed under seal in accordance with the procedures set forth in the Local Rules of the United States District Court for the District of Massachusetts.

When a Party files any pleadings, motions, or other papers under seal with the Court, the Party shall also file, within seven (7) business days, a public version of that pleading, motion, or other paper that redacts out those portions that reveal any information designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY.” If the entire document filed under seal (*e.g.*, an exhibit to a motion) is designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY,” the Party may file a slip sheet designating that the document has been redacted in its entirety.

These procedures for filing and disclosure of “CONFIDENTIAL” and “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” information with the Court shall apply only to pretrial proceedings. If necessary, the Parties shall propose to the Court procedures for the filing and disclosure of “CONFIDENTIAL” and “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” information with regard to trial.

6. Access to “CONFIDENTIAL” Materials

Material designated as “CONFIDENTIAL” shall not be provided, shown, made available, or communicated in any way to any person or entity with the exception of:

(i) outside counsel of record for the Parties who are involved in this action, including but not limited to such counsel’s partners, associates, staff and contract attorneys, and

their authorized secretarial, paralegal, clerical and legal assistant staff whose duties and responsibilities require access to material designated under this Protective Order;

(ii) outside vendors for the outside counsel for the Parties who are performing legal and other related support services in connection with this action;

(iii) the Court, court personnel, and stenographic reporters;

(iv) court reporters, videographers, and court reporting services who are performing support services in connection with depositions and other proceedings in this action;

(v) mediators who are assigned to or retained in and for this action, and their regularly employed staff;

(vi) experts specifically retained in and for this matter, subject to the provisions of Section 8 below, and their regularly employed staff who are performing support services in connection with this action and to whom disclosure is reasonably necessary to assist in the preparation and trial, or the mediation or settlement, of this action;

(vii) no more than two (2) in-house counsel for a Receiving Party, for the sole purpose of assisting in this action, to whom disclosure is reasonably necessary to assist in the preparation and trial, or the mediation or settlement, of this action, and (1) provided that prior to disclosure of designated materials to any such individual, such individual of the Receiving Party is provided with a copy of this Protective Order and such individual agrees, in writing, to be bound by the terms of this Protective Order by executing a copy of the PROTECTIVE ORDER ACKNOWLEDGEMENT attached hereto as Exhibit A, and a copy of such executed PROTECTIVE ORDER ACKNOWLEDGEMENT is provided to outside counsel of record for

the Parties; and (2) provided that such individuals will comply with all other requirements under this Protective Order;¹

(viii) any person who prepared a document designated under any section of Section 1, who appears as an author, addressee, or recipient on the face of such document, or who affirms under oath by deposition or at trial or other hearing in this action to have authored, received, or previously had access to or knowledge of such document, but the disclosure shall be limited to the specific designated material disclosed in such document;

(ix) witnesses who are current employees of the Producing Party or who have been designated pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure by the Producing Party;

(x) jury or trial consultants, who are not affiliated with any Party and who have first signed the PROTECTIVE ORDER ACKNOWLEDGEMENT, attached hereto as Exhibit A, which shall be maintained by counsel retaining such persons;

(xi) translators and interpreters employed by outside counsel and/or the Court in connection with this action, who are not affiliated with any Party and who have first signed the PROTECTIVE ORDER ACKNOWLEDGEMENT, attached hereto as Exhibit A, which shall be maintained by counsel retaining such persons;

¹ An individual designated under this Section 6(vii) may disclose material designated under this Protective Order to his/her secretarial, paralegal, clerical, or legal assistant staff, provided that such individual designated under this Section 6(vii) ensures that his/her secretarial, paralegal, clerical, or legal assistant staff complies with the terms of this Protective Order.

Moreover, should an individual designated under this Section 6(vii) cease to have responsibility relating to this litigation, the party that designated such individual may designate another individual who otherwise qualifies under the provisions of this Section 6(vii) to replace such person upon giving written notice of such change to outside counsel for the other parties in this action, provided that such other individual complies with the foregoing terms of this Section 6(vii).

(xii) graphic and visual aid consultants, who are not affiliated with any Party and who have first signed the PROTECTIVE ORDER ACKNOWLEDGEMENT, attached hereto as Exhibit A, which shall be maintained by counsel retaining such persons;

(xiii) mock jurors, who are not affiliated with any Party and who have first signed the PROTECTIVE ORDER ACKNOWLEDGEMENT, attached hereto as Exhibit A, which shall be maintained by counsel retaining such persons; and

(xiv) others to whom the Producing Party consents.

7. Access to “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” Materials

Material designated as “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” shall not be provided, shown, made available, or communicated in any way to any person or entity with the exception of those persons listed in Sections 6(i)-(vi) and 6(viii)-(xiv), subject to any conditions thereof, but only so long as such persons described in Sections 6(x)-(xiii) have first signed the PROTECTIVE ORDER ACKNOWLEDGEMENT attached as Exhibit B. Any person who signs a PROTECTIVE ORDER ACKNOWLEDGEMENT attached as Exhibit B shall not need to sign a PROTECTIVE ORDER ACKNOWLEDGEMENT attached as Exhibit A. If a copy of a PROTECTIVE ORDER ACKNOWLEDGEMENT attached as Exhibit A is required to be disclosed in accordance with Section 6, then a copy of a PROTECTIVE ORDER ACKNOWLEDGEMENT attached as Exhibit B which is signed in lieu of a PROTECTIVE ORDER ACKNOWLEDGEMENT attached as Exhibit A (pursuant to this Section 7) shall be disclosed as provided in Section 6.

8. Disclosure of Designated Material to Experts Specifically Retained for the Purposes of This Litigation

Prior to any disclosure by a Party of material designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” by a Producing Party to

any expert specified in subsection (vi) of Section 6, counsel desiring to make such disclosure shall provide written notification to counsel for the Producing Party of the desire to make such disclosure, and the name, present employer, business address, and position of the expert to whom it is intended that disclosure be made, together with a current curriculum vitae, and (i) a list of all proceedings in which the expert has testified by deposition or at hearing or trial in the last five (5) years, (ii) a list of all companies for which such expert has consulted or worked during the last five (5) years; (iii) a list of all persons, companies, and other entities for which such expert has consulted or worked, without any limitation, concerning coronavirus, SARS-CoV-2, COVID-19, and/or therapies for the treatment of coronavirus infection; and (iv) the time period of any work or consultancy listed in response to the preceding clause. Disclosure to the expert so identified shall not be made until at least five (5) business days after a signed copy of the PROTECTIVE ORDER ACKNOWLEDGEMENT attached hereto as Exhibit B has been provided to the Producing Party. If the Producing Party does not convey an objection to the proposed disclosure within five (5) business days of receipt of the written notification, the Producing Party shall be deemed to have waived objection to the disclosure and its agreement shall be assumed. If the Producing Party believes, in good faith, that a potential conflict of interest exists with respect to such expert, the Producing Party shall provide, in writing, its objection to the disclosure to counsel desiring to make the disclosure within five (5) business days of receipt of written notification. Not later than three (3) business days after the Producing Party provides its written objection, the Parties shall meet and confer in good faith to resolve any dispute concerning the intended disclosure to such expert. If the Parties are unable to resolve such dispute by meet and confer, the Producing Party objecting to such disclosure shall thereafter, and in any event not later than ten (10) calendar days after providing its written

objection, file a motion to prevent such disclosure. If the Producing Party does not file such motion with ten (10) calendar days after providing its written objection, the Producing Party shall be deemed to have withdrawn any objection to the disclosure.

9. Use of Designated Materials

Materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” must not be disclosed by the Receiving Party to anyone other than those persons allowed under the terms of this Protective Order, must be handled in the manner set forth herein, and must not be used for any purpose other than in connection with this action (including the mediation or settlement thereof), unless and until such designation is removed either by agreement of the Producing Party, or by order of the Court. Materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” shall not be used for purposes of any competitive decision-making by the Receiving Party, including in patent prosecution. For the avoidance of doubt, information derived from any material designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY,” including data, summaries, and compilations derived from any such materials, shall be subject to the same designation (and thus the same restrictions) as the materials from which it was derived. For the avoidance of doubt, materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” shall not be used by the Receiving Party to prosecute any patent application, including in direct contribution to drafting, revising, amending, or modifying the scope of patent claims in the United States or in any foreign country and in formulation of strategy for prosecution.

10. Retention of Designated Materials

All materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” and any and all copies or reproductions thereof, shall be

retained (except as otherwise provided in Section 13 hereof) for the pendency of the litigation as follows:

(i) materials designated “CONFIDENTIAL” are to be retained by the persons listed in subsection (i) of Section 6 hereof;

(ii) materials designated “CONFIDENTIAL” and either filed with the Court or served as a written discovery response or as an expert disclosure may be retained by the persons listed in subsection (vii) of Section 6 hereof;

(iii) materials designated “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” are to be retained by the persons identified in subsection (i) of Section 6 hereof;

(iv) experts authorized to view designated materials under the terms of this Protective Order and their regularly employed staff identified in subsection (vi) of Section 6 hereof may retain custody of copies of such materials as may be necessary for such experts’ participation in this litigation.

11. Discovery Sought from or by Third Parties

A copy of this Protective Order shall be furnished to each third-party person or entity required to produce documents or otherwise formally disclose information in response to discovery requests in this action. Such third parties may elect to avail themselves of, and agree to be bound by the terms and conditions of, this Protective Order by executing a copy of the PROTECTIVE ORDER ACKNOWLEDGEMENT attached hereto as Exhibit B.

In the event that any Party, having possession, custody or control of any materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” by any other Party or any third-party person or entity, receives a subpoena or other process or order to produce such materials in another, unrelated legal proceeding from a

non-party to this action, such Party shall promptly notify counsel for the Producing Party of the subpoena or other process or order, furnish counsel for the Producing Party with a copy of said subpoena or other process or order and cooperate with respect to all reasonable procedures sought to be pursued by the Producing Party whose interests may be affected. The Party having designated such materials as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” shall have the burden of defending against such subpoena, process, or order.

12. Inadvertent Production of Privileged or Personal Materials

If the Producing Party notifies any Receiving Party in writing that it has inadvertently produced documents and/or things that are protected from disclosure under attorney-client privilege, work-product immunity, and/or any other applicable privilege or immunity from disclosure, or contain non-relevant personal information, the Receiving Party shall return all copies of such documents and/or things to the Producing Party within ten (10) calendar days of receipt of such notice or confirm in writing that all electronic copies have been deleted and all hard copies have been destroyed. The Receiving Party shall not further disclose or use such items for any other purpose until further order of the Court. Such inadvertent production shall not constitute a waiver of the attorney-client privilege or work-production immunity or any other applicable privilege, if this procedure is followed.

Within thirty (30) calendar days following the return or destruction request by the Producing Party, if it wishes to challenge the claim of privilege or immunity, the Receiving Party shall file a motion to challenge the propriety of the Producing Party’s claim for the disputed documents and/or things. In connection with such a motion to compel, the Parties agree to waive any challenges as to whether the production of such materials was inadvertent. In other words, no Party shall assert that such production waived any applicable privilege or immunity, and the

only grounds for a motion to compel the production of such materials shall be that: (a) the materials are not properly subject to any privilege or immunity; and/or (b) any applicable privilege or immunity has been waived by some act other than the production of the materials in this litigation.

Nothing herein shall prevent the Receiving Party from challenging the propriety of the privilege or immunity designation by submitting a written challenge to the Court by filing an appropriate motion with the Court within the thirty (30) calendar day time frame. In connection with such motion practice, the burden of establishing the propriety of the privilege or immunity claim shall remain on the Party making it.

13. Disposition of Designated Materials at Conclusion of Case

Within sixty (60) calendar days of the adjudication or resolution through settlement of the claims at issue herein, unless otherwise agreed to in writing by counsel of record for the Producing Party, each Party shall either (i) certify that they have effected the destruction of all designated materials, including all copies and extracts thereof, in their possession, custody, or control in such a manner that would preclude any person or entity from accessing the information contained therein, or (ii) assemble and return all designated materials, including all copies and extracts thereof, to the Party or third-party person or entity from whom it was obtained.

Notwithstanding the foregoing, outside counsel of record shall be entitled to maintain all correspondence, pleadings, motions, and other materials submitted to the Court (including all supporting and opposing papers and exhibits thereto), written discovery requests and responses (and exhibits thereto), deposition transcripts (and exhibits thereto), trial transcripts, and exhibits offered or introduced into evidence at trial, as well as any drafts, internal memoranda, and other work product which were based upon or include “CONFIDENTIAL” or “HIGHLY

CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” information. In the event that outside counsel maintains such documents, it shall not disclose material containing any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” information to another person or entity absent subpoena or court order. Counsel likewise need not purge their email, document management systems, or back-up tapes, provided, however, that any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” information contained in such documents retained by outside counsel shall remain subject to the protections of this Protective Order.

14. Patent Prosecution Bar

Absent the written consent of the Producing Party, any person who reviews materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” by a Producing Party shall not be involved in the prosecution (including drafting, amending, or otherwise affecting the scope or maintenance of patent claims or portions thereof, including patent reissue) of patents or patent applications directed to a 3CL protease inhibitor for use in treating coronavirus, SARS-CoV-2, or COVID-19 on behalf of a Receiving Party, including without limitation the patent(s) asserted in this action, any patent or application claiming priority to the patent(s) asserted in this action (a “Child Application”), any patent or application to which the patent(s) asserted in this action claim priority (a “Parent Application”), any patent or application that claims priority to a Child Application or a Parent Application, or any patent or application to which a Parent or Child application claims priority, or any patent or application that is a foreign counterpart of any of the foregoing, before any foreign or domestic agency, including the United States Patent and Trademark Office (the “Prosecution Bar”). The Prosecution Bar shall apply from the date when the affected individual first reviews materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S

EYES ONLY” until the earlier of (i) one year after final judgment or dismissal in this action, including any and all appeals or (ii) one year after the affected individual withdraws from representing any and all parties in this litigation. Nothing herein shall preclude any person who has access to or has reviewed materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” from representing a Receiving Party in all capacities before a domestic or foreign agency involving other post-grant review proceedings including, but not limited to, *ex parte* reexamination or *inter partes* review, provided such person does not participate in the drafting, revising, modifying, or amending of patent claims. Further, the Prosecution Bar shall apply on an individual basis only, and shall not be imputed to other individuals of a law firm or practice or to any person who did not actually review materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” by a Producing Party. The role of an individual as supervisor of an attorney or patent agent engaged in prosecution described herein shall not, in itself, constitute evidence that such individual is engaged in such prosecution and the Prosecution Bar shall not apply in such circumstance alone. In addition, the Prosecution Bar shall not preclude any outside counsel for a Receiving Party from being involved in prosecution described herein on behalf of any person or entity who is not a Party to this action.

15. Miscellaneous Provisions

(i) This Protective Order shall be without prejudice to the right of any Party or any third-party person or entity to bring before the Court at any time the question of (a) whether any particular information is confidential, or (b) whether any particular information is relevant to any issue of this case. Upon such hearing, the Party asserting confidentiality or relevance shall have the burden of establishing the same.

(ii) Neither the taking of any action in accordance with the provisions of this Protective Order, nor the failure to object thereto, shall be construed as a waiver of any claim or defense in this action. Moreover, neither the failure to designate information in accordance with this Protective Order, nor the failure to object to a designation at a given time, shall preclude the filing of a motion at a later date seeking to impose such designation or challenging the propriety thereof. The entry of this Protective Order shall not be construed as a waiver of any right to object to the furnishing of information in response to discovery or to object to a requested inspection of documents or things, and, except as expressly provided, shall not relieve any Party of the obligation of producing information in the course of discovery.

(iii) The inadvertent or unintended disclosure of materials designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” by a Producing Party, or the failure to initially designate materials as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” under this Protective Order, shall not be deemed a waiver of any claim for protection, provided that the Producing Party gives reasonably prompt notice, after discovery of said inadvertent or unintended disclosure or the failure initially to designate, that the materials should be treated confidential in accordance with the provisions of this Protective Order. Upon such notice, the Receiving Party must treat the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY,” and must then make a good faith effort to advise any person to whom such materials may have been disclosed as to the change in designation and the manner in which such materials should thereafter be treated. At the request of the Producing Party, all Receiving Parties immediately shall return all copies of such incorrectly designated document(s), and the Producing Party shall provide appropriately marked replacement copies for all Receiving

Parties. Nothing herein shall prevent the Receiving Party from challenging the confidentiality designation by submitting a written challenge to the Court.

(iv) A Party may object to the designation of any document, information, thing, or other form of evidence or discovery as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” by giving written notice to the Party designating the disputed information. The written notice shall identify the information to which the objection is made. The Producing Party shall then have five (5) business days after being provided notice to provide the objecting Party with a written explanation of the reasons for the designation. If the Parties are unable to resolve the objection within five (5) business days after the Producing Party supplies the objecting Party with a written explanation of the reasons for the designation, the Party objecting to the designation of materials as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” shall have ten (10) business days after the conclusion of the negotiation period within which to file a motion compelling the reclassification of the materials in dispute. The Party producing the materials designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” shall have the burden of establishing that good cause exists for maintaining the designation under this Protective Order. The disputed information shall be treated as designated (*i.e.*, as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY”) until the Court rules on the motion.

(v) In the event anyone shall violate, or threaten to violate, the terms of this Protective Order, the Parties agree that the aggrieved Party may immediately apply to obtain injunctive relief against any violation or threatened violation, and in the event the aggrieved Party shall do so, the respondent, subject to the provisions of this Protective Order, shall not

employ as a defense thereto any claim that the aggrieved Party possesses an adequate remedy at law. The Parties and any other person subject to the terms of this Protective Order agree that this Protective Order shall continue to be binding after termination of this action, except with respect to those documents and information that become a matter of public record. The Court retains and shall have continuing jurisdiction over the Parties and recipients of materials designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” for enforcement of the provisions of this Protective Order following termination of this action.

(vi) This Protective Order may be modified by written agreement of the Parties and approval of the Court.

(vii) Entry of this Protective Order is without prejudice to any Party or third-party person or entity seeking to impose further restrictions on the dissemination of materials designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” in this action, seeking to rescind, modify, alter, or amend this Protective Order with respect to specific documents or information, or seeking any other form of relief from this Protective Order. The Party seeking such relief shall first attempt in good faith to resolve the matter informally by setting forth, in writing, the proposed changes and the reasons for the proposed changes, and shall give the responding Party at least five (5) business days to address the issues. If the matter cannot be resolved within an additional ten (10) business days, the Party seeking relief may then apply for a suitable order from the Court.

(viii) Nothing in the foregoing provisions of this Protective Order shall affect any previous protective order.

(ix) Notwithstanding any other provision of this Protective Order to the contrary, the confidentiality obligations of this Protective Order shall not apply or shall cease to apply to any information that:

a. at the time of disclosure hereunder, was generally known to the public or the document containing the information is already in the public record by publication or otherwise;

b. since the time of disclosure hereunder, has become, through no act or failure on the part of the Receiving Party, part of the public domain by publication or otherwise;

c. at the time of disclosure, was already in the possession of the Receiving Party and was not acquired directly or indirectly from the Producing Party or from any third party under obligation of confidence to the Producing Party;

d. after disclosure hereunder, was acquired by the Receiving Party from a third party lawfully possessing the same and having no obligation to the Producing Party hereunder; or

e. the Producing Party agrees may be disclosed to a third party under no obligation of confidentiality.

The Party claiming that it is relieved of the obligation of this Protective Order by operation of any of Section 15(ix)(a-e) shall have the burden of proving that any of the provisions of Section 15(ix)(a-e) apply.

(x) This Protective Order shall not bar any attorney herein from rendering legal advice to such attorney's client that is based in part on the attorney's analysis or evaluation of materials designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL'S EYES ONLY," provided, however, that any such analysis or evaluation is

otherwise in accordance with the terms of this Protective Order (including the terms of Section 6(vii)) and further provided that in rendering such advice and otherwise communicating with the client, the attorney shall not disclose the substance of any materials designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL’S EYES ONLY” by another Party or third-party person or entity contrary to the terms of this Protective Order.

ORDER

IT IS SO ORDERED on this the 26th day of May, 2023



The Honorable Denise J. Casper
United States District Court Judge
District of Massachusetts
Boston Division