

1 UNITED STATES DISTRICT COURT1
2 EASTERN DISTRICT OF CALIFORNIA

3
4 SYNTHES, INC. AND DEPUY SYNTHES
SALES, INC.,

5 Plaintiffs /Counterclaim-Defendants,

6 vs.

7 GREGORY KNAPP,

8 Defendant /Counterclaim-Plaintiff.

No. 2:13-cv-02261-MCE-DAD

**STIPULATION AND ORDER ON
AGREEMENT FOR THE DISCOVERY
OF CONFIDENTIAL INFORMATION
FROM K2M, INC.**

9
10 WHEREAS, Plaintiffs/Counterclaim Defendants, Synthes, Inc. and DePuy Synthes Sales,
11 Inc. (collectively, "Plaintiffs/Counterclaim Defendants") and Defendant/Counterclaim Plaintiff,
12 Gregory Knapp ("Knapp"), as parties to litigation captioned *Synthes, Inc. et al. v. Knapp*, Eastern
13 District of California, Case No. 2:13-cv-02261-MCE-DAD (the "Litigation"), and third-party K2M,
14 Inc. ("K2M"), as the recipient of a subpoena duces tecum pursuant to Federal Rule of Civil
15 Procedure 45 (the "Subpoena"), have stipulated to the signing and entry of this Confidentiality
16 Agreement for the Discovery of Confidential Information of K2M (the "Agreement"), IT IS
17 HEREBY AGREED that each of the parties to this Agreement and their counsel shall be governed
18 by the following terms and conditions concerning confidential information produced by or of K2M
19 (the "K2M Confidential Information") in connection with the Litigation and the Subpoena. By
20 entering into this Agreement, K2M does not waive any of its objections to the Subpoena or other
21 discovery sought from or concerning K2M.

- 22 1. Information That May Be Designated As Confidential. K2M, Plaintiffs/Counterclaim
23 Defendants, and Knapp agree that K2M may designate as "K2M Confidential Information"
24 any of the following in connection with the Litigation or the Subpoenas: (a) documents or
25 information produced by K2M at any time; (b) documents or information that pertain to K2M
26 that are produced or to be produced by a party or a non-party to the Litigation; (d) deposition,
27 hearing, or trial testimony or transcripts of K2M employees, agents, or representatives or
28 concerning K2M, or any part thereof; and (e) access to K2M's premises for inspection or

1 information. The agreement to utilize certain definitions of “K2M Confidential Information”
2 herein is solely for the purpose of facilitating discovery in the Litigation and in connection
3 with the Subpoena and does not constitute, and may not be offered as, an admission by any
4 party to this Agreement in any court that any particular category of K2M Confidential
5 Information is confidential under the substantive law.

6 2. The restrictions set forth in this Agreement shall not apply to information or tangible items
7 which, at or prior to disclosure in the Litigation or in connection with the Subpoena, are or
8 were within public knowledge through lawful means, or which, after disclosure, come within
9 public knowledge other than by act or omission of the one receiving the K2M Confidential
10 Information or its agents, consultants or attorneys.

11 3. Categories of Protected Information.

12 a. Basis For Designation Of K2M Confidential Information. K2M may designate
13 Information as “Confidential” based upon a good faith belief that the information
14 constitutes or contains information of K2M’s which is not available to the general
15 public, including, but not limited to, trade secrets, know-how, proprietary data and/or
16 other technical, commercial, business, financial or personal information.

17 b. Basis For Designation Of Confidential - Attorneys’ Eyes Only Information. K2M
18 may also designate information as “Confidential – Attorneys’ Eyes Only” based upon
19 a good faith belief that the information constitutes or contains K2M’s highly sensitive
20 confidential or personal information, including information which, if placed in the
21 hands of a person or entity other than K2M, may place K2M at a competitive
22 disadvantage. As used in this Agreement, and except as otherwise set forth, “K2M
23 Confidential Information” includes both information designated as “Confidential” and
24 “Confidential – Attorneys’ Eyes Only.”

25 4. Permissible Use Of K2M Confidential Information. Any person having access to K2M
26 Confidential Information shall use it solely and strictly for the purposes of the Litigation
27 (including appeals) and not for any business or other purpose; shall not disclose it to anyone
28 other than those persons designated herein, and solely and strictly as necessary for the

1 purposes of prosecution or defense of the Litigation; and shall handle it in the manner set
2 forth in this Agreement. The designation of material as K2M Confidential Information shall
3 not itself affect the rights of K2M (or K2M's authorized representative) to give or disclose
4 K2M Confidential Information to any person for any reason, and such giving or disclosing of
5 confidential information shall not be deemed a waiver of this Agreement.

6 5. Persons With Access To Information Designated as "Confidential". Access to information
7 designated as "Confidential" by K2M shall be limited to:

- 8 a. Two Current officers, directors, and employees of Plaintiffs/Counterclaim
9 Defendants, who shall be disclosed to K2M at least five (5) calendar days in advance
10 of any disclosure, to enable K2M to object;
- 11 b. Knapp;
- 12 c. Outside counsel for the parties to the Litigation whose firms have entered an
13 appearance in the Litigation (including counsel's employees, agents and clerical
14 assistants);
- 15 d. Officers, directors, employees, agents, or attorneys of K2M;
- 16 e. The Court, court personnel, and court reporters;
- 17 f. Experts and consultants (including their employees and clerical assistants) who are
18 employed, retained, or otherwise consulted by counsel of record for the parties to the
19 Agreement for the purpose of analyzing data, conducting studies, or providing
20 opinions for assistance in the Litigation. Such experts and consultants of
21 Plaintiffs/Counterclaim Defendants or Knapp, however, shall not, unless K2M
22 consents in writing, include any person or business entity that is currently engaged in
23 the business of developing, manufacturing, or distributing spinal implants or
24 instrumentation, and shall be disclosed to K2M at least five (5) business days prior to
25 any information designated as "Confidential" being disclosed, to enable K2M to
26 object;
- 27 g. Deposition, hearing, or trial witnesses who previously had access to the information
28 through lawful means;

- 1 h. Any person indicated on the face of the document or thing as an originator, author or
2 recipient of a copy thereof; and
- 3 i. Any other person only upon order of Court or stipulation of K2M.
- 4 6. Persons With Access To Information Designated as “Confidential – Attorneys’ Eyes Only”.
5 Access to information designated as “Confidential – Attorneys’ Eyes Only” shall be limited
6 to:
- 7 a. Outside counsel for the parties to the Litigation whose firms have entered an
8 appearance in the Litigation (including counsel’s employees, agents and clerical
9 assistants);
- 10 b. Knapp;
- 11 c. Officers, directors, employees, agents, or attorneys of K2M;
- 12 d. The Court, court personnel, and court reporters;
- 13 e. Experts and consultants (including their employees and clerical assistants) who are
14 employed, retained, or otherwise consulted by counsel of record for the parties to the
15 Agreement for the purpose of analyzing data, conducting studies, or providing
16 opinions for assistance in the Litigation. Such experts and consultants of
17 Plaintiffs/Counterclaim Defendants or Knapp, however, shall not, unless K2M
18 consents in writing, include any person or business entity that is currently engaged in
19 the business of developing, manufacturing, or distributing spinal implants or
20 instrumentation, and shall be disclosed to K2M at least five (5) business days prior to
21 any information designated as “Confidential” being disclosed;
- 22 f. Deposition, hearing, or trial witnesses who previously had access to the information
23 through lawful means;
- 24 g. Any person indicated on the face of the document or thing as an originator, author or
25 recipient of a copy thereof; and
- 26 h. Any other person only upon order of Court or stipulation of K2M.
- 27 i. Should Plaintiffs/Counterclaim Defendants or Knapp disclose K2M Confidential
28 Information to any person(s) listed in Paragraph 5(a), 5(b), 5(e), 5(f), 5(g), 5(h), or

1 5(i), or Paragraph 6(d), 6(e), 6(f), 6(g), or 6(h), the disclosing party
2 (Plaintiffs/Counterclaim Defendants or Knapp) shall advise such person of the
3 existence of this Confidentiality Agreement and the terms herein (but only to the
4 extent the person is not an officer, director, employee, or attorney of K2M), and, prior
5 to disclosing K2M Confidential Information to any person listed in Paragraph 5(a),
6 5(f), or 5(i), or Paragraph 6(e) or 6(h), the disclosing party (Plaintiffs/Counterclaim
7 Defendants or Knapp) shall obtain a signed declaration (in the form attached as
8 Exhibit 1 hereto) from such person and provide the executed declaration, Exhibit 1, to
9 counsel to K2M.

10 7. Filing And Use Of Confidential Information In Court. Unless provided herein, the label
11 “Confidential Subject to Confidentiality Agreement of Plaintiffs/Counterclaim Defendants
12 and K2M” must appear on the front page of all documents filed with the Court that contains
13 K2M Confidential Information. All K2M Confidential Information that bears the label
14 “Confidential” or “Confidential – Attorneys’ Eyes Only” shall be filed under seal in
15 accordance with Federal Rule of Civil Procedure 5.2, and United States District Court for the
16 Eastern District of California Local Rule 141. The party wishing to use the “Confidential” or
17 “Confidential – Attorneys’ Eyes Only” information shall make the request to seal, and no
18 party shall file or testify in Court concerning K2M “Confidential” or “Confidential –
19 Attorneys’ Eyes Only” information unless such information is under seal.

20 8. Procedures To Designate Confidential Information. For the purposes of this Agreement,
21 “documents” shall have the broadest possible meaning as defined in the Subpoena (and such
22 definitions are incorporated by reference herein).

23 a. K2M may designate information which K2M believes, in good faith, to constitute
24 K2M Confidential Information, as defined by this Agreement, as “Confidential” or
25 “Confidential – Attorneys’ Eyes Only” in accordance with the provisions of this
26 Agreement. In the case of documents, designation shall be made by placing the
27 words “CONFIDENTIAL” or “CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
28 on at least the first page of the document prior to production or, in the case of native

1 electronic documents, otherwise indicating the designation of the document. K2M
2 may elect to produce original documents for inspection before such documents are
3 marked “Confidential” or “Confidential - Attorneys’ Eyes Only”. Once specific
4 documents have been designated for copying, any documents containing K2M
5 Confidential Information will then be marked as “Confidential” or “Confidential –
6 Attorneys’ Eyes Only” after copying but before delivery to K2M. There will be no
7 waiver of confidentiality by the inspection of K2M Confidential Information before
8 they are copied and marked “Confidential” or “Confidential – Attorneys’ Eyes Only”
9 pursuant to this procedure.

10 b. Whenever a deposition taken of a K2M witness or an inspection of K2M’s premises
11 is made which involves a disclosure of K2M Confidential Information:

12 i. Said deposition, inspection or portions thereof may be designated as
13 “Confidential” or “Confidential – Attorney’s Eyes Only.” Such designations
14 shall be made on the record whenever possible, but K2M may designate
15 portions of depositions as “Confidential” or “Confidential – Attorney’s Eyes
16 Only” after transcription by no later than ten (10) business days after receipt
17 of the deposition transcript or notice of errata, whichever is later, informing
18 the parties to the Litigation in writing of the portions of the transcript
19 designated “Confidential” or “Confidential – Attorneys’ Eyes Only.” Such
20 deposition transcripts shall be treated as Confidential – Attorneys’ Eyes Only
21 until K2M’s review period has expired; and

22 c. K2M shall have the right to exclude from attendance at depositions or inspections,
23 during time(s) that K2M Confidential Information is or may be disclosed, any person
24 other than a deponent, outside counsel for the Parties (including their staff and
25 associates), the court reporter, and the person(s) agreed upon pursuant to Paragraphs 5
26 and 6 above. The K2M Confidential Information shall not be disclosed until
27 requirements of this provision have been met or waived; and
28

- 1 d. The original transcripts containing K2M Confidential Information and all copies
2 thereof shall bear the legend “Confidential” or “Confidential – Attorneys’ Eyes Only”
3 as appropriate.
- 4 9. Retention of Confidential Information. All K2M Confidential Information which has been
5 designated as “Confidential” or “Confidential – Attorneys’ Eyes Only” by K2M, and any and
6 all reproductions thereof shall be retained only in the custody of outside counsel for the
7 parties in the Litigation whose firms have entered their appearance in the Litigation, except
8 that experts and consultants authorized to view such information under the terms of this
9 Agreement may retain custody of such copies as are necessary for their participation in the
10 Litigation.
- 11 10. Disclosure Of Confidential Information In Other Actions. In the event that a person (the
12 “recipient”) subject to this Agreement receives a subpoena related to another action that
13 seeks the production of K2M Confidential Information, the recipient shall, within not more
14 than three (3) business days of receipt of such subpoena, provide notice in writing to K2M,
15 c/o Shannon Hampton Sutherland, Duane Morris LLP, 30 S. 17th St., Philadelphia, PA
16 19103, SHSutherland@duanemorris.com, and c/o General Counsel, Legal Department, K2M,
17 Inc., 751 Miller Drive, SE, Leesburg, VA 20175. To the extent permitted by law, the
18 recipient shall not produce the K2M Confidential Information at issue for at least ten (10)
19 business days from the date the recipient receives the subpoena and shall cooperate fully with
20 K2M in contesting the subpoena.
- 21 11. Return Of K2M Confidential Information. Immediately after entry of final judgment
22 including appeals, or of dismissal in connection with the Litigation, all K2M Confidential
23 Information produced in connection with the Litigation or the Subpoenas, including any
24 copies thereof and summaries or descriptions thereof contained in other documents, shall be
25 returned to K2M. Alternatively, the receiving parties may destroy such information,
26 including by rendering electronically stored information inaccessible, and the Party in
27 possession of the information shall provide to K2M’s undersigned counsel written
28 confirmation of the destruction of the K2M Confidential Information. This provision does

1 not prohibit outside counsel for the Parties from retaining deposition transcripts in order to
2 maintain complete client files, provided, however, that outside counsel shall retain those
3 copies as Attorneys' Eyes Only, and shall use them solely in connection with the Litigation.

4 12. Inadvertent Production. The inadvertent production of any document or other information
5 during discovery in connection with the Litigation or the Subpoenas shall be without
6 prejudice to any claim that such material is subject to the attorney client privilege, joint
7 defense privilege, common interest privilege, or any other applicable privilege, or is
8 protected from discovery as work product within the meaning of Federal Rule of Civil
9 Procedure 26(b)(3). No party to this Agreement shall be held to have waived any rights by
10 such inadvertent production. Inadvertent production of information considered K2M
11 Confidential Information without the "Confidential" or "Confidential – Attorneys' Eyes
12 Only" designation shall not constitute a waiver of K2M's right to designate the information
13 produced as K2M Confidential Information. K2M shall give prompt written notice to
14 Plaintiffs/Counterclaim Defendants and Knapp as soon as the omission is discovered.
15 Plaintiffs/Counterclaim Defendants and Knapp shall then mark as "Confidential" or
16 "Confidential – Attorneys' Eyes Only" all documents or things indicated by K2M as having
17 been produced without such designation, and treat those documents in accordance with this
18 Agreement. Further, if multiple versions of the same document are produced with different
19 confidentiality designations, the more restrictive designation shall apply to all copies
20 produced even if not so designated. In reviewing the production of documents produced by
21 K2M, should counsel to Plaintiffs/Counterclaim Defendants or Knapp believe that a
22 particular document is or may be privileged ("Suspect Document"), such attorney (the
23 "Reporting Party") will cease further review of the Suspect Document and shall promptly
24 notify K2M's counsel and opposing counsel in writing and identify the Suspect Document by
25 Bates Number (or, if the document does not bear a Bates Number, by other identifying
26 information). Once a document is identified as a Suspect Document, then neither
27 Plaintiffs/Counterclaim Defendants nor Knapp, nor their counsel, nor any person (e.g., an
28 expert or consultant) to which such Suspect Document may have been provided shall further

1 access such Suspect Document or use the information contained therein until such time as
2 counsel for K2M notifies counsel to Plaintiffs/Counterclaim Defendants and Knapp, in
3 writing, regarding whether K2M claims a privilege in the Suspect Document as delineated
4 below. Within ten (10) business days of receipt of the written notification, counsel for K2M
5 shall in writing notify counsel for Plaintiffs/Counterclaim Defendants and Knapp whether
6 K2M claims a privilege in such Suspect Document. If privilege is claimed in the Suspect
7 Document, K2M's counsel shall thereafter add the newly identified document to K2M's
8 privilege log reasonably promptly. Should K2M claim a privilege in such Suspect
9 Document, then such Suspect Document shall thereafter be treated as privileged and
10 eliminated from the computer systems of Plaintiffs/Counterclaim Defendants, Knapp, and
11 their counsel (and any other place where such document may be found). Should elimination
12 be technically infeasible, then Plaintiffs/Counterclaim Defendants, Knapp, and their counsel,
13 and any other person who had access to the Suspect Document, shall in good faith no longer
14 access such document and shall mark it as privileged in their own systems. Nothing herein
15 shall prevent Plaintiffs/Counterclaim Defendants or Knapp from challenging through
16 appropriate motion to the Court K2M's designation of the Suspect Document (or any other
17 document) as privileged. The parties agree and stipulate, however, that the fact of such
18 document having been produced pursuant to the terms of this Agreement will not in any way
19 constitute a waiver of any claimed privilege (in the Litigation or any other matter) nor shall
20 the facts of such production be argued to any court. Should Plaintiffs/Counterclaim
21 Defendants or Knapp choose to challenge through an appropriate motion to the Court K2M's
22 designation of a Suspect Document as privileged, the Suspect Document shall continue for
23 the duration of such motion practice to be treated as privileged and not accessed by
24 Plaintiffs/Counterclaim Defendants or Knapp, or their counsel, for any purpose. Rather, such
25 motion shall be limited to the material contained in K2M's privilege log. Should
26 Plaintiffs/Counterclaim Defendants or Knapp believe it necessary for the document to
27 reviewed by the Court *in camera*, then Plaintiffs/Counterclaim Defendants or Knapp shall so
28 petition the Court for such *in camera* review. Should the Court determine that a Suspect

1 Document is privileged, then it shall continue to be treated as privileged as set out herein or
2 as more specifically directed by the Court. Should the Court determine that the Suspect
3 Document is not privileged, then it shall cease to be treated as privileged as directed by the
4 Court.

5 13. Challenges To Designations Of Confidentiality.

6 a. No party to this Agreement concedes that any material designated by any other
7 person as “Confidential” or “Confidential -Attorneys’ Eyes Only” does in fact contain
8 or reflect trade secrets, proprietary or confidential information, or has been properly
9 designated as Confidential. Any party to this Agreement may at any time move for
10 relief from the provisions of this Agreement with respect to specific material, as set
11 forth below.

12 b. If Plaintiffs/Counterclaim Defendants or Knapp believes that any information labeled
13 as K2M Confidential Information is not properly designated “Confidential” or
14 “Confidential – Attorneys’ Eyes Only”, Plaintiffs/Counterclaim Defendants or Knapp
15 may, at any time, notify K2M and request a release of confidentiality or modification
16 of the confidentiality designation. Plaintiffs/Counterclaim Defendants, Knapp, and
17 K2M shall attempt in good faith to resolve any dispute that may arise and should only
18 seek appropriate application with the Court in order to protect the rights created by
19 this Agreement after all efforts to privately resolve their dispute have failed. If K2M
20 does not grant the requested release or modification of confidentiality within ten (10)
21 business days, Plaintiffs/Counterclaim Defendants or Knapp may thereafter file a
22 motion exclusively with the Court requesting a determination by the Court as to
23 whether the information at issue shall be treated as “Confidential” or “Confidential –
24 Attorney’ Eyes Only” under the terms hereof. If Plaintiffs/Counterclaim Defendants
25 or Knapp files a motion with the Court requesting such a determination, the
26 confidential status of the information shall be maintained pending the Court’s ruling
27 on the motion. The burden of proving confidentiality of designated information
28 remains with the person or entity so designating the information. There is no

1 obligation to challenge the propriety of any designation of information as
2 “Confidential” or “Confidential – Attorneys’ Eyes Only” and the failure to do so
3 promptly shall not preclude any subsequent objection to such designation.

4 14. Reservation Of Rights. Nothing in this Agreement shall constitute a waiver of any right by
5 K2M to object in whole or in part to any requests for information, documents, inspection, or
6 deposition, and all such objections are preserved. Nothing in this Agreement shall be
7 construed as an admission or acquiescence by K2M that any request for information,
8 documents, inspection, or deposition is permissible, the proper subject of discovery or
9 inquiry, relevant, not burdensome, or admissible.

10 15. Jurisdiction, Venue, and Choice of Law. Plaintiffs/Counterclaim Defendants, Knapp, and
11 K2M and any other person or entity subject to the terms of this Agreement agree that the
12 United States District Court for the Eastern District of California shall have personal
13 jurisdiction over it/them with respect to this Agreement, exclusive jurisdiction over the
14 subject matter of this Agreement, and exclusive venue with respect to this Agreement, for the
15 purposes of enforcing this Agreement, notwithstanding any subsequent disposition of the
16 Litigation. Plaintiffs/Counterclaim Defendants, Knapp, and K2M and any other person or
17 entity subject to the terms of this Agreement further agree that California law shall govern
18 any action to enforce or relating to this Agreement.

19 16. Production or disclosure of information designated as “Confidential” or “Confidential –
20 Attorneys’ Eyes Only” according to the provisions of this Agreement shall not prejudice the
21 right of any person making that production or disclosure to maintain the trade secret status or
22 confidentiality of that information in other contexts.

23 17. This Confidentiality Agreement may be signed in counterparts.
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2 COUNTER DEFENDANTS
3 SYNTHES, INC. &
4 DEPUY SYNTHES SALES, INC.:

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Exhibit 1 to Confidentiality Agreement

DECLARATION

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4 I, _____, hereby understand and agree that information
5 and/or documents designated as Confidential Information shall be provided to me subject to the
6 terms and conditions set forth in the Confidentiality Agreement for the Discovery Of Confidential
7 Information from K2M, Inc. and Its Employees (the “Agreement”), which was agreed to by Synthes,
8 Inc., DePuy Synthes Sales, Inc., Gregory Knapp, and K2M, Inc. in connection with the matter
9 entitled *Synthes, Inc. et al. v. Gregory Knapp*, United States District Court for the Eastern District of
10 California, No. 2:13-cv-02261 (the “Litigation”) and a subpoena issued out of the same Court to
11 K2M, Inc..

12 I hereby acknowledge that I have been given a copy of and have read the Agreement. I agree
13 that I shall not disclose the information and/or documents to others and that the information and/or
14 documents shall be used only for the purpose of the Litigation. I agree that, following the
15 conclusion of the Litigation, I will return or destroy all K2M Confidential Information, including all
16 copies thereof and all summaries or descriptions thereof contained in other documents.

17 I further agree to be bound by the terms of the Agreement and to subject myself to the
18 exclusive jurisdiction of and venue of the United States District Court for the Eastern District of
19 California and California law for the enforcement of the Agreement and understand that, in the event
20 that I fail to abide by the terms of the Agreement, I may be subject to sanctions by the Court.

21
22 Date: _____

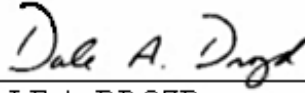
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ORDER

Pursuant to the parties' stipulation, IT IS SO ORDERED.

Dated: December 16, 2014



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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