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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 LIFESCAN, INC.,
19 Plaintiff,
20 v.

21 AMERICAN HEALTHCARE, INC.,
22 PAYLESS WHOLESAL, INC., and
23 DOES 3 through 10, inclusive,
24 Defendants.

CASE NO. C 05-2016-JSW
STIPULATED [~~PROPOSED~~] PROTECTIVE
ORDER

25 **STIPULATION**

26 Pursuant to Federal Rule of Civil Procedure 26, and it appearing that discovery in the
27 above-entitled action will involve the disclosure of confidential information, it is hereby
28 stipulated by and between Plaintiff LifeScan, Inc. (“LifeScan”) on the one hand and Defendants

1 American Healthcare, Inc. (“American Healthcare”) and Payless Wholesale, Inc. (“Payless
2 Wholesale”) on the other hand, through their respective counsel of record, that the following
3 Protective Order be entered to give effect to the terms and conditions set forth below.

4 1.0 Definitions

5 1.1 “LifeScan” means LifeScan, Inc.

6 1.2 “American Healthcare” means American Healthcare, Inc.

7 1.3 “Payless Wholesale” means Payless Wholesale, Inc.

8 1.4 “Party” or “Parties” means LifeScan and/or American Healthcare and/or
9 Payless Wholesale as the context so requires.

10 1.5 “Designating Party” means LifeScan or American Healthcare or Payless
11 Wholesale or any non-party producing documents or information under this Protective Order.

12 1.6 “Protected Information” includes the following categories of information,
13 and shall include documents produced during discovery, answers to interrogatories, responses to
14 requests for admission, depositions, hearing or trial transcripts, and tangible things, the
15 information contained therein and all copies, abstracts, excerpts, analyses or other writings that
16 contain, reflect or disclose such information whether contained in an attorney work product or
17 not.

18 1.6.1 “Confidential” designates Protected Information that a Designating
19 Party believes to be of a proprietary business or technical nature and not readily available to
20 competitors, potential competitors, and/or other third parties.

21 1.6.2 “Highly Confidential – Attorneys’ Eyes Only” designates Protected
22 Information that the Designating Party reasonably believes is “Confidential” information within
23 the meaning of Section 1.6.1, the disclosure of which is likely to cause harm to the competitive
24 position of the Designating Party. Such information may fall into one or more of the following
25 categories:

26 1.6.2.1 Current Business Plans

27 1.6.2.2 Future Business Plans

28 1.6.2.3 New Product Development

- 1 1.6.2.4 New Business Development (for old products)
- 2 1.6.2.5 Trade Secrets (as defined by California law)
- 3 1.6.2.6 Customer Lists
- 4 1.6.2.7 Internal Financial/Accounting Information
- 5 1.6.2.8 Operations Information
- 6 1.6.2.9 Distributor Agreements
- 7 1.6.2.10 License Agreements
- 8 1.6.2.11 Development Agreements
- 9 1.6.2.12 Agreements with Sales Representatives
- 10 1.6.2.13 Prices Charged to Distributors and/or Customers
- 11 1.6.2.14 Business Relationships with Third Parties
- 12 1.6.2.15 Current Product Development and Production
- 13 1.6.2.16 Cost Related Information

14 1.6.3 Protected Information shall not include: information that is in the
 15 public domain at the time of disclosure (except such information in the public domain that may be
 16 treated as a trade secret due to the effort involved in collecting and maintaining such
 17 information); information which after disclosure is published or becomes part of the public
 18 domain through no fault of a Party receiving information under this Protective Order, but only
 19 after it is published or comes into public domain (subject to the same trade secret exclusion stated
 20 above); information that is in the possession of a Party receiving such information without any
 21 confidentiality obligations at the time of disclosure; information independently derived by a Party
 22 receiving Protected Information without reference to any Protected Information, as evidenced by
 23 documentation; or information disclosed by a third party having the legal right to do so.

24 1.7 “Document” shall have the meaning ascribed to it in the Federal Rules of
 25 Civil Procedure Rule 34(a).

26 1.8 “Employees” means regular full or part-time employees and also temporary
 27 personnel who are providing only secretarial, clerical and/or administrative services for the
 28 designated employer.

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2.0 Designations of Protected Information

2.1 Each Designating Party who produces or discloses any material that the Designating Party reasonably believes to contain or reveal Protected Information may designate the same “Confidential,” or “Highly Confidential – Attorneys’ Eyes Only.”

2.2 Documents may be designated as “Confidential” only if, prior to production, the document is clearly marked with a legend that states:

CONFIDENTIAL

2.3 Documents may be designated as “Highly Confidential – Attorneys’ Eyes Only” if, prior to production, the document is clearly marked with a legend that states:

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

2.4 An answer to an Interrogatory or Request for Admission may be designated as the appropriate category of Protected Information by a statement made therein.

2.5 A deposition transcript or a portion thereof may be designated as the appropriate category of Protected Information by so designating on the record at the deposition or designating any portion of the transcript as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” within thirty (30) days following the mailing of the transcript of videotape by the court reporter or videographer. Such notice thereof shall be made in writing to the reporter, with copies to all other counsel, designating the portions of the transcript or videotape that contain Protected Information as either “Confidential” or “Highly Confidential – Attorneys’ Eyes Only,” and directing the reporter to mark that portion of the transcript or videotape accordingly. Until expiration of the thirty day period specified in this Section, all deposition transcripts and/or videotapes shall be considered and treated as “Highly Confidential – Attorneys’ Eyes Only.”

2.6 Counsel of record shall exert their best efforts to raise claims of confidentiality prior to the disclosure of Protected Information.

2.7 Notwithstanding the provisions of Sections 2.1 through 2.6 of this Protective Order, failure of counsel to designate and/or mark any Protected Information as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” as provided above shall not

1 preclude the disclosing Party from thereafter in good faith making such a designation and
2 requesting the Receiving Party to so mark and treat such Protected Information so designated.
3 After such designation, such Protected Information shall be fully subject to this Protective Order
4 and treated thereafter according to the new or corrected designation subject to any objection
5 procedure provided herein. The Receiving Party, however, shall incur no liability for disclosures
6 made prior to notice of such designation. The parties shall confer in good faith to correct the
7 designation and shall take all necessary steps to prevent further dissemination of the subject
8 materials.

9 3.0 Disclosure of Protected Information

10 3.1 Information designated “Confidential” may only be disclosed to the
11 following persons:

12 3.1.1 outside counsel of record for LifeScan or American Healthcare or
13 Payless Wholesale and the Employees of outside counsel of record (“Outside Counsel”) who are
14 assisting in this litigation and whose duties require access to Protected Information;

15 3.1.2 independent experts and/or consultants retained by counsel of
16 record for LifeScan or American Healthcare or Payless Wholesale, subject to the provisions of
17 Section 4.0 of this Protective Order;

18 3.1.3 in-house attorneys for each Party, and Employees who are assisting
19 such in-house attorneys in this litigation in filing and/or administrative duties and whose duties
20 require access to Protected Information;

21 3.1.4 Employees or representatives of each Party who are necessary to
22 the Party’s preparation and pursuit of claims and defenses in this action;

23 3.1.5 third parties specifically retained to assist outside counsel in
24 copying or computer coding of documents, but only for purposes of copying or computer coding
25 Protected Information;

26 3.1.6 qualified persons taking or recording testimony involving Protected
27 Information and their Employees whose duties require access to Protected Information; and

28 3.1.7 the Court and the Court’s staff; and

1 3.1.8 such other persons as the Parties agree to in writing prior to any
2 disclosure of Protected Information.

3 3.2 Information designated “Highly Confidential – Attorneys’ Eyes Only,”
4 including copies thereof, extracts therefrom, compilations and/or summaries thereof and any
5 information therein, may only be disclosed to persons falling within the categories specified in
6 Sections 3.1.1, 3.1.2, 3.1.5, 3.1.6, and 3.1.7 of this Protective Order, but shall in no case be
7 disclosed to persons who are involved in competitive decision making for LifeScan or American
8 Healthcare or Payless Wholesale.

9 3.3 Protected Information shall not be made available to any person except as
10 authorized under this Protective Order, and no person identified in Sections 3.1.2 and 3.1.5 shall
11 have access to Protected Information without having first read, acknowledged and agreed in
12 writing (in the form of the Declaration and Undertaking attached hereto as Exhibit A) to be bound
13 by this Protective Order. A file of all such written acknowledgments shall be maintained by the
14 Party obtaining them, and copies of such written acknowledgments shall be provided to all
15 counsel of record upon request at the conclusion of this action or if circumstances arise that create
16 reasonable concern over the adherence to this Protective Order.

17 3.4 Each individual who receives any materials designated as “Confidential” or
18 “Highly Confidential – Attorneys’ Eyes Only” hereby agrees to subject himself or herself to the
19 jurisdiction of this Court for purposes of any proceedings relating to the performance under,
20 compliance with, or violation of this Protective Order.

21 3.5 If the recipient of any Protected Information learns that, by inadvertence or
22 otherwise, it has disclosed Protected Information to any person or in any circumstance not
23 authorized under this Protective Order, the Receiving Party must immediately (a) notify in
24 writing the Designating Party of the unauthorized disclosures; (b) use its best efforts to retrieve all
25 copies of the Protected Information; (c) inform the person or persons to whom unauthorized
26 disclosures were made of all the terms of this Order; and (d) request such person or persons to
27 execute the Declaration and Undertaking in the form attached hereto as Exhibit A.

28

1 4.0 Objections to Disclosures

2 4.1 Not less than ten (10) days prior to the initial disclosure of Protected
3 Information to any person falling under the provisions of Section 3.1.2 of this Protective Order,
4 the Party planning to make such disclosure shall serve (by facsimile and mail) the name, address,
5 present employer, title, resume, and a signed Declaration and Undertaking in the form of
6 Exhibit A of the proposed recipient on the Designating Party (and to the opposing Party, if the
7 Designating Party is other than LifeScan or American Healthcare or Payless Wholesale).

8 4.2 Within the ten (10) day period before disclosure of the Protected
9 Information to the proposed recipient, the Party or non-party whose Protected Information is
10 concerned may serve (by facsimile and mail) a written objection to disclosure to such person.
11 Such an objection shall stay disclosure to the proposed recipient. Failure to serve a written notice
12 of objection within ten (10) days shall be deemed approval of a proposed recipient.

13 4.3 If a written objection is served pursuant to Section 4.2, the Parties shall
14 attempt to resolve the objection by meeting and conferring within ten (10) days of service of the
15 written objection. If the objection is not resolved by meeting and conferring, the Party seeking to
16 prevent disclosure shall file a motion for protective order, to be heard on the earliest date
17 available. Failure to file such a motion within ten (10) days of meeting and conferring or at the
18 conclusion of the ten-day period to meet and confer shall preclude a Party from objecting to the
19 disclosure of Protected Information to the person to whom the objection is directed. The
20 disclosure of Protected Information to such proposed person shall be withheld pending the ruling
21 of the Court on any such motion. On any such motion, the Party seeking to prevent disclosure to
22 a person proposed for approval shall have the burden of proof.

23 4.4 If at any time during the pendency or trial of this action, counsel for any
24 Party claims that a Designating Party is unreasonably designating certain information as
25 “Confidential” or “Highly Confidential – Attorneys’ Eyes Only,” the objecting Party may serve a
26 captioned notice of objection on the Designating Party and all Parties, identifying with
27 particularity the items to which the designation is challenged, stating the basis for each challenge,
28 and proposing a new designation for each item. If the Designating Party does not re-designate the

1 material within ten (10) days after service of such notice, the objecting Party may file and serve a
2 motion for an order that the material be re-designated. On any such motion, the Party seeking to
3 prevent re-designation shall have the burden of proof. The original designation shall remain
4 effective until three (3) business days after an Order is entered re-designating the materials. The
5 Court may award sanctions on any motion concerning the challenge of a designation if the Court
6 finds that any Designating Party's or Receiving Party's position was taken without reasonable
7 justification.

8 5.0 Use of Protected Information

9 5.1 Protected Information disclosed pursuant to this Protective Order shall,
10 unless otherwise ordered by this Court, be used by a recipient thereof solely for the purpose of
11 this action and not for any other action or for any business or competitive purposes or for any
12 other reason. Protected Information shall not be used for any purposes other than in the
13 prosecution or defense of claims asserted in this action. In no event shall any person receiving
14 Protected Information use it for commercial or competitive purposes, or make any public
15 disclosure of the contents thereof. Nothing contained in this Protective Order, however, shall
16 affect the right of the Designating Party to disclose information designated solely by it under this
17 Protective Order.

18 5.2 No person shall disclose to anyone not specified in Section 3.0 of this
19 Protective Order any Protected Information without prior written consent of the Designating Party
20 or further Order of this Court.

21 6.0 Depositions Involving Protected Information

22 6.1 At any deposition session, when counsel of record for a Party deems that a
23 question and/or the answer to a question will result in the disclosure of Protected Information,
24 counsel may designate as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" the
25 portion of the transcript or videotape containing such question or answer.

26 6.2 Any portion of a transcript designated as "Confidential" or "Highly
27 Confidential – Attorneys' Eyes Only" Protected Information shall be transcribed separately from
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or

HIGHLY CONFIDENTIAL
SUBJECT TO PROTECTIVE ORDER
IN CIVIL ACTION NO. C 05-2016 JSW
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

7.2 All such materials shall be accepted by the Clerk of the Court for filing and shall be maintained by the Clerk of the Court separate from the public records in this action and shall be released only upon further Order of the Court.

7.3 All documents, exhibits or papers filed in connection with any proceedings related to compliance with, performance under, construction of or violation of this Protective Order, shall be filed under seal pursuant to Civil Local Rule 79-5.

8.0 Pretrial and Trial

8.1 This Protective Order is intended to regulate the handling of Protected Information during the pretrial period of this litigation, but shall remain in force and effect thereafter until modified, superseded or terminated on the record by agreement of the Parties hereto or by Order of this Court.

8.2 Subject to the Federal Rules of Evidence, Protected Information may be offered in evidence at trial or any Court hearing in this Action, provided that:

8.2.1 the proponent of the evidence advises the Court and the Designating Party that Protected Information will be offered prior to its offer and the Designating Party has an appropriate opportunity to object to the disclosure of the Protected Information;

8.2.2 any documents, exhibits or papers containing Protected Information shall be filed under seal pursuant to Civil Local Rule 79-5;

8.2.3 the evidence be received *in camera* or under other conditions to prevent disclosure to any persons other than the judge, the jury, the court reporter, counsel of record, any witness testifying with respect to the evidence, and other persons who are entitled to

1 receive the appropriate category of Protected Information under the terms of this Protective
2 Order; and

3 8.2.4 the trial or Court hearing transcript is treated in the manner
4 specified in Section 6.0 of this Protective Order.

5 9.0 General Provisions

6 9.1 Upon final termination of this action with respect to any Party, that Party
7 shall, at the option of the Designating Party, either return to the Designating Party or destroy all
8 Protected Information in its possession, except such pretrial and trial records as are regularly
9 maintained by outside counsel in the ordinary course of business, which records must be
10 protected in conformity with this Protective Order. The termination of proceedings in this action
11 shall not thereafter relieve the Parties from the obligation to maintain the confidentiality of all
12 Protected Information received pursuant to this Protective Order.

13 9.2 This Protective Order is intended to provide a mechanism for the handling
14 of Protected Information, the disclosure or production of which is objected to only on the basis of
15 confidentiality. Each Party reserves the right to object to any disclosure of information or
16 production of any document it deems Protected Information on any other ground it may deem
17 appropriate. The designation of Protected Information pursuant to this Protective Order shall not
18 create any presumption with respect to the confidential, proprietary, or trade secret nature of any
19 information, documents or things.

20 9.3 The Parties may, by joint stipulation, apply to amend this Protective Order.
21 The amendment shall take effect once the stipulation is entered by the Court.

22 9.4 The Court retains jurisdiction to amend this Protective Order without
23 agreement of the Parties and to issue Orders concerning Protected Information disclosed under
24 this Protective Order.

25 9.5 Notwithstanding the foregoing provisions, counsel for either Party may
26 give advice and opinions to his or her client based on his or her evaluation of information
27 disclosed by the opposing Party or a third party and designated as "Confidential" or "Highly
28 Confidential – Attorneys' Eyes Only," including for purposes of settlement discussions.

1 9.6 Nothing in this Protective Order shall limit or restrict the manner in which
2 the Parties shall handle their own Protected Information.

3 9.7 Adherence to this Protective Order in no way constitutes an admission by
4 any Party that any information provided in this action and not subject to this Protective Order is
5 not proprietary or confidential.

6 9.8 This Protective Order shall not abrogate or diminish any contractual,
7 statutory or other legal obligation or right of any Party or person, nor obligate any Party or person
8 to provide any discovery to which it asserts objections.

9 9.9 Nothing in the foregoing provisions of this Protective Order shall be
10 deemed to preclude any Party from seeking and obtaining, on an appropriate showing, such
11 additional protection with respect to the confidentiality of these proceedings or specific
12 documents or testimony as that Party may deem appropriate, including but not limited to
13 restrictions on public disclosure or disclosure to competitors.

14 9.10 The terms of this Protective Order shall apply to confidential documents or
15 material produced or disclosed by third parties in connection with this action if such third party
16 wishes to designate the document or information Protected Information.

17 9.11 Each Party reserves the right to apply to the Court to modify the terms of
18 this Protective Order in the event that the Party believes that it is necessary. In the event such an
19 application is made, all persons described herein shall be bound by this Protective Order until it is
20 modified by the Court.

21 9.12 The disclosure of Protected Information to any attorney of record shall not
22 prevent or disqualify that attorney of record from representing any Party or any non-party in any
23 future litigation.

24 9.13 If any Party or non-party, having received Protected Information, receives
25 a subpoena or other compulsory process from any other person or entity seeking the production of
26 the Protected Information produced by the Designating Party, counsel for the Designating Party
27 shall be notified in writing immediately and in no event more than three (3) court days after the
28 receipt of the subpoena or other compulsory process and such notification shall include copies of

1 the subpoena or compulsory process. Absent the consent of the Designating Party, the Party or
 2 person receiving such subpoena or compulsory process shall refrain to the fullest extent
 3 permissible under law from producing the subpoenaed Protected Information. The Party or
 4 person receiving such subpoena or compulsory process also must immediately inform in writing
 5 the party who caused the subpoena or order to issue in the other litigation that some or all the
 6 material covered by the subpoena or order is the subject of this Protective Order. In addition, the
 7 Receiving Party must deliver a copy of this Protective Order promptly to the party in the other
 8 action that caused the subpoena or order to issue. The purpose of imposing these duties is to alert
 9 the interested parties to the existence of this Protective Order and to afford the Designating Party
 10 in this action an opportunity to try to protect its confidentiality interests in the court from which
 11 the subpoena or order issued. The Designating Party shall bear the full burden and all expenses
 12 of seeking protection in that court of its Protected Information, and nothing in these provisions
 13 should be construed as authorizing or encouraging a Party to this action to disobey a lawful
 14 directive from another court.

15
16 DATED: March 3, 2006

QUINN EMANUEL URQUHART
OLIVER & HEDGES, LLP

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19 By /s/ Albert P. Bedecarré
 Albert P. Bedecarré
 Attorneys for LifeScan, Inc.

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23 DATED: March 3, 2006

LAW OFFICE OF DEREK A. ELETICH

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26 By /s/ Derek A. Eletich
 Derek A. Eletich
 Attorneys for American Healthcare, Inc.

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DATED: March 3, 2006

LAW OFFICES OF LAWRENCE G. TOWNSEND

By /s/ Lawrence G. Townsend
Lawrence G. Townsend
Attorneys for Payless Wholesale, Inc.

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ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: March 23, 2006



The Honorable Jeffrey S. White
United States District Judge

