

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re *Inter Partes* Review of:)
U.S. Patent No. 7,166,062)
Issued: Jan. 23, 2007)
Application No.: 09/641,627)
Filing Date: Aug. 18, 2000)

For: **System For Interaction With Exercise Device**

FILED VIA E2E

**PETITIONER PELOTON INTERACTIVE, INC.'S
UNOPPOSED MOTION TO FILE DOCUMENTS UNDER SEAL
AND FOR A PROTECTIVE ORDER**

I. INTRODUCTION

Pursuant to 37 C.F.R. §§ 42.14 and 42.54, Petitioner Peloton Interactive, Inc. (“Peloton”) respectfully requests the Board authorize the filing under seal of the confidential version of Patent Owner iFIT’s Preliminary Infringement Contentions, served in the parallel district court proceeding *ICON Health & Fitness, Inc. v. Peloton Interactive, Inc.*, No. 1:20-cv-01386-RGA (D. Del. Aug. 6, 2021) (“iFit’s Infringement Contentions”) (Ex. 1014).¹ In addition, Peloton respectfully requests the Board enter the Joint Proposed Protective Order, a copy of which is attached hereto as Appendix A.

iFIT’s Preliminary Infringement Contentions contain Peloton’s highly confidential technical information that Peloton has designated as confidential materials, either as “PROTECTIVE ORDER MATERIAL – CONFIDENTIAL” or “PROTECTIVE ORDER MATERIAL – HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” under the attached Joint Proposed Protective Order. The designated materials Peloton seeks to seal include highly confidential technical information, including technical specifications, internal documents setting forth software and hardware specifications, internal documents and presentations

¹ Peloton will file redacted public versions of iFIT’s Preliminary Infringement Contentions concurrently with this motion.

excerpting highly confidential source code, and other documents showing the operation of the Peloton Bike+. These materials relate to the core of Peloton's business. Public disclosure of this information would significantly harm Peloton's competitive position because it would allow competitors, including Patent Owner iFIT, to access sensitive technical information.

Importantly, the parties have both produced and are continuing to produce such sensitive information in the related currently-pending district court litigation. The parties previously arrived at a mutual agreement that such information is highly confidential information relating to their core businesses, and that public disclosure of this information could significantly harm their competitive positions (collectively, "Protective Order Material"). To that end, in the related currently-pending district court action between the parties involving the patent-at-issue in this proceeding, the parties negotiated, and the district court signed and entered, a protective order that is in effect, a copy of which is attached as Appendix C.

Peloton respectfully submits that the status of the parties as mutual competitors; the district court's approval, notwithstanding the public interest in general in court proceedings being public, of the parties' negotiated confidentiality protections for this Protective Order Material; the fact that iFIT does not oppose this motion; the wide acceptance of the fact that highly sensitive and confidential technical and financial information should be afforded protections from disclosure;

and the confidential nature of the information that is the subject of the Proposed Joint Protective Order all weigh strongly in favor of granting this motion.

Moreover, importantly, Peloton submits that the negotiated specific protections in the existing protective order in district court with respect to the Protective Order Material should be preserved. Specifically, source code and technical documents have been produced in the district court action under specific provisions to preserve its confidentiality. For example, under the protective order in the district court, source code, sensitive financial and business information, and technical documents are not permitted to be seen by the non-producing party or its in-house counsel, but only by outside counsel of record; their employees; outside consultants or experts; and the Court. Peloton requests that this limitation on access to the Protective Order Material, which was negotiated between and agreed to by both Peloton and iFIT in the district court litigation, should likewise be approved by the Board in this proceeding. This restriction applies only to information that would already be sealed from the public view by the other provisions of the proposed Protective Order.²

² If the Board disagrees that these protections in the district court should be preserved, Peloton respectfully requests an opportunity to either supplement its

Attached as Appendix A is a copy of the Board's Default Protective Order, with modifications, that the parties jointly request be entered. A redline copy showing the differences between the proposed Joint Protective Order (Appendix A) and the Board's Default Protective Order is attached as Appendix B. Peloton respectfully requests that the Board's Default Protective Order, as modified and attached as Appendix A, govern these materials in this proceeding to the extent they are found to contain Protective Order Material.

Pursuant to 37 C.F.R. § 42.54, Peloton certifies that it conferred in good faith with iFIT regarding this motion and the scope of the Joint Proposed Protective Order for this petition for *inter partes* review. iFIT does not oppose this motion to seal and the parties agree to the terms of the Joint Proposed Protective Order attached as Appendix A.

II. THE BOARD SHOULD SEAL THE CONFIDENTIAL EXHIBITS

A. Good Cause Exists to Seal the Confidential Exhibits

The Trial Practice Guide provides that “the rules aim to strike a balance between the public’s interest in maintaining a complete and understandable file history and the parties’ interest in protecting truly sensitive information.” 77 Fed.

motion as to this question, or to withdraw its filed Confidential Exhibits to prevent its disclosure beyond the disclosure permitted in the district court.

Reg. 48756, 48760 (Aug. 14, 2012). Further, the rules “identify confidential information in a manner consistent with Fed. R. Civ. P. 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information.” *Id.* (citing 37 C.F.R. § 42.54).

Here, good cause exists to allow Peloton to file iFIT’s Preliminary Infringement Contentions (Ex. 1014) under seal. As described in more detail below, the information in these materials that Peloton seeks to seal includes non-public technical information relating to the design and functionality of the Peloton Bike and Bike+, and specifically its auto-follow feature and the way the Bike+ set the resistance value under certain conditions (*e.g.*, internal presentations; non-public product requirements documents; and source code). As explained in detail below, good cause exists to seal iFIT’s Preliminary Infringement Contentions for several reasons.

First, iFIT’s Preliminary Infringement Contentions contains highly sensitive, non-public, technical information, disclosure of which would create an elevated risk of commercial or apparent harm to Peloton. Second, iFIT’s Preliminary Infringement Contentions contain highly confidential source code, which is designated under the protective order in the related district court litigation as being highly confidential and restricted to attorneys’ eyes only. Third, the parties have met and conferred, and iFIT does not oppose Peloton’s designation of iFIT’s

Preliminary Infringement Contentions pursuant to the attached Joint Protective Order. Finally, because Peloton concurrently submits redacted versions of iFIT's Preliminary Infringement Contentions, this motion strikes the appropriate "balance between the public's interest in maintaining a complete and understandable file history and the parties' interest in protecting truly sensitive information." 77 Fed. Reg. 48756, 48760, 48770 (Aug. 14, 2012).

The Board should grant this motion in its entirety and enter the attached Joint Proposed Protective Order.

B. iFIT's Preliminary Infringement Contentions Contain Confidential Information That Should Be Sealed

As explained above, in order to strike the appropriate balance and ensure that only truly confidential information is being sealed, Peloton provides the following detailed descriptions of the information in iFIT's Preliminary Infringement Contentions that it seeks to seal; identifies the portions of each that it seeks to seal; and explains why the Board should seal these specific portions.

Peloton requests that the Board seal Exhibit 1014, which contains Peloton's highly sensitive, non-public technical information, including technical specifications relating to the hardware and software of the Peloton Bike+. For example, pages 10, 12, 20, 29, 30, 46, and 49 of Exhibit 1014 contain, and excerpt from, Peloton's proprietary source code for the Peloton Bike+ that is used to calculate the resistance setting for a user as part of the Bike+'s auto-follow feature. Page 60 of Exhibit 1014

contains an excerpt from an internal and highly confidential Peloton product development presentation, containing computer-aided design renderings of the Bike+'s braking mechanism as well as results and analysis of various testing.

The Board should seal Exhibit 1014 because the potential harm from disclosure substantially outweighs the public's interest in maintaining a complete and understandable file history for several reasons. First, the technical information in these exhibits is highly sensitive to Peloton. Second, disclosure of this technical information contained in the excerpted source and internal presentations could cause Peloton serious competitive harm by, for example, providing competitors with a strategic and unfair advantage against Peloton. Peloton invests significant resources in developing, maintaining, and improving the technology underlying the Peloton Bike+, and public disclosure of this information would allow competitors more easily to copy Peloton's technology and allow them unfairly to market competing products without making the same research and development investment as Peloton. Third, in the related district court litigation, there is a separate confidentiality designation for highly confidential source code under the protective order. Because Exhibit 1014 contains excerpts of Peloton's source code, consistency with the district court protective order warrants sealing of these presentations that contain highly confidential information.

Finally, Peloton submits a redacted version of Exhibit 1014, thereby striking the appropriate balance in maintaining the public's interest in maintaining a complete and understandable file history and its own interest in protecting its confidential and highly sensitive technical information.

III. CONCLUSION

For the foregoing reasons, Peloton respectfully requests the PTAB grant this motion and enter the Joint Proposed Protective Order attached as Appendix A.

Respectfully submitted,

Dated: October 13, 2021

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CERTIFICATE OF SERVICE

The undersigned certifies that a complete copy of **Petitioner Peloton Interactive, Inc.’s Unopposed Motion To File Documents Under Seal And For A Protective Order with appendices** was served on the official correspondence address for the patent shown in PAIR via FEDERAL EXPRESS next business day delivery, on October 13, 2021:

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APPENDIX A

[PROPOSED] PROTECTIVE ORDER

The following Protective Order will govern the filing and treatment of confidential information in the proceeding:

IPR2022-_____

This protective order governs the treatment and filing of confidential information, including documents and testimony.

1. Confidential information shall be clearly marked “PROTECTIVE ORDER MATERIAL.”

2. Access to PROTECTIVE ORDER MATERIAL is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(B) Party Representatives. Representatives of record for a party in the proceeding.

(C) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(D) In-house counsel. In-house counsel of a party.

(E) Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(F) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

3. Confidential information of such a highly sensitive nature that revelation of the same to an adversary party will likely cause a current competitive harm shall be clearly marked “ATTORNEYS’ EYES ONLY” (“AEO”).

4. Access to AEO information is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) Party Representatives. Representatives of record for a party in the proceeding.

(B) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(C) Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(D) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

5. Employees (e.g., corporate officers), consultants, or other persons performing work for a party, other than those persons identified above in (2)(A)–(F) and (4)(A)–(D), shall be extended access to confidential information (including PROTECTIVE ORDER MATERIAL and AEO information) only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person and after signing the Acknowledgment. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

6. Persons receiving confidential information shall use reasonable efforts to maintain the confidentiality of the information, including:

- (A) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;
- (B) Otherwise using reasonable efforts to maintain the confidentiality of the information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;
- (C) Ensuring that support personnel of the recipient who have access to the confidential information understand and abide by the

obligation to maintain the confidentiality of information received that is designated as confidential; and

(D) Limiting the copying of confidential information to a reasonable number of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

7. Persons receiving confidential information shall use the following procedures to maintain the confidentiality of the information:

(A) Documents and Information Filed With the Board.

(i) A party may file documents or information with the Board along with a Motion to Seal. The Motion to Seal should provide a non-confidential description of the nature of the confidential information that is under seal, and set forth the reasons why the information is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The documents or information shall remain under seal unless the Board determines that some or all of it does not qualify for confidential treatment.

(ii) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(B) Documents and Information Exchanged Among the Parties.

Documents (including deposition transcripts) and other information designated as confidential that are disclosed to another party during discovery or other proceedings before the Board shall be clearly marked

as “PROTECTIVE ORDER MATERIAL” or “ATTORNEYS’ EYES ONLY” and shall be produced in a manner that maintains its confidentiality.

8. This Order does not alter any obligations under orders entered in other proceedings (including in *Peloton Interactive, Inc. v. ICON Health & Fitness, Inc.*, No. 1:20-cv-00662-RGA), of any person who obtains, receives, has access to, or otherwise learns, in whole or in part, PROTECTIVE ORDER MATERIAL or AEO information. This Order does not purport to supersede or otherwise alter any protective order issued by any court, including the United States District Court for the District of Delaware in *Peloton Interactive, Inc. v. ICON Health & Fitness, Inc.*, No. 1:20-cv-00662-RGA.

9. Within 60 days after the final disposition of this action, including the exhaustion of all appeals and motions, each party receiving confidential information must return, or certify the destruction of, all copies of the confidential information to the producing party.

10. Standard Acknowledgement of Protective Order. The following form may be used to acknowledge the protective order and gain access to information covered by the protective order:

IPR2022-_____

Standard Acknowledgment for Access to Protective Order Material

I _____, affirm that I have read the Protective Order; that I will abide by its terms; that I will use the confidential information only in connection with this proceeding and for no other purpose, except that any portion of the confidential material that is obtained by other, appropriate means, such as through discovery in a district court or other proceeding, that portion of the confidential information may be used in the other proceeding, subject to any confidentiality terms applicable to that portion of the confidential information in the other proceeding; that I will only allow access to support staff who are reasonably necessary to assist me in this proceeding; that prior to any disclosure to such support staff I informed or will inform them of the requirements of the Protective Order; that I am personally responsible for the requirements of the terms of the Protective Order and I agree to submit to the jurisdiction of the Office and the United States District Court for the Eastern District of Virginia for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

Signature

Date

APPENDIX B

~~DEFAULT~~[PROPOSED] PROTECTIVE ORDER

The following ~~Default~~ Protective Order will govern the filing and treatment of confidential information in the proceeding:

~~Default Protective Order~~IPR2022-

This protective order governs the treatment and filing of confidential information, including documents and testimony.

1. ~~1.~~ Confidential information shall be clearly marked “PROTECTIVE ORDER MATERIAL.”

2. ~~2.~~ Access to ~~confidential information~~PROTECTIVE ORDER MATERIAL is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) ~~(A)~~ Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

~~and other persons who are named parties to the proceeding.~~

(B) ~~(B)~~ Party Representatives. Representatives of record for a party in the proceeding.

(C) ~~(C)~~ Experts. Retained experts of a party in the proceeding who further

certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(D) ~~(D)~~ In-house counsel. In-house counsel of a party ~~support personnel of the~~.

(E) Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those

persons in the proceeding shall not be required to sign an ~~persons in the proceeding shall not be required to sign an~~

Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(F) ~~(F)~~ The Office. Employees and representatives of the United States Patent

and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

3. Confidential information of such a highly sensitive nature that revelation of the same to an adversary party will likely cause a current competitive harm shall be clearly marked “ATTORNEYS’ EYES ONLY” (“AEO”).

4. Access to AEO information is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) Party Representatives. Representatives of record for a party in the proceeding.

(B) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(C) Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(D) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

5. 3-Employees (e.g., corporate officers), consultants, or other persons performing work for a party, other than ~~in-house counsel and in-house counsel's support staff, who sign the Acknowledgement~~those persons identified above in (2)(A)–(F) and (4)(A)–(D), shall be extended access to confidential information (including PROTECTIVE ORDER MATERIAL and AEO information) only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person and after signing the Acknowledgment. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

6. 4-Persons receiving confidential information shall use reasonable efforts to maintain the confidentiality of the information, including:

not (A) ~~(A)~~ Maintaining such information in a secure location to which persons

authorized to receive the information shall not have access;

the (B) ~~(B)~~ Otherwise using reasonable efforts to maintain the confidentiality of

information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;

the (C) ~~(C)~~ Ensuring that support personnel of the recipient who have access to

confidential information understand and abide by the obligation to maintain the confidentiality of information received that is designated as confidential; ~~the confidentiality of information received that is designated as confidential;~~

and

number (D) ~~(D)~~ Limiting the copying of confidential information to a reasonable

of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

7. 5- Persons receiving confidential information shall use the following procedures to maintain the confidentiality of the information:

(A) Documents and Information Filed With the Board.

(i) ~~(i)~~ A party may file documents or information with the Board along with a

Motion to Seal. The Motion to Seal should provide a non-confidential description of the nature of the confidential information that is under seal, and set forth the reasons why the information is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The documents or information ~~the information by opposing the Motion to Seal. The submission shall be~~

~~treated as confidential and remain under seal, unless the Board determines that the documents or information do not to qualify for confidential treatment.~~

~~The information~~ shall remain under seal unless the Board determines that some or all of ~~the information~~it does not qualify for confidential treatment.

(ii) ~~(ii)~~ Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and ~~non-~~ non-confidential versions of its submission, together with a Motion to Seal the ~~confidential versions of its submission, together with a Motion to Seal the~~

confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made ~~from the non-confidential version is confidential and should not be made~~

available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed ~~of the submission shall clearly indicate the locations of information that has~~

~~been redacted. The confidential version of the submission shall be filed~~

under seal. The redacted information shall remain under seal unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(B) Documents and Information Exchanged Among the Parties. Documents (including deposition transcripts) and other information designated as confidential that are disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as “PROTECTIVE ORDER MATERIAL” or “ATTORNEYS’ EYES ONLY” and shall be produced in a manner that maintains its confidentiality.

8. This Order does not alter any obligations under orders entered in other proceedings (including in *Peloton Interactive, Inc. v. ICON Health & Fitness, Inc.*, No. 1:20-cv-00662-RGA), of any person who obtains, receives, has access to, or otherwise learns, in whole or in part, PROTECTIVE ORDER MATERIAL or AEO information. This Order does not purport to supersede or otherwise alter any protective order issued by any court, including the United States District Court for the District of Delaware in *Peloton Interactive, Inc. v. ICON Health & Fitness, Inc.*, No. 1:20-cv-00662-RGA.

9. ~~6-~~ Within 60 days after the final disposition of this action, including the

exhaustion of all appeals and motions, each party receiving confidential information must return, or certify the destruction of, all copies of the confidential information to the producing party.

10. ~~(K)~~ Standard Acknowledgement of Protective Order. The following form

may be used to acknowledge ~~a~~the protective order and gain access to information covered by the protective order:

[CAPTION]

IPR2022-

Standard Acknowledgment for Access to Protective Order Material

I _____, affirm that I have

read the Protective Order; that I will abide by its terms; that I will use the confidential information only in connection with this proceeding and for no other purpose, except that any portion of the confidential material that is obtained by other, appropriate means, such as through discovery in a district court or other proceeding, that portion of the confidential information may be used in the other proceeding, subject to any confidentiality terms applicable to that portion of the confidential information in the other proceeding; that I will only allow access to support staff who are

reasonably necessary to assist me in this proceeding; that prior to any
~~reasonably necessary to assist me in this proceeding; that prior to any~~

disclosure to such support staff I informed or will inform them of the requirements of the Protective Order; that I am personally responsible for the requirements of the terms of the Protective Order and I agree to submit to the jurisdiction of the Office and the United States District Court for the Eastern District of Virginia for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

[Signature]

| Signature

Date

Summary report:	
Litera® Change-Pro for Word 10.14.0.46 Document comparison done on 10/13/2021 11:13:59 AM	
Style name: L&W without Moves	
Intelligent Table Comparison: Active	
Original filename: DEFAULT PROTECTIVE ORDER(127002599.1).docx	
Modified filename: Joint Proposed Protective Order (Appendix A) (rev IPR2022)(126998119.2).docx	
Changes:	
Add	57
Delete	67
Move From	0
Move To	0
Table Insert	0
Table Delete	0
Table moves to	0
Table moves from	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
Total Changes:	124

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ICON HEALTH & FITNESS, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 20-1386 (RGA)
)	
PELOTON INTERACTIVE, INC.,)	
)	
Defendant.)	
)	

STIPULATED PROTECTIVE ORDER

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiff ICON Health & Fitness, Inc. and defendant Peloton Interactive, Inc. and their respective undersigned counsel, that this Protective Order shall govern the disclosure, handling, and use of documents, records, testimony, and any other information, items, or materials that are produced, supplied, or given by, or otherwise exchanged between, the Parties and any Non-Party (as those terms are defined herein) during the litigation of the above-captioned action (this “Action”).

IN LIGHT OF THE PARTIES’ STIPULATION AND AGREEMENT, IT IS HEREBY ORDERED pursuant to Rule 26(c) of the Federal Rules of Civil Procedure that the following Protective Order shall be adopted and observed in the Action:

1. DEFINITIONS

1.1 Party: A party to this Action, including each of its officers, directors, employees, consultants, retained experts, and Outside Counsel of Record (as defined herein) and their support staff.

1.2 Non-Party: Any natural person, partnership, corporation, association, or other legal entity not named as a Party to this Action.

1.3 Outside Counsel of Record: Attorneys who are not employees of a Party to this Action but are retained to represent or advise a Party to this Action or have appeared in this Action on behalf of that Party or are affiliated with a law firm that has appeared on behalf of that Party.

1.4 In-House Counsel: Attorneys who are employees of a Party to this Action, but not including Outside Counsel of Record.

1.5 Challenging Party: A Party or Non-Party that challenges the designation of information or items under this Protective Order.

1.6 “CONFIDENTIAL” Information or Items: Non-public information (regardless of how it is generated, stored, or maintained), items that contain or disclose information that constitute or relate to trade secrets or other confidential or proprietary research, development, technical, financial, or commercial information that a Party reasonably believes could cause harm to its business operations or provide improper business or commercial advantage to another Party or Non-Party, or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

1.7 Counsel (without qualifier): Outside Counsel of Record and In-House Counsel (as well as their support staff).

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

1.9 Disclosure or Discovery Material: All information or items, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this Action.

1.10 Expert: A person with specialized knowledge or experience in a matter pertinent to this Action who (1) has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this Action, (2) is not a current employee of a Party or of a Party’s competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party or of a Party’s competitor.

1.11 Final Disposition: The later of (1) dismissal of all claims and defenses in an action, with or without prejudice; or (2) final judgment in an action after the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of that action, including the time limits for filing any motions or applications for extension of time pursuant to applicable law.

1.12 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items: Extremely sensitive “CONFIDENTIAL” Information or Items, disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means. Such information or items may include, without limitation, pending but unpublished patent applications, information concerning research, development and other activities related to unreleased products, trade secrets, or other highly confidential research,

development, technical, financial, or commercial information. Information or items produced pursuant to Local Rule 26.2 and/or designated as Highly Confidential – Outside Counsel Eyes Only shall be treated the same as information or items designated as HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY under this Protective Order.

1.13 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items:

Extremely-sensitive “CONFIDENTIAL” Information or Items that meets the definition of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items and is non-public computer source code that exhibits extremely-sensitive trade secret or other confidential research or development, the disclosure of which to an unauthorized individual could create a substantial risk of serious harm that could not be avoided by less restrictive means. As used herein, “source code” means human-readable computer instructions expressed in a form suitable for input to an assembler, compiler, or other data processing module in native format.

1.14 Producing Party: A Party or Non-Party that produces Disclosure or Discovery Material in this Action.

1.15 Professional Vendors: Third-party persons or entities that provide litigation support services (e.g., photocopying, imaging, videotaping, translating, preparing exhibits or demonstrations, and organizing, processing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

1.16 Protected Material: Any Disclosure or Discovery Material that is designated “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.”

1.17 Receiving Party: A Party that receives Disclosure or Discovery Material from a Producing Party.

2. SCOPE

This Protective Order shall apply to all Protected Material, regardless of the medium or manner in which it is generated, stored, or maintained, that is produced, disclosed, or generated either by a Party or Non-party in connection with discovery or Rule 26(a) disclosures in this Action. Moreover, this Protective Order shall apply to (a) any information copied or extracted from Protected Material, (b) any copies, excerpts, summaries, or compilations of Protected Material, and (c) any testimony, conversations, or presentations by a Party or its Counsel that might reveal information or items that have been designated in accordance with the procedures set forth herein.

However, this Protective Order shall not apply to (a) any information or items that are in the public domain at the time of receipt by the Receiving Party or that become part of the public domain, after receipt by the Receiving Party, in a manner that does not violate this Protective Order, or (b) any information or items that are known to the Receiving Party prior to being designated with a confidentiality designation for this Action or that are obtained by the Receiving Party from a source who lawfully obtained the information or items and who was under no obligation of confidentiality to the Designating Party.

Nothing in this Protective Order shall (a) affect the right of the Producing Party to disclose or use its own Protected Material for any purpose, or (b) prevent or otherwise restrict Counsel from rendering legal advice to their client and in the course thereof, relying on Protected Material, provided, however, that in relying on such Protected Material, Counsel shall not disclose, reveal, or describe the content of any Protected Material except insofar as allowed, if at all, under the terms of this Protective Order.

Counsel of the Parties will work together to discuss how to handle Protected Material that is to be presented at hearings or at trial.

3. DURATION

Even after Final Disposition of this Action, the confidentiality obligations imposed by this Protective Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order otherwise directs.

4. DESIGNATING DISCLOSURE OR DISCOVERY MATERIAL

4.1 Restraint and Care in Designating Disclosure or Discovery Material

Each Party or Non-Party that designates Disclosure or Discovery Material for protection under this Protective Order shall exercise restraint and take care to limit any designation to specific information or items that qualify under the appropriate standards. If it comes to a Designating Party's attention that information or items that it designated for protection do not properly qualify for protection or do not qualify for the level of protection initially asserted, that Designating Party must promptly notify all other Parties in its respective action that it is withdrawing the mistaken designation.

4.2 Timing of Designations

Except as otherwise provided herein, or stipulated to or ordered, each Party or Non-Party shall designate Disclosure or Discovery Material for protection under this Protective Order before the information or items are disclosed or produced. If it comes to a Designating Party's attention that information or items were not properly designated as Protected Materials, that Designating Party must promptly notify all other Parties in its respective action that it is designating the materials as Protected Materials pursuant to Paragraph 4.4 below.

4.3 Manner of Designating

a. Disclosure or Discovery Material in Documentary Form

Disclosure or Discovery Material that is produced in documentary form (excluding transcripts) shall be designated by labeling or marking each page of the document with the appropriate designation.

b. Native Files

Disclosure or Discovery Material that is produced in native electronic format shall be designated by appending to the file names an indication of the appropriate designation or by implementing any other reasonable method for designating materials produced in native electronic format. If such Disclosure or Discovery Material are printed, such as for use at a deposition or in a court proceeding, the party printing the materials shall label or mark each page of the printed materials with the designation of the electronic file.

c. Depositions and Other Testimony

Testimony given during a deposition or in other pretrial or trial proceedings shall be initially designated as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” until the expiration of thirty (30) days after the Designating Party receives a final transcript of the testimony (“thirty-day period”), unless the testimony is otherwise designated at the time of the testimony or during the thirty-day period.

An entire transcript of testimony or pages thereof may be designated by an appropriate statement either at the time the testimony is given or by notification within the thirty-day period. If the testimony is not designated at the time of testimony or during the thirty-day period, the testimony shall no longer be considered Protected Material under this Protective Order.

Transcripts containing pages designated with a confidentiality designation shall include an obvious legend on the title page indicating that the transcript contains Protected Material (e.g., “This transcript contains HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY information”), and each transcript page containing Protected Material shall include a label or mark indicating the appropriate designation.

d. Written Discovery

Written discovery responses and information contained therein shall be designated by means of a statement specifying the level of designation prior to each response that contains Protected Material or any other means of identifying the designation level of a particular response(s). Moreover, the title page for such written discovery responses shall also include an obvious legend indicating that the response contains Protected Material.

e. Information or Items Made Available for Inspection

Any information or items made available for inspection prior to producing copies of selected information or items shall initially be designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” unless otherwise designated at or before the time of inspection. Thereafter, the Producing Party shall have a reasonable amount of time to review and designate the selected information or items prior to producing copies to the Receiving Party.

f. Information or Items Produced in Some Form Other than Documentary

Disclosure or Discovery Material that is produced in some form other than documentary shall be designated by affixing a legend with the appropriate designation in an obvious place on the exterior of the container or the like in which protectable information is stored.

4.4 Inadvertent Failure to Designate Properly

Any information or items that are inadvertently produced or disclosed without a designation or are inadvertently produced or disclosed under- or over-designated may be corrected by the Producing Party providing written notice to Counsel for the Receiving Party, and the Receiving Party shall thereafter treat that information or items as properly designated. Within five (5) business days of such written notice, the Producing Party shall produce to the Receiving Party replacement copies of the information or items with the proper designation and such information or items shall be protected under this Protective Order as if it had been initially so designated.

So long as the Producing Party provides the written notification within a reasonable amount of time after becoming aware of the inadvertent failure to designate or under- or over-designation, the failure to designate or under- or over-designation shall not, standing alone, waive the Producing Party's rights to secure protection for the affected information or items under this Protective Order. After timely correction of a designation by the Producing Party, the Receiving Party shall make reasonable efforts to afford the information or items the protections set forth herein.

5. CHALLENGING CONFIDENTIALITY DESIGNATIONS

5.1 Timing

A Party may challenge a confidentiality designation at any time. Unless a prompt challenge to a confidentiality designation is necessary to avoid a foreseeable, substantial, and unnecessary burden on a Party or a significant disruption or delay in the litigation, a Party does not waive its right to challenge a confidentiality designation by forgoing to promptly challenge the designation after its disclosure.

5.2 Manner of Challenging

a. Written Notice

Any challenge to a confidentiality designation (i) shall be in writing, (ii) shall be served on Counsel of the Designating Party, (iii) shall particularly identify the information or items (including page numbers as appropriate) that the Challenging Party alleges should be differently designated, and (iv) shall describe the basis for each challenge.

b. Meet and Confer

Within seven (7) business days of service of the written notice, the Parties shall meet and confer in an attempt to resolve each challenge in good faith. In conferring, the Challenging Party shall explain the basis for each challenge, and the Designating Party shall (i) review the challenged material, (ii) consider the basis for the challenge, and (iii) if no change in the challenged designation is offered, explain the basis for the confidentiality designation. A Challenging Party shall only proceed to resolution by the Court if it has engaged in the foregoing meet and confer process or establishes that the Designating Party is unwilling to timely participate in such process.

c. Resolution by the Court

If the Parties cannot resolve a designation challenge, the Challenging Party may contact the Court pursuant to the dispute procedures in the local rules and the scheduling order to seek a ruling that the Disclosure or Discovery Material in question is not entitled to the status of and protection associated with the Designating Party's designation. Initiation of the dispute procedures must be made within ten (10) business days of the meet and confer. Each motion filed pursuant to this paragraph must be accompanied by a certification or declaration affirming that the Challenging Party has complied with the requirements imposed in this section. Failure

by the Challenging Party to comply with this paragraph shall constitute a waiver of any challenge to the designations at issue.

The Designating Party shall bear the burden of persuasion regarding the propriety of any challenged designation. Frivolous challenges and those made for an improper purpose (e.g., for delay or to harass or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party to sanctions. All parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the Court rules on the challenge.

6. ACCESS TO DESIGNATED MATERIALS

Except as otherwise provided, a Receiving Party shall have access to and may use Disclosure or Discovery Material that is disclosed or produced by another Party or Non-Party in connection with this case only for prosecuting, defending, or attempting to settle the litigation of this Action. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order.

After Final Disposition of this Action, all Receiving Parties must comply with the requirements of Section 14.

6.1 CONFIDENTIAL

Unless otherwise ordered by the Court, allowed under this Protective Order, or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated "CONFIDENTIAL" only to:

- a. individuals who are permitted to receive information designated as
HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY.

b. no more than five (5) officers, directors, or employees (including In-House Counsel) of the Receiving Party to whom it is reasonably necessary to disclose, except that either Party may in good faith request the other Party's consent to designate one or more additional representatives, the other Party shall not unreasonably withhold such consent, and the requesting Party may seek leave of Court to designate such additional representative(s) if the requesting Party believes the other Party has unreasonably withheld such consent, provided that such individuals agree to be bound by this Protective Order by signing a copy of Exhibit A;

6.2 HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY

Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may disclose Protected Material designated as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" to only the following:

- a. the Receiving Party's Outside Counsel of Record in this Action, employees of such Outside Counsel to whom it is reasonably necessary to disclose, and any Professional Vendors working at the direction of such Outside Counsel;
- b. any Expert of the Receiving Party to whom it is reasonably necessary to disclose, provided that such Expert (i) agrees to be bound by this Protective Order by signing a copy of Exhibit A, and (ii) complies with the procedures set forth below in Section 7;
- c. the Court, court personnel, and jury;
- d. court reporters, stenographers, or videographers, as well as their staff;
- e. professional jury or trial consultants, their staff, and mock jurors to whom it is reasonably necessary to disclose;

f. any mediator who is assigned to hear this matter, and his or her staff, subject to their agreement to maintain confidentiality to the same degree as required by this Protective Order; and

g. the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

6.3 HIGHLY CONFIDENTIAL – SOURCE CODE

Access to Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE CODE” shall be governed by the procedures set forth below in Section 8.

To the extent a Receiving Party obtains copies of HIGHLY CONFIDENTIAL – SOURCE CODE” pursuant to the Provisions in Section 8, the Receiving Party may disclose copies of Protected Material designated as “HIGHLY CONFIDENTIAL – SOURCE CODE” to only the following:

a. the Receiving Party’s Outside Counsel of Record in this Action, employees of such Outside Counsel to whom it is reasonably necessary to disclose, and any Professional Vendors working at the direction of such Outside Counsel;

b. any Expert of the Receiving Party to whom it is reasonably necessary to disclose, provided that such Expert (i) agrees to be bound by this Protective Order by signing a copy of Exhibit A, and (ii) complies with the procedures set forth below in Section 7;

c. the Court, court personnel, and jury;

d. court reporters, stenographers, or videographers, as well as their staff; any individual who currently has or previously had access to the Protected Material, including but not limited to any author, recipient, or custodian of the Protected Material or any individual currently employed by the Designating Party.

6.4 USE OF CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION FOR PTAB PROCEEDINGS

Upon consent of the Producing Party, Parties and attorneys with access to documents and testimony designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” that pertain to the validity of the patents (including, for example, documents and testimony related to secondary considerations) asserted in this Action, shall be permitted to submit such documents and testimony as evidence in post-grant proceedings before the Patent Trial and Appeal Board (“PTAB”), subject to the following restrictions: (a) the Party submitting information as evidence before the PTAB shall follow all procedures before the PTAB to maintain the confidentiality of such information, pursuant to 37 C.F.R. §§ 42.14, 42.54, 42.55, and/or 42.56, as relevant; and (b) this provision shall not apply to documents marked HIGHLY CONFIDENTIAL – SOURCE CODE”, and the Parties may not submit documents marked HIGHLY CONFIDENTIAL – SOURCE CODE” as evidence in post-grant proceedings before the PTAB. A Producing Party shall not unreasonably withhold consent to other Party’s use of documents in the PTAB that pertain to the validity of the patents.

7. ACCESS BY EXPERTS

A Receiving Party that seeks to disclose Protected Material to an Expert shall provide the Producing Party with written notice that includes:

- a. the full name of the Expert and address of his or her primary residence and/or place of business;
 - b. an up-to-date curriculum vitae, including a list of all current and former employers from the past ten (10) years and a list of all publications from the past ten (10) years;
- and

c. identification by name and number of the case and location of court, to the extent possible) any litigation in which the Expert offered expert testimony in the past five (5) years.

The Designating Party shall have up to ten (10) business days after receipt of such written notice to object in writing to the Receiving Party's Outside Counsel. The Designating Party may also request that this notice period be extended by up to three (3) additional business days for a legitimate purpose (i.e., not just to delay the identified Expert's access to Protected Material), and the Receiving Party shall not unreasonably withhold its agreement to this request. A Receiving Party that makes a request and provides the information specified in the preceding paragraphs shall not disclose the subject Protected Material to the identified Expert until expiration of the notice period. Any objection by the Designating Party shall be for good cause and shall set forth in detail the grounds on which it is based. If during the notice period the Designating Party serves such an objection, there shall be no disclosure of the Protected Material until the objection is resolved.

If an objection is made, the Parties shall meet and confer within five (5) business days to attempt in good faith to resolve the dispute. If the dispute is not resolved, the Designating Party will have ten (10) business days from the date of the meet and confer to initiate the dispute procedures pursuant to local rules and the scheduling order. Any motion filed pursuant to this section shall describe the circumstances with specificity and set forth in detail the reasons why disclosure to the expert should not be made.

8. SOURCE CODE

Nothing in this Order shall be construed as a representation or admission that source code is properly discoverable in this Action or obligate any Party to produce any source code. To the

extent production of source code becomes necessary to the prosecution of claims or defenses in the Action, the following procedures shall apply to ensure secure access to source code:

a. A single electronic copy of source code or executable code shall be made available for inspection on a stand-alone computer. The source code shall be produced in native, electronic format as it is organized and kept in the ordinary course of business.

b. The stand-alone computer shall be password protected and supplied by the Producing Party.

c. The Producing Party shall make the source code computer available for inspection at the office of the Producing Party's Counsel during normal business hours (or at other mutually agreeable times or locations).

d. Access to the stand-alone computer shall be permitted, after notice to the Producing Party and an opportunity to object, to two (2) Outside Counsel representing the Receiving Party and two (2) experts retained by the Receiving Party who have been approved pursuant to Section 7.

e. The Producing Party shall provide a manifest of the contents of the source code computer. This manifest, which shall be supplied in both printed and electronic form, shall list the name, location, directory path of every source code file on the computer. The Producing Party shall also be required to supplement this manifest each time source code is added to the source code computer.

f. The stand-alone computer shall include software utilities which will allow counsel and experts to view, search, and analyze the source code. At a minimum, these utilities must provide the ability to (i) view, search, and line-number any source file, (ii) search for a

given pattern of text through a number of files, (iii) compare two files and display their differences, and (iv) compute the MD5 checksum of a file.

g. If the Court determines that the issue of missing files needs to be addressed, the source code provider shall include on the stand-alone computer the build scripts, compilers, assemblers, and other utilities necessary to rebuild the application from source code, along with instructions for their use.

h. During inspection, the Receiving Party shall not be permitted to photograph, copy, remove, or otherwise transfer any portion of the source code onto any recordable media or recordable device.

i. In the event that at or after an inspection of the Producing Party's source code the Receiving Party requests that the Producing Party print-out or copy a portion of its source code for production to the Receiving Party, and the Receiving Party does so pursuant to this Protective Order or as otherwise ordered by the Court, such print-out or copy may only be used by the Receiving Party for purposes of preparation for trial, court filings, discovery, depositions, or expert reports in this Action. But in no event, absent further order of the Court upon a showing of good cause by the Receiving Party, shall a Producing Party be required to print-out or copy more than 600 pages in total or 40 consecutive pages of its source code (printed on standard US 8 1/2" x 11" paper with 1" margins, double-spaced Times New Roman font).

j. If the Receiving Party's Outside Counsel or experts obtain printouts or photocopies of source code excerpts, by agreement of the Producing Party or order of the Court, the Receiving Party shall ensure that such Outside Counsel, consultants, or experts keep the printouts or photocopies in a secured locked area in the offices of such Outside Counsel, consultants, or expert. The Receiving Party may also temporarily keep the printouts or

photocopies at: (i) the Court for any proceedings(s) relating to the source code excerpts, for the dates associated with the proceeding(s); (ii) the sites where any deposition(s) relating to the source code excerpts are taken, for the dates associated with the deposition(s); and (iii) any intermediate location reasonably necessary to transport the printouts or photocopies (*e.g.*, a hotel prior to a Court proceeding or deposition).

k. Unless otherwise agreed by the parties, the Producing Party is not allowed to make changes to the source code on the source code computer once it is made available for inspection.

l. The source code inspections permitted under this Protective Order shall be for a reasonable period of time. If the Parties dispute the reasonableness of an inspection period, the Party objecting to the duration of an inspection may seek relief or instruction from the Court.

m. Upon providing reasonable notice, the Receiving Party shall be permitted to request that the Producing Party make the source code computer available for demonstration during trial. For purposes of this provision, notice at least ten (10) business days in advance shall be considered reasonable.

9. OTHER PROCEEDINGS

By entering this Protective Order and limiting the disclosure of information in this Action, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or Party subject to this order who becomes subject to a motion to disclose another Party's information designated as confidential pursuant to this Order shall promptly notify that Party of the motion so that the Party may have an opportunity to appear and be heard on whether that information should be disclosed.

10. NON-PARTY MATERIALS

The provisions of this Protective Order are applicable to all materials produced by a Non-Party in this Action. As such, the remedies and relief provided herein protect all materials produced by Non-Parties in this Action. Nothing in this section, however, shall be construed as prohibiting a Non-Party from seeking additional protections.

11. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party or a Producing Party learns that it has disclosed, inadvertently or otherwise, Protected Material to any person or in any circumstances not authorized under this Protective Order, such Party shall (a) immediately notify the Designating Party in writing of all the pertinent facts, (b) make every effort to prevent further unauthorized disclosure including retrieving all copies of the Protected Material from any recipients, (c) inform the recipients of all terms of this Protective Order, and (d) request that such recipients agree to be bound by this Protective Order by signing a copy of Exhibit A.

12. INADVERTENT PRODUCTION OF PRIVILEGED MATERIAL

Pursuant to Federal Rule of Evidence 502, the inadvertent production of any Disclosure or Discovery Material subject to attorney-client privilege, work-product immunity, or other privilege or immunity shall not waive any such privilege or immunity, provided that (a) the Producing Party took reasonable efforts to prescreen such Disclosure or Discovery Material prior to the inadvertent production, and (b) after the Producing Party becomes aware of the inadvertent production, the Producing Party promptly sends to each Receiving Party a written request for return of the inadvertently produced Disclosure or Discovery Material.

Within ten (10) business days of receiving such a request, a Receiving Party shall return to the Producing Party, or certify the destruction of, all Disclosure or Discovery Material identified by the Producing Party as being protected by a privilege or immunity and inadvertently

produced. A Receiving Party shall not utilize or disseminate the information contained in the inadvertently produced Disclosure or Discovery Material for any purpose, except for contesting the claimed privilege or immunity.

If the Receiving Party wishes to contest the claimed privilege or immunity, the Receiving Party shall provide written notice thereof to the Producing Party. The Receiving Party may retain one (1) copy of each Disclosure or Discovery Material at issue, but any such retained copies shall be sequestered and shall not be used for any purpose except to meet and confer with the Producing Party regarding the claimed privilege or immunity and to present information to the Court for a determination regarding the claimed privilege or immunity.

13. MISCELLANEOUS

13.1 Right to Further Relief

Nothing in this Protective Order abridges the right of any Party or person to seek its modification by the Court in the future.

13.2 Right to Assert Other Objections

By stipulating to this Protective Order, the Parties do not waive the right to argue that certain Disclosure or Discovery Material may require additional or different protections than those set forth herein. Similarly, the Parties do not waive any right to object to another Party's use in evidence of any of the Disclosure or Discovery Material covered by this Protective Order.

13.3 Filing Under Seal

A Party seeking to file under seal any Protected Material must comply with D. Del. LR 5.1.3, CM/ECF Procedures. Where reasonably practicable, only the portions of documents containing Protected Material shall be filed under seal.

13.4 Prosecution of Intellectual Property

Absent written consent from the Producing Party, any individual who reviews or accesses “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” information of another Party shall not be directly involved in the prosecution of patents or patent applications directed to the Protected Materials of the other Party that the individual reviewed or accessed, not including information that is publicly available at the time of prosecution. In addition, such individual shall not be involved in the prosecution of the patents asserted in this action and any patent or application claiming priority to or otherwise related to the patents asserted in this action, before any foreign or domestic agency, including the United States Patent and Trademark Office (“the Patent Office”), other than to (a) submit materials pursuant to 37 C.F.R. § 1.56, and (b) provide any required notices related to litigation, for the duration of this action (including any appeal(s)). To avoid any doubt, “prosecution,” as used in this paragraph, does not include representing a Party or Non-Party in opposition, *inter partes* review, or other post-grant proceedings before the United States Patent and Trademark Office or any foreign agency. This Prosecution Bar shall begin when access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” information is first reviewed or accessed by the affected individual and shall end two (2) years after final termination of this Litigation, including all appeals.

14. FINAL DISPOSITION

Within ninety (90) days after the Final Disposition of this Action, each Receiving Party shall return all Protected Material to the Producing Party or destroy such material. As used in this section, “all Protected Material” includes copies, abstracts, compilations, summaries, and any other format that reproduces or captures any Protected Material. Whether the Protected

Material is returned or destroyed, the Receiving Party shall submit a written certification to the Producing Party by the 90-day deadline confirming the return or destruction of all the Producing Party's Protected Material.

Notwithstanding this Section, Outside Counsel of a Receiving Party may retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, communications, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material shall remain subject to this Protective Order as set forth in Section 3.

To the extent that the duties imposed on a Receiving Party by this section conflict with the Receiving Party's obligations in another action, the Receiving Party may forgo returning and destroying Protected Material and shall seek guidance of this Court within a reasonable amount of time of becoming aware of the conflict.

/s/ Christine D. Haynes

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Attorneys for Defendant

SO ORDERED this ____ day of _____, 2020.

The Honorable Richard G. Andrews
United States District Court Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ declare that:

1. My present residential address is

_____;

2. My current employer is _____;

3. My current occupation is _____;

4. I have read in its entirety and understand the Protective Order that was issued by the United States District Court for the District of Delaware on November __, 2020 in the case of *ICON Health & Fitness, Inc. v. Peloton Interactive, Inc.*, Civil Action No. 20-1386-RGA;

5. I agree to comply with and be bound by all the provisions of the Protective Order;

6. I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt.

7. I will not disclose any information that is subject to the Protective Order in any manner that is contrary to the provisions of the Protective Order; and

8. I agree to submit to the jurisdiction of the United States District Court for the District of Delaware for the purpose of enforcing the terms of the Protective Order.

Signature: _____

Date: _____