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8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

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11 IN RE: INCRETIN-BASED  
12 THERAPIES PRODUCTS LIABILITY  
13 LITIGATION

Case No. 13md2452 AJB (MDD)

**JOINT MOTION FOR AN  
ORDER CONCERNING  
CLAIMS OF PRIVILEGE AND  
PRIVILEGE LOGS**

Judge: Hon. Anthony J. Battaglia  
Magistrate: Hon. Mitchell D. Dembin

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18 Plaintiffs and Defendants (collectively, the “Parties”) jointly request that the  
19 Court enter the Order Concerning Claims of Privilege and Privilege Logs (“Privilege  
20 Order”), which is attached to this Joint Motion. In support of this Joint Motion, the  
21 Parties further state as follows:

22 1. This MDL proceeding involves the production of documents from four  
23 different defendants, anticipated to encompass millions of pages.

24 2. To improve the efficiency of the process for asserting privileges and  
25 disputing those assertions, the Parties have agreed to the attached Privilege Order.

26 3. The Privilege Order will govern: (1) the grounds upon which a party may  
27 assert either the attorney-client privilege or the work product doctrine and withhold  
28 and/or redact information on those bases; (2) the protocol that shall be followed

1 regarding the preparation of privilege logs pursuant to Fed. R. Civ. P. 26(b)(5)(A)(i)-  
2 (ii); and (3) the method for resolving privilege disputes by and among Plaintiffs and  
3 Defendants.

4 Accordingly, the Parties respectfully request that the Court enter the attached  
5 Privilege Order.

6 Dated: August 13, 2014

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**SIGNATURE ATTESTATION**

I hereby certify that authorization for the filing of this document has been obtained from each of the other signatories shown above and that all signatories concur in the filing's content.

s/ Jonathan L. Williams

**ATTACHMENT**

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**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

IN RE: INCRETIN-BASED  
THERAPIES PRODUCTS LIABILITY  
LITIGATION

Case No. 13md2452 AJB (MDD)

**[PROPOSED] CASE  
MANAGEMENT ORDER NO. \_\_\_\_  
CONCERNING CLAIMS OF  
PRIVILEGE AND PRIVILEGE  
LOGS**

Judge: Hon. Anthony J. Battaglia  
Magistrate: Hon. Mitchell D. Demblin

This Order does not replace or amend the Protective Order in this litigation. To the extent any provision of this Order is or can be interpreted to be inconsistent with the terms of the Protective Order, the terms of the Protective Order shall govern. This Order is entered to set forth guidelines and protocols that shall govern: (1) the grounds upon which a party may assert either the attorney-client privilege or the work product doctrine and withhold and/or redact information on those bases; (2) the protocol that shall be followed regarding the preparation of privilege logs pursuant to Fed. R. Civ. P. 26(b)(5)(A)(i)-(ii); and (3) the method for resolving privilege disputes by and among Plaintiffs and Defendants.

1 **I. GOVERNING LAW**

2 **A. Attorney-Client Privilege: Choice of Law**

3 The parties were unable to reach an agreement on the governing law for  
4 attorney-client privilege issues.

5 **B. The Work Product Doctrine: Choice of Law**

6 Federal law governs the existence and scope of the work product doctrine in the  
7 federal courts, even where the basis of jurisdiction is diversity of citizenship under 28  
8 U.S.C. § 1332. The Parties have agreed that claims to protection under the work  
9 product doctrine will be governed by federal law.

10 **II. PROTOCOLS GOVERNING ATTORNEY-CLIENT PRIVILEGE**  
11 **AND WORK PRODUCT DOCTRINE**

12 The Parties have agreed to the following protocol governing the assertion of  
13 attorney-client privilege and work product doctrine in connection with their  
14 production of documents responsive to discovery propounded in this litigation.  
15 Privilege logs for productions served prior to January 1, 2014 need not be revised or  
16 updated to conform to the specifications in this Order.

17 **A. Redactions Relating to Attorney-Client Privilege and Work**  
18 **Product Doctrine**

19 A party shall redact only those portions of a document that are within the scope  
20 permitted by the attorney-client privilege and/or the work product doctrine. A  
21 document may be withheld in its entirety if the entire document is within the scope of  
22 the attorney-client privilege and/or work product doctrine.

23 When a document is redacted on the basis of privilege, an identifier will be  
24 provided on the page or in the load file, stating the basis for redaction to enable the  
25 other party to evaluate the applicability of the claimed privilege and/or work product  
26 protection. The Parties shall identify in a clear manner the legal personnel whose  
27 advice or solicitation thereof forms the basis for the claim of privilege and/or work  
28 product protection, to the extent it cannot be discerned from the portion of the

1 document that was produced without redaction. Redacted documents otherwise do not  
2 need to be logged. Where a redaction is subsequently lifted by order of the Court or  
3 by agreement of the Parties (*e.g.*, subject to a privilege challenge), the party claiming  
4 privilege shall provide a replacement document with the redaction removed and  
5 associate the document with the original document in the manner provided by the  
6 relevant Order governing the production of electronically stored information.

7 **B. Privilege Log**

8 Every responsive document withheld from production based on a claim of  
9 privilege shall be reflected on a privilege log that complies with Fed. R. Civ. P.  
10 26(b)(5)(A)(i)–(ii). Communications with outside counsel concerning matters relating  
11 to the defense of the litigation, including but not limited to fact investigation,  
12 document production, responding to discovery, and deposition preparation, that  
13 occurred after the first lawsuit was filed (whether in state or federal court) for each  
14 respective Defendant, concerning this litigation, are not required to be logged. All  
15 other communications with outside counsel are required to be logged. The Parties  
16 shall produce privilege logs in Excel format or a similar electronic format that allows  
17 text searching, sorting and organization of data. Consistent with Rule 26(b)(5)(A) and  
18 the Advisory Committee Comments thereto, a privilege log shall contain the  
19 following<sup>1</sup>:

- 20 1. The document date;
- 21 2. The source of the document – *e.g.*, custodian/repository;
- 22 3. The identity of the person(s) who prepared the document. Where  
23 reasonably discernible and not already evident from a provided  
24 email address domain, this information should include the person’s  
25

26 \_\_\_\_\_  
27 <sup>1</sup> The parties have acknowledged that this information is not always available for  
28 every document. The parties will do their best to provide this information where  
reasonable to do so.

1 employer if the employer is not one of the named defendants or  
2 one of its legal entities;

3 4. The identity of any person(s) to whom the document was  
4 disseminated. Where reasonably discernible and not already  
5 evident from a provided email address domain, this information  
6 should include the person's employer if the employer is not one of  
7 the named defendants or one of its legal entities;

8 5. The subject/title of the document (if this information is not itself  
9 privileged);

10 6. The specific privilege or protection allegedly applicable to the  
11 document; and

12 7. A description of the document to include a statement identifying  
13 why the producing party believes the document to be privileged or  
14 protected sufficient to enable the other party to evaluate the  
15 applicability of the claimed privilege or protection. Where  
16 identifiable, the description shall identify in a clear manner the  
17 legal personnel whose advice or solicitation thereof forms the basis  
18 for the claim of privilege and/or work product protection. If the  
19 claimed privilege is held by an entity other than the defendant  
20 (including its corporate affiliates), the description will identify that  
21 entity.

22 When a single document contains a chain of only privileged emails and each  
23 email was not disseminated to a third party or an employee outside the scope of the  
24 privilege, the producing party need log the information listed above in items 1–7 for  
25 only the most recent email in the document pursuant to the following:

26 a) The producing party must provide the date range of the emails in the  
27 chain, if it spans over seven (7) days.

1 b) If the information logged in items 5, 6 and 7 listed above of the privilege  
2 log for the most recent email is different for other emails in the chain, the  
3 information for the other emails shall also be logged in the privilege log.

4 c) To the extent that any emails in the chain are responsive and non-  
5 privileged, without regard to whom the email was forwarded, the  
6 producing party must independently produce the document in redacted  
7 form with the non-privileged emails unredacted.

8 Each producing party will produce a complete and updated privilege log within  
9 45 days of each production. Initial privilege logs will be due 45 days after entry of this  
10 Order. For good cause, a party shall have the right to request an expedited privilege  
11 log, but not sooner than 30 days after production, for certain custodians or document  
12 sources for purposes of deposition preparation. In addition, the Parties shall have the  
13 right to request an extension of the privilege log deadline. If the producing party  
14 objects to providing an expedited privilege log or the receiving party objects to  
15 providing an extension of time to prepare a privilege log, the Parties will meet and  
16 confer in good faith in an attempt to resolve the disagreement prior to seeking Court  
17 intervention. If the Parties cannot reach an agreement, the requesting party may seek  
18 relief from the Court.

19 When a party locates or identifies previously unknown or unidentified  
20 responsive documents and withholds those documents from production based on a  
21 claim of privilege, the party must promptly supplement its privilege log under Fed. R.  
22 Civ. P. 26(e)(1) to reflect those documents.

### 23 **C. Inadvertent Disclosures**

24 Pursuant to Federal Rule of Evidence 502(d) and the Protective Order in this  
25 litigation, the inadvertent production of a privileged or work product protected  
26 document is not a waiver in the pending case or in any other federal or state  
27 proceeding. Inadvertent disclosures continue to be governed by the Protective Order,  
28 and nothing in this Order amends or supersedes the Protective Order in any respect.

1 To the extent anything in this Order could be construed as inconsistent with the  
2 Protective Order's provisions regarding inadvertent disclosures, the Protective Order  
3 (and any order amending or superseding the Protective Order) governs.

4 **IT IS SO ORDERED.**

5  
6 DATED: \_\_\_\_\_, 2014

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9 Hon. Anthony J. Battaglia  
10 U.S. District Judge  
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