1039879384

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., §
MIKE HUNTER, §
ATTORNEY GENERAL OF OKLAHOMA, §
§
Plaintiff, §
§
vs. §
§
(1) PURDUE PHARMA L.P.; §
(2) PURDUE PHARMA, INC.; §
(3) THE PURDUE FREDERICK COMPANY; §
(4) TEVA PHARMACEUTICALS USA, INC.; §
(5) CEPHALON, INC.; §
(6) JOHNSON & JOHNSON; §
(7) JANSSEN PHARMACEUTICALS, INC.; §
(8) ORTHO-McNEIL-JANSSEN §
PHARMACEUTICALS, INC., n/k/a §
JANSSEN PHARMACEUTICALS, INC.; §
(9) JANSSEN PHARMACEUTICA, INC., §
n/k/a JANSSEN PHARMACEUTICALS, INC.; §
(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, §
f/k/a ACTAVIS, INC., f/k/a WATSON §
PHARMACEUTICALS, INC.; §
(11) WATSON LABORATORIES, INC.; §
(12) ACTAVIS LLC; and §
(13) ACTAVIS PHARMA, INC., §
f/k/a WATSON PHARMA, INC., §
§
Defendants. §

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY
FILED In The
Office of the Court Clerk
MAR 27 2018
In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816
JURY TRIAL DEMANDED

THE STATE OF OKLAHOMA'S OBJECTION TO AND MOTION TO MODIFY THE PROTECTIVE ORDER

Pursuant to the Court's January 25, 2018 Order Appointing Discovery Master[1], the State of Oklahoma (the "State") respectfully files this Objection to and Motion to Modify the Protective Order ("Motion"). The State's proposed modifications to the Protective Order are shown in the redline version attached hereto as Exhibit A. In support of this Motion, the State respectfully shows the Court as follows:

I. INTRODUCTION

The blanket Protective Ordered entered on March 20, 2018 ("Protective Order") provides numerous procedural obstacles that will cause needless delay, and almost certainly require modification of the May 2019 trial date. As such, the State objects to the Protective Order and requests that the Court modify the Protective Order to:

(1) remove the requirement that witnesses at depositions must sign "Attachment A" agreeing to be bound by the Protective Order prior to being shown designated material;

(2) remove the requirement that witnesses at depositions may only be shown "specific portions" of Attorneys' Eye Only Information "to which access is reasonably necessary, with all other designated material redacted";

(3) narrow the scope of "Highly Confidential – Attorneys' Eyes Only Information" to include only "trade secret" information, as defined by Oklahoma law;

(4) remove entirely the section regarding the use of designated material at hearings, or in the very least, modify it to remove the requirement that the State must disclose to Defendants in advance those materials the State intends to use at the hearing; and

(5) delete the broad declaration that all designated material is "not of historical value" and should not be archived by the State.

As a critical example of the above requested modifications, the Protective Order currently has the potential for months and months of delay by requiring third parties and former employees—who are not parties to the litigation and are not subject to this Court's jurisdiction—

[1] The Court's January 25, 2018 Order Appointing Discovery Master states in Paragraph 7, "[i]f the Discovery Master files an order, report, or recommendation, any party may file objections to it or a motion to adopt or modify it no later than seven (7) days after it was filed."

to sign "Attachment A" and agree to be bound by the Protective Order before any designated materials can be shown to them or discussed during the deposition. It is likely, if not certain, that any lawyer representing such individuals would instruct her client NOT to sign "Attachment A" because it voluntarily places her client under the jurisdiction of a foreign court. If that happens, every single third-party deposition involving a document covered by the Protective Order will come to a halt. And, any disputes over that issue between either side and the witness will likely be resolved by a foreign court, not this one. There are other concerns with the Protective Order (as listed above)—but this one most aptly illustrates the type of procedural difficulties and delays that will occur if the Protective Order is not modified.

The Court has consistently stated that this case should not be delayed and has instructed the parties to move efficiently towards trial. The State agrees. Defendants, however, proposed a blanket proposed protective order with unnecessary procedural hurdles that will cause delay.

As explained in the State's March 8, 2018 Status Report (attached hereto at Exhibit B), the State strenuously objected to such a protective order because it would lead to massive amounts of motion practice and procedural nightmares affecting third-party discovery, depositions, hearings, and trial—all of which will delay this case without sufficient cause or justification. Given the public nature of this important case, the State does not believe that a prophylactic protective order (other than a HIPAA Order) is necessary at all. In fact, at this time, the State does not intend to designate as confidential anything other than "protected health information" under HIPAA. However, as a reasonable compromise, the State submitted a proposed protective order allowing

Defendants to designate "trade secret" information (as defined by Oklahoma law) as confidential and/or "attorneys' eyes only" information.[2] *See* Exhibit B.

On March 9, 2018, Judge Hetherington held a hearing on the parties' disputes regarding a protective order and took the matter under advisement.[3] On March 21, 2018, the parties received from Judge Hetherington a copy of the Protective Order that had been entered the day before, which is currently the operative Protective Order. Generally, the Protective Order is exactly what Defendants wanted—it allows for broad and unworkable "attorneys' eyes only" designations that go far beyond the types of trade secrets that are generally subject to "attorneys' eyes only" treatment; and inserts unnecessary procedures into nearly every aspect of the litigation, including court filings, depositions (including the "Attachment A" requirement), and hearings. Given the diverse geographic locations of witnesses and third parties in this case and the extensive third-party discovery required, it is conceivable that this Protective Order could spawn satellite litigation in dozens of states after third-party subpoenas and letters rogatory are issued.

For the reasons herein, the State respectfully objects to the Protective Order and requests that the Court modify it as reflected in Exhibit A.

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[2] As for any material other than trade secrets, Defendants do not need and are not entitled to blanket prophylactic protection. Indeed, the Oklahoma Code of Civil Procedure does not contemplate blanket protective orders at all. Rather, § 3226(C) allows a party to move for protection on specific issues at the appropriate time and *for good cause*. The State believes there is no reason to depart from this default rule, especially in a case of grave importance to the Oklahoma public.

[3] At the hearing, Defendants could not identify any specific material that should be treated confidential, other than potential trade secrets. Defendants provided zero specific examples of the kind of material that would or should be covered by their proposed blanket confidentiality order. And, having failed to identify any such materials or examples, Defendants certainly could not show good cause for protecting them. That is, Defendants sought blanket, go-forward protection for unspecified materials responsive to unspecified discovery requests and failed to explain why such protection was necessary.

II. LEGAL STANDARDS

The Court may enter a protective order "*upon motion by a party or by the person from whom discovery is sought,* accompanied by a certification that the movant has in good faith conferred or attempted to confer . . . *and for good cause shown* . . . ." 12 O.S. § 3226(C) (emphasis added). The Protective Order, as currently entered, largely circumvents this procedure by allowing Defendants to blanket designate broad categories of discovery materials *prior* to showing any cause or justification for doing so. Therefore, the procedures contained in the Protective Order, which deviate from the Code of Civil Procedure, should be appropriately scrutinized.

Moreover, much of the discovery material produced in this case will ultimately become part of the Court record. "Court records are public records . . . . Sealing a public record should be a very rare event that occurs in only the most compelling of circumstances." *Shadid v. Hammond*, 2013 OK 103, ¶¶ 2–3, 315 P.3d 1008 (Taylor, J., concurring) ("All of this current litigation and expense demonstrates the very reason why courts should rarely take the drastic measure of sealing public records. After the records are sealed, those seeking to protect the public interest are required to go to great time and expense to view what were once public records."). A blanket protective order imposed upon the State and its counsel (*i.e.*, "those seeking to protect the public interest") will cost immense time and expense and will unnecessarily delay this litigation.

Finally, under the Court's January 25, 2018 Order Appointing Discovery Master, findings of fact and conclusions of law made or recommended by the Discovery Master are reviewed *de novo* by the Court. Procedural matters are reviewed for an abuse of discretion. As set forth below, the State respectfully contends it was an abuse of discretion to not apply the "good cause" standard set forth in §3226(C) and to define "Attorneys' Eyes Only" information more broadly than the

statutory definition for trade secrets. To address such issues, the State proposes modifications to the blanket Protective Order, as set forth below.

While the Court may ultimately find it necessary to leave in place some parts of the blanket Protective Order already on file, the above authorities should guide the Court in consideration of this Motion, which seeks to modify the broad Protective Order and the procedures therein in the interests of fairness, openness, and efficiency.

III. ARGUMENT

The State objects to the March 20, 2018 Protective Order and requests that the Court modify the Protective Order to remove the procedure hurdles as explained below. Because the State does not intend to designate as confidential any non-privileged documents or information other than "protected health information" under HIPAA, the procedures in the current Protective Order which the State seeks to modify only work against the State, not against Defendants. This is patently unfair and illustrates the excessive nature of the Protective Order in its current form. The State respectfully submits that no good cause exists for the current Protective Order, and requests that the Protective Order be modified as explained herein and as reflected in Exhibit A.

A. The procedures related to deposition witnesses are unworkable, will likely foreclose important depositions, and will lead to satellite litigation.

There are a number of procedures in the Protective Order related to showing designated material to deposition witnesses that are unworkable, will impede or prevent important third-party depositions, and will likely lead to litigation in jurisdictions outside of Oklahoma where many of these depositions will take place. Indeed, the State anticipates taking numerous depositions of Defendants' former employees and third-party witnesses who are scattered across the nation. This will require the use of third-party subpoenas and letters rogatory, which may be subject to litigation in other venues. If left unchanged, the deposition procedures in the current Protective Order will

delay this case well beyond the May 2019 trial date. The State respectfully submits that it was an abuse of discretion to enter such blanket protection and onerous procedures with no finding of "good cause." Therefore, the Court should modify the Protective Order as follows. *See also* Exhibit A.

1. Witnesses at depositions should not be required to sign "Attachment A" and agree to be bound by the Protective Order.

Paragraphs 7(b)(2) and (7)-(8) currently require witnesses at depositions to sign Attachment A (entitled "Acknowledgement of Understanding and Agreement to Be Bound") prior to being shown "Confidential" or "Highly Confidential" information, even if they authored the document. This requirement should be removed from the Protective Order because it places the progress of this litigation in the hands of deposition witnesses, who may refuse to sign Attachment A on their own or at the instruction of their counsel. Signing Attachment A will subject these witnesses—many of whom reside across the country—to the jurisdiction of this Court in Cleveland County, Oklahoma. Thus, it is highly likely that such witnesses and their attorneys will object to and refuse to comply with the "Attachment A" requirement, if for no other reason than the potential burden and expense of being hauled into Court in Oklahoma. Such an outcome would foreclose important questioning of necessary deponents and therefore prejudice the State's ability to prepare for trial.

Further, the refusal of any witness to sign Attachment A would inevitably lead to satellite litigation in other jurisdictions, which would pull the State into expensive discovery disputes around the country and deprive this Court of control over the litigation. This should be avoided.

The "Attachment A" requirement, and the serious concerns it raises, could affect at least the following depositions the State may take:

- Depositions of Defendants' former employees;

- Depositions of third-party Front Groups, including:

  - American Academy of Pain Medicine
  - American Chronic Pain Association
  - American Geriatrics Society
  - American Pain Foundation
  - American Pain Society
  - American Society of Pain Educators
  - Federation of State Medical Boards
  - National Pain Foundation/Global Pain Initiative
  - Pain & Policy Studies Group
  - American Academy of Pain Management/Academy of Integrative Pain Management
  - Pain Care Forum
  - US Pain Foundation

- Depositions of third-party "Key Opinion Leaders," including:

  - Perry Fine, MD
  - Scott Fishman, MD
  - Kathleen Foley, MD
  - Bradley Galer
  - David J. Haddox, MD
  - Russel Portenoy, MD
  - Lynn Webster, MD
  - Barry Cole, MD
  - Daniel Alford
  - Myra Christopher
  - Aaron Gilson
  - Charles Argoff

Therefore, Paragraphs 7(b)(2) and (7)-(8) of the Protective Order should be modified to remove the requirement that deposition witnesses must sign Attachment A prior to being shown "Confidential" or "Highly Confidential" information. *See* Exhibit A.

2. Showing "Highly Confidential – Attorneys' Eyes Only Information" to deponents should not be limited to "the specific portions ... to which access is reasonably necessary, with all other designated material redacted."

Paragraph 7(c)(3) imposes an even more unworkable restriction related to showing deposition witnesses "Highly Confidential – Attorneys' Eyes Only Information." Specifically, this section includes the following overly-restrictive language: "The witness shall only be shown the specific portions of the Discovery Material to which access is reasonably necessary, with all other designated material redacted." The requirement imposed by this language is improper for two reasons. First, this provision is impractical and imposes immense burden on the State to (1) identify those "specific portions ... to which access is reasonably necessary" and (2) redact "all other designated material." To start, the parties will undoubtedly dispute the meaning and application of the phrase "to which access is reasonably necessary," which will lead to unnecessary motion practice and judicial involvement, further delaying the discovery process. Moreover, even if that line of demarcation were clear, requiring the State to redact documents absent a showing of good cause by Defendants is overly burdensome. In fact, the State may be required to redact the same document in different places for different deponents, which would further increase burden and time, and cause unneeded confusion.

Second, requiring redaction of documents prior to depositions improperly limits the scope of permissible discovery. The definition of "Highly Confidential – Attorneys' Eyes Only Information" is far too broad and should be narrowed as explained below. But, in any event, "Highly Confidential – Attorneys' Eyes Only Information" is already subject to heightened confidentiality treatment by limiting *who* can see this information. This provides Defendants with protection that is commensurate with the confidentiality concerns at issue. Encumbering questioning and discovery with an additional redaction requirement far outweighs those

confidentiality concerns. Therefore, this provision should be removed from the Protective Order, as reflected in Exhibit A.

B. The definition of "Highly Confidential – Attorneys' Eyes Only Information" should only include "Trade Secret" information as defined by Oklahoma Law.

In an effort towards compromise, the State submitted a proposed protective order providing (among other things) that Defendants could designate true trade secrets as "attorneys' eyes only" information. *See* Exhibit B. "Attorneys' eyes only" protective orders are typically utilized in patent and trade secret cases, where the commercial value of the information is directly at issue and is undeniable. Although this is not a patent or trade secret case, to avoid prolonged dispute, the State proposed allowing Defendants the use of an "attorneys eyes only" designation on the condition that such designations would be limited to true "trade secrets." Conveniently, Oklahoma law defines a "trade secret" as:

> Information, including a formula, pattern, compilation, program, device, method, technique or process, that:
>
> a. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> b. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

78 O.S. §86(4). Information that satisfies this definition is the *only* kind of information that arguably warrants "attorneys' eyes only" protection, and the State did not propose or agree to "attorneys' eyes only" treatment for any other category of information. Rather, the State proposed that other categories of information should only be given confidential treatment *if and when* a Defendant identified the specific information it sought to protect and could show good cause for such protection, as required by § 3226(C).

However, the current Protective Order allows a much wider variety of information to be designated "Highly Confidential – Attorneys' Eyes Only Information."[4] The Protective Order broadly defines "Highly Confidential – Attorneys' Eyes Only Information" as any information that:

> (1) meets the definition of Confidential Information pursuant to Paragraph 2 above; and (2) the Designating Party in good faith believes could reasonably result in commercial, financial, or business injury to the Designating Party (other than injury to the Designating Party's position in this Action) in the event of the disclosure, dissemination, or use by or to any of the persons not enumerated in Paragraph 7(c).

Protective Order at ¶3. This sweeping category of information does not warrant "attorneys' eyes only" treatment, but, rather, is the kind of information that is typically covered by a run-of-the-mill (*i.e.*, non "attorneys' eyes only") protective order. Indeed, § 3226—which does <u>not</u> contemplate "attorneys' eyes only" treatment at all—specifically references "confidential research, development or commercial information." 12 O.S. § 3226(C)(1)(g). That is, the Code of Civil Procedure deems a normal non "attorneys' eyes only" protective order sufficient to protect the same information that is given "attorneys' eyes only" treatment under the Protective Order here.

Thus, the State objects to the definition of "Highly Confidential – Attorneys' Eyes Only Information" because it conflates several categories of information and goes far beyond trade secrets. This is improper because the Protective Order gives heightened protection to "Highly Confidential – Attorneys' Eyes Only Information." *See* ¶7(c). Generally speaking, only the Court, counsel for the parties, experts, and witnesses who have already been exposed to the material at

[4] The Protective Order also allows blanket designations of two other categories of information that receive more traditional protection: "Confidential Information" and "Highly Confidential Information." While the State believes the inclusion of these categories makes the Protective Order far too broad, at present, the State does not challenge their inclusion, but reserves the right to assert such a challenge if and when appropriate.

issue can be shown "Highly Confidential – Attorneys' Eyes Only Information." *Id.* Because of this heightened treatment, the definition of "Highly Confidential – Attorneys' Eyes Only Information" should be appropriately limited to avoid the delay caused by discovery abuse and inevitable disputes.

The Protective Order does not do this. Thus, the Protective Order will unnecessarily impede discovery to the State's detriment. Defendants will be free to designate regular confidential information as "Highly Confidential – Attorneys' Eyes Only Information," which will result in either needless discovery obstacles (due to the heightened treatment) or needless motion practice (when the State challenges those designations) or both. Further, if broad "attorneys' eyes only" designations are permitted, non-attorney representatives of the State—who are not competitors with Defendants but are integral to this litigation—will not be permitted to view large swaths of relevant material. This too is unworkable.

To avoid these outcomes, the Court should modify the definition of "Highly Confidential – Attorneys' Eyes Only Information" to include only "trade secret" information as defined by 78 O.S. §86(4). The State respectfully submits that it was an abuse of discretion—and indeed reversible error—to permit a broader definition of as yet unidentified "Attorneys' Eyes Only Information" than the statutory definition of a "trade secret." Further, no good cause was demonstrated for such broad protection. All other categories of confidential material should fall within the definitions of "Confidential Information" or "Highly Confidential Information," which also receive protection under the Protective Order.

C. The Court should remove or limit the procedures in Section 16 related to the State's use of designated materials at hearings.

Paragraph 16 imposes a number of procedural hurdles on the State when the State intends to use designated materials at hearings. Specifically, this Paragraph contemplates the following

procedures: (1) the State must inform Defendants which materials the State intends to use at the hearing; (2) the parties must meet and confer on the issue prior to the hearing; (3) the parties (either or both) may apply to the Court for relief; and (4) the Court may issue orders related to use of the material at the hearing. Paragraph 16 should be removed in its entirety because it is impractical and will delay the litigation, tramples on the State's work product privilege, and is entirely unnecessary.

First, if these steps must be carried out before any designated material may be used at a hearing, the Court and this litigation will be bogged down with motions and hearings about future motions and hearings. The inevitable delay and waste of resources occasioned by this Paragraph are obvious, and they should be avoided.

Second, requiring the State to disclose to Defendants which material it intends to use at hearing infringes the State's work product privilege by giving Defendants insight into the State's anticipated strategy and preparation.

Finally, the procedure contemplated by Paragraph 16 are entirely unnecessary. The Court is capable of handling confidentiality issues if and when they arise at any hearing. Because the parties are bound by any protective order, the State cannot freely disclose or publish confidential information at a hearing. If the State does improperly disclose confidential information (which the State has no intention of doing), Defendants will be entitled to relief under the Protective Order. However, practically speaking, when the State desires to disclose or publish designated material, the parties and the Court can deal with the matter when it arises at a hearing, much like the procedures required by a motion *in limine* at trial. This approach is much more workable and does not trample on the work product privilege. Thus, Paragraph 16 should be removed from the Protective Order.

If not deleted entirely, this Paragraph should be substantially modified to remove the requirement that the State give notice to Defendants of the confidential material it intends to use at a hearing. To the extent the Protective Order includes any pre-arranged procedure for using confidential information at a hearing, it should simply be that the Parties must approach the bench prior to disclosing or publishing any designated material.

D. The Protective Order should be modified to delete the blanket declaration that all designated materials are "not of historical value" and shall not be archived by the State.

Paragraph 19(b), entitled "Obligations at Conclusion of Litigation," contains the following overbroad declaration: "It is also agreed and understood that the confidential business information at issue is not of historical value and these records are not of the type to be provided to the State archivist." This broad declaration should be removed from the Protective Order for two reasons. First, this case is undoubtedly historically significant, and the material produced herein—even if not made part of the record—should *not* be declared at this early stage to be devoid of historical value. Nothing is gained by the inclusion of this statement in the Protective Order, and no "good cause" was demonstrated for doing so.

Second, the statement that designated materials are "not of the type to be provided to the State archivist" is potentially at odds with State law governing the State's archiving obligations. Including this statement in the Protective Order poses a serious and unnecessary risk that could potentially affect dozens of State Agencies and breed confusion as to State archiving requirements. Moreover, any designated materials that are archived will remain subject to the Protective Order. Because the protective order itself provides remedies for the improper disclosure of designated materials, there is nothing to be gained by including this statement in the Protective Order.

Therefore, these unnecessary statements in Paragraph 19(b) should be removed from the Protective Order.

IV. CONCLUSION

The State objects to the Protective Order as it is currently written and respectfully requests that the Court modify the Protective Order as explained herein and as reflected in Exhibit A. In its current form, the Protective Order will undoubtedly delay this litigation and most like lead to modification of the May 2019 trial date, an outcome that should be avoided in the important case.

Dated: March 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was mailed and emailed on March 27, 2018 to:

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Exhibit A

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	Case No. CJ-2017-816 Judge Thad Balkman
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC. (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC; (8) ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,	)	
Defendants.	)	

PROTECTIVE ORDER

In recognition of long established Oklahoma jurisprudence that "the plaintiff's right to prepare for trial and to avoid delay in the evidentiary process should be *balanced* against the

defendant's legitimate claim to privacy,"[1] the parties in this action have conferred and agreed to enter into a Protective Order in this matter that provides for procedures regarding the exchange, use and filing of confidential information under Oklahoma law. Here, both parties have a right to prepare for trial in an expeditious manner with legitimate claims to privacy protected. While the parties have agreed to the entry of a protective order, they do not agree on its scope and other terms. Accordingly, and considering the unique circumstances of this case, it is ORDERED:

1. Scope.

(a) Generally. All materials produced or adduced in the course of discovery in this Action including initial or amended disclosures, responses to interrogatories and requests for admission, responses to discovery requests, deposition testimony and exhibits, documents, and testimony, data, and other information produced, adduced and/or disclosed ("Discovery Material"), shall be subject to this Order as defined below. This Order is subject to the Oklahoma Rules of Civil Procedure on matters of procedure and calculation of time periods.

(b) Party Definitions. A Party (or, if applicable, non-party) producing information covered by this Order shall be referred to as the "Designating Party." Any Party (or, if applicable, non-party) receiving Discovery Material covered by this Order shall be referred to as the "Receiving Party."

(c) Derivative Material, Compilations. The protections conferred by this Order cover Discovery Material designated as Confidential or Highly Confidential – Attorneys' Eyes Only and also (1) any information copied or extracted from such Discovery Material; and (2) all copies, excerpts, summaries, or compilations of such Discovery Material.

[1] *YWCA of Oklahoma City v. Melson*, 1997 OK 81, ¶24, 944 P.2d 304, 311.

(d) Material Not Covered. The protections conferred by this Order do not cover any information that is in the public domain or that is not Discovery Material as defined in Paragraph 1(a) of this Order.

(e) Designations by a Non-Party. Any non-Party to this Action may designate any Discovery Material it produces as Confidential or Highly Confidential – Attorneys' Eyes Only pursuant to the terms of this Order, so long as the Party reasonably and in good faith believes the information is properly so designated. In so designating the non-party and the Parties agree that the restrictions and terms of this Order shall be applicable to all such Discovery Material to the same extent as Discovery Material produced by a Party. The non-Party producing Discovery Material must first complete the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

2. Confidential or Highly Confidential Information. As used in this Order, "Confidential or Highly Confidential Information" means information designated as "Confidential" or "Highly Confidential" by the Designating Party that falls within one or more of the following categories: (a) information prohibited from disclosure by any applicable laws and regulations; (b) confidential research, development or commercial information (*see* 12 O.S. § 3226(C)(1)(g)); (c) trade secret information, including a formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; (d) medical or other "Protected Health Information" concerning any individual that is subject to the entry of a separate order pursuant to the Health Insurance Portability and Accountability Act; (e) personal identity information; (f) income tax

returns (including attached schedules and forms), W-2 forms and 1099 forms; or (g) personnel or employment records of a person who is not a party to the case.

3. Highly Confidential – Attorneys' Eyes Only Information. As used in this Order, "Highly Confidential – Attorneys' Eyes Only Information" means information that meets the following definition of "trade secret" under Oklahoma law:

> Information, including a formula, pattern, compilation, program, device, method, technique or process, that:
>
> a. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> b. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

78 OKLA. STAT. §86.

Deleted: (1) meets the definition of Confidential Information pursuant to Paragraph 2 above; and (2) the Designating Party in good faith believes could reasonably result in commercial, financial, or business injury to the Designating Party (other than injury to the Designating Party's position in this Action) in the event of the disclosure, dissemination, or use by or to any of the persons not enumerated in Paragraph 7(c).

4. Designation

(a) The Designating Party may designate a document or other Discovery Material at the time of production as Confidential Information or Highly Confidential – Attorneys' Eyes Only Information for protection under this Order by placing or affixing the words "Confidential," "Highly Confidential – Attorneys' Eyes Only," "Subject to Protective Order," or similar language respectively on each page of the document or material and on all copies in a manner that will not interfere with the legibility of the document or material. The designation of Discovery Material as Confidential or Highly Confidential – Attorneys' Eyes Only Information is a certification by an attorney or a party appearing pro se that the Discovery Material contains Confidential or Highly Confidential – Attorneys' Eyes Only Information as defined in this Order.

(b) As used in this Order, "copies" includes electronic images, electronic devices, duplicates, extracts, summaries or descriptions that contain the Confidential or Highly Confidential

– Attorneys' Eyes Only Information. Electronic media (such as CDs and DVDs) shall, at the time of production, be designated "Confidential" or "Highly Confidential – Attorneys' Eyes Only" by affixing a label to such media. In the case of initial or amended disclosures, interrogatory answers, responses to requests for admissions, and other similar documents providing information, the designation shall be made by means of a statement in the relevant document specifying that the document or specific parts thereof are designated Confidential or Highly Confidential – Attorneys' Eyes Only.

(c) Any copies that are made of any documents marked Confidential or Highly Confidential – Attorneys' Eyes Only shall also be so marked. Indices, electronic databases or lists of documents that do not contain substantial portions or images of the text of marked documents and do not otherwise disclose the substance of the Confidential or Highly Confidential – Attorneys' Eyes Only Information are not required to be marked.

5. Depositions. Deposition testimony is protected by this Order only if designated as Confidential or Highly Confidential – Attorneys' Eyes Only on the record at the time the testimony is taken or, within fourteen (14) days after receiving a certified copy of the transcript from the court reporter, by serving a Notice of Designation on all parties of record identifying the specific portions of the transcript that are so designated. Further, any designation of deposition testimony as Confidential or Highly Confidential – Attorneys' Eyes Only shall state the basis for such designations and designate by reference to the questions and answers, as applicable. All depositions shall be treated as Confidential or Highly Confidential – Attorneys' Eyes Only until the expiration of the 14-day period to make a written confidentiality designation.

6. Non-Documentary and Non-Testimonial Material. Non-documentary and non-testimonial material, such as oral statements, shall be designated as Confidential Information or

Highly Confidential – Attorneys' Eyes Only if and as appropriate at the time of disclosure or in writing within fourteen (14) days of their disclosure.

7. Protection of Confidential Material.

(a) General Protections. Confidential Information and Highly Confidential – Attorneys' Eyes Only Information shall not be used or disclosed by the Parties, counsel for the Parties, or any other persons identified in subparagraphs (b) and (c) for any purpose whatsoever other than in this Action and any appeal thereto, except as the Designating Party may agree in writing.

(b) Limited Third-Party Disclosures of Confidential Information. The Receiving Party and counsel for the Receiving Party shall not disclose or permit the disclosure of any Confidential Information to any third person or entity except as set forth in subparagraphs (1)-(11). Subject to these requirements, the following categories of persons may be allowed to review Confidential Information:

(1) Counsel. Counsel for the Parties and employees and consultants of counsel who have responsibility for the Action. For purposes of this Order, the Office of the Oklahoma Attorney General is included in the definition of Counsel for the Parties unless doing so could render any Confidential Information subject to public disclosure;

(2) Parties. Individual Parties and present or former officers, directors, and employees of a Party, to the extent counsel for the Receiving Party determines in good faith that the employee's assistance is reasonably necessary to the conduct of this Action;

Deleted: and provided that if a former employee is shown documents prepared after the date of his or her departure that such person(s) have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound

(3) The Court and its Personnel;

(4) Court Reporters and Recorders. Court reporters, recorders, and other personnel engaged for transcribing or videotaping testimony in this Action ("Court Reporters and Recorders");

(5) Contractors. Those persons specifically engaged for the purpose of making copies of Discovery Material or organizing or processing Discovery Material, including outside vendors hired to process electronically stored documents, copying services, litigation support services, translation services, graphics and design services, and document review and handling services, as well as investigators, trial consultants, jury consultants, and mock jurors, but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound ("Contractors");

(6) Experts. Testifying experts and consulting experts employed by the parties or counsel for the parties to assist in the preparation and trial of this action subject to the provisions of Paragraph 8 below and only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound ("Experts");

(7) Witnesses at Depositions. In connection with their depositions, witnesses in this Action to whom disclosure is reasonably necessary. Witnesses shall not retain a copy of documents containing Confidential or Highly Confidential – Attorneys' Eyes Only Information, except witnesses may receive a copy of all exhibits marked at their depositions solely in connection with review of the transcripts, and must return all copies after their review. Pages of transcribed deposition testimony or exhibits to depositions that are properly designated as Confidential Information or Highly Confidential – Attorneys' Eyes Only pursuant to the process set out in this Order may not be disclosed to anyone except as permitted under this Order;

Deleted: and after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound

(8) Author, Sender or Recipient. Any non-Party witnesses who authored, modified, sent or received the Discovery Material, provided that the non-Party witnesses shall only be shown the Discovery Material authored, sent, or received by the witness that counsel for the Receiving Party determines in good faith that the person's assistance is reasonably necessary to the conduct of this Action;

Deleted: , and provided that such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound

(9) Neutrals. Neutrals, if any, including but not limited to special masters, mediators, arbitrators, or other third parties appointed by the Court or jointly retained by the Parties for settlement purposes or resolution of discovery or other disputes in this Action and their necessary staff, but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound ("Special Masters");

(10) Others by Consent. Other persons only by written consent of the Designating Party or upon order of the Court and on such conditions as may be agreed or ordered; and

(11) Law Enforcement Agencies. To the extent the Receiving Party believes it is allowed by state or federal law or regulation to disclose Discovery Material to a state or federal law enforcement agency empowered to investigate matters or prosecute laws, regulations or rules related to the marketing, distribution, and sale of opioid products; provided that Confidential or Highly Confidential – Attorneys' Eyes Only Information shall not be disclosed to any such agency if doing so would render any such information subject to public disclosure. Any law enforcement agency with which Discovery Material is shared in accordance with this paragraph must first complete the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

(c) Limited Third-Party Disclosures of Highly Confidential – Attorneys' Eyes Only Information. The Receiving Party and counsel for the Receiving Party shall not disclose or permit the disclosure of any Highly Confidential – Attorneys' Eyes Only Information to any third person or entity except as set forth in subparagraphs (1)-(5). Subject to these requirements, the following categories of persons may be allowed to review Highly Confidential – Attorneys' Eyes Only Information:

(1) Counsel. All Counsel for the Parties in this Action and employees and consultants of counsel who have responsibility for the Action. For purposes of this Order, the Office of the Oklahoma Attorney General is included in the definition of Counsel for the Parties unless doing so could render any Highly Confidential – Attorneys' Eyes Only Information subject to public disclosure;

(2) Court and its Personnel, Court Reporters and Recorders, Contractors, Experts, and Special Masters;

(3) Witnesses at Depositions. In connection with their depositions, witnesses in this Action to whom disclosure is reasonably necessary, only when (1) the witness is or was employed by the Producing Party of the Discovery Material at issue, or (2) when the witness authored, sent, modified or received the Discovery Material in the ordinary course of business. The witness shall only be shown the specific portions of the Discovery Material to which access is reasonably necessary, with all other designated material redacted, but only after such persons have complete the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound. Witnesses shall not retain a copy of documents containing Highly Confidential – Attorneys' Eyes Only Information, except witnesses may receive a copy of all exhibits

marked at their depositions solely in connection with review of the transcripts, and must return all copies after their review. Pages of transcribed deposition testimony or exhibits to depositions that are properly designated as Highly Confidential – Attorneys' Eyes Only Information pursuant to the process set out in this Order must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Order. In no event will a current or prior officer, director, or employee, or affiliate of one defendant be shown the Highly Confidential – Attorneys' Eyes Only Discovery Material of another defendant unless the witness authored, sent, modified or received the Discovery Material in the ordinary course of business.

(4) Others by Consent. Other persons only by written consent of the Designating Party or upon order of the Court and on such conditions as may be agreed or ordered; and

(5) Law Enforcement Agencies. To the extent the Receiving Party believes it is allowed by state or federal law or regulation to disclose Discovery Material to a state or federal law enforcement agency empowered to investigate matters or prosecute laws, regulations or rules related to the marketing, distribution, and sale of opioid products; provided that Confidential or Highly Confidential – Attorneys' Eyes Only Information shall not be disclosed to any such agency if doing so would render any such information subject to public disclosure. Any law enforcement agency with which Discovery Material is shared in accordance with this paragraph must first complete the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

(d) Control of Documents. Counsel for the Parties shall make reasonable efforts to prevent unauthorized or inadvertent disclosure of Confidential and Highly Confidential – Attorneys' Eyes Only Information. Counsel to the Party employing, examining, or

interviewing witnesses shall be responsible for obtaining the executed Acknowledgment of Understanding and Agreement to Be Bound, shall maintain the originals of that form for a period of three years after the termination of the case, and shall serve it on counsel upon request.

8. Disclosure to Experts and Expert Consultants. Confidential or Highly Confidential – Attorneys' Eyes Only Information may be provided to experts and expert consultants assisting counsel to the Parties in this Action only to the extent necessary for the expert or expert consultant to prepare a written opinion, to prepare to testify, or to assist counsel in the prosecution or defense of this Action and provided that the expert or expert consultant is using said Confidential or Highly Confidential – Attorneys' Eyes Only Information solely in connection with the rendition of expert services in this Action and is not currently a partner, director, officer, employee, or other affiliate of the Designating Party. Nothing herein shall be construed as a waiver of any objection to retaining a former partner, director, officer, employee or other affiliate of the Designating Party to serve as a retained expert or expert consultant in this Action.

9. Limitations. Entering into, agreeing to, producing, or receiving Confidential or Highly Confidential – Attorneys' Eyes Only Information pursuant to this Order, or the taking of any action pursuant to this Order shall not:

(a) Limit or restrict a Party's handling and use of its own Confidential or Highly Confidential – Attorneys' Eyes Only Information that has been designated as such solely by that Party.

(b) Prejudice in any way the rights of any Party to petition the Court to seek additional protection for Discovery Material for any reasons not specifically addressed by this Order;

(c) Prejudice in any way the rights of any Party to object to the relevancy, authenticity, or admissibility into evidence of any document or other information subject to this Order, or otherwise constitute or operate as an admission by any Party that any particular document or other information is or is not relevant, authentic, or admissible into evidence at any deposition, at trial, or in a hearing; or

(d) Prevent the interested Parties from agreeing, in writing, to alter or waive the provisions or protections of this Order with respect to any particular document, information, or person.

10. Inadvertent Failure to Designate and Mis-Designation. An inadvertent failure to designate Discovery Material as Confidential or Highly Confidential – Attorneys' Eyes Only Information or mis-designation of Discovery Material does not, standing alone, waive the right to designate or re-designate the Discovery Material or constitute a waiver of a claim of confidentiality. A failure to designate or correctly designate Discovery Material may be corrected by prompt written notice upon discovery of such failure, accompanied by appropriately designated substitute copies of the Discovery Material within thirty (30) days of disclosure. No Party shall be found to have violated this Order for failing to maintain the confidentiality of material during a time when that material has not been designated as Confidential or Highly Confidential – Attorneys' Eyes Only Information, even where the failure to so designate was inadvertent and where the material is subsequently designated as Confidential or Highly Confidential – Attorneys' Eyes Only Information. If a party designates or re-designates Discovery Material as Confidential or Highly Confidential – Attorneys' Eyes Only Information after it was initially produced, the Receiving Party, on notification of the designation and receipt of substitute copies, must make a reasonable effort to promptly destroy or return to the Designating Party all copies of such non-designated or mis-designated Discovery Material and shall treat the substitute Discovery Material

as Confidential or Highly Confidential – Attorneys' Eyes Only Information as appropriate as if it had been initially so designated. If the Receiving Party disclosed Discovery Material that was subsequently designated as Confidential or Highly Confidential – Attorneys' Eyes Only Information, it shall in good faith assist the Designating Party in retrieving such Discovery Material from all recipients not entitled to access to such Discovery Material and prevent further disclosures except as authorized under the terms of this Order.

11. Inadvertent Production of Privileged Information.

(a) Generally. Any inadvertent disclosure of Discovery Material subject to a claim of attorney client privilege, attorney work product protection, common interest privilege, or any other privilege, immunity or protection from production or disclosure ("Privileged Information") will not in any way prejudice or otherwise constitute a waiver of, or estoppel as to, such Privileged Information or generally of such privilege. As used herein, "Privileged Information" means any documents, materials, or information that the producing party reasonably and in good faith believes to be subject to the attorney-client privilege, attorney work-product privilege, and/or any other applicable privilege available to the Parties and/or third parties under Oklahoma law.

(b) Notice of Inadvertent Production. If a Party or non-Party discovers that it has inadvertently produced Privileged Information, it shall promptly notify the Receiving Party of the inadvertent production in writing, shall identify the inadvertently produced Privileged Information by Bates range where possible, and may demand that the Receiving Party return or destroy the Privileged Information. In the event that a Receiving Party receives information that it believes is subject to a good faith claim of privilege by the Disclosing Party, the Receiving Party shall immediately refrain from examining the information and shall promptly notify the Disclosing Party in writing that the Receiving Party possesses potentially Privileged Information. The

Disclosing Party shall have fourteen (14) business days to assert privilege over the identified information. If the Disclosing Party does not assert a claim of privilege within the fifteen-day period, the information in question shall be deemed non-privileged.

(c) Claw Back of Privileged Information. If the Designating Party has notified the Receiving Party of inadvertent production, or has confirmed the inadvertent production called to its attention by the Receiving Party, the Receiving Party shall within fourteen (14) days of receiving such notification or confirmation: (1) destroy or return to the Designating Party all copies or versions of the inadvertently produced Privileged Information requested to be destroyed returned or destroyed; (2) delete from its work product or other materials any quoted or paraphrased portions of the inadvertently produced Privileged Information; (3) ensure that inadvertently produced Privileged Information is not disclosed in any manner to any Party or non-Party. Notwithstanding the above, the Receiving Party may segregate and retain one copy of the clawed back information solely for the purpose of disputing the claim of privilege. The Receiving Party shall not use any inadvertently produced Privileged Information in connection with this Action or for any other purpose other than to dispute the claim of privilege. The Receiving Party may file a motion pursuant to 12 O.S. § 3226(B)(5)(b) disputing the claim of privilege and seeking an order compelling production of the material at issue; the Disclosing Party may oppose any such motion, including on the grounds that inadvertent disclosure does not waive privilege. If the Receiving Party disclosed Discovery Material that was subsequently designated as Privileged Information, it shall in good faith assist the Designating Party in retrieving such Discovery Material from all recipients not entitled to access to such Discovery Material and prevent further disclosures except as authorized under the terms of this Order.

12. Unauthorized Disclosure. If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Confidential or Highly Confidential – Attorneys' Eyes Only Information to any person or in any circumstance not authorized under this Order, the Receiving Party must immediately (a) notify the Designating Party in writing of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Confidential or Highly Confidential – Attorneys' Eyes Only Information, (c) inform the person or persons to whom unauthorized disclosures were made of this Order, and (d) request such person or persons complete the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

13. Filing of Confidential or Highly Confidential – Attorneys' Eyes Only Information. Any party wishing to file a document designated as Confidential or Highly Confidential – Attorneys' Eyes Only Information in connection with a motion, brief or other submission to the Court, or file a motion, brief, or other submission containing Confidential or Highly Confidential – Attorneys' Eyes Only Information, may file such motion, brief or other submission to the Court under seal pursuant to 12 O.S. § 3226(C)(2) and 51 O.S. §§ 24A.29-30 and must also file a public version of such motion, brief or other submission to the Court wherein all Confidential or Highly Confidential – Attorneys' Eyes Only Information is redacted. The Designating Party shall have the opportunity to join in a motion to file under seal and file supplemental briefing in support of the motion.

14. Challenges by a Party to Designation as Confidential or Highly Confidential – Attorneys' Eyes Only Information. The designation of any material or document as Confidential or Highly Confidential – Attorneys' Eyes Only Information is subject to challenge by any Party. The following procedure shall apply to any such challenge.

(a) Meet and Confer. A Party challenging the designation of Confidential or Highly Confidential – Attorneys' Eyes Only Information must do so in good faith and must begin the process by conferring directly with counsel for the Designating Party. In conferring, the challenging Receiving Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the designation, and, if no change in designation is offered, to explain the basis for the designation. If the Receiving Party believes that portion(s) of a document are not Confidential or Highly Confidential – Attorneys' Only Information, it will identify the specific information that it believes is not confidential and the Designating Party will review and respond, as laid out in paragraph (b) below, with respect to that specific information.

(b) Judicial Intervention. If the Parties are not able to reach an agreement pursuant to the provisions set forth in the preceding paragraph, the Designating Party shall have seven (7) days after the meet and confer to file a motion with the Court seeking protection under this Order and must set forth in detail the basis for retention of the confidentiality designation. Each such motion must be accompanied by a competent declaration that affirms that the movant has complied with the meet and confer requirements of this procedure. The Objecting Party must thereafter file a response setting forth in detail the basis for such Objection within seven (7) days of service of the Motion. The burden of persuasion in any such challenge proceeding shall be on the Designating Party. Until the Court rules on the challenge, all parties shall continue to treat the materials as Confidential or Highly Confidential – Attorneys' Eyes Only Information, as appropriate, under the terms of this Order. If a Party fails to file such motion during the time frames set forth in this paragraph, the challenged document(s) at issue will no longer be entitled to protection and such designation may be disregarded.

15. Action by the Court. Applications to the Court for an order relating to materials or documents designated Confidential or Highly Confidential – Attorneys' Eyes Only Information shall be by motion. Nothing in this Order or any action or agreement of a Party under this Order limits the Court's power to make orders concerning the disclosure of documents produced in discovery or at trial.

16. Confidential or Highly Confidential – Attorneys' Eyes Only Information Requested by Third Party; Procedure Following Request.

(a) If any person receiving Discovery Material covered by this Order (the "Receiver") is served with a subpoena, a request for information, or any other form of legal process that would compel disclosure of any Confidential or Highly Confidential – Attorneys' Eyes Only Information that was produced by a person or entity other than the Receiver ("Request"), the Receiver must so notify the Designating Party, in writing, immediately and in no event more than three business days after receiving the Request. Such notification must include a copy of the Request.

(b) The Receiver also must immediately inform the party who made the Request ("Requesting Party") in writing that some or all the requested material is the subject of this Order. In addition, the Receiver must deliver a copy of this Order promptly to the Requesting Party.

(c) The purpose of imposing these duties is to alert the Requesting Party to the existence of this Order and to afford the Designating Party in this case an opportunity to try to protect its Confidential or Highly Confidential – Attorneys' Eyes Only Information. The Designating Party shall bear the burden and the expense of seeking protection of its Confidential or Highly Confidential – Attorneys' Eyes Only Information, and nothing in these provisions should be construed as authorizing or encouraging the Receiver in this Action to disobey a lawful directive from another court. The obligations set forth in this paragraph remain in effect while the Receiver

Deleted:
16. Use of Confidential or Highly Confidential – Attorneys' Eyes Only Information at Trial or Hearings. A Party that intends to present Confidential or Highly Confidential – Attorneys' Eyes Only Information at a hearing shall bring that issue to the Parties' attention so that the Parties may meet and confer to determine whether to stipulate to the handling of the information as appropriate, including whether to apply to the Court for any relief. The Court may thereafter make such orders, including any stipulated orders, as are necessary to govern the use of Confidential Information or Highly Confidential – Attorneys' Eyes Only Information at the hearing. The use of any Confidential Information or Highly Confidential – Attorneys' Eyes Only Information at trial shall be governed by a separate stipulation and/or court order.

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has in its possession, custody or control Confidential or Highly Confidential – Attorneys' Eyes Only Information by any other Party in this Action.

(d) Materials that have been designated as Confidential or Highly Confidential-Attorneys' Eyes Only shall not be provided or disclosed to any third party in response to a request under the Oklahoma Open Records Act or any similar federal, state or municipal law (collectively, the "Public Disclosure Laws"), and are exempt from disclosure pursuant to 51 O.S. § 24A.12, and may be exempt under other provisions. If the Oklahoma Attorney General receives a request for so designated Discovery Materials pursuant to the Oklahoma Records Act, 51 O.S. §§ 24A.1-24A.30, it shall (i) provide a copy of this Order to the requesting party and inform it that the requested materials are exempt from disclosure and that the Oklahoma Attorney General is barred by this Order from disclosing them, and (ii) promptly inform the party that has produced the requested material that the request has been made, identifying the name of the requesting party and the particular materials sought. The restrictions in this paragraph shall not apply to materials that (i) the Designating Party expressly consents in writing to disclosure; or (ii) this Court has determined by court order to have been improperly designated as Confidential or Highly Confidential-Attorneys' Eyes Only Discovery Material. The provisions of this section shall apply to any entity in receipt of Confidential or Highly Confidential-Attorneys' Eyes Only Discovery Material governed by this Order. Nothing in this Order shall be deemed to (1) foreclose any party from arguing that Discovery Material is not a public record for purposes of the Oklahoma Open Records Act or Public Disclosure Laws, (2) prevent any party from claiming any applicable exemption to the Oklahoma Open Records Act or Public Disclosure Laws; or (3) limit any arguments that a party may make as to why Discovery Material is exempt from disclosure.

17. Information Subject to Existing Obligation of Confidentiality. In the event that a Party is required by a valid discovery request to produce any information held by it subject to an obligation of confidentiality in favor of a third party, the Party shall, promptly upon recognizing that such third party's rights are implicated, provide the third party with a copy of this Order and inform the third party in writing (i) of the Party's obligation to produce such information in connection with this Action and of its intention to do so, subject to the protections of this Order; (ii) of the third party's right within fourteen (14) days to seek further protection or other relief from the Court if, in good faith, it believes such information to be confidential under the said obligation and either objects to the Party's production of such information or regards the provisions of this Order to be inadequate; and (iii) seek the third party's consent to such disclosure if it does not plan to object. Thereafter, the Party shall refrain from producing such information for a period of twenty-one (21) days in order to permit the third party an opportunity to seek relief from the Court, unless the third party earlier consents to disclosure. If the third party fails to seek such relief within fourteen (14) days, the Party shall promptly produce the information in question subject to the protections of this Order.

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18. Obligations on Conclusion of Litigation.

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(a) Order Continues in Force. Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

(b) Obligations at Conclusion of Litigation. Within sixty (60) days after dismissal or entry of final judgment not subject to further appeal, all Confidential and Highly Confidential – Attorneys' Eyes Only Information under this Order, including copies as defined in Paragraph 4(b) above, shall be destroyed or returned to the producing party unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; and (2) as to documents bearing

the notations, summations, or other mental impressions of the Receiving Party, that Party elects to destroy the documents and certifies to the producing party that it has done so. Nothing in this paragraph shall modify the State's obligations under Paragraph 17 of this Order.

Deleted: It is also agreed and understood that the confidential business information at issue is not of historical value and these records are not of the type to be provided to the State archivist.

(c) Retention of Work Product and one set of Discovery Material. Notwithstanding the above requirements to return or destroy documents, State's counsel and Defendants' outside counsel may retain (1) attorney work product, including an index that refers or relates to designated Confidential or Highly Confidential – Attorneys' Eyes Only Discovery Material so long as that work product does not duplicate verbatim substantial portions of Confidential or Highly Confidential--Attorneys' Eyes Only Information, and (2) one complete set of all documents filed with the Court including those filed under seal, deposition and trial transcripts, and deposition and trial exhibits. Any retained Confidential or Highly Confidential – Attorneys' Eyes Only Discovery Material shall continue to be protected under this Order. An attorney may use his or her work product in subsequent litigation, provided that its use does not disclose or use Confidential Information or Highly Confidential – Attorneys' Eyes Only Information.

19. Order Subject to Modification. This Order shall be subject to modification by the Court on its own initiative or on motion of a party or any other person with standing concerning the subject matter.

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20. No Prior Judicial Determination. This Order is entered based on the representations and agreements of the Parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any Discovery Material designated as Confidential or Highly Confidential – Attorneys' Eyes Only Information is entitled to protection under 12 O.S. § 3226(C) or otherwise until such time as the Court may rule on a specific document or issue.

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21. **Persons Bound.** This Order shall take effect when entered and shall be binding upon all counsel of record and their law firms, the parties, and persons made subject to this Order by its terms.

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ENTERED THIS _____ DAY OF MARCH, 2018:

_____
Thad Balkman
Judge, District Court of Cleveland County, Oklahoma

_____
William C. (Bill) Hetherington, Jr.
Special Discovery Master

ATTACHMENT A

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	)	
Plaintiff,	)	
	)	Case No. CJ-2017-816
vs.	)	Judge Thad Balkman
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC; (8) ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,	)	
Defendants.	)	

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

The undersigned hereby acknowledges that he/she has read the Protective Order entered in the above-captioned action on _____, 2018, and attached hereto, understands the terms. The undersigned submits to the jurisdiction of the District Court of Cleveland County of the State of Oklahoma in matters relating to the Protective Order and understands that the terms of the Protective Order obligate him/her to use materials designated as Confidential or Highly Confidential--Attorneys' Eyes Only Information in accordance with the Order solely for the purposes of the above-captioned action, and not to disclose any such Confidential Information to any other person, firm or concern.

The undersigned acknowledges that violation of the Protective Order may result in penalties of contempt of court.

Name: _____

Job Title: _____

Employer: _____

Business Address: _____

Date: _____

Signature: _____

Exhibit B

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	Case No. CJ-2017-816 Judge Thad Balkman
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC; (8) ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,	)	
Defendants.	)	

PLAINTIFF'S STATUS REPORT REGARDING MARCH 9, 2018 HEARING

In anticipation of the hearing on March 9, 2018, the State provides this Status Report regarding certain discovery issues and the State's position. During the initial status conference on February 22, 2018, Your Honor proposed an electronic filing procedure through DropBox or some other means, and the State welcomes some type of electronic filing procedure.[1] However, prior to that procedure being implemented, the State is submitting this Status Report by email. Your Honor noted a concern about email security at the prior conference and, as such, the State has not included any confidential information in this Status Report.

Based on the prior conference and the current status of the case, the State provides the status and its position regarding the following issues:

1. Protective Orders
2. Modification of the Default Discovery Limits
3. Procedure for Non-Party Fact Discovery
4. Defendants' Responses to the State's First Discovery Requests
5. Agreed Protocol for Electronically Stored Information (ESI)

The State will be prepared to address any other issues Your Honor believes will help streamline discovery and maintain the Court's Scheduling Order.

1. Protective Orders

a. HIPAA Protective Order

Both parties agree that a protective order specifically related to protected health information is necessary and appropriate in this case. The State sent a revised version of the HIPAA protective order to Defendants on March 7, which is attached hereto as Exhibit A. The State anticipates the parties will reach an agreement regarding the HIPAA protective order and seek entry of this order at such time.

[1] The State, however, is unable to agree to the use of DropBox, as it is not approved for use by the State. The State will shortly provide available options to transfer documents electronically which do meet the State's security protocols.

b. Defendants' Proposed Blanket Confidentiality Order

Defendants have requested a broad protective order in this case. Broad protective orders are generally disfavored in Oklahoma, and a protective order is unnecessary in this case except for the limited purpose of maintaining confidentiality of HIPAA-protected information. Thus, Defendants bear the burden to demonstrate good cause for entry of any other protective order. 12 O.S. §3226 (C)(1).

By agreement with Defendants, the State is currently treating all documents produced by Defendants as "confidential" until such time as the Court rules on whether a protective order is required and, if so, enters an order.

The State does not believe it is appropriate to have a blanket protective order covering "confidential" documents in a case like this that involves perhaps the most severe public health crisis in Oklahoma history. As Your Honor noted at the prior conference, "the law has sort of moved in the direction of disfavoring protective orders in the interest of the public's right to know. And that's true." Feb. 22, 2018 Hearing Transcript, 20:21-23. To allow any party the ability to designate large volumes of documents as confidential does nothing to help the public or this Court, or to protect any party. The truth is the truth and there is no reason to hide it. Yet that is what a blanket confidentiality order will permit. As discussed below, if a party believes a specific document or issue warrants heightened scrutiny and potential protection from broad disclosure, the rules allow the party to move for protection—as to the document(s) at issue.

With that said, the State recognizes that legitimate trade secret information warrants protection. Indeed, Your Honor previously noted that some protections "are necessary in particularly cases like this that deal with trade secrets, protected process that are legitimate trade

secret, protected processes, proprietary information that these defendants individually or collectively may have." *Id.* at 21:01-04. The State agrees. Fortunately, Oklahoma law provides a clear definition of what constitutes a trade secret.[2] Thus, the State offered to agree to a narrowly-tailored protective order in accordance with Oklahoma law to protect Defendants' trade secret information. Thus far, Defendants have not agreed on the wording of the protective order that would address trade secret information, insisting instead on a form of order that would allow a blanket, preemptive designation of non-trade secret documents as confidential.

Accordingly, the State attaches a proposed protective order that addresses these issues and serves the public interest. *See* Exhibit B.

The attached protective order addresses three important issues.

First, it provides Attorneys' Eyes Only protection for Defendants' trade secret information while being narrowly-tailored to avoid improper umbrella designations. Exhibit B, § 2. "Court records are public records . . . . Sealing a public record should be a very rare event that occurs in only the most compelling of circumstances." *Shadid v. Hammond*, 2013 OK 103, ¶¶ 2–3, 315 P.3d 1008 (Taylor, J., concurring) ("All of this current litigation and expense demonstrates the very reason why courts should rarely take the drastic measure of sealing public records. After the records are sealed, those seeking to protect the public interest are required to go to great time and expense to view what were once public records."). The same underlying policy considerations counsel against broad protective orders.

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[2] Under the Oklahoma Uniform Trade Secrets Act, "Trade Secrets" are expressly defined as: information, including a formula, pattern, compilation, program, device, method, technique or process, that:

a. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

b. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

78 O.S. §86.

This case is of particular public interest as it relates to perhaps the worst public health crisis in our country's history, affecting the entire State of Oklahoma and its citizens on an unprecedented scale. Allowing Defendants to prophylactically shield records of such significant public interest under blanket confidentiality designations is therefore improper and contrary to the public interest.

The State is concerned Defendants, if given the opportunity, will blanket designate information as confidential in order to shield certain information from ever seeing the light of day. This is what has happened with Purdue in Kentucky. By way of example, Purdue continues to fight to maintain the secrecy of the court records, including a deposition transcript of Richard Sackler, in a prior case brought by the Kentucky Attorney General based on similar misconduct. Though a trial court ordered that the records be unsealed, Purdue has continued to fight access to these records and is appealing that decision. *See* Exhibits C-D.

To date, Defendants have not identified anything outside of trade secrets—which are expressly identified and defined by Oklahoma statute—that warrants confidential treatment or would warrant blanket protection. Indeed, the Defendants, who are direct competitors, are assuredly working in a joint defense group and sharing such information among themselves. Indeed, Your Honor previously directed Defendants to work together as much as possible to streamline issues in discovery. *See* Feb. 22, 2018 Hearing Transcript at 17:23-20:15. Accordingly, a protective order limiting confidential treatment to "trade secrets" as defined by 78 O.S. §86 is reasonable.

If Defendants have documents that do not qualify as trade secrets, but Defendants believe should be entitled to some other type of protection, then Defendant(s) bear the burden of filing a motion for protection, satisfying their respective burden of proof that the documents are entitled to protection, and allowing the Court to determine whether such documents are indeed entitled to

protection and, if so, what that protection should be. 12 O.S. §3226(C). That is what the Oklahoma rules contemplate and allow. Nothing about the State's proposal precludes Defendants from doing so.

While it is true that in some cases the parties agree to, and a court enters, a protective order that has broad classifications of documents that can be labeled "confidential," here, the parties have the benefit of a Special Discovery Master who is required to hold hearings once a month and has indicated that hearings will be held more frequently as needed. Given this resource, it should not be problematic if a party wishes to seek protection on an *ad hoc* basis beyond the trade secret categories called for by statute and set forth in the proposed order.

Second, the attached protective order specifies that it is the designating party's burden to preserve any claimed confidentiality designations. Under Oklahoma law, the Court may enter a protective order "***upon motion by a party or by the person from whom discovery is sought***, accompanied by a certification that the movant has in good faith conferred or attempted to confer . . . and for good cause shown . . . ." 12 O.S. § 3226(C) (emphasis added). The State anticipates that no matter what protective order is entered, there will be some disputes about what should and should not be protected. Any such order should therefore include a procedure for challenging confidentiality designations. The State proposes that, consistent with Oklahoma civil procedure, the designating party (not the requesting party) bear the burden of persuasion and be required to file any motions to confirm that challenged designations will remain confidential. Exhibit B, § 14. Placing the burden on the designating party to defend its designations accords with the Oklahoma rules and is especially appropriate where, as here, only one party seeks entry of a protective order.

Third, the attached protective order allows for sharing protected information with other litigating states under the order's safeguards. *See* Exhibit B, § 7. Permitting the sharing of documents among litigating states, under the safeguards of the protective order, is efficient for all parties. Given the nationwide scope of the epidemic and concurrent litigation, such a provision simply makes sense.

For the reasons set forth above, to the extent Your Honor determines good cause exists for a protective order outside of a HIPAA order, the State's position is that the version attached as Exhibit B is most appropriate. Importantly, this protective order does not preclude either party from seeking additional specific protection for any material as needed and as the case develops.

2. Modification of the Default Discovery Limits

As briefly discussed at the initial conference on February 22, 2018, the State believes the default limits on requests for production should be modified for this case. For clarification, the State's position regarding the default discovery limits is that each party must respond to no more than:

1. Thirty interrogatories;
2. Thirty requests for production (RFPs); and
3. Thirty requests for admission (RFAs).

Regarding interrogatories, the Oklahoma Code of Civil Procedure states, "[t]he number of interrogatories ***to a party*** shall not exceed thirty in number." 12 O.S. §3233(A) (emphasis added). As such, absent an order to the contrary modifying these limitations, each party to this litigation, including the State, is only required to respond to a sum total of 30 interrogatories, regardless of the number of parties purporting to serve such interrogatories. This is especially true, where here, Defendants are defending this litigation and conducting discovery pursuant to a joint defense agreement and, as such, the State believes the Defendants coordinated to submit their discovery

requests in a targeted manner to get around these discovery limitations. Because they are working in concert, the State should not be required to respond to more than a total of 30 separate Interrogatories.

The State however, agrees that each subsidiary and affiliate of each Defendant family should not separately be required to respond to thirty interrogatories (nor thirty RFPs or RFAs). As such, the State agrees that, at this time, it should only be permitted to serve thirty interrogatories and thirty RFAs per Defendant family. However, the State requests that the limit on RFAs not apply to any RFAs related solely to authentication and/or admissibility of documents.

Regarding RFPs, the applicable rule similarly states: "The number of requests to produce or permit inspection or copying shall not exceed thirty in number." 12 O.S. §3234(B)(2). However, the State requests fifty RFPs to serve per Defendant family. In other words, each family would only be required to respond to a maximum of fifty RFPs at this time. Similarly, the State would respond to fifty RFPs total. In fact, the State has already responded to ***53*** RFPs, the bulk of which were not Defendant specific and pertain to all Defendants and all opioids. *See, e.g.*, Exhibits E–J (utilizing identical defined terms and requesting documents related to "any Defendant" or "Defendants"). Allowing more than this will significantly prejudice the State, which would have to respond to a disproportionate amount of RFPs (and other discovery requests) from Defendants. Thus, under the State's proposal, each party will bear the same burden in responding, rather than the State being subjected to as many as thirty or fifty RFPs from each Defendant family or more if Defendants continue to strategically divide up discovery amongst affiliate organizations that are in identical positions and operate as one group.

The State's suggestion does not preclude either party from seeking leave for additional discovery as needed as the case progresses.

3. **Procedure for Non-Party Fact Discovery**

As alleged in the State's Petition, Defendants funded and collaborated with members of the medical community and seemingly neutral third-party organizations to promote opioid use and further spread Defendants' false messaging. Consequently, the State needs to gather documents and testimony from these third parties, most of which are located outside the State of Oklahoma. Therefore, the State wishes to discuss the different procedures for obtaining out of state discovery and how the parties can reduce the burden on those involved.

As an initial matter, a significant amount of the burden and expense associated with gathering this discovery can be avoided if Defendants will agree to produce documents they have exchanged with these organizations and individuals. For example, U.S. Senator Claire McCaskill, the top-ranking Democrat on the Senate Homeland Security and Governmental Affairs Committee, recently released the latest product of her wide-ranging investigation into opioid manufacturers and distributors. "Fueling an Epidemic: Exposing the Financial Ties Between Opioid Manufacturers and Third Party Advocacy Groups" describes how manufacturers of opioids, including two of the Defendants, have made significant financial investments into third party organizations just during the last five years. These groups have, in turn, engaged in pro-opioid advocacy over a long period of time, including through guidance minimizing the risks of opioid addiction and the endorsement of opioid use for the long-term treatment of chronic pain—an approach not backed up by medical science. *See* Exhibit K.

Currently, the State intends to subpoena every Third-Party Advocacy Group mentioned in this report, and at least nine other "Key Opinion Leader" (KOLs) non-party witnesses with whom Defendants worked. If Defendants would agree to produce documents provided to those groups and individuals and the underlying data and documents cited in Senator McCaskill's report, it

would significantly narrow the scope of discovery the State will have to directly obtain from the third parties, greatly reducing the burden and expense on both the State and these third parties.

Nevertheless, there will be other categories of documents and testimony that only these third parties can provide. Thus, the State wishes to discuss the different procedural mechanisms used to obtain this out-of-state discovery.

4. **Defendants' Responses to the State's First Discovery Requests**

The State served its initial written discovery requests (the "Discovery Requests") on Defendants on August 3, 2017. Defendants delayed their responses by filing a motion to stay discovery, which was denied on November 14, 2017. As such, the Court ordered Defendants to respond by December 13, 2017. There are numerous inadequacies and deficiencies with Defendants' responses to the Discovery Requests. Below are two issues that relate to numerous requests, and the State believes would significantly advance discovery if immediately resolved. The State sent letters to each Defendant addressing these issues on March 5. *See* Exhibit L-N.

First, several of the Discovery Requests seek information produced or discovered in other litigation and investigations related to the opioid epidemic, including documents, deposition transcripts, witness statements, and any expert reports. The Discovery Requests identify certain cases, including past cases like the 2007 cases against Purdue, and also describe the nature of any similar case or investigation. Specifically, the State requested each Defendant produce:

REQUEST FOR PRODUCTION NO. 1: All Documents produced by You, whether as a party or non-party, in other litigation related to the promotion, marketing, distribution, and/or prescription of opioids, including, without limitation, any and all Documents produced by You in the Other Opioid Cases.

REQUEST FOR PRODUCTION NO. 2: All discovery responses, investigative demand responses, deposition transcripts, witness statements, hearing transcripts, expert reports, trial exhibits and trial transcripts from prior litigation related to the promotion, marketing, distribution, and/or prescription of opioids, including, without limitation, the Other Opioid Cases.

Defendants' responses to these Discovery Requests vary from outright refusal, to substantially limiting their responses, to stating they will only produce such documents if that Defendant unilaterally determines a document concerns Oklahoma, and, finally, cries of undue burden. *See* Exhibit O. None of Defendants' responses are adequate. Producing such information is not unduly burdensome and would expedite certain discovery in this case because it will allow Defendants to produce information they have already produced and, to the extent any prior cases involved deposition testimony or expert reports, could substantially narrow or streamline discovery in this matter. For example, again, the Kentucky case referenced above includes prior deposition transcripts and other materials that are part of the court record that relate to this case. There simply is no reason—at least no reasonable one—whatsoever to not produce these types of documents.

Second, as mentioned above, the State's Discovery Requests seek significant information about Defendants' relationships and activities with purportedly unbiased organizations ("Front Groups") and KOLs. *See, e.g.*, Exhibit P at RFP Nos. 8-9, 13, 18, 24. Defendants, at times, wholly refuse to produce such information and, at others, improperly limit their responses. This information concerns Defendants' sweeping and clandestine marketing campaign to distribute misinformation through other channels. As demonstrated by Senator McCaskill's report, this is significant information that, among other things, "suggests...a direct link between corporate donations and the advancement of opioids-friendly messaging." Exhibit K at 1. Information has apparently been produced to Senator McCaskill in response to her investigation. *See id.* at n. 103-06 (referencing productions from Johnson & Johnson and Purdue Pharma). Defendants should produce that information here. As stated above, Defendants have yet to articulate any difference between their marketing campaign in Oklahoma and the rest of the country that would impact the

scope of discovery. Nor have Defendants articulated how reproducing information already produced is, in any way, unduly burdensome. Responding to these Discovery Requests would substantially advance discovery and lessen the burden on all parties regarding non-party fact discovery.

5. **Agreed Protocol for Electronically Stored Information (ESI)**

The parties have discussed entering an agreed ESI protocol in this case since December 20, 2017. At the time, the State understood that Defendants would send a proposed ESI protocol. Defendants never did and, as such, the State sent its proposal on February 20, 2018. The parties discussed the State's proposal on March 2, 2018, and Defendants sent their proposed revisions on March 7, 2018. The parties should promptly finalize this agreement so that all parties are operating under the same protocol for purposes of collecting and producing ESI in this matter.

The State looks forward to discussing the above-described issues on Friday, March 9. The State's goal is to move this case forward as efficiently as possible to comply with the Court's Scheduling Order.

Dated: March 8, 2018

/s/ Michael Burrage

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