



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.*, MIKE)
HUNTER, ATTORNEY GENERAL OF)
OKLAHOMA,)
)
Plaintiff,)
)
v.)
)
PURDUE PHARMA L.P.; PURDUE PHARMA)
INC.; THE PURDUE FREDERICK COMPANY,)
INC.; TEVA PHARMACEUTICALS USA, INC.;)
CEPHALON, INC.; JOHNSON & JOHNSON;)
JANSSEN PHARMACEUTICALS, INC.;)
ORTHO-McNEIL-JANSSEN)
PHARMACEUTICALS, INC., n/k/a JANSSEN)
PHARMACEUTICALS, INC.; JANSSEN)
PHARMACEUTICA, INC., n/k/a JANSSEN)
PHARMACEUTICALS, INC.;)
ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a)
ACTAVIS, INC., f/k/a WATSON)
PHARMACEUTICALS, INC.; WATSON)
LABORATORIES, INC.; ACTAVIS LLC; and)
ACTAVIS PHARMA, INC., f/k/a WATSON)
PHARMA, INC.,)
)
Defendants.)

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.

FILED

APR 10 2018

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816

Special Discovery Master
Hetherington

**DEFENDANTS' RESPONSE TO THE STATE'S OBJECTION TO AND
MOTION TO MODIFY THE PROTECTIVE ORDER**

Defendants respectfully submit to the Special Discovery Master this response to the State's objection to and motion to modify the protective order (the "Motion"). In accordance with the instructions of the Special Discovery Master, Defendants respond to the State's objections to three specified provisions of the protective order: (i) the definition of "Highly Confidential – Attorneys' Eyes Only," (ii) restrictions on witness access to Highly Confidential documents during depositions, and (iii) the prohibition on providing Confidential and Highly

Confidential documents not filed in Court to the State Archivist. (Apr. 1, 2018 email from Special Discovery Master Hetherington to A. Dillsaver, et al. (Ex. A hereto).)¹

Oklahoma law permits the entry of a protective order to prevent the disclosure of a party's confidential information and trade secrets. 12 O.S. § 3226(C)(1)(f). The Special Discovery Master's protective order, which drew from the parties' competing proposals, appropriately balanced the need to protect the parties' confidential information against the need to use such information during litigation. The Special Discovery Master did not, contrary to the State's assertion, impose "hurdles" designed to delay the case. (State Mot. at 2.)

As to the first challenged provision (the definition of "Highly Confidential – Attorneys' Eyes Only"), Defendants do not object to aligning the meaning of this term with the Oklahoma Uniform Trade Secrets Act.

As to the second challenged provision (restrictions on the disclosure of Highly Confidential documents to witnesses), the State's objection should be overruled. Highly Confidential information is by definition commercially sensitive, and improper disclosure of such information to Defendants' competitors would cause them economic harm. The Special Discovery Master struck a proper balance between the parties' legitimate need to use Highly Confidential information, including during depositions, and the parties' equally legitimate need to protect the economic value of that information. The State's assertions that the obligation to redact Highly Confidential documents used as deposition exhibits would be unduly burdensome or somehow grind the case to a halt are not credible or explained.

As to the third challenged provision (the prohibition on providing Confidential and Highly Confidential documents not filed in Court to the State Archivist), the State's objection

¹ Defendants reserve the right to address the other changes to the protective order that the State seeks but that are not presently at issue.

should likewise be overruled. The State's objection to this provision is inconsistent with its failure to object to provisions elsewhere in the protective order requiring it to return or destroy such documents at the conclusion of the litigation. And though the State claims that the challenged provision conflicts with state law, it cites no statute in support.

ARGUMENT

I. THE SCOPE OF HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY INFORMATION CAN PROPERLY TRACK THE OKLAHOMA DEFINITION OF TRADE SECRETS

Upon consideration of the parties' submission, the protective order entered defined "Highly Confidential – Attorneys' Eyes Only" documents as those that fit the definition of confidential documents and "could reasonably result in commercial, financial, or business injury to the Designating Party ... in the event of the disclosure, dissemination, or use by or to any of the persons enumerated" in the protective order. (Protective Order ¶ 3.) The State seeks to adjust this definition so that it applies to documents that meet the definition of trade secrets under the Oklahoma Uniform Trade Secrets Act. That statute defines a "trade secret" as "information" that "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 "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." 78 O.S. § 86.

Upon consideration of the proposals at hand, Defendants agree with the State that the definition of trade secret may be used to define Highly Confidential documents. Indeed, Oklahoma law lists trade secrets as a type of information that may be included in a protective order. 12 O.S. § 3226(C)(1)(f). Accordingly, Defendants do not object to this revision to the protective order.

II. DISCLOSURE OF HIGHLY CONFIDENTIAL INFORMATION DURING DEPOSITIONS SHOULD BE REASONABLY LIMITED

The protective order appropriately provides that deponents may be shown Highly Confidential Information only where such “access is reasonably necessary, with all other designated material redacted.” (Protective Order ¶ 7(c)(3).) Importantly, this provision applies *only* to information whose economic value depends on not being disclosed to a competitor. Without these protections, a Defendant’s trade secrets could be disclosed to the employee of a competitor during a deposition, causing that Defendant economic injury. The State should not be permitted to disclose a Defendant’s trade secrets where this disclosure is not reasonably necessary for the purposes of this litigation.

Oklahoma law specifically contemplates limiting the disclosure of trade secret information in the course of litigation or providing that such information “be disclosed only in a designated way[.]” 12 O.S. § 3226(C)(1)(f). The disclosure of confidential information on an attorneys’ eyes only basis is a “routine feature of civil litigation involving trade secrets.” *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1202–03 (10th Cir. 2014). These protections are meant to limit third-party access to confidential information while still allowing the parties to use the information in litigation. *Id.*

The State asserts that redacting a document would subject the State to “immense burdens” but fails to explain how. (Mot. at 8.) These deposition-related restrictions will apply to a limited number of documents, and it will not be unduly difficult for the State to redact potential deposition exhibits, or—as appropriate—to simply show a witness selected pages from a document. Defendants will cooperate at or before depositions to ensure depositions proceed in good faith.

The State's contention that "requiring redaction of documents prior to depositions improperly limits the scope of discovery" (Mot. at 8) is incorrect. Nothing in the protective order limits the scope of discovery. The State may show witnesses Highly Confidential Information where it is "reasonably necessary" to do so.

III. HIGHLY CONFIDENTIAL AND CONFIDENTIAL DOCUMENTS THAT ARE PRODUCED BUT NOT USED SHOULD NOT BE RETAINED BY THE STATE

Oklahoma law provides that, a protective order may remove material obtained in the course of discovery from the public record. 12 O.S. § 3226(2). This statute embodies the principle that a party's right to maintain the confidentiality of its records outweighs the public's interest in access to those records, where such documents are not actually used in judicial proceedings.

The protective order implements this principle in Paragraph 19(b), which provides that the parties return or destroy each other's Confidential and Highly Confidential documents after the conclusion of the case (except for documents filed in Court without restriction). The State does not object to this provision. However, the State does object to Paragraph 19(b)'s provision that "the confidential business information at issue is not of historical value and [that] these records are not of the type to be provided to the State archivist."

To the extent the State contemplates providing unfiled Confidential and Highly Confidential documents to the State Archivist, this action would be inconsistent with the State's obligation to destroy such documents at the conclusion of the litigation. This action would also conflict with Paragraph 7 of the protective order, which limits the use and disclosure of Highly Confidential and Confidential documents to the parties, their counsel, the court and its personnel, experts, witnesses, and special masters, and other parties designated *by written consent*. (Protective Order ¶ 7(b)(1)-(11).)

The State asserts that the challenged provision at issue is “*potentially* at odds with State law governing the State’s archiving obligations.” (Mot. at 13 (emphasis added).) But it cites no authority whatsoever for this proposition. Contrary to the State’s assertion, this provision is entirely consistent with relevant state law. The Records Management Act directs the heads of agencies to “maintain records containing adequate and proper documentation of the organization . . . to protect the legal and financial rights of the state.” 67 O.S. § 206. After the conclusion of the litigation, retention of Defendant’s Confidential and Highly Confidential information will not be necessary to protect the State’s “legal and financial rights;” those rights will have been adjudicated by the Court during the litigation itself.

For all these reasons, the State’s objection should be overruled. In the alternative, Defendants submit that the “historical value” clause (“the confidential business information at issue is not of historical value”) could be removed from the protective order so long as the remainder of the clause is kept (“these records are not of the type to be provided to the State archivist”).

CONCLUSION

On the three issues upon which the Special Discovery Master ordered additional briefing, Defendants respectfully submit that (i) the protective order’s definition of “Highly Confidential – Attorneys’ Eyes Only” documents may be defined using the terms of the Oklahoma Uniform Trade Secret Act; (ii) the State’s objection to the limitations on the parties’ disclosure of Highly Confidential documents to deponents should be overruled; and (iii) the State’s objection to language concerning the State Archivist should be overruled, in keeping with the State’s duty to return or destroy unfiled Highly Confidential and Confidential documents.

Dated: April 9, 2018.

Respectfully submitted,



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CERTIFICATE OF MAILING

This is to certify on April 9, 2018, a true and correct copy of the above and foregoing has been served via the United States Postal Service, First Class postage prepaid, and by e-mail to the following:

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Sanford C. Coats

EXHIBIT A

Sanford C. Coats

From: Bill Hetherington <hethlaw@cox.net>
Sent: Sunday, April 01, 2018 3:23 PM
To: 'Abby Dillsaver'; 'Ashley E. Quinn'; 'Benjamin H. Odom'; 'Bradley Beckworth'; 'Brian M. Ercole'; 'Charles C. Lifland'; Cullen D. Sweeney; 'Ethan Shaner'; 'Glenn Coffee'; 'Harvey Bartle IV'; 'Hayden A. Coleman'; 'Jeffrey Angelovich'; 'Jennifer D. Cardelús'; 'Jeremy A. Menkowitz'; 'John H. Sparks'; 'Mark S. Cheffo'; 'Michael Burrage'; 'Nicholas V. Merkley'; 'Patrick J. Fitzgerald'; 'R. Ryan Stoll'; 'Reggie Whitten'; 'Robert G. McCampbell'; Sanford C. Coats; 'Sheila Birnbaum'; 'Stephen D. Brody'; 'Steven A. Reed'
Subject: Protective Order/Defendant Responses

As we discussed at the March 29th hearing, I would ask for Defendant Responses to the following issues raised by the State as to the Protective Order (As numbered in the State's March 27th Objection and Motion To Modify):

(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 material redacted";

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

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

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Exhibit A