IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff, vs. PURDUE PHARMA L.P., *et al.*, Defendants.	Case No. CJ-2017-816 The Honorable Thad Balkman Special Master: William Hetherington

STATE'S RESPONSE TO TEVA ET AL. DEFENDANTS' MOTION FOR A PROTECTIVE ORDER TO PRESERVE THE CONFIDENTIAL STATUS OF JOHN HASSLER'S DEPOSITION DESIGNATIONS

CONFIDENTIAL

FILED UNDER SEALED PURSUANT TO PROTECTIVE ORDER DATED APRIL 16, 2018

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The State predicted Defendants would abuse the Protective Order to improperly designate information as Confidential and hide it from the public. In defending the broad confidentiality provisions they sought in the Protective Order, Defendants represented: "The defendants are not planning to blanket designate all of their documents with a certain designation. Protective order in the law requires us to make good faith determination on what documents qualify for confidentiality, and we'll make that designation." Exhibit 1 at 89:23-90:02. Nevertheless, blanket, overbroad designations have occurred and continue to occur.

For example, the Purdue Defendants designated an official government report that is publicly available and has been the subject of multiple arguments in this case alone—the 2003 GAO Report (publicly available at https://www.gao.gov/new.items/d04110.pdf) —as "Attorneys' Eyes Only." That is the highest and strictest confidentiality designation available under the Court's Protective Order. *See* Amended Protective Order ¶3. To qualify as AEO, information must qualify as a "trade secret" under Oklahoma law. *Id.* And yet, the Purdue Defendants claimed that the 2003 GAO Report, from the United States General Accounting Office, was somehow a "trade secret" of Purdue's. That is not a "good faith determination."[1]

By their Motion, the Teva Defendants are insisting a document that appears to have been publicly distributed as an unbranded marketing brochure is Confidential. Teva provides no evidence in support of this. Teva does not deny by affidavit that this document was publicly distributed. Regardless, Teva provides no explanation for why its contents are Confidential. [redacted]

That is not a "good faith determination."

[1] And, the Purdue Defendants know they improperly designated this document, as the State has used it during depositions. However, to date, Purdue has not withdrawn this ridiculous designation.

Recently, during a hearing, Defendants attempted to designate exhibits as confidential which the State's counsel demonstrated ***during the hearing*** were publicly available on the Internet to anyone in the world. Nevertheless, Defendants persisted in blanket designating at the time and have since not withdrawn the designation. Either they have not investigated those designations further or they are insisting that a publicly available document is still somehow Confidential. That is not a "good faith determination."

The State is in the process of challenging numerous other blanket improper confidentiality designations by Defendants to testimony and documents. The Teva Defendants alone have designated over 95% of their document production as Confidential or Attorneys' Eyes Only. That is the definition of a "blanket designation," and it is improper. Currently at issue are Teva's improper confidentiality designations to John Hassler's deposition. The State respectfully requests the Court deny Teva *Defendants' Motion for a Protective Order to Preserve the Confidential Status of John Hassler's Deposition Designations and Brief in Support* ("Motion"). None of the excerpts from Hassler's deposition qualify as Confidential under the Protective Order, and they certainly are not trade secrets.

I. ARGUMENT AND AUTHORITIES

A. Legal Standard

The Court previously recognized specific areas that would qualify for Confidential or Attorneys' Eyes Only treatment. *See* Amended Protective Order (filed April 16, 2018). Teva relies on the following categories of Confidential information from the Protective Order:

(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.

Motion at 3-4. Teva bears the burden of demonstrating that the testimony meets either definition under the Protective Order. Protective Order at ¶14(b).

As set forth below, the designations the State is challenging do not meet either of these definitions.

B. Teva's Proposed Confidentiality Designations Are Inappropriate

Teva claims the designations at issue fall into three categories: (1) corporate structure, operations, and decision-making; (2) internal marketing strategy and sales strategy; and (3) pharmaceutical development. Motion at 3. When the Court reviews the actual testimony at issue (*see* Exhibit 2), none of the testimony meets the definition of Confidential, and it certainly does not meet the definition of AEO or a trade secret, which Teva also claims. Unflattering or bad statements are not Confidential, nor are they commercially sensitive.

To be clear, the State is not suggesting that testimony or documents should never garner protection. The State recognized as much here by not challenging all areas of testimony Teva designated from Mr. Hassler's deposition. Instead, the State narrowly challenged the plainly improper designations.

1. Teva's Description of "Category 1" Testimony Is Misleading and the Testimony Is Not Confidential.

Teva asserts that testimony should be marked confidential for "discussions of corporate structure, corporate operations, and corporate decision-making processes." Motion at 6-7. First, the testimony at issue does not fit that description. *See* Exhibit 2 at 16:1-15, 17:7-25, 18:1-3, 23:2-

10, 65:5-11, 181:19-184:24, 253:16-23. Second, even if it did, the testimony is not Confidential, as that type of information does not find any place in the definition.

Recognizing this fact, Teva generally claims that this means the testimony is "commercial information" under the Protective Order and, because it has not already publicly disclosed, means it is "confidential." Teva relies on *Cardenas v. Dorel Juvenile Group, Inc.*, to argue that "only materials which were publicly available were not considered 'confidential.'" Motion at 5 (*citing* 230 F.R.D. 635 (D. Kan. 2005)). That is incorrect for numerous reasons. If that were the standard, then any information a company has that it has not previously made publicly available would be Confidential. That is not the law and not what the Protective Order says. Moreover, in *Cardenas*, the Court held that the company's "consumer log, complaints and claims letters" were not confidential, even though they contained individual consumer information who had not given the company permission to share their information. *Id.* at 638. It did not matter that the company had not previously disclosed that information. Further, none of the testimony or documents at issue here match *Cardenas*, which was a product liability dispute. The majority of documents at issue in that case contained confidential testing and design documents about a product still on the market. *See id.* A cursory review of the designations challenged by Plaintiff, as set forth below shows that is not what is at issue here.

The testimony that Teva claims is "Confidential" corporate structure and operations testimony is:

- 16:1-17 [redacted]
- 17:7-25, 18:1-3[2] [redacted]
- 23:2-10 [redacted]

[2] All of the State's references to deposition designations refer to Exhibit 2.

- 65:5-11 [redacted]
- 181:19-184:24 [redacted]
- 253:16-23 [redacted]

None of this information is a "trade secret" as set forth above, and Teva offers no explanation or evidence of how it would qualify as one. There are no "formula[s], pattern[s], compilation[s], program[s], device[s], method[s], technique[s], or process[es]" described. *See* Protective Order ¶3. Further, none of this information is Confidential. Some of it is public knowledge. *See, e.g.*, 17:7-25. Other testimony is stale. *See, e.g.*, 16:1-15; *see also Fox Sports Net N., L.L.C. v. Minnesota Twins P'ship*, 319 F.3d 329, 336 (8th Cir.2003) ("[O]bsolete information cannot form the basis for a trade secret claim because the information has no economic value"); *UTStarcom, Inc. v. Starent Networks, Corp.*, 675 F.Supp.2d 854, 871-72 (N.D. Ill. 2009) (finding, for "'staleness' reasons alone," competitive analyses, marketing data, revenue data, and pricing information dating back 8-12 years were not trade secrets). Most of the remainder of the testimony is simply [redacted]. Lastly, it strains credulity how [redacted] Teva provides no evidence or affidavit demonstrating the value of this information or the potential harm that could result to its business if disclosed. It should not be designated "Confidential," and the Motion should be denied.

2. Teva's Description of "Category 2" Testimony Is Misleading and the Testimony Is Not Confidential.

Teva next asserts that testimony should be marked Confidential for internal marketing strategy and sales strategy. Motion at 7-8. Similar to the category above, Teva's description is misleading. And, regardless, the testimony does not meet the definition of Confidentiality. A

publicly distributed piece of marketing is not an "internal strategy," nor is information about the drug's label. Here, Teva is clearly trying to seal from the public's eye some of its prior misrepresentations.

The testimony that Teva claims is Confidential as internal marketing strategy and sales strategy information is:

- 27:16-25 [redacted]
- 105:5–108:25, 110:01–111:13 [redacted]
- 116:5-8 [redacted]
- 118:11-16 [redacted]
- 119:12-25 [redacted]
- 122:1-4 [redacted]
- 133:1-15, 134:5-10 [redacted]
- 233:12-21 [redacted]
- 242:10-244:25 [redacted]
- 245:11-23 [redacted] and
- Exhibit 2 [redacted]

This is clearly not "trade secret" information. Nor is it Confidential. Bad testimony and documents do not equate to "Confidential" testimony and documents. Teva may not want the world to know that it distributed unbranded materials with [redacted], but that does not make such documents or testimony Confidential. Teva provides no declaration or other evidence indicating how any of this testimony is Confidential, has independent economic value, or how its disclosure would harm Teva. Nor does Teva deny in its Motion that Exhibit 2

[3] Teva further designated nearly two pages worth of lawyers debating page numbers on exhibit copies. While the State has no desire to use such irrelevant argument from this transcript, it highlights the lack of good faith in asserting confidentiality over testimony.

[redacted]. The Motion to preserve the Confidentiality of this testimony and exhibit should be denied.

3. Teva's Description of "Category 3" Testimony Is Misleading and the Testimony Is Not Confidential.

The final category of information Teva claims is Confidential is "product development" information. Motion at 8-9. However, none of the "products" discussed are still in development. They have either been released or abandoned. Stale information related to abandoned products is not a "trade secret" and is not Confidential. *See, e.g., Fox Sports Net N., L.L.C.*, 319 F.3d at 336; *UTStarcom, Inc.*, 675 F.Supp.2d at 871-72; *MicroStrategy, Inc. v. Business Objects, S.A.*, 661 F.Supp.2d 548, 555 (E.D.Va.2009).

The testimony that Teva claims is "Confidential" product development is:

- 30:14-37:13 [redacted];
- 38:01-40:06 [redacted];
- 42:25-43:02 [redacted];[4] and
- 201:4-25 [redacted].

While this material is undoubtedly highly relevant to the case, it does not threaten Teva's business model by potentially allowing competitor's insight. No insight can be gained from past operations which have now been abandoned. Indeed, [redacted]. And, claiming confidentiality over the question [redacted] and the answer [redacted] is just a blatant attempt to hide testimony. It is not Confidential. It is a fact that Teva tried to hide and mislead doctors

[4] The State is currently withdrawing any challenge to lines 41:01-42:24.

and the public about for years. But, it is not Confidential under the Protective Order. None of this information is. Again, the Motion should be denied.

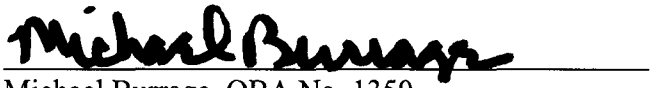
II. CONCLUSION

Teva does not show the existence of any trade secrets or Confidential information. The testimony is not similar to those "trade secret" type documents the court has recognized before. Teva provided no evidence to support its bare assertions of prejudice or potential harm. As such, the Court should continue the well-established history of protecting the public's right to information and prevent Teva's continued attempts at blanket designations of confidentiality.

For the reasons set forth above and in its *Response to Defendants' Motion for Protective Order*, the State respectfully requests the Court deny Defendants' *Motion*.

Dated: November 1, 2018

Respectfully submitted,



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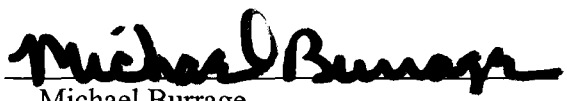

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EXHIBIT 1

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
(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.	)	

TRANSCRIPT OF PROCEEDINGS
HAD ON MARCH 9, 2018
AT THE CLEVELAND COUNTY COURTHOUSE
BEFORE THE HONORABLE WILLIAM C. HETHERINGTON, JR.
RETIRED ACTIVE JUDGE and DISCOVERY MASTER

REPORTED BY: ANGELA THAGARD, CSR, RPR

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We can identify what matters to this case, and in the meantime, we can brief whether or not that additional protection is warranted, your Honor can make a ruling, and we'll deal with it. But this is the most efficient way to do this. There's not a divorce case on the planet that is as important to the State of Oklahoma as this case.

There's not a New York case anywhere out there that Oklahomans, who are losing family members, care about. This is just a different case. And you know, I say that because it's important. I don't want to sound like a broken record.

But we represent the State of Oklahoma. We have a duty by extension to the citizens of Oklahoma, and they want to know what's going on. And we think we owe it to them. We think that the judiciary of Oklahoma owes it to them.

And so, you know, that's our argument in a nutshell. But we hope that the protective order will take into account both the public's right to know and have some mechanisms that will disincentivize blanket designations that will tie all this information up.

THE COURT: Let me have him go ahead and finish.

MR. MERKLEY: I think counsel has misunderstood what I'm saying. This procedure that we're proposing will make the process more efficient. The defendants are not planning to blanket designate all of their documents with a certain designation. Protective order in the law requires us to make a

good faith determination on what documents qualify for confidentiality, and we'll make that designation.

But this protective order would allow us to go ahead and make that designation and produce to the plaintiff without bringing the issue before the Court. And I didn't say anything about changing the burden when I said bring the issue before the Court.

But counsel has it wrong in the sense that if we get a discovery request and we don't have a protective order like this and we have a document responsive that qualifies for confidential protection, we don't give it to them in advance for them to study and use; we have to come -- we have the burden to come to you and file a motion for a protective order, saying, Your Honor, this particular document is confidential, and we need it protected.

There will be several of those, no doubt. I don't even think they'll disagree with that fact. We will be here on individual motions for protective order before the Court routinely.

And it's important, and I go back to we're not talking about instances where we're closing the record at the courthouse where the public can't see it. We're talking about the side exchange of documents between litigants in a case.

Discovery is not subject to the Open Records Act, and the public doesn't get to see discovery. And if you'll notice, if

EXHIBIT 2

(FILED UNDER SEAL