



IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,  
MIKE HUNTER,  
ATTORNEY GENERAL OF OKLAHOMA,  
Plaintiff,

v.

- (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.

For Judge Balkman's  
Consideration

Case No. CJ-2017-816  
Honorable Thad Balkman

William C. Hetherington  
Special Discovery Master

STATE OF OKLAHOMA }  
CLEVELAND COUNTY } S.S.

FILED

APR 26 2019

In the office of the  
Court Clerk MARILYN WILLIAMS

**TEVA DEFENDANTS' AND ACTAVIS DEFENDANTS'  
MOTION IN LIMINE #9 TO EXCLUDE NEW OPINIONS BY EXPERTS OR  
EXPERT RELIANCE ON NEW EVIDENCE**

Teva Pharmaceuticals USA, Inc. ("Teva USA"), and Cephalon, Inc. ("Cephalon") and Watson Laboratories, Inc. ("Watson"), Actavis LLC ("Actavis LLC"), and Actavis Pharma, Inc. ("Actavis Pharma")<sup>1</sup> move this Court to preclude the State from referring to or otherwise offering at trial, information or evidence in any form and from presenting in any manner the following:

<sup>1</sup> Cephalon and Teva USA are referred to as the "Teva Defendants." Watson, Actavis, LLC, and Actavis Pharma are referred to as the "Actavis Defendants."

- Expert opinions not previously disclosed in expert disclosures or at deposition.
- Expert testimony regarding documents not disclosed at the expert's deposition.
- Expert testimony based on a review of "all documents" or other large, general category of documents.

### **ARGUMENT AND AUTHORITIES**

Experts must identify the reasons for their opinions—sheer *ipse dixit*, or say-so of an expert, is not enough. *Christian v. Gray*, 2003 OK 10, ¶ 36, 65 P.3d 591, 607. In this case, the State provided expert disclosures, summarizing each expert's opinions. The experts then testified regarding those opinions at deposition. The Court intentionally set the expert discovery *after* the close of fact discovery so the experts would have the benefit of all fact discovery in forming their opinions. Prior to the depositions, Defendants served subpoenas on the experts, requiring them to bring to the deposition all the documents they had considered in forming their opinions. *See, e.g., Subpoena to Ty Griffith, Ex. 1.*

Despite these facts, the State's experts indicated at the depositions that they were continuing to review documents in the case and might rely on documents at trial that they had not identified at their depositions. They also suggested they might offer new opinions based on the new documents. The State's experts should not be permitted to deviate in any way from the opinions expressed in their depositions. Nor should the Court permit them to rely on documents not identified in those depositions. Defendants have now filed 18 *Daubert* motions, challenging the bases for the experts' testimony offered at the depositions. Similarly, they are preparing for trial based on the experts' previously identified opinions and cited evidence. Expert discovery is intended to allow litigants to make precisely these types of challenges and preparations—a purpose that would be thwarted if experts were permitted to alter their opinions or invoke new evidence at trial. *See Richardson v. Watco Co., Inc.*, 2011 WL 12842517, at \*3-4 (W.D. Okla.

Apr. 29, 2011) (holding that it would make a “mockery” of expert discovery if a party could present placeholder expert opinions and then change those opinions later); *Cohlma v. Ardent Health Servs., LLC*, 254 F.R.D 426, 430 (N.D. Okla. 2008) (“The reasons for requiring expert reports are ‘elimination of unfair surprise to the opposing party and the conservation of resources.’” (quotation omitted).). The Court should prohibit the State’s expert witnesses from ambushing Defendants with previously undisclosed opinions at trial or citing any previously unidentified documents as the bases for their opinions.

Similarly, the Court should preclude any expert from basing his or her opinion generally on the documents in this case. *See, e.g.*, Kolodny Dep. at 19:11-21:6; 275:2-16; 276:11-22, Ex. 2 (testifying that his opinion was based on his review the “archives” of documents “produced in this case”). An expert should not be permitted to testify that he or she has reviewed all the discovery materials in the case and reached a certain conclusion. This type of claim lacks reliability and would greatly hinder Defendants’ ability to cross-examine the expert. It should be prohibited.

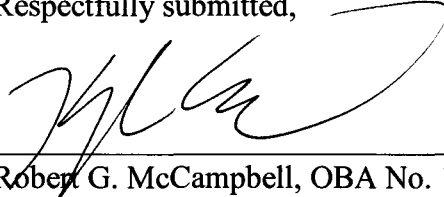
### CONCLUSION

The Court went to great lengths to manage the discovery in this complex case, including phasing discovery so that expert discovery occurred after the full factual record was developed. If the State’s experts present new opinions or rely at trial on documents not previously identified, this would run afoul of the process established by the Court and significantly prejudice Defendants. The State should be held to the expert opinions—and alleged factual bases for them—identified in discovery.

For the foregoing reasons, the Teva Defendants and Actavis Defendants ask that the Court grant this Motion in Limine and instruct the State and all counsel to instruct their expert witnesses to comply with it.

Dated April 26, 2019

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was emailed this 26th day of April 2019, to the following:

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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,

v.

PURDUE PHARMA L.P.; *et al.*

Defendants.

Case No. CJ-2017-816  
Honorable Thad Balkman

William C. Hetherington  
Special Discovery Master

**AMENDED NOTICE TO TAKE SECTION 3230(C) VIDEOTAPED DEPOSITION OF  
THE STATE'S EXPERT WITNESS AND SUBPOENA DUCES TECUM**

To: Mr. Ty Griffith

**Via Electronic Mail**

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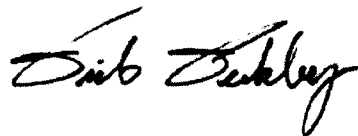
Please take notice that, pursuant to 12 O.S. § 3230(C), Defendants Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. (collectively, "Teva Defendants"), on behalf of all Defendants, notice the deposition upon oral examination of Plaintiff's expert witness, Mr. Ty Griffith, on **Friday, February 22, 2019, starting at 9:00 AM**, at the offices of Whitten Burrage, 512 North Broadway Avenue, Suite 300, Oklahoma City, Oklahoma 73102,

This deposition is to be used as evidence in the trial of the above action, and the deposition will be taken before an officer authorized by law to administer oaths. It will be recorded by stenographic means and will be videotaped. It will continue from day to day until completed.

**YOU ARE FURTHER COMMANDED** to produce true and correct copies of the documents, electronically stored information, or objects in your possession, custody or control that are identified in Exhibit A. These documents should be brought to the deposition scheduled for **Friday, February 22, 2019, starting at 9:00 AM**, to the offices of Whitten Burrage, 512 North Broadway Avenue, Suite 300, Oklahoma City, Oklahoma 73102.

This subpoena is authorized pursuant to 12 O.S. § 2004.1 and all parties to this case are being given notice of the issuance of this subpoena. The provisions of 12 O.S. § 2004.1(C), relating to your protection as a person subject to a subpoena, and 12 O.S. § 2004.1(D) & (E), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

DATED: February 18, 2019.



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was emailed this 18th day of February, 2019, to the following:

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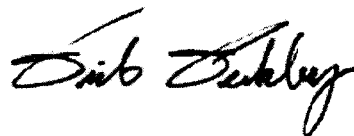
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**Oklahoma Session Law, 2010 O.S.L. 50, 2004.1 (c), (d), (e)**

SECTION 2. AMENDATORY 12 O.S. 2001, Section 2004.1, as last amended by Section 5, Chapter 12, O.S.L. 2007 (12 O.S. Supp. 2009, Section 2004.1), is amended to read as follows:

Section 2004.1.

**C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.**

1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney, or both, in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

2. a. A person commanded to produce and permit inspection, copying, testing or sampling of designated books, papers, documents, electronically stored information or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

b. Subject to paragraph 2 of subsection D of this section, a person commanded to produce and permit inspection, copying, testing or sampling or any party may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve written objection to inspection, copying, testing or sampling of any or all of the designated materials or of the premises, or to producing electronically stored information in the form or forms requested. An objection that all or a portion of the requested material will or should be withheld on a claim that it is privileged or subject to protection as trial preparation materials shall be made within this time period and in accordance with subsection D of this section. If the objection is made by the witness, the witness shall serve the objection on all parties; if objection is made by a party, the party shall serve the objection on the witness and all other parties. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. For failure to object in a timely fashion, the court may assess reasonable costs and attorney fees or take any other action it deems proper; however, a privilege or the protection for trial preparation materials shall not be waived solely for a failure to timely object under this section. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

3. a. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(1) fails to allow reasonable time for compliance,



(2) requires a person to travel to a place beyond the limits allowed under paragraph 3 of subsection A of this section,

(3) requires disclosure of privileged or other protected matter and no exception or waiver applies,

(4) subjects a person to undue burden, or

(5) requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title.

b. If a subpoena:

(1) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena. However, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

#### D. DUTIES IN RESPONDING TO SUBPOENA.

1. a. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

b. If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena shall produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

c. A person responding to a subpoena is not required to produce the same electronically stored information in more than one form.

d. A person responding to a subpoena is not required to provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. If such showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subparagraph c of paragraph 2 of subsection B of Section 3226 of this title. The court may specify conditions for the discovery.

2. a. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

b. If information is produced in response to a subpoena that is subject to a claim or privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for such claim. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies the party has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, such shall take reasonable steps to retrieve the information. The person who produced the information shall preserve the information until the claim is resolved. This mechanism is procedural only and does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived.

#### E. CONTEMPT.

Failure by any person without adequate excuse to obey a subpoena served upon him or her may be deemed a contempt of the court from which the subpoena issued.

## EXHIBIT A

### INSTRUCTIONS

The following definitions and instructions apply:

1. The documents requested shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond with the categories in the request.
2. These requests are directed toward all documents known or available to the witness, including records or documents in his custody or control or available to him upon reasonable inquiry.

### DEFINITIONS

1. "**Communication**" means transmissions, exchanges, or transfers of information in any form between two or more persons, including by telephone, facsimile, telegraph, telex, text message, letter, email, mobile messaging application, or other medium.
2. "**Document**" includes, but is not limited to, any electronic, written, printed, handwritten, graphic matter of any kind, or other medium upon which intelligence or information can be recorded or retrieved.
3. "**Including**" shall be construed to mean "including but not limited to."
4. "**Opioid(s)**" refers to FDA-approved pain-reducing medications consisting of natural or synthetic chemicals that bind to receptors in a Patient's brain or body to produce an analgesic effect.
5. "**Defendants**" means the defendants in the above-styled action, including: Purdue Pharma L.P.; Purdue Pharma, Inc.; The Purdue Frederick Company; 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.
6. "**Relate to,**" "**relates to,**" "**relating to,**" "**regarding,**" and "**concerning**" mean referring to, summarizing, reflecting, constituting, containing, concerning, embodying, mentioning, discussing, describing, consisting of, comprising, showing, commenting on, tending to support or tending to refute, or in any way logically or factually connected with the matter that is the subject of the document request.
7. "**Relevant time period**" means the date range that is applicable in this litigation, which is from May 1996 to the present.

## DOCUMENTS TO BE PRODUCED

- (a) All files, reports, summaries, correspondence, memoranda, or other documents that describe or relate to your opinions in this litigation, except to the extent protected under 12 Okla. Stat. § 3226(B)(4)(b);
- (b) All literature, data, records, or other documents reviewed or relied upon by you in forming your opinions in this case;
- (c) All documents provided to you by the State of Oklahoma (including by any representative or attorney for the State of Oklahoma) for your review as an expert witness in this case. This includes those documents which you reviewed but ultimately did not rely upon in forming your expert opinion;
- (d) All articles, books or other treatises upon which you may base your testimony or which you intend to cite or introduce as an authoritative publication;
- (e) All documents in your possession that relate to the issues in this case, or the opinions you will render;
- (f) All documents in your possession that discuss, reference, identify or otherwise relate to Defendants;
- (g) All engagement letters, retention agreements or contracts entered into between you and the State of Oklahoma (including any representative or attorney for the State of Oklahoma) regarding your retention to serve as an expert witness in this case;
- (h) All invoices for services you have provided as an expert witness in connection with this case;
- (i) All time records or other documents reflecting or recording the time you have spent working on this case, including time spent reviewing or analyzing documents/data or other materials related to the development of your expert opinion in this case, time spent communicating with any representative or attorney for the State of Oklahoma in connection with your work as an expert in this case, time spent preparing any draft or final expert report in this case, and time spent preparing for your deposition in this case.

# **EXHIBIT 2**

IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,  
MIKE HUNTER, ATTORNEY GENERAL  
OF OKLAHOMA,

Plaintiff,

vs.

No. CJ-2017-816

PURDUE PHARMA L.P.;  
PURDUE PHARMA, INC.;  
THE PURDUE FREDERICK  
COMPANY;  
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.

VIDEOTAPED DEPOSITION OF ANDREW KOLODNY, M.D.  
TAKEN ON BEHALF OF THE DEFENDANTS  
ON MARCH 27, 2019, BEGINNING AT 9:24 A.M.  
IN OKLAHOMA CITY, OKLAHOMA

VIDEOTAPED BY: Kaleb Pianalto  
REPORTED BY: Jane McConnell, CSR RPR CMR CRR

1 Q Days, more than one day?

2 A Absolutely.

3 Q More than a week?

4 A Yes.

5 Q More than a week full time?

6 A I wouldn't say more than a week full time  
7 in one shot. But in terms of the hours that one  
8 might work in a week, more than 40 hours certainly.

9 Q More than 80 hours?

10 A Probably.

11 Q You said you reviewed discovery materials.  
12 Were those provided by counsel?

13 A Counsel provided me with access to  
14 Catalyst, and so I've done searches in Catalyst on  
15 my own. So in some cases there were documents that  
16 Oklahoma's counsel identified and shared with me or  
17 asked me to help them understand, and in other cases  
18 I found documents on my own.

19 Q What's your understanding of what is in  
20 Catalyst?

21 A Materials that were produced by the  
22 defendants and third parties in the litigation.

23 Q What searches did you run?

24 A I've run probably hundreds of searches.  
25 I can't -- that's a very difficult question to

1 answer.

2 Q Can you remember one?

3 A I -- sure.

4 Q Can you give me one?

5 A One search that I ran, I ran a search  
6 recently on -- I ran a search using the term "SWAT,"  
7 as in SWAT team, S-W-A-T and tramadol. Because one  
8 document that I didn't find on my own was an email  
9 exchange, an internal Johnson & Johnson email  
10 exchange, about the need to form a SWAT team to  
11 block state efforts to put tramadol in a more  
12 restrictive category.

13 And there was an email exchange involving  
14 Ted Cicero who's a researcher who's had a  
15 longstanding financial relationship with Johnson &  
16 Johnson, and this was a description of the need to  
17 intervene should a state want to upschedule or  
18 schedule tramadol. I thought that was interesting.

19 So I wanted to see if there was more  
20 information about that in Catalyst. So I ran a  
21 search on SWAT, S-W-A-T, and tramadol.

22 Q Do you have documents pertaining to your  
23 testimony at home?

24 A I have what I've termed "The Kolodny  
25 Archive," and it's been -- I think that's been



1 shared with you, and that some of those are print  
2 materials that have been scanned. So I have the  
3 print materials at home. So, yes, I have quite a  
4 bit.

5 Q You say that's been produced in the case?

6 A Yes, it has.

7 Q Did you meet with attorneys to prepare for  
8 the deposition in the time that -- the time period  
9 we're talking about here since you completed your  
10 disclosure?

11 A Yes. I've had meetings with the team here  
12 since submitting the disclosure.

13 Q Which attorneys?

14 A I've had meetings with Brad Beckworth,  
15 with Drew Pate and with other members of counsel  
16 representing the State of Oklahoma.

17 Q About how many hours did you meet with  
18 them?

19 A That's hard to quantify. It wasn't --  
20 these were not meetings specifically about my  
21 deposition, but I've met with them in that time  
22 frame since submitting the disclosure.

23 Q Can you give me a ballpark?

24 A How many hours --

25 Q How many hours you spent meeting with them

1           A     Yes.

2           Q     You brought all the materials that  
3 underlie your opinion aside from the materials from  
4 your background and knowledge. But the stuff that  
5 you had reviewed to prepare your opinions you said  
6 was brought here; you said that, right?

7           MR. PATE: Object to form.

8           A     I misspoke if that's what I said. So  
9 these are examples. There's quite a bit more that  
10 I've relied on, a lot in my archives that I've  
11 relied on that I didn't bring with me. Information  
12 I heard firsthand sitting in on depositions, I  
13 didn't bring transcripts for those depositions.

14           So if I implied or stated that this was --  
15 that this was it, I misspoke. These are examples.

16           Q     (BY MR. LIFLAND) Okay. So you haven't  
17 complied with the subpoena that asked you to bring  
18 it all?

19           MR. PATE: Object to form. That misstates  
20 his testimony. Your questioning was confusing.  
21 We've served objections to the subpoena. We've  
22 complied, as we've told you repeatedly, with the  
23 expert disclosure requirements in your document  
24 request. You have everything.

25           Q     (BY MR. LIFLAND) There was an objection

1 to the form. Can you answer my question?

2 A Sure.

3 Q And there was a speech.

4 A Sure.

5 MR. PATE: It's a good speech.

6 A I'm not a lawyer. When I receive a  
7 subpoena, I work with lawyers to make sure that the  
8 subpoena is complied with, and my understanding from  
9 Oklahoma's counsel is that I have complied with the  
10 subpoena.

11 Q (BY MR. LIFLAND) Do you intend to produce  
12 the rest of your reliance materials which you didn't  
13 bring here today?

14 MR. PATE: You already have it. Did you  
15 listen to what he said? It's the archives that were  
16 produced in the case. It's your own documents and  
17 testimony.

18 MR. LIFLAND: I'm asking him.

19 A Yes. My archives, which I explained  
20 earlier, have been shared with you and the other  
21 defendants. So you have materials that I relied on  
22 for preparing my disclosure.

23 MR. LIFLAND: No further questions.

24 MR. PATE: The witness will read.

25 I'm sorry, Robert. Did you have one?