

SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*,

v.

Nos. 220145 & 220146 (Consolidated)

ARKANSAS, *et al.*, *Defendants*

**STIPULATION AND PROTECTIVE ORDER GOVERNING
THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL
INFORMATION**

The parties to the above-captioned litigation (the “Litigation”), by and through their respective undersigned attorneys, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, hereby stipulate to the entry by the Court of this Stipulation and Protective Order Governing the Production and Exchange of Confidential Information (the “Protective Order”) as follows:

PURPOSE AND LIMITATIONS

Disclosure and discovery activity in the Litigation may involve production of confidential information. Accordingly, the parties hereby stipulate to and jointly request that the Court enter the following Protective Order governing the handling of documents, depositions, deposition exhibits, interrogatory responses, admissions, and other written, recorded, graphic, or electronic matter or information produced, filed with, or submitted to the Court or given or exchanged

by and among the parties (“Discovery Material”), including Discovery Material produced by nonparties to the Litigation.

The parties acknowledge that this Protective Order does not confer blanket protections on all disclosures or responses to discovery. The protection it affords extends to the information or items that are entitled under the applicable legal principles to treatment as confidential, and to the maximum extent permitted by each State’s relevant public records law.

USE OF CONFIDENTIAL MATERIALS IN DISCOVERY

1. Except as required by state or federal law, all Discovery Material, including Discovery Material designated as “Confidential Information” (“Confidential Discovery Material”) shall be used solely for purposes of the Litigation and any action that may be related to or consolidated with the Litigation, including any appeal or retrial, and must not be used for any business, commercial, or other purpose, or for other litigation.

2. When used in this Protective Order, the word “document” has the meaning under Southern District of New York Local Rule 26.3(c), and includes, without limitation, all original written, recorded, electronic, or graphic materials, and all copies, duplicates, or abstracts thereof, including, but not limited to, notes on documents. A person or entity that produces or discloses Discovery Material in the Litigation is referred to herein as the “Producing Party,” and the recipient of

any Discovery Material in the Litigation is referred to herein as the “Receiving Party.”

3. Any Producing Party, including a third party, may designate as “Confidential Information” (or “Confidential” or “Confidential Treatment Requested”) any material, testimony, or other information that the Producing Party in good faith reasonably believes satisfies the definition of “Confidential Information” in Paragraph 4 of this Protective Order. This Protective Order does not apply to information that is public, or that after disclosure becomes public knowledge other than by an act or omission of the Receiving Party.

4. For purposes of this Protective Order, “Confidential Information” means Discovery Material that the Producing Party in good faith believes contains non-public, confidential, proprietary, protected from disclosure by state statute or commercially sensitive information that requires the protections provided in this Protective Order, and any information derived therefrom.

5. The designation by any Producing Party of any Discovery Material as “Confidential” shall constitute a representation that such Discovery Material has been reviewed by an attorney for the designating party or a supervised designee and that there is a good faith basis for such designation, subject to Paragraph 7, hereof.

6. The designation of Discovery Material as Confidential Discovery Material for purposes of this Protective Order must be made in the following manner by any party (or any non-party participating in the Litigation):

- (a) In the case of paper documents (apart from depositions or other pre-trial testimony), designation must be made by affixing the legend “CONFIDENTIAL” to each page containing any Confidential Discovery Material.
- (b) In the case of electronically stored information produced on CD, DVD or other electronic storage medium, the party producing the Confidential Discovery Material must affix the legend “Confidential” to such electronic storage medium and to the extent practical, to each page or unit of material. In the event designation through affixation of the legend “Confidential” is impractical, designation may be made in any manner that is sufficient to notify any Receiving Party that the Confidential Discovery Material has been designated “Confidential.”
- (c) In the case of depositions or other pre-trial testimony, designation of the portion of the transcript (including exhibits) which contains Confidential Discovery Material must be made (i) by a statement to such effect on the record during the proceeding in which the testimony is received, or (ii) by written notice served on counsel of

record in this Litigation within 20 business days after the receipt of the rough transcript of such proceeding, provided that all testimony, exhibits, and transcripts of depositions or other testimony must be treated as “Confidential” before such 20-day period has expired. Each court reporter participating in the deposition shall be provided with a copy of this Protective Order and shall adhere to its provisions. Each court reporter must mark the designated portions of such designated deposition transcript(s) with the legend “CONFIDENTIAL” as appropriate, must separately bind those portions of the deposition transcript, and must place on the cover of any such transcript the following legend:

THIS TRANSCRIPT CONTAINS INFORMATION DESIGNATED “CONFIDENTIAL” PURSUANT TO AN ORDER OF THE COURT UNDER WHICH THERE ARE PENALTIES FOR IMPROPER USE OR DISCLOSURE.

The parties may modify this procedure for any particular deposition through agreement on the record at such deposition without further order of the Court.

7. Inadvertent failure to designate Discovery Material as “Confidential” shall not constitute a waiver of such a claim and may be corrected by supplemental written notice. Any party receiving such notice shall thereafter mark and treat materials as “Confidential” and such materials shall be fully subject to this

Protective Order as if they had been initially so designated. A person who disclosed Discovery Material that is subsequently designated as “Confidential” shall in good faith assist the Producing Party in its efforts to retrieve such Discovery Material from all recipients not entitled to receive such Discovery Material designated as “Confidential” under the terms of this Protective Order and shall prevent further disclosures except as authorized under the terms of this Protective Order.

8. Discovery Material designated “Confidential” may be disclosed, summarized, described, characterized, or otherwise communicated or made available in whole or in part only to the following persons:

- (a) outside counsel of record for parties in the Litigation and any other counsel employed by any party to the Litigation, and regular and temporary employees and service vendors of such counsel (including outside copying and litigation support services) assisting in the conduct of the Litigation for use in accordance with this Protective Order;
- (b) subject to Paragraph 9, experts, consultants, advisors and investigators (including their professional staffs) assisting counsel for the parties in the Litigation;

- (c) the parties in the Litigation and the directors, officers, co-workers and employees (including, but not limited to, inside counsel) and general or limited partners of the parties, or any subsidiary or affiliate thereof, who are assisting the parties in the Litigation, or who appear as witnesses or deponents, and any professional employee of any person providing professional advice to any of the corporate defendants;
- (d) witnesses or deponents, and their counsel, during the course of or, to the extent necessary, in preparation for depositions in the Litigation (subject to Paragraph 10 below). Those witnesses or deponents who are shown Confidential Information may not retain copies;
- (e) the Court, Court personnel, any appellate Court having jurisdiction of any appeal of this Litigation, any referee, mediator, arbitrator, master or settlement judge or master, and their respective personnel involved in the Litigation, pursuant to Paragraphs 14 – 16 of this Protective Order;
- (f) Court reporters and videographers, and their respective staffs, employed in connection with the Litigation;
- (g) any person indicated to be the author, addressee, or a recipient of the Confidential Information;

- (h) mediators and any person carrying on an insurance business that may be liable to satisfy part or all of any judgment that may be entered in the Litigation, or to indemnify or reimburse for payments made to satisfy a judgment;
- (i) clerical and litigation support personnel involved in the production, reproduction, organizing, filing, coding, cataloging, converting, storing, retrieving, and review of Confidential Discovery Material, to the extent reasonably necessary to assist the persons identified in subparagraph 8(a) with respect to the Litigation; and
- (j) any other person only upon order of the Court or upon agreement of the Producing Party, or as otherwise required by applicable state or federal law.

9. Confidential Discovery Material may be provided to persons listed in Paragraph 8(b) above to the extent necessary for such expert, consultant, advisor or investigator to prepare a written opinion, to prepare to testify, or to assist counsel, provided that such expert, consultant, advisor, or investigator is using said Confidential Discovery Material solely in connection with the Litigation; and further provided that such expert, consultant, advisor, or investigator signs an undertaking in the form attached as Exhibit A hereto, agreeing in writing to be bound by the terms and conditions of this Protective Order, consenting to the

jurisdiction of the United States Supreme Court for purposes of the enforcement of this Protective Order, and agreeing not to disclose or use any Confidential Discovery Material for purposes other than those permitted hereunder. Such undertakings shall be retained in the files of the counsel for the parties who have engaged such expert, consultant, advisor or investigator. The Discovery Materials of any expert or consultant who signs this Protective Order will not be discoverable except upon good cause shown and order of the Court, except for testifying experts.

10. Every person given access to Confidential Information shall be advised that the information is being disclosed pursuant and subject to the terms of this Protective Order and may not be disclosed other than pursuant to the terms thereof. All persons listed in Paragraph 8(d) above may be given access to Confidential Information only after they confirm their understanding and agreement to abide by the terms of this Protective Order by signing a copy of Exhibit A hereto or state on the record at deposition that they will abide by the terms of this Protective Order.

11. Any person given access to Confidential Information must not reveal such information (including its contents, or any portion or summary thereof) or discuss such information (including its contents, or any portion or summary thereof) with any person who is not entitled to receive such information, as set

forth in Paragraph 8. Any person receiving Confidential Discovery Material must maintain that material in a reasonably secure manner so that it is not further disclosed or used in any manner inconsistent with this Protective Order. Persons receiving Confidential Discovery Material must use it only for purposes of this Litigation, and not for any other purpose, except as required by state or federal law.

12. Nothing in this Protective Order shall be taken as indicating that any information is in fact confidential or entitled to confidential treatment. No party shall be obligated to challenge the propriety of a “Confidential” designation at the time made, and a failure to do so shall not preclude a subsequent challenge thereto.

13. In the event that any party contends at any stage of these proceedings that any Discovery Material is not confidential under the Federal Rules and relevant case law, counsel for such party shall notify counsel for the disclosing party in writing (the “Notice”). The objecting party shall identify each particular document bearing a designation to which it objects and shall specify the reason(s) for the objection, provided that the party challenging the “Confidential” designation may identify multiple documents by Bates number (whether in a range of consecutive numbers or otherwise) in its Notice when the reason or reasons for challenging the “Confidential” designation apply in the same manner to the documents identified in the Notice.

14. If the parties are unable to resolve the Receiving Party's objection after conferring in good faith (which meet-and-confer must occur within seven (7) days of service of the written statement of objection), a Producing Party may request appropriate relief from the Court within fourteen (14) days after the meet-and-confer by filing a motion or presenting the dispute to the Court in accordance with the Case Management Order No. 2. The Producing Party shall have the burden of showing that the document or information is confidential under Federal Rule of Civil Procedure 26(c) or other applicable law. While such an application is pending, the Discovery Material shall be treated as "Confidential" pursuant to this Protective Order.

USE OF CONFIDENTIAL DISCOVERY MATERIAL IN COURT

15. All briefs, memoranda, motions, letters and other documents ("Filings"), and any other material of any nature that has been designated as "Confidential" pursuant to the provisions of this Protective Order (or that otherwise discloses information from Discovery Material that has been designated "Confidential" pursuant to the provisions of this Protective Order), shall, if filed with the Court, be filed under seal. All such materials so filed shall be released from confidential treatment only upon further order of the Court.

16. Any party to the Litigation who objects to the continued restriction on public access to any document filed under seal pursuant to this Protective Order

shall give written notice of his objection to the Producing Party. To the extent that the Producing Party seeks to continue the restriction on public access to documents filed with the Court, that party shall file (within twenty (20) business days of receiving written notice of an objection) an application with the Court for a judicial determination as to whether good cause exists for continued restricted access to the document.

17. In the event that any Confidential Discovery Material is used in any Court proceeding in the Litigation or any appeal therefrom, subject to the applicable Court rules, said Confidential Discovery Material shall not lose its status as Confidential Discovery Material solely through such use. Counsel shall confer on such procedures as are necessary to protect the confidentiality of any documents, information and transcripts used in the course of any Court proceedings. The provisions of this Paragraph are not intended to shift the burden of establishing confidentiality.

OTHER

18. Entering into this stipulated Protective Order and/or producing or receiving Confidential Discovery Material or otherwise complying with this Protective Order does not:

- (a) operate as an admission by any party that any particular materials designated as Confidential Discovery Material contain or reflect trade secrets or any other type of Confidential Discovery Material;
- (b) prejudice in any way the rights of the parties to object to the production of documents they consider not subject to discovery, or operate as an admission by any party that the restrictions and procedures set forth herein constitute adequate protection for any particular information deemed by any party to be Confidential Discovery Material;
- (c) prejudice in any way the rights of any party to object on confidentiality, relevancy, privilege or any other grounds to the production of any document requested;
- (d) prejudice in any way the rights of any party to object to the authenticity or admissibility into evidence of any document, testimony or other evidence subject to this Protective Order;
- (e) prejudice in any way the rights of a party to seek a determination by the Court whether any Discovery Material is, should, or should continue to be, protected as Confidential under the Federal Rules or applicable case law;

- (f) prejudice in any way the rights of a party to petition the Court for a further protective order relating to any Discovery Material; or
- (g) prevent the parties to this Protective Order from agreeing in writing to alter or waive the provisions or protections provided for herein with respect to any particular Discovery Material.

19. This Protective Order has no effect upon, and shall not apply to, any party's use of his, her or its Confidential Discovery Material for any purpose, subject to the Receiving Party's right to raise arguments regarding waiver. Nothing herein shall impose any restrictions on the use or disclosure by a party of documents, materials or information designated as "Confidential" obtained lawfully by such party independently of the discovery proceedings in the Litigation or that is already in the public domain.

20. The provisions of this Protective Order shall, absent written permission of the Producing Party or further order of the Court, continue to be binding throughout and after the conclusion of the Litigation, including without limitation any appeals therefrom. Within thirty (30) days after receiving notice of the entry of an order, judgment or decree finally disposing of all litigation in which Confidential Discovery Material is permitted to be used, including the exhaustion of all permissible appeals, all persons having received Confidential Discovery Material shall, upon written request of the Producing Party, either return such

material and all copies thereof (including summaries and excerpts) to counsel for the party that produced it or destroy all such Confidential Discovery Material and certify that fact to counsel for the Producing Party. The Receiving Party is not required to return or destroy Confidential Discovery Material that (i) is stored on backup storage media made in accordance with regular data backup procedures for disaster recovery purposes, (ii) is located in the email archive system or archived electronic files of departed employees, or (iii) is subject to legal hold or records retention obligations. Confidential Discovery Material on backup storage media must continue to be treated in accordance with the Protective Order. Counsel for the parties may retain copies of court papers (and exhibits thereto), correspondence, pleadings, deposition, and trial transcripts (and exhibits thereto), expert reports, and attorney work product that contain or refer to Confidential Discovery Materials, provided that such counsel and employees of such counsel shall not disclose such Confidential Discovery Material to any person, except pursuant to Court order or as required by state or federal law. All materials returned to the parties or their counsel by the Court likewise shall be disposed of in accordance with this Paragraph.

21. If any person receiving documents covered by this Protective Order (the “Receiver”) (a) is subpoenaed in another action, or (b) is served with a document demand or other request in another action to which he, she or it is a

party, seeking Discovery Material that was produced or designated as “Confidential” by someone other than the Receiver, the Receiver shall give prompt actual written notice, by hand, facsimile transmission, or email within ten (10) business days of receipt of such subpoena or demand, to those who produced or designated the material “Confidential” in order to enable the Producing Party to object to such production. If any objection is lodged or served on the party issuing the subpoena or the Court of relevant jurisdiction, the Receiver shall decline to produce the material unless otherwise ordered by a Court or as required by state or federal law. The burden of opposing the enforcement of the subpoena shall fall solely upon the party who designated the Confidential Discovery Material. Should the person seeking access to the Confidential Discovery Material take action against the Receiver or anyone else covered by this Protective Order to enforce such a subpoena or demand, the Receiver shall respond by setting forth the existence of this Protective Order. Nothing herein shall be construed as requiring the Receiver or anyone else covered by this Protective Order to challenge or appeal any order requiring production of Confidential Discovery Material covered by this Protective Order, or to subject himself or itself to any penalties for non-compliance with any order, or to seek any relief from the Court.

22. The parties agree to be bound by the terms of this Protective Order pending the entry of this Protective Order, or an alternative thereto which is

satisfactory to all parties, by the Court, and any violation of its terms shall be subject to the same sanctions and penalties, as if this Protective Order had been entered by the Court. This Protective Order applies to all Discovery Material produced in the Litigation, whether produced before or after the entry of this Protective Order and whether produced by a party or non-party.

23. The parties to the Litigation agree that the production of any Discovery Material by any non-party to the Litigation shall be subject to and governed by the terms of this Protective Order.

24. This Protective Order may be changed only by further agreement of all parties in writing or by order of the Court, and is without prejudice to the rights of any party to seek modification of this Protective Order by application to the Court on notice to the other parties hereto.

IT IS SO STIPULATED.
Dated: December 11, 2017

Respectfully submitted,

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IT IS SO ORDERED, this _____ day of _____, 2017.

Pierre N. Leval, *Special Master*

EXHIBIT A
SUPREME COURT OF THE UNITED STATES

DELAWARE, *Plaintiff*,

v.

Nos. 220145 & 220146 (Consolidated)

ARKANSAS, *et al.*, *Defendants*

ACKNOWLEDGMENT

I hereby attest to my understanding that Confidential Information is being provided to me pursuant to the terms and conditions of the Stipulation and Protective Order Governing the Production and Exchange of Confidential Information (the “Protective Order”) executed by the parties and entered by the Court in the above-captioned action. I hereby attest that I have been given a copy of and have read the Protective Order and that I hereby agree to be bound by it and its terms. I agree that I shall not disclose to others, except in accordance with the terms of the Protective Order, such Confidential Information. I further agree that the United States Supreme Court has jurisdiction to enforce the terms of the Protective Order, and I consent to jurisdiction of that Court over my person for that purpose.

Dated:

By: _____
[Name]

Address: _____

Phone: _____

