

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF KENTUCKY
 NORTHERN DIVISION
 (at Covington)

IN RE: DARVOCET, DARVON AND PROPOXYPHENE PRODUCTS LIABILITY LITIGATION)))))))))))	MDL No. 2226 ALL CASES DOCUMENT PRODUCTION PROTOCOL AND COST OF PRODUCTION ORDER
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This Document Production Protocol and Cost of Production Order (the “Document Production Protocol”) shall apply to all cases transferred to this Court by the Judicial Panel on Multidistrict Litigation pursuant to its Order of August 16, 2011, any tag-along actions transferred to this Court by the Panel, and any related actions that have been or will be originally filed in, transferred to, or removed to this Court and assigned thereto as part of *In re: Darvocet, Darvon, and Propoxyphene Products Liability Litigation*, MDL No. 2226. This Document Production Protocol is intended to address issues as contemplated in Sections IV(E), (J) and (K) of the May 25, 2012 Order (as defined below), between Plaintiffs and Brand Defendants.

1. **Definitions:**

- a. “March 20, 2012 Protective Order” shall refer to the Stipulation and Protective Order of Confidentiality, entered by this Court on March 20, 2012, as Docket No. 1513.

- b. “May 25, 2012 Order” shall refer to the Procedures Governing Discovery Order entered by this Court on May 25, 2012, as Docket No. 1886.
- c. “Brand Defendants” shall have the same meaning as that term is used in the May 25, 2012 Order.
- d. “Documents” and “Electronically Stored Information (ESI)” shall be defined as they are in Federal Rule of Civil Procedure 34. The definitions of these terms do not include voicemail; instant messages; information on hand-held devices synchronized to other electronic media that store such data; or temporary, transient, residual, or fragmented data.

2. **Requests for Production of Documents.** Plaintiffs may propound one Master Set of Requests for Production, as described in the May 25, 2012 Order, which shall include no more than 50 requests for production of documents, to each Brand Defendant on or before December 1, 2012 (or later as the parties may separately agree). Nothing included herein shall preclude Plaintiffs from seeking leave to file additional Requests for Production as described in the May 25, 2012 Order.

3. **Schedule of Production of Brand Defendants’ Documents.**

- a. Brand Defendants shall produce the documents specifically described in the May 25, 2012 Order, pursuant to the deadlines set forth therein.
- b. Thereafter, Brand Defendants shall produce documents responsive to the Master Set of Requests for Production and in the Defendant Fact Sheets (“DFS”) on a rolling basis.

- c. The parties shall work in good faith to agree on a schedule for the rolling production.
4. **Schedule for Production of Plaintiffs' Documents.** Each Plaintiff shall produce documents requested in the Plaintiff Fact Sheet ("PFS") when the Plaintiff serves responses to the PFS.
5. **Method For Initial Collection of Potentially Responsive ESI.** In light of any forthcoming requests for production to the Brand Defendants, Plaintiffs and the Brand Defendants will cooperate in good faith to discuss and agree upon the method for collecting potentially responsive ESI (for example, a discussion of specific search terms to be used) at the appropriate time.
6. **Format of Production for Plaintiffs' Documents.**
 - a. Each Plaintiff shall produce documents in either hard-copy format or electronically on a disk or equivalent media.
 - b. The documents produced by Plaintiffs shall be Bates-stamped and, where appropriate, endorsed with a stamp identifying the document as confidential, in accordance with the March 20, 2012 Protective Order.
 - c. Every Plaintiff shall affix a prefix to the Bates stamp on every document produced. The prefix shall be the Plaintiff's first initial and last name (and, if needed, additional plaintiff-specific identification).

- d. This section shall not apply to require Plaintiffs who already have produced documents prior to the entry of this Order to produce their documents a second time in the format described above.

7. **Format of Production for Defendants' Documents.**

a. Format of Production for ESI:

- i. The Brand Defendants shall produce documents electronically (“Produced Documents”) by providing them on disks or hard drives, or publishing them on a secure website, at the Brand Defendant’s election.
- ii. All Produced Documents will be in the form of Group IV .tif images at 300 dpi or greater.
- iii. Each .tif file shall be Bates-stamped in accordance with the May 25, 2012 Order, and where appropriate, redacted and endorsed with a stamp identifying the document as confidential, in accordance with the March 20, 2012 Protective Order. After such production in .tif format is complete, a party must demonstrate a particularized need for production of electronic documents in any other format.
- iv. Each Brand Defendant is assigned a prefix, as set forth below. The appropriate prefix shall be stamped on every .tif file produced.
 - A. The prefix assigned to Xanodyne Pharmaceuticals, Inc. is “XANO.”
 - B. The prefix assigned to Eli Lilly is “LILLY.”

- v. Any secure website, if elected for use by a producing party, will include a coding screen, such that Plaintiffs can designate any document for physical production to Plaintiffs. Brand Defendants will provide Plaintiffs a copy of any such document that is designated per paragraph 7.a.2 on a hard drive or disk (“Copied Documents”).
 - A. All Copied Documents shall be produced with a load file that is compatible with Concordance.
 - B. The Bates stamps and confidentiality endorsements that appear on the documents produced through any secure website also shall appear on the Copied Documents.
 - C. All Copied Documents will be produced with multi-page OCR text. Page breaks shall be preserved within the OCR text. OCR text files shall match the respective Bates number of its document, with a file extension of .txt.
 - D. Plaintiffs shall not produce or share Copied Documents except as already negotiated and agreed upon by the parties, and outlined in Section VII of the Stipulation and Protective Order of Confidentiality entered by the Court on March 20, 2012.
- b. Format of Production for Hard-Copy Documents:
 - i. Unless the producing party elects to scan, review, and produce selected hard copy material consistent with paragraph 7.a and its subparagraphs,

hard-copy documents will be made available for inspection and copying at the requesting party's expense.

- ii. Lilly IND/NDA and "Regulatory File" Documents. The obligation of Lilly to produce "regulatory file" documents pursuant to Section IV(B)(1) of the Court's May 25, 2012 *Procedures Governing Discovery* shall be stayed pending Plaintiffs' receipt and review of "regulatory file" documents from Xanodyne, as outlined in paragraph 7.b.iii, below, without any waiver of rights. After such review, Plaintiffs and Lilly will confer concerning the extent to which Plaintiffs still seek Lilly "regulatory file" documents and the procedures for such a production.
- iii. Xanodyne IND/NDA and "Regulatory File" Documents. Pursuant to Section IV(B)(1) of the Court's May 25, 2012 *Procedures Governing Discovery*, Xanodyne will produce its regulatory files for Darvon, Darvocet and/or any other propoxyphene-containing pain product that it actually marketed in the United States, or any part thereof, in its possession. Xanodyne will produce such documents on disks or hard drives in .tif format as Copied Documents. The parties acknowledge that the produced documents will contain personally identifiable information that will be redacted.
- iv. If the requesting party, upon inspection, wants copies of hard-copy documents, then unless the parties agree to a different format, such

documents shall be produced as image files in *.tif format at the requesting party's expense. The parties may also agree to share the cost of any requested enhancements to such *.tif images such as optical character recognition (OCR). No party is required to incur the cost of OCR without express agreement as to cost sharing.

v. All hard-copy documents shall be Bates numbered pursuant to paragraph 7.a.iv and produced with a load file that is compatible with Concordance.

c. Encryption: To maximize the security of information in transit, any media on which documents are produced may be encrypted by the producing party. In such cases, the producing party shall transmit the encryption key or password to the requesting party, under separate cover, contemporaneously with sending the encrypted media.

8. **Cost.**

a. The cost of production of any Copied Documents pursuant to this Document Production Protocol shall be \$0.10 per page. The cost shall be allocated/paid as follows:

i. One-half the cost (*i.e.*, \$0.05 per page) shall be paid by the requesting party at the time of production.

ii. One-half of the cost shall be deemed a taxable cost available for recovery by the producing party, subject to the producing party's application for the

award of such costs pursuant to law depending on the ultimate disposition of the litigation.

- b. Brand Defendants shall reimburse each Plaintiff for every document produced directly by the Plaintiffs consistent with paragraph 8.a, above.
- c. Brand Defendants will provide copies of every document obtained from third parties through the use of any authorization described in the May 25, 2012 Order if the Plaintiff has paid to the Brand Defendants:
 - i. One-half the cost charged by the provider, employer, or other entity that provided such documents pursuant to a release, plus
 - ii. \$0.10 per page for hard copies of produced documents.
 - iii. No costs in addition to those set forth in paragraph 8(c)(i) will be applicable if third parties produce documents in electronic format and Plaintiffs request electronic copies in lieu of hard copies.
- d. Notwithstanding the foregoing, the parties reserve the right to revisit issues regarding cost sharing and the costs of production as additional discovery requests are served or exchanged or as circumstances change.

9. **Organization of Production.** The documents produced shall be either:

- a. Organized and labeled to correspond with the number of the specific request to which the documents are responsive; or,
- b. Produced in the order in which they are kept in the usual course of business.

10. **Avoidance of Duplicate Production.** Each party will take all reasonable steps to reduce duplication of documents within production sets. De-duplication will be performed globally across data sets. The parties may also use e-mail thread suppression to reduce duplicative production of e-mail threads by producing the most recent e-mail containing the thread of e-mails, as well as all attachments within the thread.

11. **Privilege Log.** Any document withheld on the basis that the producing party believes production of the document is protected by the work product doctrine or an applicable privilege (“Privileged Material”) shall describe that document in a privilege log, as set forth in the May 25, 2012 Order.

- a. No party need list on a privilege log:
 - i. Documents generated after December 3, 2010. Documents produced and redacted for privilege, so long as:
 - A. For e-mails, the bibliographic information (*i.e.*, to, from, cc, bcc, date/time) is not redacted; and
 - B. For non-email documents, the redaction is noted on the face of the document in the redaction field.
 - ii. An e-mail thread may be logged in a single entry provided that such entry identifies all senders and recipients appearing at any point in the thread.
 - iii. Documents that are presumptively privileged need not be logged. These are:

- A. Internal communications within (a) a law firm, (b) a legal assistance organization, (c) a governmental law office or (d) a legal department of a corporation or of another organization.
 - B. Communications solely between outside counsel and in-house counsel.
- b. After the receipt of a privilege log, any party may dispute a claim of privilege; however, prior to any submission to the Court for an *in camera* review, the party disputing a claim of privilege shall provide in writing the identification of the documents for which it questions the claim of privilege and the reasons (including legal support) for its assertion that the documents are not privileged. Within thirty days, the party seeking to support the claim of privilege shall provide a written response supporting the claim of privilege (including legal support). The parties will then meet and confer in good faith as to the claims of privilege. If agreement cannot be met after thirty days, any party may thereafter submit the Discovery Material under seal to the Court for a determination as to privilege.

12. **Inadvertent Disclosure of Privileged Material.** The inadvertent production of Privileged Material shall be governed by Section X of the March 20, 2012 Stipulation and Protective Order of Confidentiality.

13. **Authenticity and Admissibility.** Nothing in this protocol shall be construed to affect the authenticity or admissibility of any document or data. All objections to the authenticity or admissibility of any document or data are preserved and may be asserted at any time.

14. **Confidential or Highly-Confidential-Attorneys' Eyes Only Information.** For the avoidance of doubt, nothing herein shall contradict the parties' rights and obligations with respect to any designated Confidential Information, as governed by the March 20, 2012 Protective Order regarding the protection of such information.

This 11th day of October, 2012.



Signed By:

Danny C. Reeves DCR

United States District Judge