IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FEDERAL TRADE COMMISSION, Plaintiff, v. OVATION PHARMACEUTICALS, INC., Defendant.	08-cv-6379 (JNE/JJG)
STATE OF MINNESOTA, Plaintiff, v. OVATION PHARMACEUTICALS, INC., Defendant.	(Related Case) 08-cv-6381 (JNE/JJG)

DEFENDANT OVATION PHARMACEUTICALS, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO PREVENT THE FEDERAL TRADE COMMISSION AND THE STATE OF MINNESOTA FROM DENYING OVATION'S IN-HOUSE COUNSEL ACCESS TO DISCOVERY

I. INTRODUCTION

The Federal Trade Commission and the State of Minnesota ("Plaintiffs") seek to deny Ovation Pharmaceuticals, Inc.'s ("Ovation") in-house counsel, Patrick Morris, access to any of the voluminous third party documents designated as "Confidential" or "Attorneys Eyes Only." Mr. Morris has been Ovation's lead corporate attorney for nearly a decade, as both inside and outside counsel, and his participation in this case is critical to Ovation's defense. Mr. Morris' ability to assist in Ovation's defense will be substantially diminished without access to the third party materials upon which Plaintiffs intend to rely. Plaintiffs' request defies the courts' long-held concern that such extreme measures will significantly prejudice a defendant's ability to prepare its defense properly and efficiently.

As a threshold matter, the information Plaintiffs seek to safeguard simply does not qualify as the type of competitively sensitive information typically at issue in disputes like these. The thrust of Plaintiffs' objection relates to over 3,000 pages of *legacy* documents of a *non-competitor* that exited the industry more than three years ago. Plaintiffs offer no credible explanation as to why any of the third party information at issue would compromise – or even relate to – the current state of competition. Plaintiffs' request suffers from another fatal flaw: Mr. Morris has no direct or indirect involvement in pricing, marketing, positioning, selling, or developing Ovation's drugs. Those business decisions are made independently by other Ovation employees, outside of Mr. Morris' purview. The law is clear that in-house counsel should not be denied access to confidential third party materials where counsel is not involved in the competitive decision-making process. Overall, Plaintiffs fail to demonstrate the requisite level of harm sufficient to outweigh Ovation's compelling need to have its lead attorney personally involved in preparing its defense.

II. PROCEDURAL BACKGROUND

The parties have previously submitted to the Court a proposed protective order for the above-captioned cases.[1] The parties stipulated to the entirety of the proposed protective order, except for subparagraph 4(e), which would authorize in-house counsel for Ovation to view materials designated "Confidential" and "Attorneys Eyes Only."[2] Ovation supports the inclusion of that provision, while Plaintiffs oppose it. Plaintiffs seek to bar Ovation's in-house counsel from viewing any third party materials that claim any level of confidentiality protection.

At the February 6, 2009 Initial Case Management Conference ("CMC"), the Court instructed the parties to meet and confer after Plaintiffs identified to Ovation's outside counsel the set of third party documents to which Plaintiffs seek to deny

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1 Exh. 1- 2.

2 Exh. 2, ¶ 4.

Ovation's in-house counsel access.[3] The Court specifically asked whether the parties' conflict relates to only a handful of highly sensitive documents, or a much larger population.[4] Plaintiffs have now produced to Ovation substantially all documents secured during the pre-complaint phase of this case, the vast majority of which came from the following three non-parties.

- ***Abbott Laboratories*** Ross Division ("Abbott") has designated over 3,000 pages as "Attorneys Eyes Only," representing approximately one-third of its production to date.[5] Abbott has separately informed the FTC that it objects to having any of its "Attorneys Eyes Only" documents shared with Ovation's in-house counsel.[6]
- ***Merck & Co.*** ("Merck") has produced more than 18,000 pages, all of which have been designated either "Confidential" or "Attorneys Eyes Only."[7] Merck has separately informed the FTC that it does ***not object*** to having its "Attorneys' Eyes Only" documents shared with Ovation's in-house counsel.[8]
- ***Ben Venue Laboratories*** ("Ben Venue") has designed almost its entire production of over 1,700 pages as "Attorneys Eyes Only."[9] To date, Ben Venue has not taken a position on whether these documents may be shared with Ovation's in-house counsel.[10]

These documents comprise the heart of Plaintiffs' production and under the Plaintiffs' proposal, Ovation's in-house counsel would not get to see or hear about any of the Abbott or Ben Venue documents. Given the substantial number of documents involved, and the

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3 Exh. 3 at 39:7 – 40:3.

4 *Id*. at 32:20 – 32:21.

5 Pfeiffer Decl. ¶6, Exh. A.

6 *Id*.

7 Pfeiffer Decl., ¶ 5, Exh. B.

8 *Id*.

9 Pfeiffer Decl. ¶6, Exh. C.

10 *Id*.

liberal use of the "Attorneys Eyes Only" designation, the parties are unable to resolve their disagreement informally. Therefore, pursuant to the Court's request, Ovation submits this memorandum and attached declarations in support of its proposal to incorporate sub-paragraph 4(e) into the governing protective order.

III. ARGUMENT

Plaintiffs have yet to submit a statement in support of their proposal to preclude Ovation's in-house counsel from accessing the confidential materials of third parties. Based on the representations of Plaintiffs' counsel at the CMC and the parties' most recent meet and confer session on this issue, we understand Plaintiffs' position to consist of three basic concerns.

(1) Mr. Morris was personally involved in negotiating Ovation's acquisition of certain drugs and IP rights from Merck and Abbott Ross. In that sense, and as to those transactions, Mr. Morris wore both a "legal" and a "business" hat.[11]

(2) As a matter of policy, the FTC says it is committed to advocating the interests of objecting third parties, so as not to hamper the government's ability to conduct investigations in an efficient and timely manner.[12]

(3) Abbott Ross claims to be concerned that, although it does not compete with Ovation, its documents may reveal "confidential internal valuation and other procedures" that could give Ovation an unfair negotiating advantage if Abbott Ross chooses to divest another drug to Ovation in the future. Additionally, Abbott Ross mentions, without explanation, that Ovation's continuing royalty obligation for a prior drug acquisition may facilitate "continuing dealings between Abbott and Ovation."[13]

According to Plaintiffs, no other third party has objected to Mr. Morris having access to their confidential documents. Additionally, the FTC has indicated that it does not intend to assert any arguments, independent of the concerns expressed by

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[11] Exh. 3 at 32:22 – 33:7.

[12] Russell Decl. ¶2.

[13] Pfeiffer Decl. ¶6, Exh. A.

objecting third parties.[14] Each of these concerns, even if proven true, falls measurably short of the compelling demonstration of harm Plaintiffs are required to make.

A. Legal Standard

As the resisting party, Plaintiffs have the burden to prove that "disclosure to [Ovation's] in-house counsel would cause competitive harm. Categorical arguments that a party will be harmed by the disclosure are insufficient." *Sprint v. Big River Telephone Co*., 2008 U.S. Dist. Lexis 70669, at *3 (D. Kan. 2008) (quoting *MGP Ingredients, Inc. v. Mars, Inc*., 245 F.R.D. 497, 501 (D. Kan. 2007). To prevail, the resisting party "must make a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Id*.; *see also Medtronic, Inc. v. Guidant Corp.*, Nos. cv-00-1473 & cv-00-2503, 2001 WL 34784493, at *5-6 (D. Minn. Dec. 20, 2001) (rejecting a direct competitor's bare, unsupported assertions that the disclosed information is "highly sensitive" and likely to impart "a significant competitive advantage").

The burden on the resisting party is enhanced when in-house counsel is denied access to confidential documents that are necessary for preparing its defense. To this end, courts weigh the demonstrated risk of harm from the "inadvertent disclosure" or misuse of competitively sensitive information, against the "extreme and unnecessary hardship" placed upon a party in preparing its defense without the specialized knowledge of its in-house counsel. *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468-1469 (Fed. Cir. 1984). Courts applying this balancing test require the resisting party to make a clear factual showing that: (1) the confidential information at issue is both competitively sensitive and likely to cause definitive competitive harm if disclosed; (2) the in-house counsel is directly involved in the competitive decision making process, such that he cannot faithfully discharge his duties to the client without compromising or misusing the confidential information he possesses; and (3) denying the in-house counsel access to the confidential information will not hinder his specialized contribution to the case. Plaintiffs have failed to meet their burden in all three respects.

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[14] Russell Decl. ¶2.

B. Plaintiffs Cannot Demonstrate that Disclosure Will Cause Competitive Harm.

The information Plaintiffs seek to shield from Ovation's in-house counsel is not "competitively sensitive" nor is it capable of causing competitive harm if misused or inadvertently disclosed. Plaintiffs must, but cannot, show a direct and ongoing competitive relationship between the resisting party and the in-house counsel. If the parties do not compete, there is no basis to withhold the information. As this court has observed, parties that stand in a vertical relationship (*i.e.*, buyer/seller) have no basis to resist disclosure if the receiving party "cannot use that [financial or customer] information to compete unfairly" for the resisting parties customers. *Northbrook Digital, LLC v. Vendio Services, Inc.*, No. 07-cv-2250, 2008 WL 2390737 at *3-14, 13 (D. Minn. June 9, 2008) ("there is no reason to prevent the supplier from having access to the consumer's financial or customer data. . . . to determine what to charge for a license . . . . That is an entirely legitimate use of the information" and the receiving party should not "have to rely solely on outside attorneys and retained experts to assess that portion of the case.").

Even where the requisite competitive relationship exists, and the parties' actually vie for one another's customers, the resisting party must also demonstrate that the information at issue is "so highly sensitive that disclosure to anyone inside the [defendant' organization], including in-house counsel could give a significant competitive advantage." *Medtronic, Inc. v. Guidant Corp*., 2001 U.S. Dist. Lexis 22805 at *6-7 (D. Minn. 2001) (granting in-house counsel access to the confidential documents of a rival's existing products for purposes of a patent prosecution). Each of the objections in this case fails this test:

1. *As a Non-Competitor, Abbott Has No Basis to Object*.

Abbott's concerns over the potential for competitive harm are unfounded and legally deficient. As an initial matter, Ovation and Abbott do not currently compete in any relevant market, nor does Ovation believe that it has any drugs in development that

could eventually compete with Abbott. Neither the FTC nor Abbott have contended otherwise.

In actuality, the only "commercial" connection between Ovation and Abbott is one of buyer and seller, based on Ovation's acquisition of NeoProfen more than three years ago from the Ross division of Abbott. Since that time, the Ross division has exited the pharmaceutical space completely, choosing instead to focus on the sale of nutritional supplements. Although Abbott (the parent company) continues to sell other drugs in other spaces, Plaintiffs do not contend that there is any opportunity for Ovation to misuse Ross' legacy information to unfairly compete against Abbott for common customers. In this way, Abbott's objections are no different than the arguments this Court rejected in *Northbrook Digital*.

Abbott offers two other scenarios. First, Abbott proposes, without any factual support, that it is theoretically a "potential competitor," hypothesizing it could develop an unspecified rival drug at some unspecified future date.[15] This suggestion is so speculative as to be makeweight. Second, Abbott professes to worry that if it chooses to sell Ovation another drug in the future, Mr. Morris may gain an unfair negotiating advantage by learning how Abbott valued NeoProfen in 2005.[16] This is not a legally cognizable theory of harm. It also fails on the facts, on multiple levels.

- Plaintiffs point to no immediate or unavoidable harm.[17] Should Abbott and Ovation decide to enter into another transaction in the future, they will by definition do so willingly, on their own terms, and fully prepared.
- Abbott points to no uniquely sensitive documents that would create any special advantage if made available to Mr. Morris.[18] Rather, Abbott's "Attorneys Eyes Only" document production consists only of sales proposals

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[15] Pfeiffer Decl. ¶6, Exh. A.

[16] *Id*.

[17] *Id*.

[18] *Id*.

and valuation projections for NeoProfen, a drug it no longer owns.[19] Furthermore, under Plaintiffs' approach, Mr. Morris would not be able to see in this litigation documents that he has already seen or created at the time of the underlying transactions.[20]

- Abbott fails to explain how disclosure of its "valuation processes," from a single transaction, could adversely impact its business going forward.[21] The majority of the 3,000 pages designated as "Attorneys Eyes Only" span from 2004 to 2005.[22] Rarely will documents of such vintage qualify as "highly-confidential" and "competitively sensitive." Plaintiffs have failed to meet their burden to demonstrate otherwise. Additionally, several of Ovation's current employees—including those in charge of business development, marketing, sales, market assessment—previously worked at Abbott Ross, meaning they already know far more than Mr. Morris could learn from these documents about Abbott's policies and procedures.

2. *Merck Acknowledges that a Non-Competitor has No Reason to Resist Disclosure*.

Merck is a third party to this litigation and its commercial relationship to Ovation is virtually indistinguishable from Abbott's relationship to Ovation. Merck and Abbott divested several small population injectable drugs to Ovation after deciding that they no longer wanted to develop or market the drugs. Following the divestitures, both companies exited those spaces with no plans to return with competitive drugs. Notwithstanding the similarity of the two scenarios, Merck and Abbott took very different positions regarding the protective order in this case. Merck does not object to allowing Ovation's in-house counsel access to the more than 18,000 "Attorneys Eyes Only" pages that Merck produced to the FTC in the pre-complaint phase of this

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[19] *Id*.

[20] Pfeiffer Decl. ¶6, Exh. H.

[21] Pfeiffer Decl. ¶6, Exh. A.

[22] Pfeiffer Decl. ¶6.

investigation.[23] These are the same types of materials that Abbott seeks to restrict from Ovation. Merck's indifference is testament to the lack of competitive harm from Ovation's in-house counsel viewing documents of its non-competitor, Merck.

3. There is no Prospect that Ben Venue Could be Competitively Harmed by Disclosure

To date, Ben Venue has not expressed to Plaintiffs or Ovation whether it objects to having any of its documents shared with Ovation's in-house counsel. But there would be no legitimate basis to withhold its materials from Ovation's counsel in any event.

Bedford Laboratories[24] has received FDA approval for generic indomethacin, and Bedford's generic indomethacin can enter the market tomorrow. Although Bedford and Ovation are potential competitors, it is hard to imagine any degree of competitive harm that could accrue from allowing Mr. Morris access to Bedford's "Attorneys Eyes Only" documents because Mr. Morris is not involved in the pricing, marketing, or sales of Indocin I.V. and, even if he was involved in these matters, disclosure to Mr. Morris would have no impact on either companies' business practices. First, Bedford's pricing plans are irrelevant to Ovation because Ovation's pricing plan for Indocin I.V. is already set—as is typical of branded-drug manufacturers facing generic entry—irrespective of how Bedford ultimately prices its generic version of the drug. *See e.g.*, Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration* 9 (July 2002). Second, there is no credible argument that Bedford possesses competitively sensitive marketing or product position plans. It is well established that generic drugs are largely unsupported by sales staff, instead free-riding off of the marketing efforts of the branded drug. (*i.e.*, Ovation's Indocin).

Indeed, when faced with a virtually identical scenario, Boehringer Ingelheim (Bedford's parent company) successfully argued the same position Ovation

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[23] Pfeiffer Decl. ¶ 5, Exh. B.

[24] Ben Venue Laboratories is the parent company to Bedford Laboratories, and Boehringer Ingelheim Pharmaceuticals, Inc. is the parent company to Ben Venue Laboratories.

articulates here. Specifically, in a patent infringement suit against its direct competitor, Boehringer secured full access to its opponent's "Attorneys Eyes Only" documents for its own in-house counsel, arguing that its in-house counsel are officers of the Court bound by the rules of professional responsibility and subject to sanctions. *See Boehringer Ingelheim v. Hercon Laboratories Corporation*, 18 U.S.P.Q. 1166 (D. Del. 1990).

C. Plaintiffs Have Failed to Demonstrate a Credible Risk of Inadvertent Disclosure or Misuse of Competitively Sensitive Information

Courts should not deny in-house counsel access to competitors' documents unless counsel cannot faithfully discharge his duties to the client without disclosing or misusing the confidential information he possess. *See, e.g.*, *Brown Bag Software v. Symantec*, 960 F.2d 1465, 1470 (9th Cir. 1992) (in-house counsel should be denied access to sensitive documents if it places him in the 'untenable position' of having to refuse his employer legal advice on a host . . . competitive marketing decisions lest he improperly or indirectly reveal [the rival's] trade secrets."). Courts make this determination by focusing on whether counsel is actively involved in the "competitive decisionmaking" for things such as "pricing [and] product design … made in light of similar or corresponding information about a competitor." *U.S. Steel*, 730 F.2d at 1468 n.3. (holding that active participation in competitive decision making is a basis to deny counsel access to sensitive materials); *United States v. Oracle Corp*., No. 04-0807 (N.D. Cal. Mar. 23, 2004) (held that in-house counsel not involved in competitive decision making process are expected to observe their ethical duties, and therefore, and may view the most sensitive documents of their direct competitor). Courts take a hard-look at the scope of the counsel's duties, examining "the facts on a counsel-by-counsel basis" with regard for labels or "the classification of counsel as in-house counsel rather than retained." *Id*. at 1468. For example, counsel is not considered part of the "competitive decisionmaking" where he becomes involved "after market decisions had already been made." *In re Sibia Neurosciences, Inc.*, 1997 U.S. App. Lexis 31828 at 2, 8 (Fed. Cir. 1997). Likewise, it is not proper to deny access merely because in-house counsel is in

"regular contact with executives who [are] involved in day-to-day pricing and policy decisions" or even attends meetings where "competitive decisions" are made. *Matsushita Elec. Indus. Co. v. United States*, 929 F.2d 1577, 1580 (Fed. Cir. 1991) (internal quotations omitted).

1. Mr. Morris Does Not Engage In Competitive Decisionmaking

Mr. Morris does not participate in Ovation's competitive decisionmaking.[25] As General Counsel and Vice President of Legal Affairs, Mr. Morris oversees the entire legal department and supervises the four other in-house attorneys at Ovation.[26] Mr. Morris engages in purely legal matters arising from competitive or strategic decisions made by other Ovation employees, and for the most part is limited to the same functions that he performed as outside counsel – legal counseling on company policies, acquisitions, and financing – when Mr. Morris represented Ovation while a partner at the firm Katten Muchin Rosenman LLP prior to joining Ovation in 2003.[27] Mr. Morris is not involved in any decisions regarding drug development, acquisition deal terms, pricing, clinical studies, or the commercialization of Ovation's products.[28] Therefore, there is minimal risk of disclosure or misuse of highly confidential intellectual property or trade secrets related to drug development or clinical research; nor is there a risk that Mr. Morris' access to confidential documents could somehow seep into Ovation's commercial operations.

While Mr. Morris is occasionally copied on emails or attends meetings discussing pricing, sales and marketing, contract term negotiations, and other competitive information,[29] courts have consistently held that this kind of "regular contact" with competitive decisionmaking is not enough to deny in-house counsel access to "Attorneys Eyes Only" documents. *Matsushita,* 929 F.2d at 1580; s*ee, e.g.*, *Medtronic, Inc.*, 2001

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[25] Morris Decl. ¶¶ 5 – 6.

[26] Morris Decl. ¶¶ 1 – 2.

[27] Morris Decl. ¶¶ 5 – 6.

[28] Morris Decl. ¶6.

[29] *Id*.

WL 34784493 at *4 (granting access to inside counsel in part based on unrebutted assertion that counsel does not participate in competitive decisionmaking); *Glaxo Inc. v. Genpharm, Inc.*, 796 F. Supp. 872, 874 (E.D.N.C. 1992) (granting access to inside counsel whose affidavits suggest no role in competitive decisionmaking); *Intel Corp. v. Via Tech., Inc.*, 198 F.R.D. 525, (N.D. Cal. 2000) ("Unrebutted statements made by counsel asserting that he does not participate in competitive decisionmaking, which the court has no reason to doubt, form a reasonable basis to conclude that counsel is isolated from competitive decisonmaking.").

This case is therefore analogous to *Matsushita v. United States*, where the papers submitted by general counsel affirmed his lack of involvement in competitive decisionmaking. 929 F.2d at 1579. Moreover, as in this case, the record in *Matsushita* was devoid of any evidence disputing the attorney's statements concerning his job duties. *Id*. at 1580. The Court of Appeals for the Federal Circuit therefore upheld the decision to grant general counsel access to "proprietary business information," noting that denying access to general counsel under these circumstances was reversible error:

> the court's conclusion here even seems to suggest that general counsel are automatically to be denied access to confidential information merely because they have regular "contact" with those who are involved in competitive decisionmaking, a criterion which would disqualify almost *all* in-house counsel and thus effectively constitute the very per se rule we rejected in *U.S. Steel.*

Matsushita, 929 F.2d at 1580-81. These considerations are especially salient in Pat Morris' case as he is now performing in-house essentially the same functions that he was previously performing as outside counsel while at Katten Muchin Rosenman LLP.[30] In-house counsel are not second class citizens, and to have them treated as such is seriously prejudicial to Ovation's defense of this case. *See Medtronic*, 2001 WL 34784493 at *5-6.

[30] Morris Decl. ¶5.

D. In-House Counsel's Participation Is Critical to this Litigation

A prohibition on Ovation in-house counsel's ability to access documents will seriously prejudice Ovation's defense of this case. Indeed, when in-house counsel assumes supervisory duties and contributes specialized knowledge that is integral to case development, they must be able to review relevant documents. *See Northbrook Digital, LLC v. Vendio Services, Inc.*, No.cv-07-2250, 2008 WL 2390740 at *18 (D. Minn. April 4, 2008) (overruled on other grounds) ("Where internal counsel has specialized expertise about [the subject matter of the suit], and that expertise is necessary for evaluating confidential materials and supervising litigation, there is an adequate showing of hardship to overcome a protective order."); *Intel*, 198 F.R.D. at 528 (noting that where "the specialized knowledge of in-house counsel [is] necessary to supervise the litigation, good cause…outweigh[s] the risk of inadvertent disclosure" and in-house counsel may access confidential information); *Volvo Penta, Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 243 (E.D. Va. 1999) (finding that outside counsel required in-house counsel's assistance in managing a fast-paced litigation).

1. In-House Counsel Possess Specialized Knowledge and Denying Access to Documents Will Impair Counsel's Participation

Here, Ovation's outside counsel must rely on Mr. Morris's specialized knowledge in preparing Ovation's defense. Mr. Morris has a deep understanding and knowledge of Ovation's business within small patient populations, as well as some pharmacological and scientific aspects of Ovation's products.[31] Much like the counsel in *Volvo Penta* – who needed to review produced documents to assist with Volvo's defense – Mr. Morris cannot participate effectively if he is unable to review the produced materials because outside counsel needs him to interpret and comment upon these documents.[32] Furthermore, Mr. Morris cannot adequately evaluate outside counsel's

[31] Morris Decl. ¶7.

[32] Morris Decl. ¶¶ 7 – 8.

strategic advice absent knowledge of the materials informing that advice.[33] In light of the critical nature of Mr. Morris' participation in this litigation, prohibiting him from viewing documents designated as "Confidential" or "Attorneys Eyes Only" would seriously impair Ovation's defense.[34]

2. The case is extremely complex and the litigation has reached a crucial, advanced stage

As in *U.S. Steel*, Ovation's "present litigation is extremely complex and at an advanced stage" and forcing Ovation to rely solely on retained counsel without the benefit of Ovation in house counsel's oversight, strategy, and guidance would present an extreme hardship and severely prejudice Ovation's ability to prepare its defense. *U.S. Steel*, 730 F.2d at 1468.

Plaintiffs have the benefit of an eight-month lead time during which they developed their case.[35] During the pre-complaint investigation, Ovation voluntarily produced to the Federal Trade Commission, to which the State of Minnesota has gained access, over 9,900 documents constituting over 53,000 pages of material.[36] Now, Ovation must play catch up on an accelerated discovery schedule, and the complexity of this case clearly requires the full support of its inside counsel.[37] Preparing this case and ultimately simplifying it for trial, requires a wide range of high and low-level knowledge about the dynamics of the pharmaceutical industry, and would be highly prejudicial to Ovation's defense if outside counsel is not allowed to share important information with the in-house attorneys.[38]

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33 *Id.*

34 Pfeiffer Decl. ¶¶ 3 – 4.

35 Pfeiffer Decl. ¶2.

36 *Id.*

37 *Id.*

38 Pfeiffer Decl. ¶¶ 3 – 4.

IV. CONCLUSION

For the reasons set forth above, Ovation's in-house counsel, and Pat Morris in particular, should be granted access to "Confidential" and "Attorneys Eyes Only" documents discovered during this litigation. Ovation respectfully submits that Subparagraph 4(e), authorizing access of in-house counsel to such documents, should be included in the Protective Order.

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Respectfully submitted,

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