**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**JACKSON DIVISION**

**MARIA L. BROWN** **PLAINTIFF**

**vs.** **CIVIL ACTION NO. 3:07cv727HTW-LRA**

**DAVID NUTT, P.A., et al.** **DEFENDANTS**

**DEFENDANTS' RESPONSE IN OPPOSITION TO**
**JOHN DOE'S MOTION FOR PROTECTIVE ORDER**

Defendants David Nutt, P.A., David Nutt & Associates, P.C., Nutt & McAlister, PLLC, David H. Nutt, Mary E. McAlister, and William S. Jones (collectively "Defendants") respectfully submit this Response in Opposition to John Doe's Motion for Protective Order. Defendants respond to the numbered paragraphs of John Doe's Motion for Protective Order as follows:

1. The Court has denied Plaintiff's request to file a Second Amended Complaint adding Christopher A. Shapley and the law firm of Brunini, Grantham, Grower & Hewes, PLLC as party defendants. See Docket No. 52. Accordingly, the operative Complaint remains Plaintiff's First Amended Complaint filed on December 27, 2007. See Docket No. 5.

2. Defendants admit that they are in possession of documents and information regarding a sexual relationship between Plaintiff and John Doe during the time that Plaintiff was employed by Defendants David Nutt & Associates, P.C., and Nutt & McAlister PLLC, and aver that John Doe was counsel opposite in connection with certain litigation. Such information is not confidential and is not subject to any evidentiary or legal privilege. Rather, the information apparently is embarrassing to John Doe. Defendants obtained this information from persons other than John Doe, and such information is highly relevant to Defendants' defenses to Plaintiff's sexual harassment and retaliation claims.

3. Defendants have no knowledge regarding John Doe's reputation in the community. The documents and information that are the subject of John Doe's Motion were obtained from persons other than John Doe. Defendants believe that the information and documents at issue already are in the public domain.

4. Rule 26(c) speaks for itself.

5. Responding to the specific provisions of the proposed Protective Order:

¶ 1 Defendants deny that any of the information that John Doe seeks to protect is either confidential or subject to any evidentiary or legal privilege. Rather, the information is simply embarrassing to John Doe. Defendants dispute that any of the subject information is "protected from disclosure under Mississippi substantive law and Federal procedural law." John Doe has failed to identify in his Motion any statutory or other provision of law that would be violated as a result of the disclosure of the subject documents and information.

¶ 2 Defendants object to the scope of the definition of "CONFIDENTIAL" as overly broad, vague and not subject to any objective ascertainable standard capable of being enforced. Moreover, the definition is so overly broad that it plainly encompasses documents and information that are in the public domain. Additionally, the proposed language of this provision fails to address who will make the initial determination of whether documents and information are to be designated "confidential". The parties to this action should not be put to the burden and expense of identifying documents and information that fall within the ambit of this proposed definition. Finally,

the parties to this action should not be put in the position of having to determine which documents and information would be deemed "intimate", "personal" or "private" to John Doe.

¶ 3 This proposed provision, mandating the anticipatory sealing of court records, violates Uniform Local Rule 83.6(b). As the Court previously has recognized: "[A]ny item sought to be filed under seal must be individually submitted to the court by way of motion, which will only be granted after good cause is shown." See Order entered in Gross v. Purdue, et al.; Civil Action No. 3:07cv604-WHB-LRA, attached hereto as Exhibit A. Accordingly, for this reason alone, the Court should decline to enter John Doe's proposed Protective Order.

¶ 4 Requiring portions of deposition and trial testimony deemed to be "sensitive", "private", and "personal" to be identified and designated "confidential" would be both burdensome and problematic. As noted above, determining if testimony is "sensitive", "private" or "personal" is not subject to an objective standard. Further, the nature of Plaintiff's sexual harassment claims and Defendants' defenses to these claims necessarily will implicate testimony of a "sensitive", "private" and "personal" nature, and much of this testimony will not implicate John Doe. Thus, this provision is overly broad and unworkable. Additionally, this proposed provision gives any party or third-party fourteen (14) days to designate testimony "confidential". If testimony is needed in connection with a motion or brief, it may not be

possible for a party to this action to delay filing a motion or brief fourteen (14) days to allow for designations under this proposed provision.

¶ 5 The procedure for challenging designations provided by this proposed provision is extremely burdensome to the parties to this action for the following reasons: (a) it requires the challenging party to incur the expenses of filing otherwise unnecessary motions and supporting briefs; (b) the motion practice required to challenge the designation will take a minimum of sixty (60) days, thus delaying for at least that long a determination as to whether, or how, the information can be used by Plaintiff in prosecuting her claims and by the Defendants in defending themselves; (c) Documents and information designated "confidential" must be treated as "confidential" during the pendency of the challenge, thus enabling a third-party who is not even a party to this action to hinder a party's use of information, including work product, which the party obtained from other sources; and (d) the procedure would require the parties to this action to challenge such a designation, even a designation by a third-party who is not even a party to this action, within thirty (30) days following the designation, thus prohibiting them from making a subsequent challenge that may be based on evolving facts or litigation strategy.

¶ 6 This proposed provision is oppressive and potentially burdensome to the parties as it prevents them from utilizing information developed in this case in connection with other pending actions or potential future actions. Additionally, since, to date, no documents or information have been

obtained from John Doe, John Doe has no standing to limit the parties use of information in connection with the prosecution and defense of this case, or as the parties reasonably deem to be necessary and/or appropriate in connection with other pending actions or potential future actions.

¶ 7 To the extent that this proposed provision would prevent the parties from disclosing documents or information designated as "confidential" to anyone to whom such party may reasonably feel the need to disclose it, the proposed provision is both burdensome and oppressive. Again, the information in question was not obtained from John Doe; it is not "owned" by John Doe; and it is not protected by any legal privilege. The information in question was, or will be, obtained by the parties to this action from sources other than John Doe. The parties to this action should be permitted to use the information now and in the future in such way(s) as they reasonably deem to be necessary or appropriate.

¶ 8 This proposed provision, mandating the anticipatory sealing of court records, violates Uniform Local Rule 83.6(b). As the Court previously has recognized: "[A]ny item sought to be filed under seal must be individually submitted to the court by way of motion, which will only be granted after good cause is shown." See Order entered in Gross v. Purdue, et al.; Civil Action No. 3:07cv604-WHB-LRA, attached hereto as Exhibit A. Accordingly, for this reason alone, the Court should decline to enter John Doe's proposed Protective Order.

¶ 9 This proposed provision is unnecessarily burdensome to the parties. No party to this action has requested entry of a protective order. Thus, it can be inferred that neither party to date has concluded that any documents or information produced is "confidential". Requiring the parties to notify John Doe if they are asked to produce information John Doe deems "confidential" imposes an unnecessary burden on the parties. Defendants are constrained to repeat again that the information described in John Doe's Motion is not confidential; it is simply embarrassing to John Doe. Further, the information was obtained by the parties from sources other than John Doe, and the information is not subject to any legal privilege. The burden imposed on the parties by the proposed provision is unreasonable and burdensome.

¶ 10 This proposed provision necessarily will impede the course of the trial of this matter. Further, requiring a party to give notice to the "opposing party" before "confidential" information is "mentioned, discussed, or referred to in the presence of the jury" would be a meaningless exercise, and any requirement that John Doe or any other non-party be given such notice would unduly hinder the parties in the conduct of the trial.

¶ 11 The vagueness and overly broad nature of Paragraphs 1 and 2 has been discussed above. Further, insofar as Defendants are aware, neither party to this action has to date sought any discovery from John Doe, and John Doe has not produced any information – confidential or otherwise. In the event the parties seek discovery from John Doe, then John Doe can seek

protection for information that he or she considers to be confidential, and the Court can address that issue at that time. In the meantime, the parties should not be required to return to anyone any information they have obtained from sources that are not John Doe.

6. Defendants admit that in April 2008, they were contacted by Kimberly P. Turner regarding John Doe's request for entry of a protective order. **Defendants DENY that they "agreed to the entering of a protective order identical in substance and form to that set forth herein at Paragraph 5."** While Kimberly P. Turner did email to Defendants' Counsel in April 2008 a proposed protective order, at no time did Defendants' Counsel agree to entry of this proposed order. Further, at that time, Defendants' Counsel advised Kimberly P. Turner that Defendants did not intend to ask the Court for a protective order, but would not oppose the filing of a John Doe Motion proposing a reasonable protective order. As discussed above, Defendants respectfully submit that the proposed protective order proffered by John Doe is not reasonable.

ACCORDINGLY, for the reasons set forth above, Defendants respectfully request that the Court deny John Doe's Motion for Protective Order. Defendants respectfully submit that entry of John Doe's proposed Protective Order would impose upon the parties to this action an unreasonable burden and expense. Further, the provisions of the proposed Protective Order mandating the anticipatory sealing of court records plainly violate Uniform Local Rule 83.6(b). Finally, entry of the proposed Protective Order would unnecessarily hamper Defendants in their defense of Plaintiff's claims, as well as cause Defendants to incur additional expenses, including attorneys' fees, to comply with the requirements of the Order. Thus, for each of these reasons, John Doe's Motion for Protective Order should be denied.[1]

[1] Alternatively, if the Court is inclined to enter a protective order to protect the confidentiality of embarrassing information such as John Doe describes in his or her Motion, Defendants respectfully submit that the order should:

This the 26th day of June, 2008.

Respectfully submitted,

DAVID NUTT, P.A.,
DAVID NUTT & ASSOCIATES, P.C.,
NUTT & MCALISTER, PLLC,
DAVID H. NUTT, MARY E. MCALISTER, AND
WILLIAM S. JONES,
Defendants

By: s/ Joseph Anthony Sclafani
One of Their Attorneys

OF COUNSEL:

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(a) more precisely describe the information which can be designated as "confidential"; (b) require the party, or third-party, who desires that the information be treated as confidential to make the designation; (c) provide that the information shall be deemed to be not "confidential" unless and until written notice of the designation is provided to the parties to this action; (d) provide that any party to this action can challenge the designation at any time; (e) provide a more expeditious procedure for obtaining a decision when a designation is challenged; (f) impose more reasonable restrictions on the use of such "confidential" information by any party to this action; and (g) require the party or third-party who designates information as "confidential" under the provisions of the order to pay the expenses incurred by the parties to this action in complying with the order, including reasonable attorneys' fees incurred by the parties to this action.

## CERTIFICATE OF SERVICE

I, Joseph Anthony Sclafani, hereby certify that I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Louis H. Watson , Jr., Esq. (louis@louiswatson.com);

Robert Nicholas Norris, Esq. (nick@louiswatson.com);

Michael J. Malouf, Esq. (mike@malouflaw.com);

Michael J. Malouf, Jr., Esq. (mikejr@MaloufLaw.com); and

James W. Craig, Esq. (craigj@phelps.com, mcalpins@phelps.com).

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: NONE.

This the 26th day of June, 2008.

s/ Joseph Anthony Sclafani

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MARGARET GROSS — PLAINTIFF

V. — CIVIL ACTION NO. 3:07cv604-WHB-LRA

THE PURDUE PHARMA COMPANY, *et al.* — DEFENDANTS

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**ORDER**

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This cause is before the Court upon the parties' joint submission of a Consent Protective Order of Confidentiality in this action. The court has reviewed the submitted Order and finds that it cannot be entered as submitted. Neither a presumptive nor an anticipatory sealing of court records is permitted solely upon the agreement of the parties. Unif. Local R. 83.6(b); *see also Securities and Exchange Comm'n v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993); *United States v. Nix*, 976 F. Supp.417, 420 (S.D. Miss. 1997). Instead, any item sought to be filed under seal must be individually submitted to the court by way of a motion, which will only be granted after good cause is shown. The parties should refer to Rule 83.6 for the procedure by which to make such submissions.

IT IS THEREFORE ORDERED that the joint request for a Confidentiality Order is denied at this time, without prejudice to the parties' right to re-submit their request after conforming the Order to comply with Unif. Local R. 83.6(b).

SO ORDERED, this the 7th day of March, 2008.

s/Linda R. Anderson
UNITED STATES MAGISTRATE JUDGE