

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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IN RE: FLUOROQUINOLONE PRODUCTS  
LIABILITY LITIGATION

MDL No. 15-2642 (JRT)

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This Document Relates to All Actions

**PRETRIAL ORDER NO. 6  
PRESERVATION ORDER**

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All Parties to this litigation and their counsel recognize that certain materials that are relevant to any party's claim or defense and proportional to the needs of the case should be appropriately preserved. All Parties to this litigation and their counsel also recognize that absent a showing of good cause, certain categories of electronically stored information (“ESI”) need not be preserved. The Parties agree they are responsible for taking reasonable steps, pursuant to Federal Rule of Civil Procedure 26(b)(1), to preserve relevant and discoverable Documents, ESI and Tangible Things within their possession, custody, or control. This Preservation Order is intended to be interpreted consistently with the preservation obligations required by the Federal Rules of Civil Procedure. The Parties understand that additional meet and confers may be required to continue identifying materials to be the subject of this Order. To assist in these efforts, the court enters the following Order.

**I. DEFINITIONS**

- A. “Documents, ESI, and Tangible Things” is to be interpreted consistently with Rule 34 of the Federal Rules of Civil Procedure.

- B. “Parties” shall mean all named Plaintiffs and all named Defendants who have appeared in this litigation. “Party” shall mean any individually named Plaintiff or Defendant who has appeared in this litigation.
- C. “Plaintiff” shall mean a Plaintiff, Plaintiff’s spouse (in loss of consortium cases) and Plaintiff’s executor or decedent (in survivor or wrongful death cases).
- D. “Custodian” shall mean a current or former employee of a Defendant that the Parties agree or the Court determines possesses information that is relevant to a party's claim or defense and proportional to the needs of the case.
- E. “Preservation” shall include taking reasonable steps to prevent the destruction, alteration, shredding, or deletion of non-duplicative Documents, ESI, and Tangible Things that are relevant to a party’s claims or defenses and proportional to the needs of the case. The Parties understand that there are limits to preservation pursuant to Federal Rules of Civil Procedure 26(b)(1), 26(b)(2), and 37(e). As such, the Parties agree that they will negotiate in good faith to avoid imposing excessive costs and burdens upon each other regarding preservation.

No Party is under an obligation to preserve the following:

- i. ESI deleted in the normal course of business before the time a preservation obligation in this matter came into effect;
- ii. Data maintained or duplicated in any electronic backup system for the purpose of system recovery or information recovery, including

but not limited to, system recovery backup tapes or other media, continuity of operations systems, and data or system mirrors or shadows;

- iii. Deleted, slack, fragmented, or unallocated data;
- iv. Random access memory (RAM), temporary files, or other ephemeral data;
- v. On-line access data such as (without limitation) temporary internet files, history files, cache files, and cookies;
- vi. Data in metadata fields frequently updated automatically, such as last-opened or last-printed dates;
- vii. Data stored on photocopiers, scanners and fax machines. This clause is not intended to limit the preservation of photocopies, scanned documents, or faxes maintained on hard drives.
- viii. Voicemail, including Telephone or VOIP voice messages;
- ix. Server, system, network, or software application logs;
- x. Data remaining from systems no longer in use that is unintelligible on the systems in use that are not known to contain relevant data;
- xi. Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report;
- xii. Structural files not material to individual file contents (e.g. .CSS, .XSL, .XML, .DTD, etc.).

- xiii. Mobile devices and text messages, as set forth in Section IV of this Order.
- xiv. Instant messages, as set forth in Section IV of this Order.

## **II. DEFENDANTS' PRESERVATION OBLIGATIONS**

### **A. General**

Defendants have met and conferred (and will continue to meet and confer) with Plaintiffs to identify sources of relevant information that should be preserved in a manner consistent with the obligations set forth in this Order. Defendants shall take reasonable steps to preserve and prevent the destruction, alteration, shredding, or deletion of Documents, ESI and Tangible Things that are relevant to a party's claim or defense and proportional to the needs of the case, and shall either refrain from degrading the accessibility (e.g., by moving data from a more readily accessible medium [hard drive] to a less accessible medium [backup tape]) of any relevant information or restore less accessible data at its own expense if moved. In order to not unduly interfere with business needs relating to the replacement or upgrade of equipment, no defendant is obligated to preserve hardware on which discoverable data resides, so long as such data has first been preserved in an accessible form on another hardware device. ESI falling outside the scope of this Order may be recycled, overwritten, or erased pursuant to each Defendant's otherwise applicable document retention practices, policies and schedules.

### **B. Discoverable Information**

Pursuant to Federal Rule of Civil Procedure 26(b)(1), discoverable information is that which is relevant to a party's claim or defense and proportional to the needs of the case, including information that would be discoverable but for the claim of a privilege or protection such as the attorney work product protection or the attorney-client privilege, and includes information that relates to the testing, development, approval, manufacture, labeling, marketing and sale of fluoroquinolone products.

**C. Materials to be Preserved**

Custodial information. Defendants have begun to identify Custodians of relevant discoverable information. For each Custodian of discoverable information, Defendants shall take reasonable steps to preserve information that is relevant to any party's claim or defense and proportional to the needs of the case that is within the custody or possession of that custodian subject to the data sources excluded in Section I (E), Preservation.

Emails. To the extent they exist, Defendants shall take reasonable steps to preserve identified Custodians' email communications that are relevant to any party's claim or defense and proportional to the needs of the case. Acceptable methods of preservation may include one of the following (1) maintaining such email files on a server or within another electronic archive folder that is not subject to a deletion schedule, or (2) creating an electronic snapshot of implicated email on servers, or (3) maintaining one set of backup tapes for implicated email servers. The decision as to which method to use is at the sole judgment of defendant.

Network Shares. Defendants shall take reasonable efforts to identify network shares that are relevant to any party's claims and defense and proportional to the needs of the case, and upon agreement as to the particular shares, Defendants shall take reasonable steps to preserve such information from network shared areas (*e.g.*, "Departmental Shares") (1) by maintaining such shared information contained therein in accessible electronic systems that are not subject to a deletion schedule, (2) creating an electronic snapshot of implicated email on servers, or (3) by maintaining one set of backup tapes for relevant servers. The decision as to which method to use is at the sole judgment of defendant.

Internet and Intranet Sites and Social Media. To the extent it exists, Defendants shall take reasonable steps to preserve information that is relevant to any party's claim or defense and proportional to the needs of the case from company internet or intranet sites as well as company pages on social media sites (*e.g.*, Facebook, Google+).

Databases. Defendants shall take reasonable steps to preserve data that is relevant to any party's claim or defense and proportional to the needs of the case maintained in its databases (1) by maintaining such data in accessible electronic systems that are not subject to a deletion schedule, (2) creating an electronic snapshot of implicated email on servers, or (3) by maintaining one set of backup tapes for relevant database servers. The decision as to which method to use is at the sole judgment of defendant.

Third parties. Defendants shall take reasonable steps for the preservation of non-duplicative information that it owns, or controls, but which may be in the possession of third parties that is relevant to any party's claim or defense and proportional to the needs

of the case. To the extent a Defendant takes reasonable steps for the preservation of such information that is relevant to any party's claim or defense, it shall not be responsible for the subsequent loss, deletion or destruction of such information by the third party.

Other. Defendants shall promptly disclose to Plaintiffs any additional categories of Documents, ESI, and Tangible Things that may contain information that is relevant to any party's claim or defense and proportional to the needs of the case, and the Parties will then meet and confer to discuss proper methods of preservation.

### **III. PLAINTIFFS' PRESERVATION OBLIGATIONS**

Plaintiffs shall take reasonable steps to ensure the preservation of Documents, ESI and Tangible Things that are relevant to any party's claim or defense and proportional to the needs of the case including, but not limited to, email, hard drives, social media, websites, and paper files. This may include (without limitation):

- (1) Product labels, packaging and any remaining, unused fluoroquinolone product.
- (2) Product literature, literature addressing conditions that may be treated with fluoroquinolones, and medical and scientific literature.
- (3) Literature from or about clinics, hospitals, medical offices, and other facilities where Plaintiff either inquired about or received Fluoroquinolones.
- (4) Medical, pharmacy, insurance, employment, Medicare/Medicaid, and Social Security records in their possession or control.
- (5) Relevant emails and other documents relating to fluoroquinolones, including but not limited to plaintiff's use of fluoroquinolones.

- (6) Relevant postings or statements made by Plaintiff on the internet, including the content of any personal webpage(s), blogs, or social media accounts (e.g. Facebook, Myspace, LinkedIn, Twitter) and including relevant information that may have been marked “private” on social media website(s). This obligation can be satisfied by Plaintiffs’ being made aware that this Order prohibits them from deleting relevant data on any personal webpage(s), blogs, or social media accounts.
- (7) Journal, diary and calendar entries made by, and notes drafted by, Plaintiff.

#### **IV. MUTUAL PRESERVATION OBLIGATION**

(1) Mobile Devices (Including Text Messages). The Parties have agreed that no Party (including Plaintiffs) shall be required to preserve mobile data either in a systematic way or on a system-wide, central, or enterprise basis, or on an individual level (whether a Defendant’s employee or Plaintiff), nor shall they be required to request that service providers for Defendants’ employees’ mobile devices or Plaintiffs’ mobile devices preserve such data.

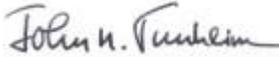
(2) Instant Messaging. The parties have agreed that no Party (including Plaintiffs) shall be required to preserve instant messaging either in a systematic way or on a system-wide, central or enterprise basis, or on an individual level (whether a Defendant’s employee or Plaintiff), nor shall they be required to request that service providers for Defendants’ or Plaintiffs preserve such data, to the extent a Party’s current policy is to not retain such instant messaging in the ordinary course of business. To the extent a party retains company-sponsored instant messaging in the ordinary course of business, such party shall continue to preserve such messages.

**V. RESERVATION OF RIGHTS**

The Parties shall make their best efforts to comply with and resolve any differences concerning compliance with this Order. If a producing party cannot comply with any material aspect of this Order, such Party shall inform the requesting party in writing at or before the time of production as to why compliance with the Order was unreasonable or not possible. No Party may seek relief from the Court concerning compliance with the Order unless it has conferred with other affected Parties to these actions.

Nothing in this Order shall be construed to affect the relevance, discoverability or admissibility of evidence. All objections to relevance, discoverability or admissibility of evidence are maintained and may be asserted at any time. This Order may be modified in the interest of justice, expedience, or judicial economy on the Court's own motion or a motion by the parties for good cause shown. Nothing in this Order shall limit the Parties' ability to meet and confer, as may be necessary, to discuss further modifications to this Order.

DATED: April 25, 2016  
at Minneapolis, Minnesota.

  
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JOHN R. TUNHEIM  
Chief Judge  
United States District Court