



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2009

Mr. Joseph P. Sanders
First Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2009-17301

Dear Mr. Sanders:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 363524.

The City of Beaumont (the "city") received a request for six categories of information pertaining to a specified request for proposals. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You also state the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified Envision Rx Pharmaceutical Services ("Envision"); Scott & White Health Plan ("Scott & White"); RESTAT; InformedRx; Medco Health Solutions ("Medco"); Navitus Health Solutions ("Navitus"); LDI Integrated Pharmacy Services ("LDI"); and CVS Caremark ("Caremark") of the request and of each company's right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from Envision, Scott & White, InformedRx, and LDI. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the submitted information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2009-16719 (2009).

In that ruling, we determined the city must withhold the portions of Caremark's and Medco's information we had marked under section 552.110 of the Government Code, but must release the remainder of the information at issue in accordance with copyright law. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude the city must rely on Open Records Letter No. 2009-16719 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling.¹ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, you assert the remaining information at issue is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, you do not cite to any specific law, and we are not aware of any, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, the city may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Next, LDI and the city claim section 552.104 of the Government Code for the remaining information. Section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties; therefore, we will not consider LDI's claims under section 552.104. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. ORD 593 at 2. Generally, section 552.104 does not except information relating to competitive bidding situations once a bid has been awarded and a contract has been executed. *See id.*

The city asserts the release of the information at issue would "operate to undermine the city's efforts to get the lowest possible quotation," and would "establish a benchmark for those so inclined to use in response to the city's request for proposals." Upon review, however, we find the city has failed to demonstrate how the release of the remaining information would cause a specific threat of actual or potential harm to the city's interests in a specific

¹As our ruling is dispositive for this information, we need not address your arguments against its disclosure.

competitive situation. Accordingly, the city may not withhold any portion of the remaining information from disclosure under section 552.104 of the Government Code.

You also state the remaining information may not be disclosed because it was marked confidential or has been made confidential by agreement. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

We now turn to the arguments submitted by the third parties. We note an interested third-party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter RESTAT, Navitus, Caremark, and Medco have not submitted any comments to this office explaining how release of the submitted information would affect their proprietary interests. Therefore, these companies have not provided us with any basis to conclude they have a protected proprietary interest in any of the remaining information. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, it actually faces competition and substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the city may not withhold the information at issue related to RESTAT, Navitus, Caremark, and Medco on the basis of any proprietary interest these parties may have in the information.

Next, we note LDI seeks to withhold from public disclosure certain information on compact disks that the city did not submit. This ruling does not address information that was not submitted by the city and is limited to the information submitted as responsive by the city. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Envision, Scott & White, InformedRx, and LDI each raise section 552.110 of the Government Code for portions of their submitted information. Although the city also argues the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of private third parties, not the interests of a

governmental body. Thus, we do not address the city's arguments under section 552.110.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983). We note that pricing information pertaining to a

²The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. See Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

In advancing its arguments, LDI relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only LDI's interests in its information.

After reviewing the information at issue and the arguments of the interested third parties, we conclude LDI and Envision have demonstrated their client information constitutes a trade secret for purposes of section 552.110(a). Accordingly, the city must withhold the information we have marked under section 552.110(a). However, LDI, Envision, Scott & White and InformedRx have not demonstrated any of the remaining information at issue consists of trade secrets. Thus, the city may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

LDI, Envision, Scott & White, and InformedRx have established that release of some of their remaining information would cause each company substantial competitive harm. Accordingly, the city must withhold the information we have marked in the submitted information under section 552.110(b). However, we find Envision, Scott & White,

InformedRx, and LDI have failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to the companies. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the city may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

We note some of the remaining information may be subject to section 552.136 of the Government Code.³ Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. This office has determined that insurance policy numbers constitute access device numbers for purposes of section 552.136. The city must withhold the insurance policy numbers we have marked under section 552.136. We are unable to determine if the remaining information at issue, which we have also marked, consists of sample or actual bank account numbers. Therefore, we must rule conditionally. If the numbers we have marked are actual bank account numbers, they must be withheld under section 552.136. If the numbers we have marked represent samples, they may not be withheld under section 552.136 and must be released.

Finally, we note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the city must continue to rely on Open Records Letter No. 2009-16719 and withhold or release the same information that was at issue in the prior ruling. The city must withhold the information we have marked under section 552.110 of the Government Code and the insurance policy numbers we marked under section 552.136 of the Government

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Code. To the extent the remaining information we marked consists of actual bank account numbers, that information must also be withheld under section 552.136. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 363524

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Medco Health Solutions
c/o Joseph P. Sanders
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CVS Caremark
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RESTAT
c/o Joseph P. Sanders
First Assistant City Attorney
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Mr. Blake O. Broderson
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Ms. Elizabeth Miot
Regulatory Affairs Administrator
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Twinsburg, Ohio 44087
(w/o enclosures)

SC DEC 02 2015 At 2:00 P.M. Velva L. Price, District Clerk

CAUSE NO. D-1-GN-09-004191

CAREMARK, L.L.C.,
Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 419th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Caremark L.L.C. (Caremark), sought to withhold certain information which is in the possession of City of Beaumont. All matters in controversy between Plaintiff, Caremark, and Defendant, Ken Paxton¹, Attorney General of Texas (Attorney General), have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent a certified letter to the requestor, Ms. Toni Hass on November 12, 2015, informing her of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that the City will be told to withhold the designated portions of the information at issue. The requestor was also informed of her right to intervene in the suit to contest the

¹ Because the Attorney General was sued in his official capacity, Ken Paxton is now the correct defendant.



withholding of this information. A copy of the certified mail receipt is attached to this motion.

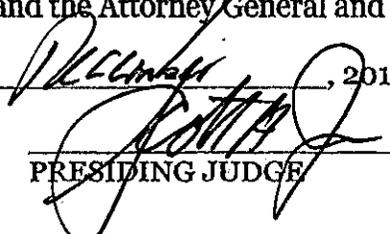
The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

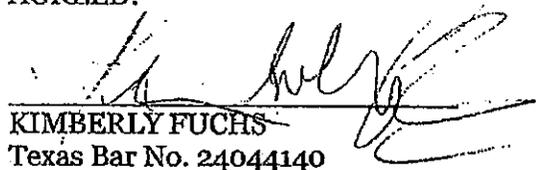
1. Caremark and the Attorney General have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, the Attorney General agrees that certain information from the bid proposals can be redacted in accordance with the markings agreed to by the parties. The Attorney General will provide a copy of the agreed markings to the City of Beaumont, with a letter instructing the City that Letter Ruling OR2009-16719 should not be relied upon as a prior determination.
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between Caremark and the Attorney General and is a final judgment.

SIGNED the 15th day of December, 2015.



PRESIDING JUDGE

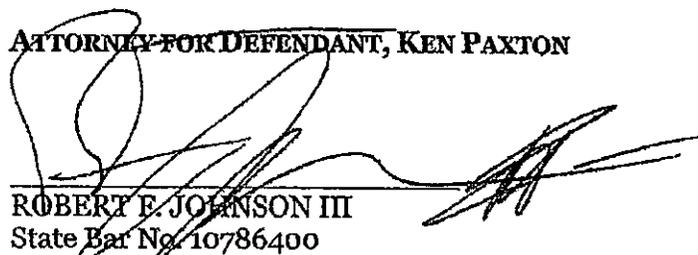
AGREED:



KIMBERLY FUCHS

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~~ATTORNEY FOR DEFENDANT, KEN PAXTON~~



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~~ATTORNEY FOR PLAINTIFF CAREMARK~~

Agreed Final Judgment
Cause No. D-1-GN-09-004191

A

CAUSE NO. D-1-GN-09-004191

CAREMARK, L.L.C.,
Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 419th JUDICIAL DISTRICT**SETTLEMENT AGREEMENT**

This Settlement Agreement (Agreement) is made by and between Caremark L.L.C. (Caremark) and Ken Paxton¹, Attorney General of Texas (the Attorney General). This Agreement is made on the terms set forth below.

Background

In 2009, three requestors made requests for information under the Public Information Act (PIA) which included a bid for services from Caremark to the City of Beaumont.

In Letter Rulings OR2009-16719, OR2009-17301, and OR2010-02393, the Open Records Division of the Attorney General (ORD) required the City to release some information Caremark claims is proprietary. While the requests giving rise to OR2009-17301 and OR2010-02393 have been withdrawn by the requestors, the request giving rise to OR2009-16719 remains outstanding.

After this lawsuit was filed, Caremark submitted information and briefing to the Attorney General establishing that some of the information at issue is excepted from disclosure under Texas Government Code section 552.104 in conjunction with *Boeing*

¹ Because the Attorney General was sued in his official capacity, Ken Paxton is now the correct defendant.

Company v. Paxton, 466 S.W.3d 831 (Tex. 2015). The Attorney General has reviewed Caremark's request and agrees to the settlement.

Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

Terms

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Caremark and the Attorney General have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, the Attorney General agrees that certain information from the bid proposals can be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of the bid proposals Caremark transmitted to the Attorney General via electronic file transfer and overnight delivery on October 20, 2015. The Attorney General will provide a copy of the agreed markings to the City of Beaumont, with a letter instructing the City that Letter Ruling OR2009-16719 should not be relied upon as a prior determination.

2. Caremark and the Attorney General agree to the entry of an agreed final judgment, a copy of which is attached as Exhibit A, the form of which has been approved by each party's attorney. The agreed final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor.

3. The Attorney General agrees that he will also notify the requestors, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of their right to intervene to contest Caremark's right to have the City withhold the information.

4. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

5. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

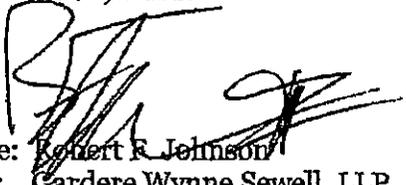
6. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

7. Caremark warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that Caremark has against the Attorney General arising out of the matters described in this Agreement.

8. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against Caremark arising out of the matters described in this Agreement.

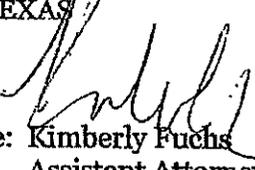
9. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

CAREMARK, L.L.C.

By: 
name: Robert F. Johnson
firm: Gardere Wynne Sewell, LLP

Date: 11/10/2015

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS

By: 
name: Kimberly Fuchs
title: Assistant Attorney General,
Administrative Law Division

Date: