STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY
FILED
MAR 22 2018
In the office of the
Court Clerk MARILYN WILLIAMS

IN THE DISTRICT COURT of CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff,	Case No. CJ-2017-816 Judge Thad Balkman
v.	
PURDUE PHARMA L.P., *et al.*, Defendants.	William C. Hetherington Special Discovery Master

JANSSEN DEFENDANTS' OPPOSITION TO PLAINTIFF'S FIRST MOTION TO COMPEL DISCOVERY AND BRIEF IN SUPPORT

Defendants Johnson & Johnson and Janssen Pharmaceuticals, Inc. (collectively "Janssen") oppose Plaintiff's First Motion to Compel Discovery ("Motion") because it is not ripe for resolution and should be denied in its entirety as to Janssen.

I. INTRODUCTION

Plaintiff's Motion does not articulate any specific failure by Janssen to comply with Plaintiff's discovery requests. To the contrary, the Motion shows that Janssen is actively conferring in good faith with Plaintiff and producing responsive documents. Janssen's rolling document production is already underway with the first production—10,278 documents totaling approximately 132,711 pages—having been delivered to Plaintiff on March 16, 2018, and the second production—62,397 documents totaling approximately 283,103 pages—set to be delivered to Plaintiff on or by March 23, 2018. Janssen will then follow up with another production by the first week of April that will contain approximately 100,000 documents. Plaintiff and Janssen have met and conferred only once, on March 14, 2018, and have agreed to schedule a second meet-and-

confer this week. Janssen has not reached an impasse with Plaintiff on any of the issues raised in the Motion. In the absence of an impasse, Plaintiff's Motion should be denied.

II. LEGAL STANDARD

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to any party's claim or defense, reasonably calculated to lead to the discovery of admissible evidence and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." OKLA. STAT. ANN. tit. 12, § 3226(B)(1)(a) (West 2018).[1] A party "may move for an order compelling an answer, or a designation, or an order compelling inspection and copying" only when "a party fails to answer an interrogatory" or "fails to produce documents or respond that the inspection or copying will be permitted as requested or fails to permit the inspection or copying as requested." *Id.* § 3237(A)(2).

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[1] The Oklahoma Legislature's amendments to certain sections of the Discovery Code, effective November 1, 2017, apply to all discovery disputes and decisions of this Court going forward. Plaintiff correctly states the general presumption that statutes operate prospectively. Mot. at 5 n.2 (quoting *Shepard v. Okla. Dep't of Corr.*, 2015 OK 8, ¶ 13, 345 P.3d 377). However, "[t]he long-recognized exception to that rule is: 'No one has a vested right in any particular mode of procedure for the enforcement or defense of his rights. Hence the general rule that statutes will be construed to be prospective only *does not apply to statutes affecting procedure*; but such statutes, unless the contrary intention is clearly expressed or implied, apply to all actions falling within their terms, *whether the right of action existed before or accrued after the enactment.*'" *Gentry v. Cotton Elec. Co-op., Inc.*, 2011 OK CIV APP 24, ¶ 8, 268 P.3d 534 (emphasis added) (quoting *Shelby-Downard Asphalt Co. v. Enyart*, 1918 OK 50, ¶ 0 (Syllabus of the Court), and holding that a statutory amendment affecting the standard of review on appeal was procedural and applied to the appeal at issue even though the certification order was filed before the statute had taken effect). *See also Cole v. Silverado Foods, Inc.*, 2003 OK 81, ¶ 8, 78 P.3d 542 ("Legislation that is general in its terms and impacts only matters of procedure is presumed to be applicable to all actions, even those that are pending."); *Okla. Bd. of Med. Licensure & Supervision v. Okla. Bd. of Exam'r in Optometry*, 1995 OK 13, 893 P.2d 498, 499–500 (holding that a statutory amendment authorizing the Medical Board to bring an action for declaratory judgment was procedural and had retrospective application even though the Optometry Board's motion to dismiss was filed *before* the statute took effect); *Qualls v. Farmers Ins. Co., Inc.*, 1981 OK 61, 629 P.2d 1258, 1259 (quoting *Okla. Water Res. Bd. v. Cent. Okla. Master Conservancy Dist., Okla.*, 1968 OK 73, 464 P.2d 748) ("'The general rule that statutes will be given prospective operation only . . . does not apply to statutes affecting procedure.'") (citation omitted).

III. ARGUMENT

Janssen's rolling production is well underway and Janssen has actively conferred with Plaintiff to respond to Plaintiff's questions about Janssen's written responses and objections. The product of that meet and confer process is an understanding that Janssen is limiting its production only in ways to which Plaintiff is amendable. As an example, Plaintiff's Motion asserts that Defendants are imposing unreasonable and unsupported geographic limitations on their responses. Mot. at 6. However, the only documents that Janssen has not produced based on geography are documents that refer to activities that occurred only outside Oklahoma *and* did not affect marketing in Oklahoma, such as out-of-state prescription data and sales representative call-notes. Plaintiff's Motion confirms its agreement to this reasonable approach. *See* Mot. at 7 n.3.

As to Janssen, the Court need not address Plaintiff's request for "cloned discovery"—requests for materials already produced or received in other lawsuits or investigations—at this juncture. Janssen informed Plaintiff that it would produce information referring to nationwide activities that was produced in other litigation. At this time, Janssen is only carving out irrelevant material that is "easily identifiable, do[es] not require a separate review process, and will not prolong the production of the remaining material." Mot. at 10–11. In other words, Janssen is limiting production in ways to which Plaintiff has already stated that it "is amenable." *Id.* at 10. Until Plaintiff points to specific failures on Janssen's part, there does not appear to be a dispute for this Court to resolve as to Plaintiff and Janssen.

While the issue of "cloned discovery" is not ripe for resolution as to Janssen, it is unlikely that the Oklahoma Discovery Code permits it. No Oklahoma court has yet ruled on the issue of cloned discovery under the current version, *see supra* note 1, of Section 3226(B)(1)(a). However, where the text of an Oklahoma statute parallels a federal rule, "federal jurisprudence is instructive." *Payne v. Dewitt*, 1999 OK 93 n.6, 995 P.2d 1088. The current text of Fed. R. Civ. P. 26(b)(1) and

Section 3226(B)(1)(a) are nearly verbatim.[2] More importantly, although the federal rules have undergone frequent revisions, they have described "the scope of party-controlled discovery in terms of matter relevant to the claim or defense of any party" since the 2000 amendment. Fed. R. Civ. P. 26 advisory committee's note to 2000 amendment. Thus, federal decisions interpreting the scope of discovery under Fed. R. Civ. P. 26 are "instructive." *Payne*, 1999 OK 93 n.6.

Numerous federal courts have recognized the impropriety of "cloned" or "piggyback" discovery. *See, e.g.*, *Moore v. Morgan Stanley & Co., Inc.*, No. 07 C 5606, 2008 WL 4681942, at *5 (N.D. Ill. May 30, 2008) ("[J]ust because the information was produced in another lawsuit . . . does not mean that it should be produced in this lawsuit."); *Midwest Gas Servs., Inc. v. Indiana Gas Co.*, No. IP99-0690-C-Y/G, 2000 WL 760700, at *1 (S.D. Ind. Mar. 7, 2000) (observing that cloned discovery "is irrelevant and immaterial unless the fact that particular documents were produced or received by a party is relevant to the subject matter of the instant case" and denying motion to compel documents produced in response to a Civil Investigative Demand from the Department of Justice). Instead, "plaintiffs' counsel must do their own work and request the information they seek directly." *Midwest Gas Servs.*, 2000 WL 760700, at *1.[3]

The State of Oklahoma has itself been denied "cloned discovery" when litigating in federal court. In *Oklahoma, ex rel. Edmondson v. Tyson Foods, Inc.*, the State requested "'documents and

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[2] The only difference between the two rules is the inclusion of the phrase "reasonably calculated to lead to the discovery of admissible evidence" in the fourth clause of Section 3226(B)(1)(a).

[3] *See also Drake v. Allergan, Inc.*, No. 2:13-cv-234, 2014 WL 12664971, at *3 (D. Vt. Mar. 19, 2014) (denying motion to compel, stating that "[a]n order which permits plaintiffs to obtain all of the materials furnished in the Department of Justice investigation may result in surrender of documents that are totally irrelevant to the pending litigation"); *King Cty. v. Merrill Lynch & Co., Inc.*, No. C10-1156-RSM, 2011 WL 3438491, at *3 (W.D. Wash. Aug. 5, 2011) (denying motion to compel cloned discovery, noting that "Plaintiff must make proper discovery requests, identifying the specific categories of documents sought, in order to obtain them—and each category must be relevant to its claims and defenses"); *Wollam v. Wright Med. Grp., Inc.*, No. 10-cv-03104-DME-BNB, 2011 WL 1899774, at *2 (D. Colo. May 18, 2011) ("Direct requests allow a court to consider the relevance of the information sought to the specific claims and defenses in the pending case. A request for all discovery in unidentified actions taken worldwide . . . does not allow such review. Discovery is intended to be liberal, but it is not unbounded.").

materials produced to plaintiffs in a similar . . . lawsuit.'" No. 05-CV-329-TCK-SAJ, 2006 WL 2862216, at *1 (N.D. Okla. Oct. 4, 2006). In *Tyson Foods*, the "surface similarities" abounded in the case from which the State sought to clone discovery: "governmental agencies suing poultry integrators, similar defendants, alleged impairment of use of Oklahoma waters, alleged pollution of drinking water, pollution of a watershed, activities by poultry integrators, legal arguments related to the relationship between the poultry integrators and their growers, manner of disposal of poultry waste, allegations of phosphorus and nitrogen poultry waste, and CERCLA, state law nuisance, trespass, and unjust enrichment claims." *Id.* However, the court found that because the two lawsuits involved "separate watersheds, different water bodies, and different poultry farms located on separate watersheds . . . the relevancy of the requested documents is not readily apparent on its face." *Id.*

In denying the State's request, the court observed that the "current Fed. R. Civ. Proc. 26 limits discovery to the claims and defense in the action." *Id.* at *2. The court refused to automatically accept that "similarity to a prior lawsuit" equated to "relevant to a claim or defense in the current proceeding." *Id.* "[T]he two lawsuits involve[d] different watersheds," the defendants "indicated that the expert witnesses in the two cases [would] be different, and the claims by Plaintiffs in [*Tyson Foods* were] broader than in the [previous] lawsuit." *Id.* Here, the differences are even greater. Although the previous opioid cases have "surface similarities" to the present litigation, *id.* at *1, they involve different geographies, different government actors, different doctors, different patient groups, and different insurers. Thus, "the relevancy of the requested documents is not readily apparent on its face." *Id.*

The fact that a communication was exchanged or a document was produced in a separate lawsuit or investigation does not make it relevant to the present action. Plaintiff has the burden to

formulate discovery requests that are tailored to lead to the discovery of admissible evidence in this case. *Id.* at *3. "Whether pleadings in one suit are 'reasonably calculated' to lead to admissible evidence in another suit is far from clear. *In the Court's view, discovery of this type of information typically will not lead to admissible evidence.*" *Id.* at *2 (original emphasis) (citations omitted).

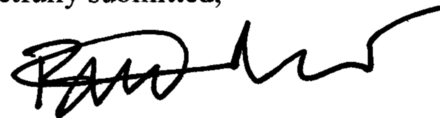
Nevertheless, without waiving its objections, Janssen is producing information referring to nationwide activities that was produced in other litigation, carving out only irrelevant batches that "are easily identifiable, do not require a separate review process, and will not prolong the production of the remaining material." Mot. at 10–11. As such, the Court need not reach the question of whether, as in *Tyson Foods*, unrestricted cloned discovery should similarly be denied.

IV. CONCLUSION

In light of the foregoing and in the absence of any Janssen-specific objections, Plaintiff's Motion simply does not present a dispute that is ripe for resolution as to Janssen. Plaintiff's Motion to Compel should be denied in its entirety.

Dated: March 22, 2018

Respectfully submitted,



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CERTIFICATE OF MAILING

Pursuant to Okla. Stat. tit. 12, § 2005(D), this is to certify on March 22nd, 2018, a true and correct copy of the above and foregoing has been served via the United State Postal Service, First Class postage prepaid, to the following:

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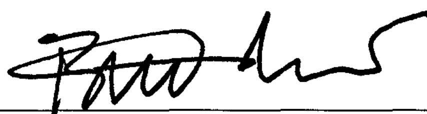

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