IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	§
Plaintiff,	§
vs.	§
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC.; (8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,	§
Defendants.	§

Case No. CJ-2017-816
JURY TRIAL DEMANDED

THE STATE OF OKLAHOMA'S RESPONSE TO WATSON LABORATORIES, INC.'S OBJECTIONS TO THE SPECIAL DISCOVERY MASTER'S ORDER ON WATSON'S MOTION TO COMPEL DISCOVERY REGARDING PRIVILEGED CRIMINAL AND ADMINSTRATIVE PROCEEDINGS

Judge Hetherington correctly denied Defendant Watson Laboratory Inc.'s ("Watson's" or "Defendant's") Motion to Compel Discovery ("Motion"), seeking access to the State's privileged criminal, civil, and regulatory investigation files. These files regard persons that are not parties to this litigation. These files are historically and statutorily protected from such disclosure. These documents—and their continued confidentiality—are vital to the State's ongoing efforts to combat

the opioid epidemic and to investigate and fulfill its civil, criminal, and administrative duties generally. Further, to the extent any such records are not protected from disclosure, the State has already agreed to provide access to them. Therefore, Watson's Objections to the Special Discovery Master's Order on Watson's Motion to Compel Discovery Regarding Criminal and Administrative Proceedings ("Objection") should be denied.

INTRODUCTION

Defendants begged for the appointment of a Special Master. They specifically asked for Judge Hetherington to be that Special Master. Yet, when the Special Master rules against them, they complain. And appeal. To try to delay even further. Fortunately, Judge Hetherington did his job and saw Watson's motion for what it is—an improper assault on the confidentiality that undergirds the State's civil, criminal, and regulatory enforcement mechanisms.

To be clear, Watson is asking for some of the most sensitive and protected information in the State's possession—information that is so sensitive that not even the State's Counsel have been made privy to it. This includes things like law enforcement investigation records containing confidential witness statements and identities; deliberative communications and drafts from administrative law judges (documents not unlike those shared between your Honor and your staff); and, of course, grand jury testimony—some of the most historically protected information known to the American legal system. The unprecedented nature of Watson's request cannot be overstated. Watson cannot cite a single case for the proposition that the State must disclose the entirety of its confidential investigatory files—regarding persons not even named in the lawsuit—in order to bring a civil action to vindicate the interests of Oklahoma and its citizens. Meanwhile, the State has cited statute after statute and case after case confirming the privileged, confidential nature of these documents.

As such, and as demonstrated below, Watson's Motion seeking access to these documents was correctly denied because: (1) these documents are protected by the work product doctrine; (2) they are further protected by a litany of statutes expressly deeming them confidential and authorizing their disclosure only in limited circumstances—none of which Watson can demonstrate are present here; (3) these protections have not, in any way, been waived; and (4) to the extent Watson seeks documents that are not protected from disclosure, the State has already agreed to produce them. Judge Hetherington got this right the first time:

> Any production of criminal investigatory files is likely to place ongoing criminal prosecutions or disciplinary actions in jeopardy. Investigative notes, reports, witness interviews, interview notes, contact information or transcripts ***are work product and protected. By their very nature they will contain prosecutor opinions and mental impressions that should be protected*** both in the criminal context and actions involving disciplinary proceedings.

Order of Special Discovery Master, October 22, 2018, ("October 22nd Order") at 7. Watson has supplied this Court with no reason to second guess that decision on appeal.

Not even the new arguments Watson now raises for the first time on appeal provide reason to depart from Judge Hetherington's well-reasoned decision below. Watson's new arguments are as inappropriate at they are unavailing. Specifically, Watson claims that it will be denied due process of the law without access to these files because it cannot properly defend its case without this information. This is untrue. The denial of access to privileged documents does not equate to a denial of due process. If that were true, then every time a party cited the work-product doctrine to protect a document from disclosure, that party would be violating the Constitution. That is absurd. Work product and other principles of privilege and confidentiality are deeply engrained in the American and Oklahoma legal traditions and, indeed, are statutorily imbedded within the very discovery code. *See* 12 O.S. § 3226(B)(3). That Watson now suggests work product and due

process are somehow incompatible—despite the fact that both serve as reliable constants for every modern American litigant—shows just how far-fetched Watson's Motion is.

Moreover, Watson was not barred from raising any of its defenses in Judge Hetherington's Order. In fact, despite claiming it does not have sufficient information to put on its defense, Watson spends 10 pages—one third—of its brief using publicly available information (the same information relied upon by the State) to instruct the Court on the wrong-doings of the individual doctors, the medical facility, and other health care workers for whom Watson seeks access to the State's litigation files. There is no lack of process here. Instead, there is simply Watson's repeated lack of respect for the discovery process, Judge Hetherington's authority, and the State's efforts to combat the opioid addiction crisis.

Indeed, Watson's Objection is a perfect example of the irony in their request. As demonstrated throughout the State's responses and in Judge Hetherington's Order, given the confidential nature of the information at issue, the State has continued to prosecute its case based on documents that are and will continue to be made available to the Defendants—sources that Watson now relies on in its Objection. This includes publicly available information like news media, the productions and depositions of third parties, Defendants own production, and of course, the non-privileged information that the State has and will continue to produce. And recall the purpose of Watson's request here: to gain knowledge and understanding of the behaviors and practices of the prosecuted doctors and facilities they list. The irony in this request is palpable. At every turn in this case it has been crystal clear that probably the most knowledgeable entities in the country on the behaviors of these doctors and facilities over the past 20 years are the Defendants themselves. They created and maintained meticulous records of prescribing data on these doctors and facilities. They used that data to specifically target each and every doctor and

facility their sales reps visited. And they purposefully targeted the highest prescribers in Oklahoma—including those prosecuted doctors listed in these RFP's—because they knew the best way to build their empire was through the prescription pads of these highest prescribers. That Watson now claims *it* is the one needing information on these prescribers is laughable.

As explained before, and as Judge Hetherington recognized, Watson's Motion to compel is an effort to frustrate and delay in the face of the State's legitimate desire and duty to protect the privacy of its citizens and the efficacy of its ongoing law enforcement efforts. The law is with the State. The equities are with the State. Watson's Motion should be denied—again.

ARGUMENT AND AUTHORITIES

I. Watson's New Arguments, Raised for the First Time on Appeal, Should be Rejected as Both Inappropriate and Inapposite

It is an axiomatic point of procedure that issues, arguments, and evidence will not be considered for the first time on appeal. *See State ex rel. Oklahoma Corporation Commission v. McPherson*, 2010 OK 31, n.6, 23 P.3d 458 (denying motion to supplement appellate record to present issue for first time on appeal, stating: "This Court does not make first-instance determinations of disputed issues of either law or fact in the exercise of its appellate jurisdiction."); *Krosmico v. Petit*, 1998 OK 90, ¶ 22, 968 P.2d 345, 351 (refusing to consider request for relief based on legal theory not presented to the trial court, stating: "This Court does not make a first-instance determination of a disputed question of law.") Watson's appeal of Judge Hetherington's Order should be treated no different.

Watson presents a new argument in Section II.D. of its Objection, relying on *General Dynamics Corp. v. United States*, 563 U.S. 478 (2011), to say that the State's case should be dismissed if Watson does not receive access to the information it seeks in its Motion. This is an appeal. Watson did not raise this argument so that it could be decided by Judge Hetherington in

the first instance. It is black letter law that you cannot assert an argument for the first time on appeal. Watson knows the rules about appealing the Special Master's orders—indeed, it selected the Special Master and negotiated the Order appointing the Special Master. Watson has thus forfeited the right to bring these arguments before the Court on this appeal. This argument should be disregarded on this basis alone. Further, this argument also was waived when Watson failed to include it in its Motion to Dismiss, which the Court denied in December 2018. This argument was waived when it was not included in Watson's Answer. This argument was waived when it was not made in the months of discovery between the parties. And this argument was waived when it was not made in Watson's motion.

But even if this Court considers Watson's waived arguments, those arguments also fail on the merits; *General Dynamics* is inapposite to the case at hand. In *General Dynamics*, private contractors hired to develop an aircraft for the U.S. Navy challenged the Navy's decision to terminate their contract for default. 563 U.S. 478, 481-82 (2011). Contractors asserted that the government's failure to share its "superior knowledge" about how to design such an aircraft excused contractors' default, but the Court of Federal Claims found the contractors' defense of "superior knowledge" was non-justiciable because it involved extensive discovery into classified state secrets. *Id.* at 482-483. Accordingly, the Court of Federal Claims completely barred contractors from asserting that defense, but nonetheless allowed the government to continue to assert its claim against the contractors for default—depriving contractors entirely of a defense to protect themselves from the government's claim. *Id.* at 483-84. The U.S. Supreme Court, however, held that when, to protect state secrets, a court finds a contractor's valid "superior knowledge" defense non justiciable, the proper remedy is to find the same with respect to the government's claim, holding the entire contract unenforceable. *See id.* at 485-492. Moreover, the

U.S. Supreme Court was clear: *General Dynamics* creates a precedent only for government contracting cases involving the assertion of state secrets to entirely preclude the assertion of an otherwise valid defense. *Id.* at 492. As the final lines of Justice Scalia's opinion explain:

> Courts should be even more hesitant to declare a Government contract unenforceable because of state secrets. It is the option of last resort, **available in a very narrow set of circumstances**. Our decision today clarifies the consequences of its use **only where it precludes a valid defense in Government contracting disputes** . . . .

Id. at 492 (emphasis added).

The State's case here is entirely different than *General Dynamics* for two important reasons. First, of course, this case does not meet the "narrow set of circumstances" outlined in *General Dynamics*, as this is not a government contract dispute, nor is there an assertion of state secrets. Second—***and most importantly—Judge Hetherington's Order did not preclude, bar, or otherwise prevent Watson or any other Defendant from asserting a defense in this case.*** Judge Hetherington's Order simply denied Watson access to privileged files to use ***as part of its defenses.***

General Dynamics is all about treating like with like: if defendant's defense is non-justiciable, then so too is plaintiff's claim. Here, however, Watson asks this Court to treat apples like zebras: if Defendants can't have privileged information, then plaintiff's claim should be dismissed. There is no correlation between those outcomes. That is not treating like with like. Thus, the State's case, and *General Dynamics*—the crux of Watson's new arguments—are totally inapposite. To the extent these arguments are even considered, they provide no reason to upset Judge Hetherington's Order.

II. Watson's Motion was Properly Denied Because these Documents Are Protected From Discovery

Watson seeks access to the State's files regarding ongoing civil, criminal and regulatory investigations. This information includes records containing attorneys' mental impressions,

adjudicatory deliberations, and the identities of undercover agents. Not surprisingly then, these documents are subject to layer upon layer of protection designed specifically to prevent their disclosure. Judge Hetherington was right to uphold those protections here. [1] This Court should do the same,

a. These Documents are Privileged Under the Work-Product Doctrine and Keeping them Protected Does not Violate Due Process

Parties are regularly forbidden from discovering the other side's work product—*i.e.*, "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent." 12 O.S. § 3226(B)(3). And when those materials include opinion work product, those protections are even stronger: "the Court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation." *Id.* at § 3226(B)(3)(b).

With respect to the documents Watson seeks through its Motion, Judge Hetherington recognized the following:

> Any production of criminal investigatory files is likely to place ongoing criminal prosecutions or disciplinary actions in jeopardy. Investigative notes, reports, witness interviews, interview notes, contact information or transcripts **are work product and protected**. By their very nature they will contain prosecutor opinions and mental impressions that should be protected both in the criminal context and actions involving disciplinary proceedings.

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[1] Watson claims Judge Hetherington improperly relied upon the "law enforcement privilege" in his Order. Yet, the phrase "lase enforcement privilege" never appears in Judge Hetherington's Order. Moreover, even if it did, Watson's argument goes against the very function of an appellate court: to review judgments, not statements in opinions. *See Camreta v. Greene*, 563 U.S. 692, 719 (2011) (It is "the settled rule that this Court reviews only judgments, not statements in opinions."); *see also FDIC v. Jernigan*, 1995 OK 54, ¶8 n.13, 901 P.2d 793, 796 ("On appeal we indulge in the presumption that a trial court's decision is correct and the proceedings are regular."). What matters is that these documents are protected from discovery—regardless of whatever label that protection carries.

October 22nd Order at 7 (emphasis added). He was absolutely right.

Watson seeks "All documents concerning any disciplinary, civil, or criminal proceedings brought" against any healthcare provider "related to the prescription of opioids." Watson RFP No. 9. As they admit in their Motion, this request includes things like "initiating documents, witness interview notes and transcripts, . . . reports, . . . pleadings, motions, [and] orders," Motion at 3-4, many of which (like investigation notes and reports) are blatantly work product. But Watson conveniently omits from its Motion that these RFPs also seek ***all drafts*** of initiating documents, pleadings, motions, and orders—things that clearly constitute work product and clearly contain the State's opinions and mental impressions. *See* Watson RFP Definition 7 ("The term 'document(s)' includes all drafts and all copies that differ in any respect from the original . . . .").[2] Moreover, Watson is not shy about why it wants these documents: it wants to know what the State says about the merits of this case. *See* Motion at 7 ("This discovery is important *inter alia*, to: . . . (2) understand whether the State made statements, admissions and uncovered evidence in the course of its investigations that exculpates the defendants . . . ."). This kind of request to serve up the mental impressions of the State's attorneys, investigators, and administrative judges for Defendant to peruse is entirely inappropriate and flies in the face of the work product doctrine. Thus, Judge Hetherington was right to deny Watson's Motion.

[2] Watson attempts to clarify in its Appellate brief that it "is not seeking attorney-client privileged information or attorney work product." Objection at 6, n.2. But, given then expansive requests at issue and, as Judge Hetherington noticed, "the very nature" of the files Watson seeks, the presence and disclosure of this sort of protected information is inevitable should they be produced. The only way to adequately uphold these protections is to, as Judge Hetherington ordered, deny the Motion.

Moreover, and contrary to Watson's claims, the Court's decision to recognize the protections surrounding these documents does not result in a denial of due process. That argument is a complete *non sequitur*. First, as the Oklahoma Court of Criminal Appeals has made clear:

> [Defendant] is not entitled to discovery of the State's work product. There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigation on a case.

Fritz v. State, 1991 OK CR 62, ¶ 12, 811 P.2d 1353, 1358 (internal citations omitted). As explained in the State's original response to Watson's Motion, this example from *Fritz* is particularly instructive here as, just as in this case, the defendant was seeking an Oklahoma State Bureau of Investigation ("OSBI") report regarding another person. *Id.* at ¶¶ 7-15. There, the Court of Criminal Appeals held that such a report was the State's work product *and* that it was not exculpatory of the defendant, as it went to the criminality of only the person that was the subject of the report. *Id.* at ¶ 12. The same are true here. Moreover, the fact that the other person in *Fritz* was in fact a co-defendant in the State's case is only further proof that the reports sought here are beyond the scope of discovery, as the healthcare providers that are the subjects of these investigation files are not even parties to this litigation—much less co-defendants. *Fritz* was criminal; this is civil. *Fritz* involved records regarding a co-defendant; this case involves records regarding third parties. Since it was not error for the State to withhold those documents in the *Fritz* context—where the accused was fighting for his freedom—it most certainly would not be an abuse here. Like the appellant in *Fritz*, Watson is able to put on its defense, and does not need privileged work product of the State to do so. Thus, just as in *Fritz*, the State should be allowed to protect this information from disclosure.

But, perhaps the most important aspect of the *Fritz* case is the fact that Watson, once again, has absolutely no answer for it. None. It's not even cited once in Watson's brief.

Second, if granted, Watson's request for privileged work product materials would flip discovery practice and tradition on its head. The protection of work product is a long-established tradition, as made clear by the U.S. Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947). There, the Supreme Court stated that when the discovery rules were adopted, "this Court and the members of the bar in general certainly did not believe or contemplate that all files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries." *Id.* at 514. And of course, the Supreme Court said that against the constant back drop of the Due Process Clause. Yet, Watson is claiming that its due process rights are violated if it is not granted access to privileged work product, placing the two concepts (work product and due process) that were so clearly in harmony in *Hickman* suddenly in conflict. If Watson had its way, any time a litigant raises work product as a reason to protect the thoughts and impressions of its attorneys, the opposing party would have constitutional grounds for objection. That is not how we do discovery in America, and it is certainly not how we do discovery in Oklahoma. Judge Hetherington recognized this. The Court should do so too.

Finally, and more generally, Watson's due process argument is entirely belied by the evidence already marshalled in its own brief. Watson claims that this information is so critical for its defense because it needs information to establish a causal chain. It is clear from its Appeal of Judge Hetherington's Order, however, that Watson already has significant knowledge regarding the doctors, the medical facility, and other health care professionals regarding whom Watson is demanding access to the State's litigation files. Specifically, Watson dedicated pages 9 through 18 of its Objection to discussing the different doctors, health care professionals, and medical facility that make up the investigatory targets of its Motion. That is 10 pages total, ***essentially one third of its brief***. This information was publicly available *and* is the same publicly available information

the State is relying upon to prove its case. Watson simply has no argument why it needs protected, privileged information to litigate its case.

Indeed, as has been the norm throughout the life of this Motion, all Watson has in support of this argument are general, nebulous quotes about the notion of due process and the pursuit of a full and fair opportunity to present its case. *See* Objection at 23. Yet, as demonstrated throughout the State's response, no one has denied Watson the opportunity to put on its case. All the State and Judge Hetherington have required is that Watson play by the same rules as any other litigant—the Rules of the Oklahoma Discovery Code and Oklahoma law, which say that work product and other protected information are beyond the scope of discovery. To say that these bedrock principles of American and Oklahoma legal practice are now suddenly unconstitutional is beyond belief.

b. These Documents are deemed Confidential by Statute

The second layer of protection for the documents requested consists of a litany of statutes expressly deeming these records confidential. Many of these statutes contain operative language that is nearly identical to a statute the Oklahoma Supreme Court held created a privilege from discovery in *State ex rel. Hicks v. Thompson*, 1993 OK 57, 851 P.2d 1077.[3]

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[3] The statute at issue in *Thompson* was 74 O.S. § 150.5(D), which provides:

> All records relating to any investigation being conducted by the [Oklahoma State] Bureau [of Investigation], including any records of laboratory services provided to law enforcement agencies pursuant to paragraph 1 of Section 150.2 of this title, shall be confidential and shall not be open to the public or to the Commission except as provided in Section 150.4 of this title; provided, however, officers and agents of the bureau may disclose, at the discretion of the Director, such investigative information to: (a) officers and agents of federal, state, county, or municipal law enforcement agencies and to district attorneys, in the furtherance of criminal investigations within their respective jurisdictions, (b) employees of the Department of Human Services in the furtherance of child abuse investigations, and (c) appropriate accreditation bodies for the purposes of the Bureau's obtaining or maintaining accreditation.

Watson recognizes many of these provisions, and even quotes them in its Motion. Watson's argument to get around this law hinges on the notion that the statutes authorize this confidential information to be used or disclosed in certain circumstances, for example that the Attorney General "***may*** disclose so much of the multicounty grand jury proceedings ***to law enforcement agencies*** as he considers essential to the public interest and effective law enforcement." *See* Motion at 14; Objection at 30; 22 O.S. § 355. Nowhere in Watson's Motion or Objection does it explain how the circumstances of this litigation meet those criteria, however. Instead, Watson's briefing demonstrates a fundamental misunderstanding of the difference between "may" and "shall" and the circumstances under which these documents ***may*** be shared. Again, nothing about Defendant's recycled arguments regarding these statutes provides any basis upon which to second guess Judge Hetherington's decision.

i. Anti-Drug Diversion Act, 63 O.S. § 2-309D

Watson acknowledges but fundamentally misunderstands the protection provided in the Anti-Drug Diversion Act. First, Watson disingenuously argues this statute "expressly authorizes the State to release information contained in its central repository." Motion at 11-12; Objection at 28. The statute is clear: "The information collected at the central repository pursuant to the Anti-Drug Diversion Act ***shall be confidential and shall not be open to the public.***" 63 O.S. § 2-309D (emphasis added). And to the extent the State can permit access to that information, "[a]ccess to the information ***shall be limited to***" the finite list of State and Federal agencies listed in the statute—which does not include Defendants. *Id.*[4] Otherwise, disclosure is solely within the

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To the extent Watson also seeks such OSBI records, the State asserts the privilege under this statute as well.

[4] The Statute also permits access to registrants "for the purposes of patient treatment and for determination in prescribing or screening new patients." § 2-309D(G).

discretion of the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control for the finite set of purposes listed under the statute—none of which Watson contends matches the circumstances of this case. *See id.* at § 2-309D(B)-(D).

Second, as Judge Hetherington recognized, Watson is flat wrong when it suggests the State has been utilizing this information at depositions without first providing it to the Defendants.[5] As discussed elsewhere, ***the State has not used any information in these depositions that was not either public record or part of Defendants' own production***. One need look no further than the local news to find information regarding Harvey Jenkins's criminal past:

- Kyle Schwab, *'Pill mill' case headed to trial*, THE OKLAHOMAN (Jan 13, 2018), https://newsok.com/article/5579406/pill-mill-case-headed-to-trial
- Andrew Knittle, *Jenkins charged with 29 felonies connected to 'pill mill,'* THE OKLAHOMAN (March 24, 2016), https://newsok.com/article/5487203/jenkins-charged-with-29-felonies-connected-to-pill-mill
- Andrew Knittle, *Doctor fined $36k loses ability to prescribe drugs*, THE OKLAHOMAN (June 18, 2015), https://newsok.com/article/5428261/doctor-fined-36k-loses-ability-to-prescribe-drugs
- M. DeLaTorre, Accused 'pill mill doctor' Harvey Jenkins has medical license revoked, OKLAHOMA'S NEWS 4 (Feb. 4, 2015), https://kfor.com/2015/02/04/imminent-danger-order-issued-against-accused-pill-mill-doctor-harvey-jenkins/

Indeed, the excerpts of the deposition in Watson's Motion and Objection illustrate this:

> Q (BY MR.PATE) You're aware that Dr. Harvey Jenkins has been charged with 29 felonies and a misdemeanor for running a pill mill?
> A I wasn't aware of the number, ***but I did see in the media where he was – he was charged.***

[5] "The record does not support Watson's allegation that the State is relying on the same confidential information when taking depositions in this case." October 22nd Order at 7.

Motion at 13 (quoting *Deposition of Brian Vaughan*, 190:11-16 (Sept. 19, 2018)); Objection at 29. As Judge Hetherington noted, the State has not relied on any confidential information related to criminal investigations or prosecutions to assist in taking depositions in this case.

As with other information, to the extent Watson seeks documents and data that are not protected, the State is willing to produce and has been producing it. But what Watson seeks through the Anti-Drug Diversion Act repository is a database of patient names, addresses, birth dates, and sensitive medical information related to prescription-medication history. *See* Motion at 12; Objection at 28. The Court has already ordered that the State does not have to produce patient-identifying information. Watson should not get access through the back door for things they cannot get through the front.

ii. Multi Grand Jury

The story of the Oklahoma Multi-County Grand Jury Act is much the same. As Watson recognizes, grand jury proceedings are confidential, but the Attorney General "***may***" use or disclose some of that information "***to law enforcement agencies*** as he considers essential to the public interest and effective law enforcement." 22 O.S. § 355(A). Again, just like the confidentiality surrounding litigation and investigation files, the choice to disclose the confidential grand jury transcripts Watson requests is committed to the discretion of the Agency (in this case, the Attorney General). And, just like with the data in the Anti-Drug Diversion Act database, such disclosure is only appropriate when directed to specified entities (in this case, the Attorney General and law enforcement agencies)—none of which include Defendants. Accordingly, nothing in this statute allows production of the information sought.

But Watson also omitted the rest of § 355(A), which further emphasizes the degree of protection surrounding grand jury transcripts:

> Otherwise, a grand juror, attorney, interpreter, stenographer, operator of any recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the multicounty grand jury ***only when so directed by the court. All such persons shall be sworn to secrecy and shall be in contempt of court if they reveal any information which they are sworn to keep secret.***

(emphases added).[6] And to be clear, when the statute says persons can reveal grand jury matters "when so directed by ***the*** court," it does not mean any court; it means the presiding judge over the multicounty grand jury. *See* 22 O.S. § 351(B)(2). No such order has been entered here.

Finally, Watson's reliance on *Rush v. Blasdel*, 1991 OK CR 2, 804 P.2d 1140, is still just plain wrong. As Watson concedes, the person in *Rush* asking for the grand jury transcript was the accused himself, Criston Eugene Rush—it was not some third party in a separate civil litigation. *See* 1991 OK CR 2, ¶1. Moreover, the reason the Court of Criminal Appeals ordered the transcript released to Rush was not out of some nebulous and unarticulated notions of due process; it was because a statute said that "[u]pon request, a transcript of the testimony or any portion thereof shall be made available to ***an accused***." *See id.* at ¶¶ 5-6; 22 O.S. § 340.[7] *Rush* is entirely inapposite. Any grand jury transcripts should remain confidential. Judge Hetherington's Order ensures they will be.

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[6] *See also In re Proceedings of Multicounty Grand Jury*, 1993 OK CR 12, ¶ 7, 847 P.3d 812, 814 ("Throughout history grand jury proceedings have been conducted in, and surrounded by, secrecy. Commentators consider the basic principle, that grand jury proceedings are nonpublic, to be universal and the policies underlying that principle to be widely recognized. The United States Supreme Court has consistently recognized that the proper functioning of the grand jury system depends upon the secrecy of the grand jury proceedings . . . .").

[7] *See also In re Proceedings of Multicounty Grand Jury*, 1993 OK CR 12 at ¶ 10 ("We also find that . . . an accused may only request grand jury transcripts which are applicable to the crime for which he/she is now charged. The holding in *Rush v. Blasdel*, 804 P.2d 1140 (Okla. Cr. 1991), is limited in accordance with this decision.").

iii. Medicaid Program Integrity Act

The argument under the Medicaid Program Integrity Act touches on all the points mentioned above—a general blanket of confidentiality protecting the records at issue; a discretionary authority to produce them; Watson's attempt to convert that discretionary authority into a mandatory duty it is not. *See* 56 O.S. § 1004(D) ("Records obtained or created by the Authority or the Attorney General pursuant to the Oklahoma Medicaid Program Integrity Act ***shall be classified as confidential information and shall not be subject to*** the Oklahoma Open Records Act or to ***outside review or release by any individual except, if authorized by the Attorney General***, in relation to legal, administrative, or judicial proceeding.") (emphasis added). Moreover, a number of cases involving Medicaid fraud are protected from disclosure by virtue of a state or federal court sealing order, which cannot be set aside or ignored here.

Further, the State has already provided Defendants with the universe of potential Medicaid claims from which the State will show the Defendants caused false claims to be made—a universe of some 9,000,000 records. These are the only Medicaid records relevant to the State's claims and the only records on which the State relies. Yet, Watson wants more. Once again, it want access to the sensitive patient records related to these claims so that they can target the individual patients as part of their campaign to harass and intimidate. In open Court, the State challenged Defendants to vow that, if given this information, they would not use it to contact the patients. Defendants would not accept that challenge.

The State, meanwhile, has remained steadfast in its promise to protect the confidentiality of these records. The Medicaid Program Integrity Act supports that confidentiality, as does Judge Hetherington's Order.

c. The State Has in no Way Waived these Protections

Under any standard, the State has not waived the privileges or protections listed above, because the State has never disclosed or relied on privileged information. To the contrary, as explained above—and in Judge Hetherington's Order—the State has pursued this action on information available to the public and from Defendants' own files.[8]

Watson places the entire weight of its waiver argument on what federal courts "applying Oklahoma law" have said about the matter, all the while overlooking the Oklahoma law itself. Indeed, Watson omitted from its Objection the citation to the Oklahoma case discussed below (*Gilson*) after the State called Defendant out for citing, yet ignoring, it in its Motion. *See* Motion at 9-10; Objection at 24-25. This makes sense, however, given that actual Oklahoma law articulates a test that doesn't fit with Defendant's narrative.

In *Gilson v. State*, the Oklahoma Court of Criminal Appeals articulated the rule for "at issue" waiver to require: "1) the party asserting the privilege does so as a result of an affirmative act; 2) through the affirmative act the privilege holder has made ***the substance of the confidential communications a material issue in the case;*** and 3) use of the privilege to suppress privileged information needed to address the material issue brought out by the holder would be manifestly unfair to the party against whom it is asserted." As demonstrated throughout the preceding sections, however, the State has never made the substance of its litigation files or investigatory reports, grand jury transcripts, or patient data a "material issue" in this litigation.

What the State has put at issue—what *is relevant to this case*—is the fact that Defendants engaged in a massive campaign to generate and expand the market for opioids across the State and

[8] "Again, State argues it will not rely on any confidential or privileged investigatory material for use in this case and the undersigned will watch carefully for any indication that State is violating this representation." October 22nd Order at 7.

to get Oklahoma citizens hooked on their dangerous narcotics; that unlawful campaign involved a coordinated and sophisticated marketing effort whereby Defendants collected volumes of information to target and convince Oklahoma physicians to prescribe their drugs. This does not open the door for Defendants to obtain work-product and other privileged information related to the State' criminal prosecutions and investigations.

d. The Protective Orders in this Case Do Not Provide an Independent Basis for Disclosure

Watson again mistakes the protective orders in this case for a production order. They are not the same. The presence of a protective order does not convert privileged, confidential information into documents subject to discovery. Just because information can be protected on the back end does not mean it should be produced on the front. Moreover, Watson's reliance on *Everitt v. Brezzel* is misplaced; it is neither Oklahoma law nor does it address attorney work product, but rather information falling under the "official information privilege." 759 F. Supp. 1063, 1064-65 (D. Colo. 1990). Watson has again shown no reason why the protective orders in place in this case give reason to compel discovery into privileged attorney work product. As the State has demonstrated before, this argument is a total red herring. Judge Hetherington's Order should be upheld.

III. To the Extent these Documents Are Relevant and Not Protected from Disclosure, the State has Already Agreed to Provide Access to Them; Anything More would be Unduly Burdensome to the State

To reiterate, the State has already agreed to produce non-privileged records related to the investigations Watson identified. And Judge Hetherington was correct to deny Watson's motion for anything else in light of the layers of protection surrounding these records. The fact that Watsons requests are also vague, overly broad, and place an undue burden on the State, is only further justification for the Court's Order.

Specifically, the State refers to Watson RFPs 9 and 10, which request "All documents concerning ***any*** disciplinary, civil, or criminal proceedings brought by You against ***any*** other HCP not previously requested related to the prescription of Opioids," and "All documents concerning ***any*** complaints or investigations by You concerning the prescribing practices of any HCP that did not result in the initiation of disciplinary, civil, or criminal proceeding." These requests seek every conceivable document ever created in relation to an unlimited number of proceedings that either did or did not take place. Moreover, with respect to the request regarding complaints that did not result in disciplinary action, there is no link whatsoever to opioids, which makes the vast majority of information culled by this request irrelevant to this case. Accordingly, the minimal degree of relevance captured by these improper catch-all requests is vastly outweighed by the substantial burden the State would incur to gather, collect, review—redact—and produce the information. The State should not be forced to engage in such an open-ended fishing expedition.

But the heaviest burden the State would incur if ordered to produce these files is the cost to the State's ability to conduct these criminal, civil and administrative investigations going forward. The law recognizes that the contents of these files are confidential,[9] and the State's prosecutors and investigators rely on that confidentiality in carrying out their duties. These files contain the identities of undercover agents and witnesses.[10] And, as discussed above, these files

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[9] *See generally* 51 O.S. § 24A.12 ("Except as otherwise provided by state of local law, the Attorney General of the State of Oklahoma and agency attorneys authorized by law, the office of the district attorney of any county of the state, and the office of the municipal attorney of any municipality may keep its litigation files and investigatory reports confidential.").

[10] Some of these files may also contain the identities of confidential informants, which are also protected by their own statutory privilege. *See* 12 O.S. § 2510 ("The United States, state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting the investigation.").

contain the mental impressions and strategies of these offices and agencies, the disclosure of which would be just as harmful in those proceedings as would be ordering the State to share its litigation strategy in this one. Defendants are asking this Court to disclose the blueprints of how the State conducts its investigations.

Further, the disclosure of investigatory files would generally have negative impact on the criminal justice system at large, as it runs the risk of eroding the presumption of innocence and putting the accused on trial in the court of public opinion. Indeed, this is exactly why the Oklahoma Rules of Professional Conduct generally require prosecutors to:

> refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule[.]

ORPC 3.8(f). Requiring disclosure of this information entirely defeats that purpose.

And once those files are released, the damage cannot be undone. For instance, if the Defendants have access to the State's investigatory files, Defendants may inadvertently disclose the information in those files—including the State's ongoing strategies to conduct those investigations—to the very persons under investigation, whether during a deposition of the accused or in a public filing in this case. If the Court grants access to this information, there is nothing to stop Defendants from asking a doctor under investigation if he or she knew that a patient was actually an undercover agent, or whether the doctor knew that one of his or her employees had come forward as a witness—all of which would put both the investigation *and the persons involved* in jeopardy. And it would be in Defendants financial interests to do so given that these doctors and their continued overprescribing are exactly how Defendants built their empire. Defendants kept libraries of data on these doctors, yet none of them told their sales reps that these doctors were

engaged in criminal activity or that their prescribing habits were cause for concern. Quite the contrary; even after sales reps themselves reported suspicious activity, Defendants own documents show that they continued to send reps to call on those doctors. This case demonstrates that there is no limit to Defendants' greed.

Only now are any of the Defendants interested in the criminal files of these pill-mill doctors. But the disclosure of investigation files and other privileged information would undermine the credibility of the State in other contexts. Specifically, many of the records in these criminal cases have been filed under seal. *See e.g.*, Docket Sheet, *State v. Jenkins*, CF-2016-2325 (Okla. Cnty. Dist. Ct.) (noting the transcripts of the preliminary hearings in Harvey Jenkins's case have been filed under seal). The same is true for civil litigation (such as *qui tam* FCA cases) currently under seal pursuant to a federal or state court sealing order. If the Court were to grant the present Motion, litigants in myriad criminal and civil cases across Oklahoma could point to this case and say that this Court's decision casts doubt on the confidentiality of historically privileged documents. That would be a travesty.

Moreover, ordering disclosure also undermines the credibility of the State in the eyes of federal and out-of-state law enforcement agencies with whom continued cooperation is vital. Put simply, if those agencies are not confident in the State's ability to protect the sensitive information they share with Oklahoma, it significantly decreases their willingness to do so in the future, and thus severely hampers the State's ability to protect its citizens from the criminal acts that so often do not discriminate between one state and the next.

As noted above, forcing prosecutors and investigators to give up their notes, their contacts, their thoughts and impressions, sends an irreversible chill across the whole of the State's law enforcement and administrative bodies. It will cause invaluable civil servants to hesitate the next

time they think to send one of their own under cover. It will make them think twice the next time they consider whether to press a novel argument or seek conviction under a new and untested statute. It will make them waiver the next time a witness asks if they can keep their identity safe. This is too high a price to pay in this or any litigation. It is unprecedented, and for good reason.

CONCLUSION

For the reasons set forth above, the State respectfully requests the Court deny Watson's Objections to the Special Master's Order on Watson's Motion to Compel Discovery Regarding Criminal and Administrative Proceedings and uphold the reasoned decision of Judge Hetherington.

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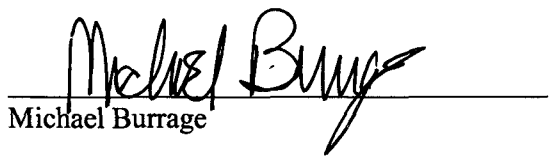

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