

IN THE DISTRICT COURT OF CLEVELAND COUNTY **DEC 13 2018**
STATE OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.*, MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

v.

PURDUE PHARMA L.P.; *et al.*

Defendants.

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

**MOTION TO SETTLE JOURNAL ENTRY
ON INVESTIGATIVE FILES AND BRIEF IN SUPPORT**

Motion

On November 29, this Court heard the appeal of Watson Laboratories, Inc. (“Watson”). The issue was Watson’s request to obtain nonprivileged documents arising from the State’s legal actions against doctors concerning opioid prescriptions. Judge Hetherington denied Watson’s Motion to Compel on October 22, 2018. On November 29, on appeal before this Court, this Court granted Watson’s appeal in part and asked the undersigned to draft a Journal Entry setting forth the Court’s ruling.

The draft Journal Entry prepared by Watson is attached as Exhibit 1. Exhibit 2 attached is an annotated version of Watson’s draft. The annotated version demonstrates the support in the record for each of the provisions in the proposed Journal Entry. The transcript of the argument on November 29 is attached as Exhibit 3. The Court’s Order filed December 4 is attached as Exhibit 4. The Court should not change its mind, and should enter the Journal Entry reflecting the Court’s rulings.

Brief in Support

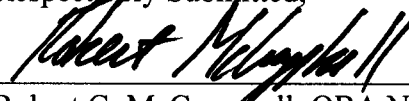
Watson has been unable to discuss the Journal Entry with counsel for the plaintiff. On December 5, counsel for Watson sent a draft of the Journal Entry to counsel for plaintiff and asked to discuss it. On December 7 and December 11 by email and on December 11 in person, counsel for Watson again invited a discussion. Counsel for plaintiff has not refused to meet, but has been unable to obtain the information necessary and has been busy with other tasks in this matter.

Because of the importance of getting this resolved before the Court on December 20, counsel for Watson is proceeding to go ahead and file this Motion to Settle. However, counsel for Watson remains open to discussing this with counsel for plaintiff to see if there are any differences of opinion and if those differences can be resolved.

Not knowing what, if any, objections the State may have, Watson submits Exhibit 2 which demonstrates that the provisions in the proposed Journal Entry simply reflect the rulings the Court made on November 29. If the State objects to any portion of the proposed Journal Entry, the Court can refer to Exhibit 2 and see what the record reflects on that issue.

Conclusion. The parties fully briefed the issue on the appeal to this Court. This Court took full argument and decided the matter on November 29. The Court followed up with an Order on December 4. There is no reason for further delay and no reason for the Court to change its mind.

Respectively Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed this 13th day of December 2018, to the following:

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Robert G. McCampbell

**IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel., MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,
Plaintiff,

v.

- (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
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

**JOURNAL ENTRY ON DISCOVERY OF CRIMINAL,
CIVIL AND ADMINISTRATIVE PROCEEDINGS**

On the 29th day of November, defendant Watson Laboratories, Inc.'s ("Watson") Objection to the Special Discovery Master's Order on Watson's Motion to Compel Discovery Regarding Criminal and Administrative Proceedings (filed November 13, 2018) came on for hearing. Present for the parties were:

Plaintiff: Trey Duck, Abby Dillsaver, Drew Pate, Reggie Whitten, Brad Beckworth, Ethan Shaner, Dawn Cash, Ross Leonoudakis, Lisa Baldwin and Brooke Churchman
Watson: Robert McCampbell and Harvey Bartle
Purdue: Paul LaFata and Trey Cox
Janssen: Larry Ottaway, Amy Fischer, John Sparks and Steve Brody

Having reviewed the briefs of the parties and received argument of counsel, this Court finds that the motion is granted in part as specified below:

1. The plaintiff shall produce charging documents, petitions, indictments, informations, motions, briefs, orders, docket sheets and other documents filed with a tribunal in all civil, criminal or administrative proceedings brought by a state prosecuting or regulatory authority against any Health Care Professional relating to the prescription of opioids, including but not limited to Harvey Jenkins, Regan Nichols, William Valuck, Roger Kinney, Tamerlane Rozsa, Joshua Livingston, Joseph Knight, and Christopher Moses. For purposes of this Order “Health Care Professional” includes doctors licensed by the Oklahoma Board of Medical Licensure and Supervision, doctors licensed by the Oklahoma Board of Osteopathic Examiners, and dentists licensed by the Oklahoma Board of Dentistry.

2. The plaintiff shall also produce all documents produced to the attorney for the defendant, respondent, or licensee in all civil, criminal or administrative proceedings brought by a state prosecuting or regulatory authority against any Health Care Professional relating to the prescription of opioids, including but not limited to Harvey Jenkins, Regan Nichols, William Valuck, Roger Kinney, Tamerlane Rozsa, Joshua Livingston, Joseph Knight, and Christopher Moses.

3. The plaintiff shall also produce to Judge William Hetherington *in camera* a list identifying all Health Care Professionals previously investigated by the State relating to the prescription of opioids where the investigation did not result in a civil, criminal or administrative proceeding with the reasons why not. Judge Hetherington shall make a ruling on whether or not materials from any of those cases should be shared with the defendants.

4. The plaintiff shall produce the documents required in items 1 and 2 to the defendants and the information required by item 3 to Judge Hetherington by January 1, 2019.

IT IS SO ORDERED this _____ date of December 2018.

THAD BALKMAN, DISTRICT JUDGE

APPROVED AS TO FORM:

Defendant: Watson Laboratories, Inc.

Plaintiff: State of Oklahoma

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EXHIBIT 2

- A. **Pleadings, etc. from All Cases, Not Just Eight Watson Had Been Able to Find.** PROPOSED JOURNAL ENTRY: “1. The plaintiff shall produce charging documents, petitions, indictments, informations, motions, briefs, orders, docket sheets and other documents filed with a tribunal in all civil, criminal or administrative proceedings brought by a state prosecuting or regulatory authority against any Health Care Professional relating to the prescription of opioids, including but not limited to Harvey Jenkins, Regan Nichols, William Valuck, Roger Kinney, Tamerlane Rozsa, Joshua Livingston, Joseph Knight, and Christopher Moses. For purposes of this Order “Health Care Professional” includes doctors licensed by the Oklahoma Board of Medical Licensure and Supervision, doctors licensed by the Oklahoma Board of Osteopathic Examiners, and dentists licensed by the Oklahoma Board of Dentistry.”

SUPPORT: Before the hearing, the State had agreed to provide the publicly available pleadings only for the eight cases Watson had been able to discover on its own from the internet and newspaper reports. As the State explained in its brief before the hearing, at p. 19 (November 20, 2018), “To reiterate, the State has already agreed to produce non-privileged records related to the investigations Watson identified.” (emphasis added.)

At the hearing on November 29, 2018, counsel for Watson emphasized that Watson is entitled to pleadings, transcripts, etc., not only on the eight cases Watson had been able to locate on its own, but on the additional cases as yet unknown to Watson. For example, Tr. at page 86, lines 17-25 (emphasis added):

MR. MCCAMPBELL: * * *

So there's all sorts of nonprivileged documents not subject to any privilege which are relevant. Most importantly, this is discovery. There are other cases out there we don't find in the newspaper. We're entitled to know what those are.

It should not be a case of blind man's bluff of us stumbling around trying to guess where that might be. They've got it in their files. They can just produce it to us and let the chips fall where they may. Let's get the facts out. That's what discovery is for. * * *

A few pages later, it came up again. At page 103, lines 21-25 (emphasis added):

MR. MCCAMPBELL: * * *

Mr. Duck points out, Well, we are producing documents based on the URLs where we cited where we found things in the newspaper. But understand, one of the main things we've asked for and one of the main things we're hoping this Court will order is what about the cases we don't know about. * * *

Later in the hearing, the State conceded that it would provide information on the cases Watson had not been able to discover on its own. At page 114, lines 2-6 (emphasis added):

MR. DUCK: * * *

I just spoke to Ms. Dillsaver. We would be willing to give them, the defendants, to the extent they don't already have it, a list of the criminal proceedings that have been filed, whether they're open, and those that have already been closed. * * *

The State reiterated that concession at page 115, lines 12-14:

MR. DUCK: * * *

Our intention is to turn over all the public documents that they've requested that relate to criminal, administrative, and civil proceedings that we can. * * *

The hearing concluded with the Court recognizing the "common ground" which had been reached on some issues. (The excerpt is quoted at item E below.) There is no reason for the Court to change its mind on this issue.

- B. Discovery Previously Produced to Opposing Counsel.** PROPOSED JOURNAL ENTRY: "2. The plaintiff shall also produce all documents produced to the attorney for the defendant, respondent, or licensee in all civil, criminal or administrative proceedings brought by a state prosecuting or regulatory authority against any Health Care Professional relating to the prescription of opioids, including but not limited to Harvey Jenkins, Regan Nichols, William Valuck, Roger Kinney, Tamerlane Rozsa, Joshua Livingston, Joseph Knight, and Christopher Moses."

SUPPORT: There was a detailed discussion that materials produced in discovery to the opposing attorney in the previous litigation ought to be produced in discovery in this case. For example, at p. 84, lines 7-15 (emphasis added):

MR. MCCAMPBELL: * * *

Also, in those underlying cases, all sorts of material was produced in discovery. And so whatever was produced to a criminal defense lawyer, for example, there is no privilege, there is no reason not to produce it.

And all of these objections the State is now making, none of those prevented -- prevented them from complying with their discovery obligations in the criminal cases. None of those prevented them from complying with discovery obligations in civil cases. * * *

The discussion concluded with a decision from the Court that materials produced to opposing counsel in criminal, civil or administrative cases would be produced in this case as well. See Tr. p. 113, lines 8-20:

MR. MCCAMPBELL: * * *

Also, if I could ask for one clarification of your Honor's order. You mentioned that we should receive whatever documents got produced to a criminal defense lawyer, that ought to be produced to us. And I think the same logic would apply to civil

defense lawyers. If documents were produced in civil cases, I would think that the Court's order would say those ought to be produced just as well.

And yeah, civil. And when I say civil, I'm counting administrative as civil, your Honor.

THE COURT: With the caveat that those are not privileged? You're asking for nonprivileged?

MR. MCCAMPBELL: Correct. If it's been produced to your adversary in litigation, it would not be privileged.

There is no reason for the Court to change its mind.

- C. **List Produced to Judge Hetherington.** PROPOSED JOURNAL ENTRY: "3. The plaintiff shall also produce to Judge William Hetherington in camera a list identifying all Health Care Professionals previously investigated by the State relating to the prescription of opioids where the investigation did not result in a civil, criminal or administrative proceeding with the reasons why not. Judge Hetherington shall make a ruling on whether or not materials from any of those cases should be shared with the defendants."

SUPPORT: There was a lengthy discussion of investigations which had not resulted in charges being filed. The State did not want to compromise investigations which may be ongoing. Watson wanted to discover investigations which are no longer sensitive, e.g. defendant passed away before charges could be filed, statute of limitations ran, a necessary witness could not be located. This Court resolved the issue as follows at Tr. page 120, lines 2-9:

THE COURT: Here's what I'm going to do. I'm going to order the State to produce a list of doctors who had been previously investigated, but are currently no longer, with the reasons why. And I'm going to order that produced to the discovery master, and I'm going to ask him to make a ruling on whether or not that should be shared with the defendants.

MR. DUCK: In camera?

THE COURT: Yes.

There is no reason for the Court to change its mind.

- D. **Time to Comply.** PROPOSED JOURNAL ENTRY: "4. The plaintiff shall produce the documents required in items 1 and 2 to the defendants and the information required by item 3 to Judge Hetherington by January 1, 2019."

SUPPORT: With respect to producing the list to Judge Hetherington, the Court imposed a deadline of January 1. Tr. page 120, lines 14-16:

THE COURT: Well, I'll give you whatever to the first of the year is. Okay. By January 1?

MR. DUCK: Okay. Thank you, Judge.

With respect to the other items, Watson's appeal before this Court (filed November 13, 2018) specifically requested at page 4 that "the State should be ordered to produce, within 30 days, the requested documents." In its 23 pages of briefing and in the 44 pages of argument before the Court, the State never once suggested that 30 days was insufficient. Similarly, in briefing and argument before Judge Hetherington on the motion to compel, the State never objected that the timeframe was insufficient.

It is far too late for the State to now restart the process with a new set of objections.

- E. **Watson Appeal Sustained**. PROPOSED JOURNAL ENTRY: "5. Having reviewed the briefs of the parties and received argument of counsel, this Court finds that the motion is granted in part as specified below:"

SUPPORT: The appeal from Judge Hetherington's Order was granted in part. The Court asked counsel for Watson what needed to be modified in light of the discussion before the Court. Counsel for Watson identified four changes at Tr. page 115, line 24 – page 116, line 13:

THE COURT: I think we ought to all look at page 6 and 7 of Judge Hetherington's order October 22nd. I want you to tell me from the defendants and from the State, what specifically, needs that you're requesting be modified based upon any common ground we found here in court today.

MR. MCCAMPBELL: Sure. [1]So right at the end where he says Watson's motion to compel, investigative – investigatory files is denied, [2] I think we're now agreed that it would be granted as to the list of doctors they're going to provide us, [3] the pleadings in all the cases they have, not just the eight we found in the newspaper, and [4] documents they've been – produced to opposing counsel in civil, administrative, or criminal proceedings.

I think we're now agreed on all of those, which would be more than what Judge Hetherington gave us. * * *

At the end of the hearing, the State's argument that Judge Hetherington's Order was affirmed was rejected by the Court at Tr. page 120, line 17 – page 121, line 12 (emphasis added):

THE COURT: Okay? All right. Anything further, Mr. McCampbell, on your motion?

MR. MCCAMPBELL: No, sir. Thank you.

THE COURT: Okay.

MR. DUCK: In all other respects, though, the discovery master's order is confirmed, we don't need to change – I mean, we've agreed to produce what we said we were going to produce, what we think is consistent with that order.

MR. MCCAMPBELL: I'm sorry. I thought we just went through this. So we get the pleadings and all the cases, not just the eight, the things that were produced to opposing counsel in civil,

criminal, and administrative. What was the third category. So no, it's not the same as what Judge Hetherington said.

THE COURT: We modified his order, and I think I would like to ask, Mr. McCampbell, if you'll take the lead in maybe preparing a proposed order to submit to me that would reflect the amendments to the order?

MR. MCCAMPBELL: Yes, sir.

Further, in the Order the Court issued on December 4, the Court not only noted that the State would have to produce the list to Judge Hetherington, but also stated: "Mr. McCampbell is to prepare a proposed order with other amendments to the Discovery Master's Order on Defendants' Motion to Compel Discovery Regarding Criminal and Administrative Proceedings." (emphasis added)

There is no reason for the Court to change its mind.

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IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,)
MIKE HUNTER)
ATTORNEY GENERAL OF OKLAHOMA,)

Plaintiff,)

vs.)

Case No. CJ-2017-816

- (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;)
- (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.)

**PORTIONS OF TRANSCRIPT MAY BE COVERED UNDER PROTECTIVE ORDER
TRANSCRIPT OF PROCEEDINGS
HAD ON NOVEMBER 29, 2018
AT THE CLEVELAND COUNTY COURTHOUSE
BEFORE THE HONORABLE THAD BALKMAN, DISTRICT JUDGE
AND WILLIAM C. HETHERINGTON, JR.,
RETIRED ACTIVE JUDGE AND SPECIAL DISCOVERY MASTER**

REPORTED BY: ANGELA THAGARD, CSR, RPR

1 getting that information.

2 THE COURT: It does not.

3 MR. BRODY: Thank you.

4 THE COURT: Let's go ahead and take a 10-minute
5 break. Let you all get a drink or go to the bathroom. We'll
6 start up again at 11:25.

7 (A recess was taken, after which the following
8 transpired in open court, all parties present:)

9 THE COURT: Judge Hetherington said he's going to
10 order pizza for all of us to stay here through lunch. I'm just
11 kidding. I plan to work until we get done. We'll take another
12 break at the hour or so just to give, if nothing else, Angie a
13 rest for her fingers, but I don't plan on taking an extended
14 lunch break.

15 Next I would like to take up the motion by Watson
16 Laboratories on the information regarding criminal
17 administrative proceedings.

18 Mr. McCampbell, are you going to take the lead on that
19 one?

20 MR. MCCAMPBELL: Yes, your Honor.

21 THE COURT: Okay.

22 MR. MCCAMPBELL: This morning when your Honor was
23 announcing kind of the form that we would go in today, your
24 Honor discussed that this would be the motion about trying to
25 discover privileged material from the State. And it was

1 concerning to me because it's exactly what we're not trying to
2 do.

3 And so anything they've got that's attorney-client
4 privilege, we don't want any of that. We've said all along, we
5 don't want any of that. Anything they have which is attorney
6 work product, we don't want it, we've never wanted it, and we
7 said all along we don't want it.

8 Preparing last night, I made a list of things which are
9 definitely not privileged and which are relevant to this
10 lawsuit, definitely responsive to the request. If I could
11 approach the Court?

12 THE COURT: Sure.

13 MR. MCCAMPBELL: And I would ask that this be marked
14 as a Court's Exhibit, please.

15 THE COURT: We can mark this Court's Exhibit 1.

16 MR. MCCAMPBELL: Thank you, your Honor.

17 So I made a list of things. I forgot about press
18 releases, and so I just handwrote that at the bottom. A press
19 release is obviously not privileged, and lots of other
20 materials we're talking about in cases brought by the State.
21 Think about, for example, discovery materials.

22 Every case they bring, civil or criminal, there's
23 discovery materials. It's produced to the defense lawyer.
24 It's not privileged. It's produced to the defense lawyer. And
25 this motion is definitely not about trying to get any

1 privileged materials.

2 Number two, my argument today, your Honor, what's good for
3 the goose is good for the gander. And we've had this entire
4 argument in front of Judge Hetherington in the spring on the
5 same issue except the roles were reversed.

6 In the spring, the State wanted to discover litigation
7 files from when we had been involved in other opioid
8 litigation. We objected, and we lost, and we were required to
9 produce that information. And there was a lot out there.

10 There's a civil case in Kentucky that had a lot of
11 documents, a criminal case, criminal investigation out of
12 Pennsylvania, where a lot of documents were produced. And what
13 I'm asking is what's good for the goose is good for the gander.
14 Just as we had to produce our litigation files, the
15 nonprivileged portions of those files, the State should have to
16 produce the nonprivileged portions of those files.

17 One of the arguments of the State at the time was, Well,
18 there's discovery exchanged, it's all electronic, all you've
19 got to do is just punch a button, produce it. Whatever was
20 produced in discovery in Kentucky or Pennsylvania or wherever,
21 punch a button, produce the same thing in Oklahoma.

22 Same thing can happen here. Whatever civil and criminal
23 and administrative proceedings are out there, whatever was
24 exchanged in discovery, it's out there, it's Bates labeled,
25 punch a button, produce it again in this lawsuit.

1 Now, one difference between the State's request and our
2 request today. What the State requested was information on
3 opioid litigation in other states based on other facts, because
4 that might be relevant to something that happened in Oklahoma.

5 Understand our request today, it's on these facts in this
6 lawsuit, these facts in this state. It's the exact same facts
7 the State is suing on. The exact same opioid pills, the exact
8 same opioid prescriptions they want to hold us liable for,
9 that's the discovery we're asking for. Those cases.

10 Now, it's unquestionably relevant. As the Court will
11 recall from the briefing, some of these we've been able to
12 find, you know, from newspaper accounts, for example. One of
13 them was Dr. Valuck. Dr. Valuck got out of prison, was allowed
14 to practice medicine in Oklahoma, prescribed opioids. Some of
15 his patients died. He ended up having to plead guilty to
16 second-degree murder.

17 There was civil follow-on litigation, civil follow-on
18 litigation against the pharmacies that allowed those
19 prescriptions to go out. There's a case called Carista against
20 Valuck, Oklahoma Civil Appeals. I've got a copy here if the
21 Court wants it. Westminster Pharmacy said, Well, we shouldn't
22 be liable for Dr. Valuck's conduct on giving these
23 prescriptions. The dismissal of the pharmacy, that was
24 affirmed on appeal by the Oklahoma Court of Civil Appeals.

25 There's another case coming out of Dr. Valuck. This one's

1 called Frantz against Valuck. Frantz, F-R-A-N-T-Z, I've got a
2 copy of that. The pharmacies were Crest Pharmacy and Buy For
3 Less Pharmacy. Same thing. They get dismissed because they're
4 not responsible for Dr. Valuck's criminal conduct in making
5 those prescriptions. That dismissal was upheld by the Oklahoma
6 Court of Civil Appeals.

7 We want to defend on the same basis. Just as the
8 pharmacies weren't liable for Dr. Valuck's conduct, we're not
9 liable for Dr. Valuck's conduct. And we're entitled to do
10 discovery on the facts of Dr. Valuck's case. He's not the only
11 one. There's eight of them that we've been able to find from
12 newspaper reports, but the State knows there are others.
13 There's others out there the State knows about. We don't. And
14 we're entitled to find out who those doctors are and find out
15 the nonprivileged information that's out there about those
16 cases so we can defend.

17 How else is it relevant. As we pointed out in our
18 briefing, one of the State's theories in responding to the --
19 in responding to interrogatories, and we quote that
20 interrogatory in our briefing, is that, Well, the doctors can't
21 be responsible for their prescriptions because of the
22 misrepresentations by the companies.

23 So we want to look at the files where they have brought
24 civil or administrative or criminal actions against the doctors
25 and see what happened there. So did they say in those cases,

1 Well, the doctor's not responsible because that doctor was
2 misled by the manufacturers? I don't know, but we're entitled
3 to find out.

4 And I think the State's going to try to have it both ways.
5 When the State wants to penalize the doctor, the State's
6 position is, the doctor is responsible for that prescription.
7 When the State wants to penalize the manufacturer, the State's
8 position is, No, the doctor's not responsible for that
9 prescription. We're entitled to find out the facts.

10 Now, at trial, we can have a healthy debate about what
11 inferences to draw from those facts, what do those facts mean.
12 I get that, and we will have a healthy debate about that. But
13 we're not there yet. This is just discovery. These facts are
14 unquestionably relevant. They are not privileged. They ought
15 to be produced in discovery.

16 In argument today -- in their pleadings, in the petition,
17 and in argument today, Mr. Duck says, Well, it was the
18 company's misrepresentations that caused these prescriptions to
19 be made. It's not a small number. For the eight we can find
20 in the newspaper, over 35 million pills. And we're entitled to
21 prove it was not our misrepresentations. Obviously, we think
22 there were no misrepresentations. But the cause of those
23 prescriptions, it was not us.

24 In the case of Dr. Thomas, the cause of the prescription
25 was because he was making deals with the patients. He would

1 give them the prescription, the patient would kick back some of
2 the opioid pills back to Dr. Thomas.

3 In the case of Dr. Jenkins, Dr. Moses, Dr. Nichols, they
4 were pill mills. They were doing it because they wanted money.
5 There were cases out there where the doctor gives the
6 prescription in return for sexual favors.

7 Well, the company, the companies, the manufacturers are
8 not responsible for any of that conduct. We're entitled to
9 defend and define the facts necessary to defend that we're not
10 responsible for those cases.

11 And one of the big questions here is how many others of
12 those are out there. How many other cases are there out there
13 where the State has brought a civil, administrative, or
14 criminal proceeding against a doctor for opioid prescription
15 and we don't find them because they're not in the newspaper.
16 There's going to be nonprivileged documents about every one of
17 those, and we're entitled to those things.

18 There is no question these documents are relevant to our
19 defenses. The State offers various objections, and those
20 objections do not prevent discovery. As we've discussed, all
21 we're asking for are the nonprivileged documents. No matter
22 what kind of arguments they want to make, there are certain
23 documents out there that definitely ought to be produced.
24 Press releases would be an obvious example.

25 Another objection they make, apparently, in one of the

1 questions, we don't specify; we're just asking for opioid
2 cases. But let me be clear. We're just asking for the
3 opioid-related cases against the doctors, is the kind of thing
4 that could have and should have been worked out at a meet and
5 confer. In any event, we're just talking about the opioid
6 cases.

7 Also, in those underlying cases, all sorts of material was
8 produced in discovery. And so whatever was produced to a
9 criminal defense lawyer, for example, there is no privilege,
10 there is no reason not to produce it.

11 And all of these objections the State is now making, none
12 of those prevented -- prevented them from complying with their
13 discovery obligations in the criminal cases. None of those
14 prevented them from complying with discovery obligations in
15 civil cases.

16 The State also wants to say, Well, we want to produce only
17 the things that are subject to the Open Records Act. Well,
18 certainly, they should produce everything that's subject to the
19 Open Records Act, but there's plenty of things out there that
20 are not privileged and also not subject to the Open Records
21 Act.

22 For example, a correspondence with opposing counsel, not
23 privileged, not subject to the Open Records Act; documents
24 exchanged in discovery; documents obtained through a subpoena;
25 statements of the accused, if the accused makes a confession,

1 for example, all sorts of things. Unquestionably relevant; not
2 privileged.

3 Next, the Discovery Code Section 3226 clearly entitles us
4 to this. This is routine discovery, and based on the case the
5 State has chosen to bring, there's also, of course, an
6 important due process element.

7 The State wants to punish us. So they're not only asking
8 for liability damages; they want to impose penalties under the
9 Oklahoma Medicaid Integrity Act. They want to impose penalties
10 under the Medicaid False Claims Act. The government wants to
11 punish us for this conduct, and at the same time, deny us
12 access to the facts the government has. They want to deny us
13 access to those facts to defend ourselves. It's a clear due
14 process violation, and the law is clear on how to handle it.

15 So it happens all the time, for example, that there's
16 parallel civil and criminal investigations out there. And the
17 government will come in and ask to stay the civil case because
18 civil discovery is going to discover things that would harm
19 their criminal case.

20 Well, here, the State wants to have its cake and eat it
21 too. They want to have the civil case and go forward with it
22 so there's no stay, but they also want to deny the discovery.
23 Well, you can't do that.

24 I also would point out Section 2509. If I could approach
25 the bench? 12 OS 2509, and it deals with when the government

1 is -- when the government's refusing to produce materials. And
2 it says here, you know, if the government does that, if the
3 government privilege is sustained and it appears a party is
4 deprived of material evidence -- this is definitely material
5 evidence -- then the Court makes other orders in the interest
6 of justice.

7 And if you look at the end there, dismissing the action is
8 one of the things the Court can do. So let me be clear. I'm
9 not asking you to do that today. We're not there. My point
10 is, the law is clear and it happens all the time.

11 The government doesn't get to have its cake and eat it
12 too. If it's going to keep things secret, it can't move
13 forward. Well, here, the government clearly wants to move
14 forward, and I get that. So we ought to have discovery. This
15 is routine discovery. The due process clause requires it, and
16 we should go forward.

17 So there's all sorts of nonprivileged documents not
18 subject to any privilege which are relevant. Most importantly,
19 this is discovery. There are other cases out there we don't
20 find in the newspaper. We're entitled to know what those are.

21 It should not be a case of blind man's bluff of us
22 stumbling around trying to guess where that might be. They've
23 got it in their files. They can just produce it to us and let
24 the chips fall where they may. Let's get the facts out.
25 That's what discovery is for. We can argue later about what

1 those facts mean.

2 We quoted Justice Scalia's language from the General
3 Dynamics case about the height of injustice. And it would be
4 the height of injustice here to allow the government to come
5 forward and punish us based on these facts, and the same
6 government denies us access to the facts they have which allows
7 us to defend ourselves.

8 It's exactly what the discovery code is designed to
9 prevent. It's exactly what the due process clause is designed
10 to prevent. So just like we had to produce the nonprivileged
11 portion of our litigation files to the State, the State should
12 have to produce the nonprivileged portion of their files to us.

13 Thank you, your Honor.

14 THE COURT: Thank you.

15 Go ahead.

16 MR. DUCK: Trey Duck on behalf of the State.

17 Your Honor, I would like to start by reiterating a point
18 that Mr. Whitten made this morning when he started his
19 argument, which is that the dispute that's now before you is
20 the culmination of months of discovery disputes, of months of
21 arguments and hearings and meet and confers, et cetera.

22 We try to boil it down to the issues that are most
23 relevant, but I'll admit that's a bit difficult to do, because
24 what these defendants have asked for here is quite sprawling,
25 and there is a lot of overlap in what they've asked for.

1 But we'll do our best to explain why what they've asked
2 for in general just should not be produced, both for legal
3 reasons and procedural reasons and for really good public
4 policy reasons, which I'll address in turn.

5 First, your Honor, a lot of the examples you've heard
6 about when criminal material has been produced in civil
7 litigations is when you actually have a true situation of a
8 parallel proceeding; meaning that the exact same defendants in
9 this civil litigation are also being prosecuted in a criminal
10 proceeding. We don't have that here.

11 So the direct overlap that Mr. McCampbell is trying to
12 paint for this situation doesn't exist. We'll admit there are
13 some criminal cases that deal with prescribers of opioids and
14 their actions. But one thing has to be made clear today. We
15 don't know anything about them.

16 When we started working on this case, outside counsel and
17 the AG's office, who have been delegated to this case, the
18 civil lawyers, it was made very, very clear to us that we would
19 not have access to and we would have no overlap with any of the
20 criminal prosecutions.

21 No one on our team that's prosecuting this case has seen
22 any of the material, other than public material, that
23 Mr. McCampbell has referenced. We haven't seen investigator
24 notes, which they asked for. We haven't seen grand jury
25 transcripts, which they've asked for. We haven't seen witness

1 interviews, which they've asked for.

2 We don't plan to see them, we haven't asked for them,
3 because the AG's office has been very, very diligent and
4 careful to keep those things separate. Why? Because, Judge,
5 the AG's office is the internal legal department of the State
6 of Oklahoma.

7 Now, the defendants like to blend the State and the AG's
8 office together entirely as if they are one entity, and that's
9 not true. Each of these defendants, likewise, has a legal
10 department that is handling confidential arbitrations,
11 confidential settlement negotiations, other civil litigation,
12 maybe even criminal litigation that we don't know about.

13 Now, we asked for some information that had been produced
14 in state opioid litigation in the past, because frankly, we
15 thought it would serve everybody's interest to get that easily
16 identifiable to us to cut to the chase.

17 What have we not asked for? We've not asked for these
18 defendants' legal department's notes. We haven't asked for any
19 of their attorneys' markups of settlement agreements. We
20 haven't asked about confidential arbitrations that they may be
21 prosecuting or defending. Why? Because that's their legal
22 department.

23 Well, the AG's office is the State's legal department, and
24 the defendants want to come in and ask for all of the internal
25 material for every other case that might touch on opioids.

1 Now, on that point, let's be clear. A lot of these pill
2 mill doctor cases that the AG's office is prosecuting -- and by
3 the way, everything I say about a pill mill doctor prosecution
4 is something I have garnered from public information on the
5 internet.

6 It's not just about opioids in some circumstances.
7 They've identified a number of different prescribers, some of
8 whom are actually being prosecuted by federal prosecutors, not
9 the State. So we wouldn't even have any information anyway.

10 But the fact that there are pill mill doctors in this
11 state is something that in this litigation, even though we
12 don't have access to that information, we have never run from.
13 And why is that? Well, Judge, one of the first things we did
14 in this case when we got the information from the defendants
15 that we requested, was we went to see who they had targeted.

16 That IMS data we talked about earlier this morning, they
17 use that to find doctors they want to send sales reps to, and
18 we have, in some instances, lists of who these defendants sent
19 sales reps to. Well, guess who were at the tops of all of
20 their lists? The doctors, who are now being prosecuted for
21 overprescribing.

22 So the defendants say, Well, those doctors are at fault
23 for doing that, and the doctors do bear responsibility. The
24 AG's office is prosecuting them in actions we're not familiar
25 with because of that. And despite their overprescribing and

1 despite these doctors being willing to hand these drugs out
2 like candy, the defendants would still send sales reps into
3 those physician's office to fight for market share.

4 Hey, this guy, Dr. Jenkins, really prescribes a lot of
5 opioids, let's go in and make sure he's prescribing Nucynta.
6 Purdue says, Let's send somebody into Dr. Jenkins' office and
7 make sure he's prescribing opioids, let's buy him meals, let's
8 host CME events at his office. All of that happened, Judge.

9 Now, what Mr. Jenkins did and is being prosecuted for is
10 important. The defendants profited from it, and they took
11 advantage of the situation.

12 Another thing that ties in with this, Judge, is no one
13 here will ever say that there is a sole liability for one
14 defendant causing one prescription that shouldn't have been
15 written. We've never said that. We've said the opposite.
16 They worked together to do this. They succeeded in doing it.

17 And on top of that, the OUJI on causation here in Oklahoma
18 is really clear. There can be more than one cause. And in
19 some of the situations, I'm sure we'll see, there was more than
20 one cause. But a primary cause and a cause that cannot be
21 denied, we believe, is that the defendants' aggressive
22 marketing tactics caused all of the overprescribing, or at
23 least they took advantage of it in an unlawful way to profit
24 from it.

25 Now, Judge, Mr. McCampbell wants to draw the line between

1 privileged and nonprivileged. I don't believe the briefs do
2 that. It's clearly -- I believe there's a little bit of a
3 pivot there, because investigation files are clearly
4 privileged. What state investigators do and think, as an
5 extension of the AG's prosecution team, is obviously work
6 product that should not be discoverable.

7 Let's talk about what happens if those are turned over.
8 Well, investigators, prosecutors, anyone working in an
9 investigation file in the future will be really hesitant about
10 what they write down. It will have a chilling effect on the
11 efficacy of our investigators. It will prevent them from
12 pursuing leads that they may not otherwise pursue.

13 And the end result, Judge, is that the investigators and
14 the prosecutors will not be as well equipped to protect
15 Oklahomans from the criminals and other bad actors that are out
16 there. Surely that's not what the defendants want.

17 And Judge, they make a very -- they spend a lot of time on
18 due process, and they say, if you don't give us this privileged
19 information, investigation files, grand jury transcripts, if
20 you don't give us this privileged information, you'll be
21 denying us due process.

22 Judge, the exact opposite is true. If this Court requires
23 the State to produce privileged information, that will be
24 violating due process, because those privileges are put in
25 place to protect the procedures that the public and the State

1 of Oklahoma are entitled to, to protect the citizens and to
2 prosecute criminals.

3 Now, Mr. McCampbell drew some comparisons between what the
4 defendants have produced from other litigation and what they've
5 asked us to produce from criminal investigations. One thing
6 can't be forgotten here. The State is not like corporations.
7 There's one really key difference.

8 The State of Oklahoma is a sovereign that has been charged
9 by its people under a constitution recognized by the United
10 States Government to prosecute criminals and to protect the
11 public interest. The defendants do not have a corresponding
12 obligation. The defendants' sole obligation, as we've seen in
13 all of the documents, has been to make money for their owners,
14 or their shareholders. There is no parallel to be drawn here.

15 The State simultaneously has the power to prosecute
16 criminals and bring civil litigation to recover money that the
17 State should not have spent and for damages that were incurred.
18 The defendants do not have and will never have those parallel
19 powers.

20 What defendants have asked this Court to do is make the
21 State choose whether it will pursue criminal actions against
22 pill mills or whether it will pursue civil actions against
23 people like these corporations or defendants like these
24 corporations. And nowhere in history has that been
25 appropriate.

1 The State should be allowed to make those parallel
2 prosecutions happen at the same time. If this stuff is turned
3 over, if we're compelled to produce it, you know, I assume a
4 criminal division of the AG's office will scramble to uncover
5 what it is they believe the Court has ordered to be produced
6 from the hard drives and other network, files that we have
7 never been given access to. It's a process that we likely
8 won't be involved in at all because we're not permitted to see
9 it either.

10 And then the very next thing after that is those
11 prosecutors will think, Well, what next. We've got five other
12 people on our list we haven't filed charges against. There's a
13 bunch of other pill mills we were going after, how do we do
14 this. Should we cease all written communication since this
15 stuff now is going to be out in the public. Maybe we just
16 don't pursue them at all. Maybe the State just needs to put
17 all of its baskets -- all of its eggs in the basket of civil
18 litigation.

19 Well, Judge, the State should not be put to that choice,
20 but our fear is that if this request of the defendants is
21 granted, that's exactly the choice that the State will have to
22 make.

23 Next, your Honor, there are a number of other protected
24 measures out there that the defendants have ignored here.
25 Criminal courts place restrictions on the sharing of

1 information.

2 There are sealing orders in Federal False Claims Act
3 litigation that literally prohibits all of the litigants from
4 sharing any of the information. So we could be in a situation
5 where there are criminal courts or federal False Claims Act
6 cases where you have conflicting orders, orders from those
7 courts, saying, You can't share this information with anybody
8 and an order from this Court saying, No, you've got to share
9 that information. And we'll have litigants potentially all
10 over the country, if this reaches into False Claims Act
11 litigation, that don't know which order to follow.

12 There will likely be satellite litigation as a result of
13 it. There is a False Claims Act Division in the AG's office
14 that then will have to figure out what they need to do, and we
15 have all of these inconsistencies.

16 Now, what will the defendants say is wrong with the
17 argument I just made. It's pretty simple. They're going to
18 say, Well, there are protective orders in this civil litigation
19 for the cases that they were ordered to produce documents from.
20 That's true. There are protective orders in those cases.

21 The protective orders that we've seen from other civil
22 litigation and the protective order in this case allows for the
23 sharing of confidential information between state governments.
24 So there may be a protective order I haven't seen that doesn't
25 have that provision. But the point is the information we've

1 received from other state litigation, information that in the
2 future might be shared with other states in other litigation,
3 that's specifically contemplated in the protective order. So
4 it's not a situation where you have conflicting orders from
5 different courts about whether the information can be shared.

6 We have this list of documents from Mr. McCampbell. I
7 want to make sure the Court is clear on one thing. We're
8 producing documents in response to these requests. This is not
9 a blanket shutdown, you're not getting anything. It's just
10 not. There are a number of things on this list that we will be
11 producing. There are a number of things on the list that we
12 don't think we should have to produce.

13 But orders, hearing transcripts from public hearings,
14 briefing by the party that was -- parties that was filed in a
15 nonsealed case, public informations and indictments, judgments
16 and sentencing, final orders, we're going to produce that
17 stuff.

18 That's the kind of thing that is subject to the Open
19 Records Act that we've already agreed to produce and have been
20 working to produce. In fact, I think that the defendants
21 already have a lot of this information.

22 Going beyond that not only would be improper for all of
23 the privileged and protection and public policy reasons we've
24 discussed; will also be very, very burdensome to the State of
25 Oklahoma. And the value that the defendants may derive from

1 any of that information does not exceed that burden.

2 How do I know that? All of the information that we've
3 used about those pill mills, defendants cited in their brief.
4 They've got like 45 footnotes in their briefs to URLs and links
5 to click to go online to read about these prosecutions. That's
6 the exact same material that I and our team went and looked at
7 before we took depositions.

8 In those depositions, we asked sales reps:

9 Mr. Smith, do you know who Dr. Harvey Jenkins is?

10 Yes, I do.

11 You visited him, didn't you?

12 Yes, I did.

13 Did you know that he has been now prosecuted, is being
14 prosecuted for running a pill mill?

15 They either say yes or no.

16 But you went and saw him anyway, didn't you?

17 That's the extent of the questioning that we've done.

18 Everything that we need to ask those questions, we gathered
19 from public information. The defendants have access to it.
20 They proved it in the footnotes.

21 So where does this logically lead us to. We've got some
22 questions about that too, Judge. But one thing I know is that
23 we found ourselves in a bit of an odd position, given that on
24 the other side of this case are two former U.S. Attorneys in
25 the state of Oklahoma, both of whom, based on public

1 information, prosecuted pill mill doctors.

2 Mr. McCampbell himself is actually in the database of
3 documents that the defendants produced to us in this
4 litigation. It's marked confidential, the document that
5 Mr. McCampbell's name is in, but it references an article that
6 he was quoted, and it related to the prosecution of an online
7 doctor who was prescribing narcotic painkillers online.
8 Mr. McCampbell himself prosecuted that case.

9 So where does this lead to. Did the federal government
10 through the Eastern District, Western District, and Northern
11 District of Texas fail to prosecute appropriate pill mill
12 doctors in this state? Did they do it adequately? Is there
13 information there? Does Mr. McCampbell himself, does Mr. Coats
14 himself know of situations where there's information that would
15 be beneficial to the State?

16 We don't know. And at this point, your Honor, it is
17 conjecture other than the articles we've seen. And I'm not
18 suggesting that the State has any intention of exploring that
19 in discovery or otherwise. But that is the logical extension
20 of where this goes if the defendants are successful in this
21 appeal for the State to turn over investigatory information.

22 The fact of the matter is there are people on the defense
23 side with relevant information about the exact same thing. We
24 don't think it should go that far right now. We don't know
25 where this case will go in the future. But that is the logical

1 extension, Judge.

2 And so, with that, we would ask this Court to be the
3 gatekeeper of the system of justice that exists in the state of
4 Oklahoma. That system has and hopefully will always have the
5 right to jury trials in both criminal and civil litigation.

6 The State is the only authority in state courts to bring
7 both of those kinds of cases. In this case, we are not looking
8 at any of the information in the criminal cases. So to
9 preserve that system of justice, to prevent a chilling effect,
10 to make sure that Oklahomans are kept safe by the criminal
11 prosecutors who are appointed to prosecute people like pill
12 mill doctors, we would ask this Court to keep all of this
13 information protected.

14 We will make sure that the defendants have all of the
15 information that is subject to disclosure that is in the
16 State's possession related to criminal prosecutions and
17 administrative proceedings. We've already done it. We'll
18 continue to do it. And hopefully, that will put an end to this
19 so that we do not have to keep bringing up these issues of
20 whether or not the State can fulfill its role as a protector of
21 Oklahomans.

22 Thank you.

23 THE COURT: Thank you, Mr. Duck.

24 Mr. McCampbell, do you want to reply?

25 MR. MCCAMPBELL: Mr. Duck argues that he hasn't

1 looked at these documents we're asking for, and I get that.
2 But that's not how discovery works. I want to look at the
3 documents because I think they're going to help my client, and
4 the fact that the other side hasn't chosen to look at them and
5 get to them, that's not the test. The test is I'm allowed to
6 discover this information to defend my client.

7 By the same token, what's good for the goose is good for
8 the gander. None of us here in Oklahoma, none of us defending,
9 the Oklahoma lawyers, we didn't see any of the documents about
10 the Kentucky case or the Pennsylvania case or any of the cases
11 in other states, but that doesn't mean they weren't
12 discoverable. Those documents were discoverable.

13 Mr. Duck mentions that there would be attorney markups and
14 legal notes at the AG's office. Let me say again we don't want
15 any attorney material. We don't want their markups. We don't
16 want their legal notes. We don't want any attorney-client
17 information.

18 He mentions grand jury transcripts. Grand jury
19 transcripts get turned over in every single criminal
20 prosecution. There's the Blasdel case from the Oklahoma Court
21 of Criminal Appeals. There's Jencks against the United States.
22 Every single prosecution.

23 But let me also say, Judge, the grand jury's transcripts
24 aren't a big deal for us. If that's what's holding the Court
25 up, just say they don't have to produce grand jury transcripts.

1 That's not it. It's finding out about those other cases, the
2 other cases that are out -- that we don't know about.

3 The other cases that are in their files where they know a
4 doctor was prescribing opioids inappropriately, but that doctor
5 didn't get prosecuted for some reason. For example, what if
6 the doctor passed away, so there would be no reason to bring a
7 case, but they're still trying to hold us liable for those
8 prescriptions. We're entitled to find out about those things.

9 He mentions federal prosecutions, they wouldn't have any
10 documents. But they would have documents. So the case I
11 prosecuted, Dr. Ricky Joe Nelson was opioid pill mill over the
12 internet, prosecuted it here in Oklahoma City. Of course, I
13 worked closely with the Oklahoma Board of Medical Licensure.
14 Of course, the Oklahoma Board of Medical Licensure would have
15 documents concerning that case, even though the actual -- the
16 criminal prosecution took place in federal court.

17 The other thing that happens routinely -- and I confess I
18 don't recall if it happened to Dr. Nelson, but I bet it did.
19 Once you get to criminal conviction, what happens is the
20 agency, the licensing agency gets a certified copy of that,
21 uses that in a licensing action to revoke the person's license.
22 So once again, of course, there would be nonprivileged
23 documents in the State's possession on those instances.

24 Mr. Duck argues, Well, there's not just one cause of an
25 event and wants to argue that, Well, it's the manufacturers

1 were the cause of this event. I want to argue, no, it was this
2 criminal activity by the doctors were the cause of the event.

3 Mr. Duck and I can have a healthy argument on that. I
4 have no doubt we will continue to have a healthy argument about
5 that. But today, it's just discovery. Let us get to the facts
6 so we can have an argument based on the facts, not just lawyers
7 arguing with each other.

8 Mr. Duck also says, Well, gee, if you turn this over in
9 discovery, what does that do to the investigators, how are
10 those investigators and agents going to feel about that
11 information getting out. I've worked with agents and
12 investigators for years, and they all know from the very first
13 document they start on a case, eventually, all of that's going
14 to be turned over to a criminal defense lawyer. That's how the
15 game works. Everybody knows that.

16 And just as it gets turned over to a criminal defense
17 lawyer or just as it gets turned over to the defense lawyer in
18 a civil case, it ought to be turned over to us in this case.
19 Not going to be a surprise to any investigator or agent that
20 that's what happens.

21 Mr. Duck mentions pending -- or pending investigations
22 that might ripen, and what do we do about those. Well, there's
23 a couple of answers. Number one, the State has chosen to be in
24 this position. They have chosen to say we're going to bring a
25 case based on all the opioids in the state. They have created

1 their own problem.

2 But again, if there's a particular file they want to hold
3 back, something that's eminent, you know, we can talk to them
4 about that. We can work with that. But there's thousands of
5 pages of other things that are way done, way in the past,
6 defendant's already sentenced and gone to prison, license is
7 already revoked, thousands and thousands of pages that there's
8 nothing sensitive in there and there's nothing privileged in
9 there.

10 He also argues, Well, there may be sealing orders in these
11 other cases that govern this, and he's right. I am going to
12 argue the same thing happened when they were asking for our
13 files. One of the problems was there's sealing orders in these
14 cases in other states. And he roared right past that. No,
15 they have to be produced in Oklahoma.

16 The other really practical answer to that is if there is a
17 sealing order out there, let's deal with that when we come to
18 it. There's thousands and thousands of nonprivileged pages for
19 which there is no sealing order, not a reason in the world they
20 can't produce it to us and produce it to us now.

21 Mr. Duck points out, Well, we are producing documents
22 based on the URLs where we cited where we found things in the
23 newspaper. But understand, one of the main things we've asked
24 for and one of the main things we're hoping this Court will
25 order is what about the cases we don't know about.

1 What about the doctors that it hasn't gone to court yet
2 for one reason or another, but the State has the information.
3 And the State's trying to punish us for that conduct, but is
4 denying us the facts to defend ourselves.

5 It's basic discovery, basic due process, and the Court
6 ought to allow us to get those documents.

7 Thank you, your Honor.

8 THE COURT: Thank you.

9 MR. DUCK: Briefly, your Honor?

10 THE COURT: Yeah, that's fine.

11 MR. DUCK: Well, we heard a lot about choice just
12 now, and one thing is really clear, Judge, and that's that the
13 State of Oklahoma did not choose this opioid epidemic. We did
14 not choose to be in this situation. The State did not choose
15 to be under circumstances where Oklahomans are dying every day
16 at a rate of up to ten people a week. No one would choose
17 that.

18 Despite very clear evidence that an epidemic would occur
19 if defendants did what they did, the defendants chose to move
20 forward with their aggressive marketing campaign. And they
21 knew, they had to know, what would happen.

22 They had to, because every single time in human history
23 that people have been given widespread access to opiates, every
24 time, dating back millennia, the result has been overdose,
25 addiction, and death, period.

1 Same thing happened here. Defendants chose to
2 aggressively market their opioids despite that knowledge,
3 despite that history. Defendants say that we have chosen not
4 to look at the criminal files. Judge, I did not make a choice
5 not to look at those criminal files. I'm not allowed to look
6 at those criminal files, because the law doesn't permit it.

7 We haven't seen them not because we're trying to be sneaky
8 and we think that if we haven't seen it, then they don't get
9 it. We're not allowed to look at them. That was made clear
10 from day one. That was no choice by this civil team.

11 Another point that we heard was about sealing orders. I
12 want to be clear about one thing so we're not confused. There
13 are sealing orders and there are protective orders. To my
14 knowledge, I'm pretty sure this is true. I don't think we've
15 gotten anything subject to a sealing order that shuts down the
16 public access to a case.

17 When a sealing order is in place, the public doesn't even
18 know the case exists. Right? And I don't think we've ever
19 been given anything by the defendants that was subject to a
20 sealing order. If I'm wrong about that, I'm sure we'll hear
21 about it.

22 Then there's protective orders, which just protect the
23 confidentiality of certain discovery information. We have
24 received information subject to protective orders. Those
25 protective orders contain provisions that allow that sharing.

1 The same is not true for what defendants are asking for
2 because we have both sealing orders and protective orders that
3 don't have sharing provisions in them for the files they're
4 after.

5 Last, Judge, there are two types of investigations we're
6 talking about. And one are old investigations. We think that
7 information is privileged as well. But think about the
8 currently -- the investigations that are currently occurring.

9 They've asked for those specifically by name. Give us
10 your investigation materials for investigations that are
11 currently ongoing. No good can come from that. The State just
12 should not be required to divulge what it is currently
13 investigating in realtime to parties who are not interested
14 parties being prosecuted in the litigation, period.

15 And I think there was some conflating of those two
16 different things there. But it does seem very clear to us that
17 the primary focus of the defendants here is to get open
18 investigation materials, and that's some of the most sensitive
19 stuff out there.

20 We would ask that the Court affirm Judge Hetherington's
21 order. We think it was the right order. It was based on the
22 law, it was based on the facts, it was based on the needs of
23 this case. And we would ask that it stay in place.

24 Thank you, Judge.

25 THE COURT: Mr. Duck, Mr. McCampbell gave me this

1 outline of examples. Tell me specifically on here things that
2 have already been or the State's agreed to share and what
3 you're not wanting to share.

4 MR. DUCK: I will do my best to address that. We
5 lawyers, I think, being creatures of organization and wanting
6 to fit things neatly into boxes, this list is very broad and
7 it's hard to know exactly what Mr. McCampbell was contemplating
8 for a lot of these, but I'll do my best to address it.

9 Any filings in criminal, civil, or administrative
10 litigation that are public filings that are not subject to a
11 protective order or a sealing order, we will produce. Now,
12 some of those are available online for the defendants. Despite
13 that, we will pull them for them. Others are not publicly
14 accessible. I guess theoretically, they could go to the
15 medical examiner or the medical board's office and request
16 certain filings and pay for them, or they could go to clerks'
17 offices and request for public filings when they're not online.
18 We're not going to put them through that.

19 If it's publicly available filed transcripts, pleadings,
20 orders, et cetera, in both criminal and civil administrative
21 proceedings, we will produce them. To the extent they're
22 asking for anything that is not filed with a tribunal, that is
23 what we believe is work product, which would include the entire
24 investigation file, we at this point in time and based on Judge
25 Hetherington's order, do not have an intention of producing

1 that.

2 I can talk to my client and see where we stand on some of
3 the communications that are referenced in here. Part of the
4 issue -- and I'm not trying to evade your question -- since I
5 haven't seen this stuff, it's hard for me to know where it
6 exists, how easy it is to get, whether it's co-mingled with
7 other things. But I can talk to Abby and other folks at the
8 AG's office and see about some of the communications.

9 My sense is that if there are communications to outside
10 parties, you know, where the information has already been made
11 public and it's easily accessible, et cetera, then we're
12 probably not going to have a problem. I just hope I'm not
13 getting in trouble with my client right now. But I think that
14 will probably be something we can do.

15 Obviously, final orders, judgments, sentences, that would
16 include things like a revocation of a physician's license, you
17 know, the final result of whatever the proceeding is, we'll
18 produce that.

19 What we will not produce I really think can be summed up
20 as investigation file materials. So what does that mean. I
21 think it means most of the things that are in No. B1 for
22 pending litigation in the criminal context, I think that would
23 mean witness statements made to prosecutors. I think that
24 would also include documents received by subpoena in the
25 criminal context. And I think that covers most of it.

1 Are there any other particular categories here that I
2 haven't addressed? Our goal -- just to put it simply, our goal
3 is to give them everything that we're allowed to give them.
4 Our second goal is to protect the things that the State needs
5 to protect in its interest, and it's really as simple as that.

6 Thank you, Judge.

7 THE COURT: Thank you.

8 Mr. McCampbell, do you want to respond to that?

9 MR. MCCAMPBELL: If I could be heard on just the
10 list, your Honor.

11 THE COURT: Sure.

12 MR. MCCAMPBELL: First, I want to the make sure we're
13 clear on the pleadings and orders and everything we're
14 discussing. At one point, there was some discussion about
15 giving us that on the eight cases we found in the newspaper. I
16 think we're agreed now it would be any cases, whether we've --
17 the eight we mentioned, or any other cases out there; pleadings
18 and orders and things like that.

19 MR. DUCK: I think we need to look at the actual
20 discovery requests and see. I certainly don't want to
21 overcommit to something that I don't even -- because I don't
22 even know the size or the magnitude of this deal. I haven't
23 seen where the State keeps all this.

24 I don't know how many cases they've got. I don't know how
25 many investigations they've got. So I think we need to look at

1 what they've actually requested, and if they requested it and
2 it's the pleadings, et cetera, that you just mentioned, then I
3 think that we can do it.

4 MR. MCCAMPBELL: So on that one, your Honor, we have
5 requested it. We're here, we've litigated it in front of Judge
6 Hetherington, we've litigated with you. I think we're entitled
7 to an order on that.

8 If I could also address Item B1, the items that have
9 already been produced to a criminal defense lawyer or a civil
10 defense lawyer, if it's already been produced to them, it's not
11 privileged. None of these things Mr. Duck's complaining about
12 applies. If it can be produced to those lawyers, it ought to
13 be produced to us.

14 The expert reports. The expert reports are going to be
15 important because they're going to tell us how many pills are
16 at issue. And once again, on the cases that are done, that
17 would have been turned over in discovery anyway, so that would
18 be done.

19 And I say again, if it's a current case against a doctor
20 who doesn't know he or she is under investigation yet, we can
21 talk about those. I understand the sensitivity on that. But
22 there's thousands and thousands of pages out there on cases
23 that either they've already been done, or they're not going to
24 happen for some reason, and everybody knows they're not going
25 to happen. And none of that is sensitive. That ought to all

1 be produced, given the case the State has chosen to bring.

2 Thank you.

3 THE COURT: Okay. You've asked me to -- I mean, this
4 is a de novo review of Judge Hetherington's decision, and I'm
5 just kind of struggling to figure out what it is that you
6 didn't like about it. I think I understand it now, and that is
7 the defendants are wanting to look at, you know, things that
8 are -- the State might have the key to that are criminal
9 administrative proceedings that are not privileged. Again, I'm
10 having a hard time getting my head around what that might be,
11 and you've kind of helped define it.

12 I think I'm inclined to deny the request to overrule, but
13 I want to make sure that I also leave the door open so that the
14 State is required to produce to the defendants documents that
15 have previously been produced, as Mr. McCampbell I think just
16 said just a minute ago, to other criminal defense attorneys. I
17 think that's a reasonable request. I think that's probably in
18 line with Judge Hetherington's previous ruling anyway.

19 My concern in not expanding or not granting the
20 defendants' further relief is I do believe that we have to be
21 careful to not have a chilling effect on law enforcement and
22 prosecution. Mr. McCampbell even stated as much a minute ago
23 with the recognition that in some cases, open investigations,
24 that that could definitely be a concern.

25 And so the bottom line is I think that the parties need to

1 have further meet and confers on whether or not the State has
2 complied with the request. But I think to the extent that the
3 defendants just want to completely open the door to any
4 information that the State has by virtue of it being an entity
5 that prosecutes people, I don't think that they just get
6 unfettered right to have all those documents.

7 I agree with what Mr. Duck stated earlier. Just because
8 the State of Oklahoma prosecutes cases, doesn't mean that in
9 the civil case they have a requirement to turn all that
10 information over to the defendants. And I'm not sure the
11 defendants necessarily want all that either.

12 Mr. McCampbell, I have in my notes that, you know, at the
13 beginning you said, who are the doctors, we want to know who
14 are the doctors. Tell me what further clarification you need
15 from me so that you feel like you can get the information you
16 need from the State as far as who are the doctors.

17 MR. MCCAMPBELL: Well, yes, your Honor. Documents,
18 certainly every case, every civil, administrative, or criminal
19 case brought against a doctor, and the documents that they know
20 where they had suspicions or probable cause, or whatever you
21 want to call it, that a doctor was prescribing opioids
22 illegally, and that a case was not brought for some reason.

23 And --

24 THE COURT: So cases brought against doctors and --

25 MR. MCCAMPBELL: Cases brought, or they've received

1 information about suspicion about that doctor, but a case was
2 not brought for some reason. So we could try to uncover the
3 facts on, you know, maybe there's nothing wrong there or maybe
4 it was millions of pills changing hands but the doctor passed
5 away and there was no -- there is no case, and there's no
6 public record of it. But we would be entitled to that. So
7 that.

8 Also, if I could ask for one clarification of your Honor's
9 order. You mentioned that we should receive whatever documents
10 got produced to a criminal defense lawyer, that ought to be
11 produced to us. And I think the same logic would apply to
12 civil defense lawyers. If documents were produced in civil
13 cases, I would think that the Court's order would say those
14 ought to be produced just as well.

15 And yeah, civil. And when I say civil, I'm counting
16 administrative as civil, your Honor.

17 THE COURT: With the caveat that those are not
18 privileged? You're asking for nonprivileged?

19 MR. MCCAMPBELL: Correct. If it's been produced to
20 your adversary in litigation, it would not be privileged.

21 MR. DUCK: We have a response that might help
22 streamline some things. Based on what we've heard, I don't
23 think there's any need to modify Judge Hetherington's order,
24 because on record today, to the extent it wasn't clear earlier,
25 I agree on behalf of the State to produce a lot of the things

1 that they have requested.

2 I just spoke to Ms. Dillsaver. We would be willing to
3 give them, the defendants, to the extent they don't already
4 have it, a list of the criminal proceedings that have been
5 filed, whether they're open, and those that have already been
6 closed. What we can't do is provide a list of those that were
7 passed on for whatever reason, those investigations that
8 occurred where no filing followed.

9 There's a few reasons for that. A lot of them, the
10 statute of limitations may not have run. You might find out
11 something else in different investigation, reopen the
12 investigation, and now all of the prior investigation materials
13 have been produced in civil litigation, et cetera.

14 But we can give them a list of the proceedings that have
15 occurred to date, closed and currently open, just not the
16 investigation files associated with those. Then they'll know
17 the identities of these physicians.

18 You know, they do have subpoena power with this Court. I
19 don't know whether to what extent these defendant doctors are
20 under some confidentiality requirement themselves, but we'll at
21 least give them a list of those names.

22 The other things, the pleadings, et cetera, I think that
23 Judge Hetherington's original order contemplates that we are
24 already going to turn over the public information, and we're
25 committed to do that.

1 MR. MCCAMPBELL: So, your Honor, just as I'm thinking
2 about it, the list, that would be very helpful. The pleadings
3 in all the cases, not just the eight we found in the newspaper,
4 very helpful. And then I think we're also at documents
5 produced to the opposing lawyer in civil, criminal, or
6 administrative proceedings. Is that where we are?

7 MR. DUCK: I don't think it's not where we are,
8 Judge. I mean, we're there. I just don't know how many cases
9 that is, and so -- or what it all entails because I haven't
10 seen it. So I think we're there. But I just want to reserve
11 the right for us to look at it and talk about it.

12 Our intention is to turn over all the public documents
13 that they've requested that relate to criminal, administrative,
14 and civil proceedings that we can. So we're committed to do
15 that and we will, barring some unforeseen circumstance that I
16 haven't seen because I haven't looked into some of these files.

17 One other point, though, Judge, we would like, to the
18 extent there is any patient information in any of these
19 documents that eventually is turned over, you know, we would
20 like for the same privacy.

21 THE COURT: Right. That would be consistent with my
22 previous ruling.

23 MR. DUCK: Yes, your Honor.

24 THE COURT: I think we ought to all look at page 6
25 and 7 of Judge Hetherington's order October 22nd. I want you

1 to tell me from the defendants and from the State, what
2 specifically, needs that you're requesting be modified based
3 upon any common ground we found here in court today.

4 MR. MCCAMPBELL: Sure. So right at the end where he
5 says Watson's motion to compel, investigative -- investigatory
6 files is denied, I think we're now agreed that it would be
7 granted as to the list of doctors they're going to provide us,
8 the pleadings in all the cases they have, not just the eight we
9 found in the newspaper, and documents they've been -- produced
10 to opposing counsel in civil, administrative, or criminal
11 proceedings.

12 I think we're now agreed on all of those, which would be
13 more than what Judge Hetherington gave us. And then I would
14 respectfully continue to ask for the other things, the -- well,
15 yeah. So the other things on cases that didn't ripen into a
16 case that went to court, for example.

17 THE COURT: And I think that's where I have a hard
18 time granting you that request, because, again, I have this
19 concern about a, you know, perhaps chilling law enforcement
20 effect. If there's a doctor out there that for some reason or
21 other, the State still may be looking at but they haven't
22 proceeded, you know, I can't grant that.

23 If there was an investigation -- I think Mr. Duck used an
24 example, maybe the State dropped the investigation because he
25 died. Okay. If there's two of those, throw those in there

1 too. But I can't grant that to include just any investigation
2 that still might be open, because I think it presents too much
3 of a risk and a chilling effect on those prosecution efforts.

4 MR. BARTLE: Can I make one point?

5 THE COURT: Sure, Mr. Bartle. Go ahead.

6 MR. BARTLE: Thank you, your Honor.

7 We would ask for a list -- we need the files. We would
8 ask for a list of the names of the doctors, which you just
9 discussed, to where a case was not proceeded against. As
10 Mr. McCampbell mentioned under the evidence rules, if we're
11 denied material evidence, we're entitled to later move the
12 Court to limit this case and to later move this Court to allow
13 us or to prohibit the State from proceeding on any
14 prescriptions related to those doctors.

15 And if the Court is going to deny us the opportunity to
16 get information about doctors for whom the case did not
17 ultimately bring a -- the State did not bring a criminal case,
18 when we can't even get access to know who they are, then they
19 can't later seek to hold us liable for those prescriptions
20 under our theory of the defense.

21 So we would be entitled under the evidence rules to then
22 move this Court to limit and reduce the amount of prescriptions
23 the State is seeking -- for which the State is seeking to hold
24 us liable.

25 They've argued earlier in this case and many others -- or

1 in this hearing and others, we're responsible for every opioid
2 -- every opioid prescription issued in the state of Oklahoma
3 more than three days' prescription or not for end of life
4 palliative care. That would necessarily include doctors for
5 whom they haven't brought a criminal case if he died, if a
6 witness died, if the statute of limitations passed.

7 So we would be entitled later to move under the evidence
8 rules of Oklahoma to limit the State's case, and we would ask
9 this Court to at least order the State to give us a list of
10 those doctors so that we may appropriately move this Court at a
11 later date when we seek to limit the scope of the plaintiff's
12 case.

13 THE COURT: And so I guess I would ask the State, you
14 know, granted -- given that there's a protective order in
15 place, you know, how would that still -- what concerns do you
16 have with that request by Mr. Bartle?

17 MR. DUCK: Couple of different concerns, your Honor.
18 First, I actually don't think -- I think we're quibbling
19 over the term investigation file. I think we're using it
20 differently. We understood Judge Hetherington to mean the
21 actual investigation file. But the pleadings that we're
22 talking about turning over and any communications made to
23 outside parties not subject to a protective order, that's not,
24 in our view, investigatory material. So we're going to turn
25 that over.

1 On the list of doctors who ultimately were not prosecuted
2 or, you know, disciplined, that could be a pretty long list.
3 And I don't know the obligation of investigations that apply to
4 the attorney general's office or to the state boards, but I
5 suspect that they operate off of tips or, you know, complaints
6 that are made. And I also suspect that many times, those
7 complaints turn out not to pan out.

8 And we would be in a situation where we are dragging
9 innocent doctors' names through the mud in some of those
10 situations because the State followed up on a complaint. And I
11 assume the defendants want to contact these people. Why else
12 do they need their names?

13 And just to be really clear on this point, there are some
14 bad doctors that prescribed opioids in this state. By and
15 large, the vast majority of physicians that prescribe opioids
16 in this state were lied to by these defendants, were victims of
17 the aggressive marketing that they undertook, and would be
18 appalled to learn some of the truths that we've learned about
19 not only these drugs, but the defendants in this litigation.
20 And to drag their names, these innocent parties' names through
21 the mud for no reason, strikes us as entirely inappropriate and
22 unnecessary.

23 We just are willing to give them those -- the list of
24 names of doctors who have been disciplined and/or prosecuted,
25 including those names of people currently being prosecuted,

1 filed charges.

2 THE COURT: Here's what I'm going to do. I'm going
3 to order the State to produce a list of doctors who had been
4 previously investigated, but are currently no longer, with the
5 reasons why. And I'm going to order that produced to the
6 discovery master, and I'm going to ask him to make a ruling on
7 whether or not that should be shared with the defendants.

8 MR. DUCK: In camera?

9 THE COURT: Yes.

10 MR. DUCK: Is there a time on that?

11 THE COURT: I'm asking you to produce it. You tell
12 me how much time you need.

13 MR. DUCK: Abby's saying at least 30 days.

14 THE COURT: Well, I'll give you whatever to the first
15 of the year is. Okay. By January 1?

16 MR. DUCK: Okay. Thank you, Judge.

17 THE COURT: Okay?

18 All right. Anything further, Mr. McCampbell, on your
19 motion?

20 MR. MCCAMPBELL: No, sir. Thank you.

21 THE COURT: Okay.

22 MR. DUCK: In all other respects, though, the
23 discovery master's order is confirmed, we don't need
24 to change -- I mean, we've agreed to produce what we said we
25 were going to produce, what we think is consistent with that

1 order.

2 MR. MCCAMPBELL: I'm sorry. I thought we just went
3 through this. So we get the pleadings and all the cases, not
4 just the eight, the things that were produced to opposing
5 counsel in civil, criminal, and administrative. What was the
6 third category. So no, it's not the same as what Judge
7 Hetherington said.

8 THE COURT: We modified his order, and I think I
9 would like to ask, Mr. McCampbell, if you'll take the lead in
10 maybe preparing a proposed order to submit to me that would
11 reflect the amendments to the order?

12 MR. MCCAMPBELL: Yes, sir.

13 THE COURT: Okay.

14 MR. DUCK: And we agree to produce those, and we
15 believe it's consistent with the order. But we will absolutely
16 go to work to get that material.

17 THE COURT: Okay. Thank you. We're going to go
18 ahead and break again, and then when we come back, I want to
19 take up the defendants' objections to the discovery master's
20 ruling on the State's corporate representative topics. Okay?
21 It's 12:36. How about 12:55? 12:55.

22 (A recess was taken, after which the following
23 transpired in open court, all parties present:)

24 THE COURT: All right. We're going to take up the
25 request for status conference next. I understand we've got

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,)
MIKE HUNTER,)
ATTORNEY GENERAL OF OKLAHOMA,)

Plaintiff,)

vs.)

Case No.: CJ-2017-816
Judge Thad Balkman

- (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)
- (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.)

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.

FILED

DEC 04 2018

In the office of the
Court Clerk MARILYN WILLIAMS

ORDER

The parties appear by counsel for oral arguments on various motions. The State's request for a Status Conference was granted and a status conference was conducted. The Court restated the jury trial will begin May 28, 2019 and admonished the parties to cooperate in discovery in order to adhere to all deadlines leading up to trial.

A de novo review was held on the Discovery Master's Order on Defendants' Motion to Compel Discovery Regarding Claims Data, Discovery Master's Order on Defendants' Motion to Compel Discovery Regarding Criminal and Administrative Proceedings, and Discovery Master's Order Overruling Defendants' Objections to the State's Corporate Representative Topics.

The Discovery Master's Order on Defendants' Motion to Compel Discovery Regarding Claims Data is affirmed.

The Discovery Master's Order on Defendants' Motion to Compel Discovery Regarding Criminal and Administrative Proceedings is affirmed in part, and the State is ordered to produce a list of doctors previously investigated and the reasons for such investigations for in camera

review by the Discovery Master by January 1, 2019. Mr. McCampbell is to prepare a proposed order with other amendments to the Discovery Master's Order on Defendants' Motion to Compel Discovery Regarding Criminal and Administrative Proceedings.

The Discovery Master's Order Overruling Defendants' Objections to the State's Corporate Representative Topics is affirmed.

IT IS SO ORDERED this 3 day of December, 2018!


Chad Balkman, District Judge

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of December, 2018, a true and correct copy of the above and foregoing instrument was emailed to the following:

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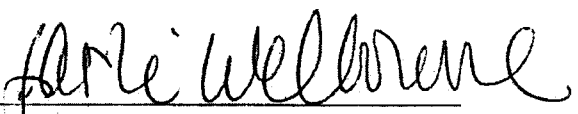
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