IN THE DISTRICT COURT WITHIN AND FOR CLEVELAND COUNTY
STATE OF OKLAHOMA

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

NON-PARTY INTEGRIS CLINTON REGIONAL HOSPITAL'S MOTION TO QUASH SUBPOENA DUCES TECUM

Integris Clinton Regional Hospital ("Hospital"), pursuant to 12 O.S. § 2004.1(C)(3), hereby moves to quash the Subpoena Duces Tecum issued by Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson, Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals Inc. n/k/a Janssen Pharmaceuticals, Inc. ("Defendants"). Undue burden is a reason often cited in these motions, but there is no other way to describe a subpoena that essentially seeks records regarding every patient who has been admitted or treated by Hospital for any "types of pain" at any time during the last 22 years. Producing the records would require an enormous amount of time, would violate the patients' privacy rights, and would include disclosure of many documents with no relevance to Plaintiff's lawsuit. These reasons trigger Oklahoma Discovery Code's mandate that in instances such as this one, "the court by which a subpoena was issued shall quash" the subpoena." 12 O.S. § 2004.1(C)(3).

BACKGROUND

Plaintiff's lawsuit accuses more than a dozen drug companies of making billions of dollars off the sale of opioids through fraudulent marketing campaigns that misrepresented the addictive properties of the painkilling drugs. Defendants issued a Subpoena Duces Tecum to Hospital, seeking the following documents for the "relevant time period," defined as May 1996 up to the present--a period of over 22 years. (Exhibit No. 1, Subpoena Duces Tecum, p. 7). The documents to be produced are as follows:

1. Documents from the relevant time period that address or otherwise relate to the types of pain, including chronic pain, that you or anyone associated with your facility diagnose or treat.

2. Documents from the relevant time period that discuss or otherwise address the role of opioid medications in the treatment of all pain, including chronic pain.

3. Documents from the relevant time period that address or otherwise relate to the types of pain therapy, including chronic pain therapy, that you offer to patients, including pharmacologic therapy.

4. Prescription guidelines, policies, practices, or procedures from the relevant time period that address or otherwise relate to pharmacologic treatment that you offer to patients for pain management, including chronic pain management.

5. Guidelines, policies, practices, procedures, or communications from the relevant time period that discuss or otherwise relate to the appropriateness of prescribing opioid medication.

6. Bulletins or updates to healthcare providers from the relevant time period that address or otherwise relate to the appropriate use of opioid medications for treatment of all pain, including chronic pain.

7. Materials from any Continuing Medical Education presentation that you sponsored, hosted, or presented within the relevant time period that discuss or otherwise address the use of opioid medications for pain management, including chronic pain management.

8. Reports or communications from the relevant time period that discuss or relate to adverse events from opioid medications experienced by patients to whom you or anyone associated with your facility prescribed opioid medications for the treatment of all pain, including chronic pain.

9. Bulletins, newsletters, updates, or other mass communications to employees from the relevant time period that address or otherwise relate to the Hospital Consumer Assessment of Healthcare Providers and Systems ("HCAHPS") survey.

10. Your HCAHPS survey results from October 2006 to the present.

(Exhibit No. 1, pp. 7-8).

ARGUMENT AND AUTHORITIES

I. THE SUBPOENA IS UNDULY BURDENSOME IN THE EXTREME.

Title 12 O.S. § 2004.1(C)(3)(a)(4) states that a trial court shall quash a subpoena that "subjects a person to undue burden." There is no other way to describe the Subpoena's Topic 1, which seeks all of Hospital's documents "that address or relate to the types of pain, including chronic pain, that [Hospital] or anyone associated with your facility diagnose or treat." Virtually everyone who comes to a hospital is experiencing some kind of pain, and needs a diagnosis or treatment. Defendants' Subpoena would require production of *all* of these documents from *all* of these patients for *all* of the last 22-plus years. This would include hospital records, notes made by nurses and doctors, prescriptions, and so on. And it would even go beyond Hospital's records, because the Subpoena seeks records from "anyone associated with your facility," meaning past

and present doctors who might have privileges at Hospital but also practice elsewhere -- again for the last 22-plus years. Further, while the Subpoena prefaces the ten Topics by stating it applies to documents "relating to chronic pain management," (Exhibit No. 1, p. 7), Topic One is not so limited, and simply states, "types of pain, including chronic pain."

Producing documents for Topic 2 would also be extremely burdensome. Documents that "discuss the role of opioid medications in the treatment of all pain" would include every prescription that stated when and how many pills to take, because each prescription would relate to "the role" of medication. Topic 3 is even broader, because it seeks documents related to "pain therapy," which would include every time a patient is offered anything as mild as an aspirin for a headache.

The Oklahoma Supreme Court has consistently taken the position that "[d]iscovery may be limited or denied when discoverable material is sought in an excessively burdensome manner." *Crest Infiniti, II, LP v. Swinton*, 2007 OK 77, ¶ 16, 174 P.3d 996, 1004. A trial judge should consider whether a discovery request "is needlessly or excessively intrusive, burdensome, or oppressive." *YWCA of Oklahoma City v. Melson*, 1997 OK 81, ¶ 25, 944 P.2d 304, 312. This is in conformity with the principle that a plaintiff's right to discovery "is not statutorily unlimited" and "stands subject to judicial supervision." *Id.*

Last year, in quashing a subpoena on the grounds it was overly broad, unduly burdensome, and exceeding the proportional needs of the case, an Oklahoma federal court noted that the subpoena at issue used blanket terms such as "all documents," "all marketing materials," "all documents regarding", "all documents indicating," "all documents indicating or referencing," "pertaining to," and "all deposition transcripts"; according to the Court, "a discovery request is facially overly broad when it uses such omnibus phrases since it requires the responding party to

engage in 'mental gymnastics' to determine what information may or may not be remotely responsive." *Ward v. Liberty Ins. Corp.*, 2018 WL 991546, at *3 (W.D. Okla. 2018).

Oklahoma courts look to federal decisions in interpreting discovery statutes obtained from the Federal Rules of Civil Procedure. *Heffron v. Dist. Court Oklahoma Cty.*, 2003 OK 75, ¶ 13, 77 P.3d 1069, 1076. Just as in the *Ward* Western District case, Defendants' Subpoena uses the broadest terms possible: "[a]ll documents and communications," "Including but not limited to," and "address or otherwise relate to," -- all the type of language that makes the Subpoena overly broad and burdensome.

For these reasons, the Subpoena should be quashed.

II. THE SUBPOENA FAILS TO ALLOW REASONABLE TIME FOR COMPLIANCE.

Title 12 O.S. § 2004.1(C)(3)(a)(1) states that the court shall quash a subpoena that "fails to allow reasonable time for compliance." Hospital incorporate its argument made above, and asserts that it would take a tremendous amount of time to comply with the Subpoena.

III. THE SUBPOENA SEEKS PRIVILEGED MATERIAL.

Title 12 O.S. § 2004.1(C)(3)(a)(3) states that the court shall quash a subpoena that "requires disclosure of privileged or other protected matter and no exception or waiver applies." The Subpoena seeks documents relating to pain (Topic 1), documents discussing the role of opioid medications (Topic 2), and documents relating to pain therapy offered to patients (Topic 3). Each of these encompasses documents specific to *patients*. Disclosure would violate HIPAA, the Health Insurance Portability and Accountability Act, which was enacted in part to "ensure the integrity and confidentiality of [patient] information." *Holmes v. Nightingale*, 2007 OK 15, ¶ 5, 158 P.3d 1039, 1049. While 45 C.F.R. § 164.512(e) provides that a covered entity may disclose protected health information in response to a subpoena, the entity may do so *only* if there is reasonable

assurance that notice has been given the patient affected or that reasonable efforts have been made to secure a proper qualified protective order. It would be impossible to find and give notice, which Defendants have certainly not even attempted.

Aside from HIPAA, the information is statutorily protected by 12 O.S. § 2503(B), Oklahoma's physician-patient privilege, which grants every patient the "privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional condition." *Id.* at § 2503(B). The Subpoena seeks information concerning about documents used to "diagnose or treat" (Topic 1), "treatment" (Topic 2), and "therapy" (Topic 3). The modern codification of this privilege serves three core policy objectives: to maximize unfettered patient communication with medical professionals, so that any potential embarrassment arising from public disclosure will not deter people from seeking medical help and securing adequate diagnosis and treatment; to encourage medical professionals to be candid in recording confidential information in patient medical records; and to protect patients' reasonable privacy expectations against disclosure of sensitive personal information. *In re Grand Jury Investigation in New York Cty.*, 98 N.Y.2d 525, 529–30, 779 N.E.2d 173, 175 (2002).

The Subpoena is at odds with these principles, the statutory privilege, and HIPAAA. It should be quashed.

IV. THE SUBPOENA SEEKS IRRELEVANT MATERIAL.

Title 12 O.S. § 2004.1(C)(3)(a)(3) requires the court to quash a subpoena that "requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title." Title 12 O.S. § 3226(B)(1) limits discovery to "any matter, not privileged, which is **relevant** to any party's claim or defense, reasonably calculated to lead to

the discovery of admissible evidence and **proportional** to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

There are two portions of this statute that are especially important here. First, relevance. In its 2017 amendments to the scope of discovery, the Oklahoma Legislature eliminated language that provided for discovery of any matter "relevant to the subject matter," and replaced it with the current language that parties may obtain discovery regarding any matter "which is relevant to any party's claim or defense." The importance of this change is that discovery is no longer considered in the broader sense of whatever the "subject matter" of the lawsuit concerns. It now focuses on what is relevant to a party's "claim or defense."

Where the meaning of a statute has been the subject of judicial determination, "the subsequent amendment thereof reasonably indicates the legislative intention to change the law." *Tom P. McDermott, Inc. v. Bennett*, 1964 OK 197, ¶ 12, 395 P.2d 566, 569–70. The change mirrors the current federal equivalent, Federal Rule of Civil Procedure 26 (b)(1), which also states that parties may obtain discovery regarding any nonprivileged matter "that is relevant to any party's claim or defense." There is no doubt that this change "narrowed the scope of discovery," as the federal courts have concluded. *See Martin v. Interstate Battery Sys. of Am., Inc.*, 2013 WL 6528828, at n. 1 (N.D. Okla. 2013), adhered to as amended, 2014 WL 1310264 (N.D. Okla. 2014).

Plaintiffs' lawsuit makes serious accusation against Defendant drug companies regarding the marketing and use of opioids. It makes no accusations against Hospital, and in no way directly

implicates any of Hospital' actions that are the subject of the Subpoena: types of pain that are diagnosed or treated by Hospital (Topic 1); the role of opioids in the treatment of pain by the Hospital (Topic 2); pain therapy (Topic 3); pharmacologic treatment offered by Hospital (Topic 4); the appropriateness of prescribing opioids by Hospital (Topic 5); the appropriate use of opioids by Hospital (Topic 6); education materials concerning opioids (Topic 7); adverse effects of opioids (Topic 8); and bulletins and results concerning a Hospital Consumer Assessment of Healthcare Providers and Systems survey (Topics 9 & 10). While "the subject matter" (the former statute's standard for discovery) of Plaintiff's lawsuit concerns opioids, the lawsuit's actual claims and defenses (the current standard) concern the drug companies' alleged violations of the Oklahoma Medicaid False Claims Act, the Medicaid Program Integrity Act, the Consumer Protection Action, plus claims of public nuisance, fraud, and unjust enrichment. All these claims are solely directed at the drug companies. The fact that opioids may have been given to Hospital's patients is outside the scope of the lawsuit's claims, as well as outside Defendants' affirmative defenses, which range from the statute of limitations to federal preemption to unclean hands. Defendants have attempted to cast some of the blame for the misuse of opioids on the medical community in general, but there is nothing in the Subpoena that ties Hospital to alleged misleading marketing practices by the defendants. The lawsuit names two physicians and several groups with misrepresenting the nature of opioid use, none of whom have any connection to Hospital.

Second, the Legislature made an additional change to § 3226(B)(1)(a) by adding a proportionality requirement also found in the current federal equivalent, so that the scope of discovery is what is, in part, proportional to the needs of the case." This was one of the factors used in the Western District *Ward* decision to quash that subpoena, 2018 WL 991546. Proportionality addresses "the importance of the issues at stake in the action, the amount in

controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." 12 O.S. § 3226(B)(1)(a).

Certainly, the issues at stake in the instant case are important. But most of the other factors do not justify the production of the vast amounts of materials sought in the Subpoena. In particular, the burden of production would be great, and nothing has indicated that production would help this Court resolve the issues involving these particular Defendants.

CONCLUSION

For these reasons, non-party Integris Clinton Regional Hospital respectfully requests that this Court quash Defendants' Subpoena Duces Tecum.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 8th day of February, 2019, a true and correct copy of the above and foregoing instrument was placed in the U.S. mail, with full and proper first-class postage thereon, addressed to the following:

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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, v. PURDUE PHARMA L.P., *et al.*, Defendants.	Case No. CJ-2017-816 Judge Thad Balkman William C. Hetherington Special Discovery Master

SUBPOENA DUCES TECUM

STATE OF OKLAHOMA)
) ss.
COUNTY OF CLEVELAND)

TO: **Custodian of Records**
Integris Clinton Regional Hospital
100 N. 30th
Clinton, OK 73601

GREETINGS:

YOU ARE HEREBY COMMANDED to produce by mail all documents and things described in Exhibit A attached hereto. These documents should be **postmarked no later than February 11, 2019** and should be mailed to the law offices of **Foliart, Huff, Ottaway & Bottom, 201 Robert S. Kerr Avenue, 12th Floor, Oklahoma City, OK 73102.**

In order to allow objections to the production of documents and things to be filed, you should not produce them until the date specified in this subpoena, and if an objection is filed, until the court rules on the objection.

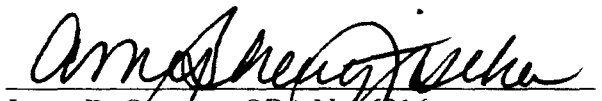
This subpoena is authorized pursuant to 12 O.S. § 2004.1 and all parties to this case are being given notice of the issuance of this subpoena. The provisions of 12 O.S. § 2004.1(C), relating to your protection as a person subject to a subpoena, and 12 O.S. § 2004.1(D) & (E), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Please direct inquiries regarding this subpoena to Larry Ottaway: tel: (405) 232-4633; email: larryottaway@oklahomacounsel.com.

EXHIBIT 1

HEREOF FAIL NOT, UNDER PENALTY OF LAW.

Issued this January 18, 2019.

By: 

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Oklahoma Session Law, 2010 O.S.L. 50, 2004.1 (c), (d), (e)

SECTION 2. AMENDATORY 12 O.S. 2001, Section 2004.1, as last amended by Section 5, Chapter 12, O.S.L. 2007 (12 O.S. Supp. 2009, Section 2004.1), is amended to read as follows:

Section 2004.1.

C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney, or both, in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

2. a. A person commanded to produce and permit inspection, copying, testing or sampling of designated books, papers, documents, electronically stored information or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

b. Subject to paragraph 2 of subsection D of this section, a person commanded to produce and permit inspection, copying, testing or sampling or any party may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve written objection to inspection, copying, testing or sampling of any or all of the designated materials or of the premises, or to producing electronically stored information in the form or forms requested. An objection that all or a portion of the requested material will or should be withheld on a claim that it is privileged or subject to protection as trial preparation materials shall be made within this time period and in accordance with subsection D of this section. If the objection is made by the witness, the witness shall serve the objection on all parties; if objection is made by a party, the party shall serve the objection on the witness and all other parties. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. For failure to object in a timely fashion, the court may assess reasonable costs and attorney fees or take any other action it deems proper; however, a privilege or the protection for trial preparation materials shall not be waived solely for a failure to timely object under this section. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

3. a. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(1) fails to allow reasonable time for compliance,

(2) requires a person to travel to a place beyond the limits allowed under paragraph 3 of subsection A of this section,

(3) requires disclosure of privileged or other protected matter and no exception or waiver applies,

(4) subjects a person to undue burden, or

(5) requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title.

b. If a subpoena:

(1) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena. However, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. DUTIES IN RESPONDING TO SUBPOENA.

1. a. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

b. If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena shall produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

c. A person responding to a subpoena is not required to produce the same electronically stored information in more than one form.

d. A person responding to a subpoena is not required to provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. If such showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subparagraph c of paragraph 2 of subsection B of Section 3226 of this title. The court may specify conditions for the discovery.

2. a. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

b. If information is produced in response to a subpoena that is subject to a claim or privilege or of protection as trial preparation material, the person making the claim may notify any party that

received the information of the claim and the basis for such claim. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies the party has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, such shall take reasonable steps to retrieve the information. The person who produced the information shall preserve the information until the claim is resolved. This mechanism is procedural only and does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived.

E. CONTEMPT.

Failure by any person without adequate excuse to obey a subpoena served upon him or her may be deemed a contempt of the court from which the subpoena issued.

EXHIBIT A

DEFINITIONS

1. "Communication" means transmissions, exchanges, or transfers of information in any form between two or more persons, including by telephone, facsimile, telegraph, telex, text message, letter, email, mobile messaging application, or other medium.

2. "Document" includes, but is not limited to, any electronic, written, printed, handwritten, graphic matter of any kind, or other medium upon which intelligence or information can be recorded or retrieved.

3. "Chronic pain" means pain persisting for longer than one month beyond resulting of the underlying insult or pain persisting beyond three months. *See, e.g.*, U.S. Food & Drug Administration, Patient-Focused Drug Development Meeting on Chronic Pain, (2018), at 7, https://www.fda.gov/downloads/Drugs/NewsEvents/UCM613195.pdf.

4. "Pharmacologic therapy" means over-the-counter medications and prescription drugs. *See, e.g.*, *id.* at 13.

5. "Relevant time period" means the date range that is applicable in this litigation, which is from May 1996 to the present.

DOCUMENTS TO BE PRODUCED

All documents and communication in your possession, custody, or control relating to chronic pain management, including but not limited to the following:

1. Documents from the relevant time period that address or otherwise relate to the types of pain, including chronic pain, that you or anyone associated with your facility diagnose or treat.

2. Documents from the relevant time period that discuss or otherwise address the role of opioid medications in the treatment of all pain, including chronic pain.

3. Documents from the relevant time period that address or otherwise relate to the types of pain therapy, including chronic pain therapy, that you offer to patients, including pharmacologic therapy.

4. Prescription guidelines, policies, practices, or procedures from the relevant time period that address or otherwise relate to pharmacologic treatment that you offer to patients for pain management, including chronic pain management.

5. Guidelines, policies, practices, procedures, or communications from the relevant time period that discuss or otherwise relate to the appropriateness of prescribing opioid medication.

6. Bulletins or updates to healthcare providers from the relevant time period that address or otherwise relate to the appropriate use of opioid medications for treatment of all pain, including chronic pain.

7. Materials from any Continuing Medical Education presentation that you sponsored, hosted, or presented within the relevant time period that discuss or otherwise address the use of opioid medications for pain management, including chronic pain management.

8. Reports or communications from the relevant time period that discuss or relate to adverse events from opioid medications experienced by patients to whom you or anyone associated with your facility prescribed opioid medications for the treatment of all pain, including chronic pain.

9. Bulletins, newsletters, updates, or other mass communications to employees from the relevant time period that address or otherwise relate to the Hospital Consumer Assessment of Healthcare Providers and Systems ("HCAHPS") survey.

10. Your HCAHPS survey results from October 2006 to the present.