



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA
HUNTER, ATTORNEY GENERAL OF
OKLAHOMA,

Plaintiff,

v.

PURDUE PHARMA L.P., et al.,

Defendants.

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.
FILED }
MAR 06 2019 }
In the office of the }
Court Clerk MARILYN WILLIAMS }

Case No. CJ-2017-816

Honorable Thad Balkman

DEFENDANTS' REPLY IN SUPPORT OF
MOTION FOR A CONTINUANCE

The State responds to Defendants' motion for a continuance by resorting to inflammatory rhetoric, speculation, and misleading, irrelevant assertions that have nothing to do with the motion before this Court. The State does not dispute that it violated the Special Discovery Master's Order requiring the State to *complete* its discovery and productions by February 5, 2019 for a host of long-outstanding discovery requests. (Jan. 17, 2019 Hr'g Order at 7 (emphasis added).) The State still remains in violation of this order, among others, despite flooding Defendants with an additional *1.6 million* pages – and almost doubling its prior document production – well after the February 5 deadline, and in the waning days of fact discovery. Nor does the State dispute any item in the long list of missing custodial files for witnesses or other missing document categories. (Defs' Mot., Ex. A.)

Defendants have been forced to file motion after motion, and obtain order after order, to wrest basic and essential fact discovery from the State. Yet the State has continued to violate orders to produce this discovery, thereby frustrating the Court's scheduling framework and prejudicing Defendants. The State strategically waited until the end of fact discovery to nearly double its document productions – with more to come – and prevent Defendants from using

those documents for fact depositions that had already occurred or follow-up discovery. The State's private counsel have not devoted the appropriate time, resources, or attention to meeting the State's substantial discovery obligations, despite repeated requests from Defendants and orders from the Court. Rather, an inordinate amount of time, effort, and resources have been expended by the State's outside lawyers with unnecessary motions, hyperbole, name calling, and manufacturing unnecessary disputes and controversies that have only distracted from the actual work that should have been taking place to prepare the case for trial. It is the State, and not the Court or Defendants, who has created the present situation. Fundamental fairness requires that the Court should remedy the consequences of the State's conduct by granting Defendants' motion.

Far from seeking to avoid taking further discovery, as the State erroneously asserts (Opp. at 4), Defendants have been clear in their moving papers that Defendants should be allowed to re-open necessary discovery against the State to the full extent warranted by the State's delinquent discovery responses. (Defs' Mot. at 4.) No doubt, the State will be releasing another flood of documents if it is ever to comply with the Court's orders. Yet, even as matters currently stand, Defendants must be afforded a fair opportunity to depose or re-depose witnesses, update expert disclosures, and depose or re-depose the State's experts using the voluminous documents that have only just been released at the end of fact discovery and any productions that are yet to come.

The merits of Defendants' motion have only strengthened since it was filed. By March 1, 2019, the State was "Ordered to *complete* database and code production" for certain State healthcare and claims databases "in a form that is either ordinarily maintained or in a de-identified form which is reasonably usable with Defendants able to obtain the relevant

information.” (Feb. 14, 2019 Hr’g Order at 4 (emphasis added).) “If Defendants continue to be denied access to necessary databases,” then “delay may be the result” of the State’s conduct. (*Id.*) Yet the State violated this order as well. The State still has not produced medical examiner and Fatal Unintentional Poisoning System data in a format that would allow decedents to be matched to Medicaid or Health Choice data. (March 6, 2019 Email from D. Roberts to T. Duck (Ex. A).) Pharmacy and medical claims data still have not been provided to Defendants to allow entries to be compared between the databases and studied. (*Id.*) Defendants have long been deprived of these key data sources, which are needed for the expert-intensive work in this case – both to prepare expert reports and to depose the State’s experts on their novel theories.

Even worse, ongoing deposition and other discovery has revealed a disturbing pattern of more fundamental violations of the State’s discovery duties. As Purdue has shown in its separate Emergency Motion to Compel, the State’s private attorneys did not send the required litigation hold notices to all custodians, leaving open the question of how much potentially responsive evidence the State’s employees may have inadvertently or intentionally destroyed. (Purdue Emergency Mot. to Compel at 5-8.) For instance, the State’s private counsel waited 302 days after filing suit to issue a litigation hold to the OHCA-contracted group at the University of Oklahoma College of Pharmacy, which administers the SoonerCare pharmacy benefits program, reviews and approves (or denies) all prior authorizations for prescription medications for SoonerCare members, prepares materials for and leads all Drug Utilization Review board meetings, and makes recommendations to the DUR board about prior authorization requirements. (*Id.* at 6-7.) The State also waited almost 10 months to issue a litigation hold to the Department of Mental Health and Substance Abuse Services, one of the agencies for which the State seeks damages. (*Id.* at 7.) It remains undetermined how much discovery has been lost

irretrievably from the State's private counsel's failure to preserve documents from these key sources.

Other key documents remain missing. Documents from senior employees at State agencies still remain unproduced. The State knows about these deficiencies from the depositions but will not address them. Among these still-missing documents are those held by the Chief Medical Officer for the Employee Group Insurance Division, the Senior Director of Pharmacy at the Oklahoma Healthcare Authority, and the spokespersons for the Attorney General's Office. (*Id.* at 6.) The State has failed to produce custodial files of 54 individuals likely to possess information relevant to the claims and defenses at issue in this lawsuit. (*Id.* at 8-10.) Among these are persons whom *the State* identified in its initial disclosures and others as having "a significant number of relevant documents." (*Id.* at 9.)

Though the State points to Defendants' document productions as also being voluminous (Opp. at 2-3), that only supports Defendants' motion to extend the time for expert discovery and trial. Defendants have not objected to the State's belated supplements to its expert disclosures to account for ongoing document productions. Perhaps more importantly, the State was ordered by the Special Discovery Master to *complete* certain document productions by February 5, 2019, and certain data productions by March 1. Yet the State indisputably violated those orders. Those orders were necessary because the State refused to produce basic fact discovery in critical areas, whereas Defendants have been producing voluminous documents in earnest throughout the discovery period.

It is obvious that the State is far behind on its discovery obligations. It is long past time for the State to get going. (*See Opp.* at 5.) Defendants cannot be punished for the State's failure to comply with its basic discovery obligations and Court orders compelling such discovery.

Defendants need the discovery that is past due – and still outstanding – to properly depose State fact witnesses, prepare Defendants’ expert disclosures, and depose the State’s more than two-dozen experts. Defendants must then prepare substantial and complex briefing on *Daubert* and summary judgment issues – with multiple hearings – all of which must be ruled upon long before trial. The State’s conduct prejudices Defendants’ opportunity to properly present these issues to the Court and truncates the Court’s opportunity to review and resolve them.

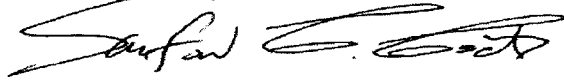
Unless the schedule is continued, for example, Defendants will be put in the untenable position of having to brief *Daubert* challenges to the admissibility of the State’s experts before their depositions are complete. Dispositive motions are due a day before the scheduled *Daubert* hearing. By the time the motions are fully briefed and the *Daubert* hearings concluded, the Court will have only two weeks to consider and decide these critical and threshold legal issues, which may eliminate or narrow issues and evidence to be presented at any trial. All of this leads to the extensive pretrial work that is necessary such as preparing deposition designations from dozens of witnesses (with objections and rulings), exhibit lists for the millions of pages of documents in the case, motions *in limine* on a host of evidentiary issues, and other pretrial briefing, hearings, and rulings.

Whatever may be said about the accelerated schedule that has been in place, it should now be continued to account for the State’s dilatory conduct in discovery and the broad and complex work leading up to trial. As Defendants submitted in their moving papers, the trial date should be continued to September 16, 2019; deadlines for expert discovery, *Daubert* motions, dispositive motions, and pretrial filings should be suspended pending further order after the parties submit a proposed schedule; and Defendants should be given leave to re-open necessary

discovery from the State arising from voluminous discovery belatedly produced by the State on or since February 21, 2019.

Date: March 6, 2019

Respectfully submitted,



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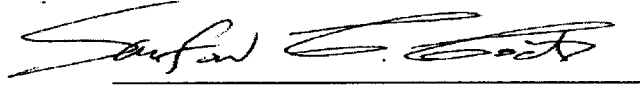
*Purdue Pharma Inc., and The Purdue
Frederick Company Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2019, I caused a true and correct copy of the following:

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR A CONTINUANCE

to be served via email upon the counsel of record listed on the attached Service List.



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EXHIBIT A

Subject:

FW: State v. Purdue et al. - Claims data follow up

From: Roberts, David K. (DC) [mailto:droberts2@omm.com]**Sent:** Wednesday, March 6, 2019 2:26 PM**To:** Trey Duck <tduck@nixlaw.com>**Cc:** Nathan Hall <nhall@nixlaw.com>; EXT sbrody@omm.com <sbrody@omm.com>; EXT

Joshua.burns@crowedunlevy.com <Joshua.burns@crowedunlevy.com>; LaFata, Paul <Paul.LaFata@dechert.com>; EXT

Brian Ercole <brian.ercole@morganlewis.com>; Tam, Jonathan <Jonathan.Tam@dechert.com>; EXT Harvey Bartle IV

<harvey.bartle@morganlewis.com>; Larry Ottaway <larryottaway@oklahomacounsel.com>; Amy Fischer

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<mark.fiore@morganlewis.com>; rwhitten@whittenburrage.com; mburrage@whittenburrage.com; Jeff

Angelovich <jangelovich@nixlaw.com>; Ross Leonoudakis <rossl@nixlaw.com>; Winn Cutler <winncutler@nixlaw.com>;

Lisa Baldwin <lbaldwin@nixlaw.com>; Brittany Kellogg <bkellogg@nixlaw.com>; Amanda Thompson

<athompson@nixlaw.com>

Subject: RE: State v. Purdue et al. - Claims data follow up

Trey – I haven't received a response to this message. Please provide the requested information as soon as you're able. Thank you.

David K. Robertsdroberts2@omm.com

O: +1-202-383-5155

From: Roberts, David K. (DC)**Sent:** Sunday, March 3, 2019 12:46 PM**To:** 'Trey Duck'**Cc:** Nathan Hall ; Brody, Steve ; joshua.burns@crowedunlevy.com; LaFata, Paul ; Ercole, Brian M.(<brian.ercole@morganlewis.com>) ; Tam, Jonathan ; harvey.bartle@morganlewis.com; Larry Ottaway ; Amy Fischer(<amyfischer@oklahomacounsel.com>) ; John Sparks ; Drew Pate ; Brad Beckworth ; mark.fiore@morganlewis.com;rwhitten@whittenburrage.com; mburrage@whittenburrage.com; Jeff Angelovich ; Ross Leonoudakis ; Winn

Cutler ; Lisa Baldwin ; Brittany Kellogg ; Amanda Thompson

Subject: RE: State v. Purdue et al. - Claims data follow up

Trey:

To follow up, your observation that Janssen should "start trying to use the data" produced to date by the State gets to the heart of the problem with the State's discovery failures. We have. But data that is incomplete, subject to deficient de-identification processes, or corrupted is not usable. It is not "good data."

I take from your email that you believe the corrupted and incomplete MMIS pharmacy claims data has been remedied by the replacement files served on March 1. We are reviewing and will let you know whether the data integrity issues with that set have in fact been corrected.

Your response to my question about Health Choice data is no response at all. The fact that "the numbers are what the numbers are" is the problem. That there may have been "two different systems over time so there are two different numbers for the different time periods" does not explain the discrepancy between pharmacy and medical claims in the State's production. To repeat, there are 347,972 unique de-identified patient IDs in prescription data. Of those, only

223,631 are found in medical data, while 124,341 (35.7%) IDs are not found in medical data. This should not be an artefact of "different systems" because the State said it would assign unique, consistent numbers to patients during the de-identification process it affirmatively undertook in order to justify its decision to mask patient identities. As you know, Judge Hetherington ordered the State to complete the process of producing the data in a de-identified and "cross-walked" form by 4 pm on March 1, 2019. Your email appears to be an explicit admission that the State failed to do so for the Health Choice data. Please confirm or explain how any other conclusion flows from your explanation of the data discrepancy.

Separately, although your email states that you believe the State has complied with its obligations, we have not seen any production of medical examiner or Fatal Unintentional Poisoning System data in a format that would allow decedents to be matched to MMIS or Health Choice data. As you know, this is one of the issues argued during the February 14 hearing on Janssen's emergency motion to compel. The motion was granted. If you did include this information in any of the productions the State has made since February 18, please let us know.

The State needs to meet its production obligations and it needs to do so now. We are months past the time when this information should have been provided to us in a usable format.

David K. Roberts
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From: Trey Duck <tduck@nixlaw.com>
Sent: Saturday, March 2, 2019 1:11 AM
To: Roberts, David K. (DC) <droberts2@omm.com>
Cc: Nathan Hall <nhall@nixlaw.com>; Brody, Steve <sbrody@omm.com>; joshua.burns@crowedunlevy.com; LaFata, Paul <paul.lafata@dechert.com>; Ercole, Brian M. (brian.ercole@morganlewis.com) <brian.ercole@morganlewis.com>; Tam, Jonathan <jonathan.tam@dechert.com>; harvey.bartle@morganlewis.com; Larry Ottaway <larryottaway@oklahomacounsel.com>; Amy Fischer (amyfischer@oklahomacounsel.com) <amyfischer@oklahomacounsel.com>; John Sparks <sparksj@odomsparks.com>; Drew Pate <dpate@nixlaw.com>; Brad Beckworth <bbeckworth@nixlaw.com>; mark.fiore@morganlewis.com; rwhitten@whittenburragelaw.com; mburrage@whittenburragelaw.com; Jeff Angelovich <jangelovich@nixlaw.com>; Ross Leonoudakis <rossl@nixlaw.com>; Winn Cutler <winncutler@nixlaw.com>; Lisa Baldwin <lbaldwin@nixlaw.com>; Brittany Kellogg <bkellogg@nixlaw.com>; Amanda Thompson <athompson@nixlaw.com>
Subject: Re: State v. Purdue et al. - Claims data follow up

Yes

Trey Duck
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3600 N. Capital of Texas Hwy.
Suite B350
Austin, TX 78746
O: (512) 328-5333
D: (512) 577-5704

On Fri, Mar 1, 2019 at 10:07 PM -0600, "Roberts, David K. (DC)" <droberts2@omm.com> wrote:

Trey: we review productions promptly upon receipt. As usual, no cover letter or other information accompanied the productions you appear to refer to. We again ask you to live up to your prior promises to describe the materials you're producing upon request. Please do so as soon as you can, including the bates ranges you believe remedy the deficiencies we have identified.

Please also confirm whether you now believe the State is in compliance with all orders to produce the information we have now been seeking for over 14 months.

Dave Roberts
O'Melveny & Myers LLP
(202) 383-5155 (Direct)
(417) 860-6736 (Mobile)

Sent from my iPhone

On Mar 1, 2019, at 10:24 PM, Trey Duck <tduck@nixlaw.com> wrote:

There are no deficiencies. You received a production today by year for the MMIS data. Please look at the productions you receive before you hurl accusations. It will save everyone time.

For health choice, the numbers are what the numbers are. There were two different systems over time so there are two different numbers for the different time periods. But you undoubtedly have what you need.

Please start trying to USE the data rather than actively looking for things to complain about. The data is usable. It is good data. It is not deficient. It will allow you to do what you want to do. You have not tried. Your emails are sent in bad faith.

We are finished appeasing your whims.

Trey Duck

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Direct: (512) 599-5704
tduck@nixlaw.com

Sent from my iPhone

On Mar 1, 2019, at 9:05 PM, Roberts, David K. (DC) <droberts2@omm.com> wrote:

Trey and Nathan - your emails do not address either of the important deficiencies I mentioned. Please provide the information we requested promptly so that we do not have to trouble Judge Hetherington yet again with the State's delays.

Dave Roberts
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(202) 383-5155 (Direct)
(417) 860-6736 (Mobile)

Sent from my iPhone

On Mar 1, 2019, at 9:49 PM, Trey Duck <tduck@nixlaw.com> wrote:

Steve,

I have an amazon prime account if you'd like to receive these in two days. Free two-day shipping. It's incredible. Not sure how they do it really. Please let me know. Thanks,

Trey Duck

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Sent from my iPhone

On Mar 1, 2019, at 7:32 PM, Nathan Hall <nhall@nixlaw.com> wrote:

Counsel:

In addition to OHCA-00445511, which provides the answers for Mr. Brody's "Code List Deficiencies" identified at our last hearing (including the 80k-plus diagnosis codes he said he was familiar with), please find the following resources regarding how to read health-insurance claims data:

[CPT 2019 \(CPT / Current Procedural Terminology \(Professional Edition\)\)](#)

[HCPCS 2019 Level II Expert \(HCPCS Level II Expert \(Spiral\)\)](#)

[ICD-10-CM Professional for Physicians 2016.](#)

Have a great weekend.

Nathan Hall

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From: "Roberts, David K. (DC)"
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Date: Tuesday, February 26, 2019 at 6:46 PM
To: Trey Duck <tduck@nixlaw.com>
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Subject: RE: State v. Purdue et al. - Claims data follow up

Trey – just following up. Please let us know when we can expect a response to the points we identified below.

Best,
Dave

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From: Roberts, David K. (DC)
Sent: Friday, February 22, 2019 10:53 PM
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Subject: State v. Purdue et al. - Claims data follow up

Trey:

I'm writing to follow up regarding additional deficiencies and questions about the State's production of claims data. As you can surely appreciate, every deficiency prejudices our ability to defend this case, so we ask that you respond as soon as you are able. We're happy to discuss by phone if you like.

First, as to MMIS data, it appears that OHCA-00445507 ("pharmacy.txt," 55 GB) is unsalvageably corrupted. Please reproduce a readable version promptly. In addition, the file overall appears to be missing significant data. It contains data for 1996-2008 only, whereas other MMIS data sources include years 1996-2018. The missing data is potentially important for our experts' work.

Second, as Steve Brody referenced during last week's hearing before Judge Hetherington, there is a large and unexpected discrepancy between HealthChoice pharmacy and medical claims data. Specifically, there are 347,972 unique de-identified patient IDs in prescription data. Of those, only 223,631 are found in medical data, while 124,341 (35.7%) IDs are not found in medical data. Because of this discrepancy, it's not clear that the pharmacy and medical claims data can be crosswalked with one another—that is, we cannot tell whether the same IDs in prescription and medical data are assigned to the same patients. That is especially so given the absence of any demographic information that could be used to confirm a match. There may be some anomaly in HealthChoice coverage that explains how 124,341 HealthChoice patients received opioid prescriptions reimbursed by the program without a documented visit to a doctor, but absent such an explanation, the State's production of medical claims data appears to be incomplete.

Thanks,
Dave

O'Melveny

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