



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

vs.

- (1) PURDUE PHARMA L.P.;
- (2) PURDUE PHARMA, INC.;
- (3) THE PURDUE FREDERICK COMPANY,
- (4) TEVA PHARMACEUTICALS USA, INC.;
- (5) CEPHALON, INC.;
- (6) JOHNSON & JOHNSON;
- (7) JANSSEN PHARMACEUTICALS, INC,
- (8) ORTHO-MCNEIL-JANSSEN
PHARMACEUTICALS, INC., n/k/a
JANSSEN PHARMACEUTICALS;
- (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.

For Judge Balkman's

Consideration STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED

MAY 09 2019

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

TEVA PHARMACEUTICALS USA, INC., CEPHALON, INC., WATSON
LABORATORIES, INC., ACTAVIS LLC, AND ACTAVIS PHARMA, INC., f/k/a
WATSON PHARMA, INC.'S EMERGENCY OBJECTION TO, AND/OR MOTION TO
AMEND, THE SPECIAL DISCOVERY MASTER'S ORDER ON INVESTIGATORY
SUMMARIES AND EGID DOCUMENTS AND COMMUNICATIONS

Defendants Teva Pharmaceuticals USA, Inc. and Cephalon, Inc., Watson Laboratories, Inc., Actavis, LLC, and Actavis Pharma, Inc. f/k/a Watson Pharma, Inc. (collectively, the "Moving Defendants") respectfully object to, and/or move to amend, the Special Discovery Master Order (the "Order") circulated via email on May 6, 2019, attached hereto as **EXHIBIT A**. For the following reasons, the Court should amend the Order and require the State to produce (1) the

medical examiners summaries which are undisputedly relevant and not privileged, and (2) all reports and communications exchanged between the Employee Group Insurance Department (“EGID”) and the State’s current and prior pharmacy benefits managers before May 15, 2019.

I. INTRODUCTION

Judge Hetherington entered an order on the Moving Defendants’ Emergency Motion to Compel on April 16, 2019 (file-stamped on April 17, 2019), which adopted and incorporated a prior Emergency Motion to Compel filed by Purdue (the “Purdue Motion”). Therein, Judge Hetherington ordered the State to produce all documents requested, except custodial files.

On April 30, 2019, the Moving Defendants received supplemental document production from the State which was grossly inadequate. First, the supplemental document production did not include the medical examiner evidence summaries. Second, the supplemental document production regarding EGID documents was inadequate because (1) the documents were so heavily redacted that they are essentially useless, and (2) the documents produced only date back to 2016.

The same day Moving Defendants received this supplemental document production, counsel for the parties exchanged numerous email correspondence with Judge Hetherington regarding the inadequacy of the State’s supplemental production. A telephonic hearing was held on the matter on May 4, 2019. Judge Hetherington issued an Order on May 6, 2019, which (1) ordered the State to provide a statistical summary of the medical examiner summaries to show how many overdose cases were linked to illegal or illicit drug activity, and (2) denied the Moving Defendants’ request to compel the production of additional EGID documents from the State. *See*

EXHIBIT A.

For the reasons set forth herein, the Discovery Master erred as a matter of law, and his Order dated May 6, 2019, should be amended.

II. DISCUSSION

The Oklahoma Discovery Code explicitly allows for objections to a discovery master's order. 12 O.S. § 3225.1. Objections are statutorily authorized and properly before this Court.

A. The State should be required to produce all medical examiner summaries relied upon in compiling its alleged statistics regarding overdose deaths in Oklahoma.

The medical examiner summaries are factual summaries of the evidence pertaining to the very opioid overdoses the State claims were caused by the Moving Defendants' medicines. They contain factual descriptions of the evidence found at the scene of an overdose or through other investigation. These reports also contain evidence of what specific FDA-approved medicines were present at the scene of the overdose (if any), which illicit drugs were present, and whether drug paraphernalia was also present at the scene. Clearly, these documents are relevant to the core contentions in this case, as well as the opinions of several of the State's experts. Because such documents are responsive to the discovery requests sent to the State many months ago, the State must be ordered to produce such documents.

The State argues that these summaries are confidential under 63 O.S. § 939. In Judge Hetherington's Order dated May 6, 2019, he noted "the factual and legally sensitive nature of these investigatory type 'filed not summary' records," but also "agree[d] with Defendants argument that the statute does not create a strict prohibitive protection from production. It does create the confidentiality analysis being discussed herein that does allow for production under circumstances where as here, good cause is shown for certain focused information which when produced, is information which remains protected under our Protective Order and does provide legal protection." *See EXHIBIT A.*

Ultimately, Judge Hetherington ordered the State to produce "through State's counsel and in statistical numerical form the number of cases throughout the relevant period that required

investigation by the Chief Medical Examiner's Office where an opioid overdose death was linked to illegal or illicit drug activity as the cause of death." See EXHIBIT A. He grounded his ruling on his belief that "personalized identification information, mental impressions, methods, means and source information as part of any investigatory notes, summaries or reports must remain confidential."

Judge Hetherington has already ruled that Moving Defendants have shown good cause regarding the need for this information. Nevertheless, he has ruled that the State is only required to produce a statistical summary of the number of overdose deaths which *the State* thinks was linked to illegal or illicit drug activity. This remedy is wholly inadequate. The sensitive nature of the information sought by Moving Defendants does not warrant the State's receipt of wholesale relief from any obligation to provide these documents.

First, the confidentiality or sensitivity of the requested information is no basis to avoid producing highly relevant, non-privileged documents, *especially in a case such as this one where a protective order has been entered by the Court*. See *Bays Exploration, Inc. v. Pensa, Inc.*, No. CIV-07-0754-D, 2009 WL 10674508, at *5 (W.D. Okla. Jan. 26, 2009) ("[C]onfidentiality does not equate to privilege [a]nd . . . alone is not an objection which precludes discovery. This is especially so when, as here, a protective order has been entered to protect the confidentiality of documents produced in [the] litigation." (alterations and omissions in original) (quoting *McCoy v. Deffenbaugh Indus.*, No. 04-2353-KHV-DJW, 2005 U.S. Dist. LEXIS 8923, at *13-14 (D. Kan. May 2, 2005)); see also *McDonald v. Akal. Sec.*, No. 09-CV-573-CVE-TLW, 2010 WL 3168102, at *4 (N.D. Okla. Aug. 10, 2010) ("In fact, there is ample case law indicating that confidential information is not 'privileged,' as that term is used in Rule 26."); *TKO Energy Servs, LLC v. M-I LLC*, No. 12-CV-108-GKF-PJC, 2012 WL 12837283, at *2 (N.D. Okla. Dec. 17, 2012) ("Finally,

the argument that the information sought is confidential or sensitive business information is not a ground for withholding that information from discovery. Confidentiality does not equate to privilege. A Protective Order has been entered in this case which governs the use of confidential or otherwise sensitive documents. ACCORDINGLY, the Motion to Compel is GRANTED.” (citations omitted)); *Principe v. Crossland Sav., FSB*, 149 F.R.D. 444, 450 (E.D.N.Y. 1993) (“First and foremost, the protective order in place in this litigation will ensure that the produced documents remain confidential. To the extent that the FDIC is arguing that the protective order is insufficient to prevent the release of documents to the public, its remedy is to seek modification of the order, not to refuse to produce relevant documents.”).

Second, Judge Hetherington’s May 6, 2019, Order functionally gives *the State* discretion for discerning whether a particular case was or was not linked to illegal or illicit drug activity. It is more likely than not that the State will use different criteria for making this determination than Moving Defendants would. Thus, the State should not be allowed to unilaterally determine which cases involved illegal or illicit drug activity.

Moving Defendants are entitled as a matter of due process to obtain discovery regarding these medical examiner summaries. The Oklahoma Discovery Code entitles Moving Defendants to “obtain discovery regarding any matter, not privileged, which is relevant to any party’s claim or defense, reasonably calculated to lead to the discovery of admissible evidence and proportional to the needs of the case.” 12 O.S. § 3226(B)(1)(a). Importantly, “‘relevant’ mean[s] those materials either (1) admissible as evidence or (2) which might lead to the disclosure of admissible evidence.” *Stone v. Coleman*, 1976 OK 182, ¶ 4, 557 P.2d 904, 906.

The medical examiner summaries are fundamental to Moving Defendants’ defenses, and Judge Hetherington has already ruled that Moving Defendants have established good cause

regarding the need for this information. Accordingly, Moving Defendants respectfully request that the State be ordered to produce the medical examiner summaries themselves as opposed to a statistical summary thereof.

B. The State should be required to produce all the reports and communications which EGID has received from or sent to its current and prior pharmacy benefits managers, including documents it has as predating 2016.

The EGID documents provided by the State only date back to 2016. The State argues that Judge Hetherington’s Order dated April 16, 2019, only required it to produce emails relevant to specific cases involving possible fraud, waste or abuse from only one of its pharmacy benefits managers—CVS Caremark.

The Moving Defendants addressed this issue with Judge Hetherington, who found in favor of the State and ruled that Moving Defendants’ “request . . . has expanded and modified the Purdue motion to compel.” See EXHIBIT A. However, a review of the Purdue Motion shows that this is not the case. The Purdue Motion, which was adopted and reasserted by Moving Defendants, references the State’s failure to produce documents exchanged “between EGID and its pharmacy benefits manager.” See Purdue Motion, p. 6. The Purdue Motion was not limited to CVS Caremark and the time during which it served as the pharmacy benefits manager. Accordingly, Moving Defendants’ request does not expand upon the scope of the Purdue Motion.

Moving Defendants’ current request does not expand upon the Purdue Motion, and the State has failed to comply with Judge Hetherington’s April 16, 2019, Order. Accordingly, Moving Defendants respectfully request that the State be ordered to produce *all* the reports and communications exchanged between EGID and its pharmacy benefits manager.

C. Regarding the EGID documents already produced by the State and any further EGID documents which this Court orders the State to produce, the documents must not be so heavily redacted as to render them essentially worthless.

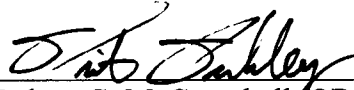
Counsel for Moving Defendants argued to Judge Hetherington that the EGID documents which Moving Defendants *have* received are so heavily redacted that they are essentially useless. In addition, during the telephonic hearing, counsel for Moving Defendants demonstrated to Judge Hetherington that (1) the State completely redacted the names and information pertaining to the doctors and pharmacists referenced in the EGID documents, and (2) the State failed to produce patient information in a de-identified format that can be crosswalked across the other State databases.

Although these arguments were raised and argued, Judge Hetherington's Order dated May 6, 2019, fails to address them. The State has not put forward any legitimate reason for redacting the names and information pertaining to the doctors and pharmacists referenced in the EGID documents. Further, the State has not offered any explanation for failing to provide de-identified information for the patients referenced in the EGID documents, just as they have been required to do so for other databases.

III. CONCLUSION

The State cannot prevent the Moving Defendants from obtaining discoverable information which is necessary to their defense of this case by simply refusing to comply. These documents should have been produced months ago, and the State's failure to timely provide these documents evinces an attempt to "run out the clock" and force Moving Defendants to try this case blindfolded. The Oklahoma Discovery Code, principles of due process and fundamental fairness, the nature of the allegations, the enormous damages sought, and the rapidly approaching trial of this case all require that Moving Defendants have access to these documents. The Moving Defendants request

that the Court amend Judge Hetherington's Order and require the State to produce (1) the medical examiner summaries for all overdose deaths in Oklahoma, and (2) unredacted copies (save redactions of patient names and replacement with de-identified information therefor) of *all* the EGID documents outlined above on or before May 15, 2019, together with such additional relief as the Court deems equitable and proper.



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CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing was emailed on this 12th day of April, 2018, to:

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EXHIBIT A



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.;)
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- (7) JANSSEN PHARMACEUTICALS, INC,)
- (8) ORTHO-MCNEIL-JANSSEN)
- PHARMACEUTICALS, INC., n/k/a)
- JANSSEN PHARMACEUTICALS;)
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- n/k/a JANSSEN PHARMACEUTICALS, INC.;)
- (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC,)
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- PHARMACEUTICALS, INC.;)
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- (12) ACTAVIS LLC; and)
- (13) ACTAVIS PHARMA, INC.,)
- f/k/a WATSON PHARMA, INC.,)

Defendants.)

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED

MAY 06 2019

In the office of the
Court Clerk MARILYN WILLIAMS

ORDER OF SPECIAL DISCOVERY MASTER

NOW, on this 6TH day of May, 2019, the above and entitled matter comes on for ruling by the undersigned having heard argument thereon on May 4, 2019.

Argument was heard regarding Teva and J&J Janssen Defendant Groups' further requests to compel as a result of State production from the undersigned's as filed April 17, 2019 Order. Defendants argue: 1. Incomplete or nonexistent production of "medical examiner summaries" relied upon by State in compiling statistics related to overdose deaths in Oklahoma; 2. Incomplete e-mail and record report production relevant to specific cases involving possible fraud, waste or abuse from any benefit managing entity to the EGID abuse committee where action was taken as

a result of this data. Argument having been heard and considered of record, the following Findings and Orders are entered:

"Medical Examiner Summaries (Sometimes Referred to as Non-Medical Narratives)"

Defendants argue State has not complied with the Order that compelled State to complete sufficient production of "Medical Examiner summaries relied upon in compiling statistics related to overdose deaths in Oklahoma...that are not deemed confidential." The argument reveals that these "summaries" are really investigator's notes, field notes and reports that are compiled into the final "CME Report" for each Oklahoma death where a Medical Examiner's investigation and report is required.

Defendants argue these summaries include factual detail concerning what FDA medicines were present and would demonstrate whether illicit or legally prescribed and obtained. Defendants argue the majority of these deaths were caused by the illegal actions of others and deaths that were not related to these Defendants. Defendants further argue these summaries are not "privileged" but are "confidential" records protected by statute until such time as a Court orders production under the statute.

State argues these investigatory notes are privileged and protected by statute under Title 63 O.S. 939, and remain confidential even to the extent State has not been able to get them and State argues therefore, State has not used the summaries in preparation for trial with witnesses nor will the trial judge receive evidence from these protected notes. State argues proof to the trial judge will not involve proof of which manufacture was involved in a particular opioid death.

Title 63 O.S. 939 involves production of records, documents, evidence or other material contained in "Medicolegal Investigations". The statute does allow for the Chief Medical Examiner to be Ordered by a court of competent jurisdiction to produce at the office of the Chief Medical Examiner (or upon a showing of good cause specifically ordered otherwise) records, documents, evidence or other material of any nature to be produced to a civil litigant upon a showing of good cause. Argument heard by the undersigned and authority presented by both sides in this case demonstrates the factual and legally sensitive nature of these investigatory type "field note summary" records which frequently include highly personal and confidential information to include source, methods and means information and mental impressions of the field investigator for both closed and ongoing investigations, as well as summaries in some cases of information sought by these Defendants argued to be relevant in defense of this case.

Any request to compel this kind of fact summary evidence requires a court to balance the realities of what may be contained in this confidential factual information against the rights of a civil litigant to obtain these records for both a factually and legally relevant purpose here, in defense of State's now pending claims. There is significant disagreement as to whether or not under the remaining equity claim to be tried to J. Balkman, these "summaries" are both legally and factually relevant.

First, I agree with Defendants argument that the statute does not create a strict prohibitive protection from production. It does create the confidentiality analysis being discussed herein that

does allow for production under circumstances where as here, good cause is shown for certain focused information which when produced, is information which remains protected under our Protective Order and does provide legal protection.

As found numerous times before by the undersigned, personalized identification information, mental impressions, methods, means and source information as a part of any investigatory notes, summaries or reports must remain confidential. In striking a balance, I do find merit to Defendant's argument that information in these summary note records which demonstrates an opioid related overdose death where the deceased obtained the drugs by other than legally "FDA" authorized prescriptions through illicit illegal activities of others, might be relevant in defense of this case.

Therefore, State is Ordered for good cause shown, production through State's counsel and in statistical numerical form the number of cases throughout the relevant period that required investigation by the Chief Medical Examiner's Office where an opioid overdose death was linked to illegal or illicit drug activity as the cause of death as compared to the number of investigations where and opioid overdose death involved legally prescribed opioid medications which caused an overdose death. To this extent, Defendants' renewed request to compel is **Sustained** in part and State is Ordered to comply on or before 4pm May 17, 2019.

E-Mail Communications and Benefit Manager's "Enhanced Safety and Monitoring Team" Reports

Defendant Groups are now more specifically focused on what they argue is incomplete or nonexistent production of EGID reports State received from pharmacy and doctor benefit managers. Defendants now argue these "Enhanced Safety and Monitoring Team" reports may show overprescribing conduct on the part of pharmacies and/or doctors and actions recommended be taken by the oversight Board. Defendants are now asking for all reports and e-mail correspondence that goes along with each report. This does relate to the Health Choice side of coverage and reimbursement, a cost claim now not being prosecuted by State. Defendants also argue that to the extent State produced records responsive to this request it only produced records from CVS Caremark as script manager, 2016 to present, and are arguing for the undersigned to compel further production from any prior benefit manager.

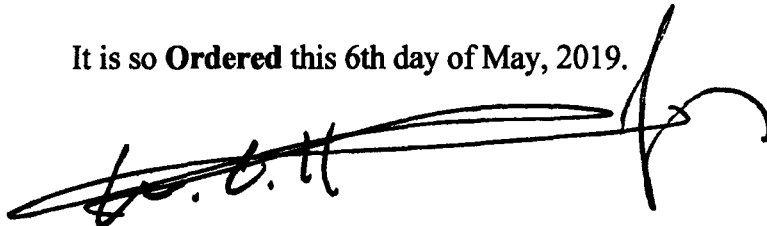
The undersigned's April 16th Order (file stamped April 17th) from the April 12th hearing was specific regarding post March 15th allowable discovery as to this category of documents and was wording taken out of Defendant's pleading request to order production of "E-mails relevant to specific cases involving possible fraud, waste or abuse from CVS Caremark to EGID abuse committee where action was taken as a result of this data being received;". My review of the re-urged Purdue motion and the March 14th e-mail chain argument directed the undersigned to pages 11-15 of Purdue's motion for document category detail requests.

I find Defendant's request now presented to the undersigned has expanded and modified the Purdue motion to compel, now requesting the "Enhanced Safety and Monitoring Team" reports. This request now expands beyond Purdue's document requests involving "Pharmacy Management Consultants" processing of prior authorizations or denials. Further, I must accept as

true State's argument that my April 16th Order was substantially complied with regarding other communications and the Oklahoma Health Care Authority initiative to review pharmacy management consultants processing of prior authorizations.

Therefore, Teva/Cephalon and J&J/Janssen Groups' request to compel is Overruled as an untimely expansion of the Purdue motion.

It is so **Ordered** this 6th day of May, 2019.

A handwritten signature in black ink, appearing to read 'W.C.H.', with a long horizontal stroke extending to the right and a large, stylized flourish at the end.

William C. Hetherington, Jr.

Special Discovery Master