IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

PART E

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

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED
MAY 24 2019
In the office of the
Court Clerk MARILYN WILLIAMS

MOTION PURSUANT TO 12 O.S. § 2509(C) TO DISMISS THE STATE'S PUBLIC NUISANCE CLAIM OR, IN THE ALTERNATIVE, EXCLUDE EVIDENCE THAT THE TEVA AND ACTAVIS GENERIC DEFENDANTS' MARKETING INFLUENCED ANY INDIVIDUAL OKLAHOMA HEALTHCARE PROVIDER

EXHIBIT H

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.	Case No. CJ-2017-816

PORTIONS OF TRANSCRIPT MAY BE COVERED UNDER PROTECTIVE ORDER

TRANSCRIPT OF PROCEEDINGS

HAD ON OCTOBER 18, 2018

AT THE CLEVELAND COUNTY COURTHOUSE

BEFORE THE HONORABLE WILLIAM C. HETHERINGTON, JR., RETIRED ACTIVE JUDGE AND SPECIAL DISCOVERY MASTER

REPORTED BY: ANGELA THAGARD, CSR, RPR

THE COURT: All right. Thank you.

State's response?

MR. LEONOUDAKIS: Yes, your Honor. Just to briefly correct one thing. What I said was we collect documents at the agency level, so, no, there have not been a targeted request for the individuals. We produce custodial files per the agency. That is happening for the Department of Corrections, so they will get custodial files for the department.

THE COURT: Okay. Thank you.

All right. On to Watson's motion to compel investigatory files. Let's proceed with that.

MR. BARTLE: Looks like I am the alpha and the omega today, your Honor.

That is, as the Court noted, the defendant Watson Laboratory's motion to compel discovery, specifically responses to Watson's first set of requests for production of documents.

As set forth --

THE COURT: Can I ask real quick just to get one thing out of the way. Are you specifically asking, among other things I know, but for criminal investigatory files?

MR. BARTLE: Absolutely.

THE COURT: Okay. Go ahead.

MR. BARTLE: As set forth in our motion, your Honor, in our request for production, we seek criminal, administrative, and investigatory files related to opioid --

healthcare providers the State has investigated related to opioid prescriptions, including eight specific healthcare providers we've listed on pages 4 and 5 of our brief. One specific, Pain Management Clinic, documents related to other charged, but not listed in our requests, healthcare providers -- those have been investigated, but have not proceeded on -- and that's what we're seeking, your Honor.

The State has put all of these files and information at issue. The State is seeking to -- as asserted in its petition, that my client's responsible for every opioid prescription issued in the state of Oklahoma, including ones issued by doctors who are criminally charged, doctors whose license were suspended, doctors who have been investigated, all by the State.

It's set forth on page 10 of our brief, your Honor. The State has put these things at issue, and we're entitled to this information. There's a three-part test. They call it the Hearn test. And the at issue waiver requires the assertion of the protection was the result of some affirmative act, such as filing suit by the asserting party.

The State has filed a suit alleging my client was responsible for every opioid prescription, even those issued by and prescribed by known and convicted criminals in the state of Oklahoma.

Through this affirmative act filing suit, the asserting

party put the protected information at issue by making relevant to the case. The State has said that it's seeking to impose liability on my client for those criminally issued prescriptions. And the application of the protection would deny the opposing party -- here, Watson -- access to information vital to its defense.

The information contained in these files, your Honor, is vital to the offense. We're not seeking attorney-client work product or attorney-client communications. But you know what's not attorney-client communications or work product? Witness interviews, interviews of defendants, investigator reports, documentary evidence, grand jury materials, and trial transcripts. Also, undercover recordings.

If they sent an investigator in to, for example, Dr. Harvey Jenkins, and he didn't even look at that undercover agent, for example, but gave him a prescription, a month prescription of opioids, that's a defense.

I'm entitled. That's pretty powerful, pretty compelling. When I can go in front of this jury here in May of 2019 and say the State wants to say that my client is responsible for a doctor who didn't do his job, a doctor who acted criminally, that's important. And it's put at issue by the State.

The State had a choice. So let's look at this, your Honor. You've got both cases. The State of Oklahoma vs. Healthcare Provider, State of Oklahoma vs. Teva. The

prescriptions at issue in those cases are the exact same. They're the same.

They're seeking to impose liability on us for conduct that took place criminally and either -- or in violation of Oklahoma's civil licensure requirements for doctors. We're entitled to this. We're entitled to be able to show that, no -- factually, your Honor, I'm entitled to show and would like to show to this jury that my client had nothing to do, that they cannot put any responsibility on my client for conduct of these healthcare providers who violated their obligations either civilly or criminally. We're entitled to know that. We're entitled to this information. State put it at issue.

Now, the State says, Well, we didn't look at the documents, so you can't. That is silly. The fact that they know that there are files that may contain evidence that exculpates or bolsters my defense in this case, just because they don't want to look at it, doesn't mean I can't.

It's not a game of blind man's bluff. I think there's a great Oklahoma case that says that in discovery. It's not a case of, we get these files and you don't. The State put them at issue, and the State has an obligation to produce them.

Nor is it -- frankly, your Honor -- and frankly, I found this so striking. I wasn't at the last hearing, but I had to read this a couple times. The State has said and it has asked

questions of all of the corporate reps, as far as I can tell, about these specific doctors. Says, Well, we haven't reviewed those files, so no harm, no foul. Goes back to the point I just made, which is, Well, that's great, I know you haven't reviewed them, but I'm entitled to review them, whether or not you decide you want to review them, number one.

But, number two, the State has already, for example, prosecuted a doctor for murder in connection with the overprescribing of opioids; yet they didn't even look at that file before they decided that they were going to also claim that my client was liable.

They don't know anything about apparently -- and I find that hard to believe. They don't know anything about that doctor's prescribing practices? They haven't looked at that, but they're going to have some expert come in and say, Well, oh, no, it was some misrepresentation that Teva made that caused that doctor to issue those prescriptions? That's their theory, and I'm entitled to challenge it.

And we're entitled to challenge it, your Honor, by getting access to these filings. There is a protective order in place. Okay, there's a protective order. I'm a former assistant U.S. attorney. We have two former U.S. attorneys in the State of Oklahoma here.

We're not interested in disrupting any pending investigations. But what we are interested in is effectively

and appropriately defending our clients against, frankly, the amazing claim that even though a doctor -- there was one doctor who was issuing seven prescriptions an hour, even though that doctor did that, we're still responsible for that opioid prescription. As a result, your Honor, they put this at issue. There's just absolutely no question about it.

And the publicly available, nonprotected documents they talk about, Oh, we'll give you those. That's not what I need or I'm entitled to. I'm entitled to know what those investigators did, what -- who they talked to, what did those doctors say, what did those doctors do, what documentary evidence do they have. Because I can show that to this jury and say, You know what, ladies and gentlemen, this is what the State's trying to do. They're trying to tell you that my client is somehow responsible for that.

It's not appropriate, your Honor, for them to withhold this discovery. It's appropriate for you to order them to produce it.

This goes right to causation, your Honor. It's an essential element they need to prove by clear and convincing evidence, and I'm entitled to defend. And as a result, we're entitled to this information.

One last point, your Honor. You know, they talk about to the extent they didn't really make this argument in their brief, but maybe they will up here: Proportionality. You

ordered us to produce every case across the country to the State of Oklahoma six or seven months ago.

We talked a lot about the produced the Kentucky case today. Well, I didn't, but there was talk about it. The State is obligated to provide this information to us, given the sweeping allegations in their complaint and their attempt to impose liability for every opioid prescription prescribed in the state of Oklahoma on my client. Thank you.

THE COURT: All right. Thank you, Mr. Bartle. State's response, please?

MR. DUCK: Your Honor, before I address each of Harvey's arguments, I first want to point out something that keeps getting slipped into some of these arguments.

Our nuisance claim is not subject to a clear and convincing evidence standard. A number of our claims, other claims, are not subject to a clear and convincing evidence standard. It keeps getting slipped in.

And we're under the impression that there are teams of lawyers that we've never seen here in Oklahoma that just read our transcripts and cite things back to us, and I don't want to be accused of not pointing out that clear and convincing keeps getting slipped in. We don't accept that as applicable to the vast majority of our claims.

Judge, there are two categories of documents we're talking about here today that Teva wants. They want privileged

investigatory files, and they want nonprivileged documents related to cases. We're going to give them the second category. We've always told them we're going to give them the second category.

The State is here to talk about the first category, the privileged documents. It's a very serious -- very serious motion. Despite the statements to the contrary, Judge, I know you're taking it seriously, and I don't think we're getting any short shrift, even though it's late in the day.

But we've had many conversations with the AG's office about how important these privileges are. They take them very, very seriously. I'm not a criminal lawyer. I've relied on them to explain to me just how serious they are, and, Judge, this is a big deal.

Here are the privileges we're talking about today that span a couple of different motions we've dealt with. We've dealt with the deliberative process privilege from the Governor's office, attorney-client privileges across a number of different agencies, work product privileges across a number of different agencies, and the investigatory privilege across a number of different agencies.

Judge, these are serious longstanding privileges. They shouldn't be taken lightly. But here we are. And Teva has stood here and told you, Yes, we're asking for those privileged documents.

I don't know why they're asking for them. We haven't asked for their attorney-client work product documents. And if we did, we would expect that you wouldn't allow it, and we're hoping that you won't allow this either.

We don't have access to these documents. And Harvey doesn't seem to think that's a good argument. But, Judge, I can tell you as an officer of the Court, I have not seen the privileged documents that they want.

THE COURT: Well, I'm going to interrupt you there, because that's a question in yellow right here.

MR. DUCK: Okay.

THE COURT: I mean, some of these documents that involve these types of files are protected under, you know, the Oklahoma Anti-Drug Diversion Act and other databases and acts that have very specific provisions for who can gain access and who can't.

And by my reading of these, can you even get access to some of this stuff? I mean, I guess short of a Court order, but I'm not -- I'm not sure that -- well, for instance, you know, some of it has to be -- can be released by the attorney general, but only to specific agencies or folks --

MR. DUCK: Right.

THE COURT: -- highly protected and governed by discretion to where those things can go to.

MR. DUCK: You're absolutely right.

THE COURT: Solely within the discretion of the director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs. I guess my question is to the extent that I think something could be not relevant to the defense -- relevant to the defense, it can be and should be produced, how do you do that?

MR. DUCK: I don't know. I don't have all the statutes that you have with you in front of me right now. I know this; I can't get access to them. We haven't tried because we've known from the very beginning that's not what our case is about, and that's a whole different thing.

As you know, Judge, the AG's office generally -- Abby may cringe at this -- but generally, can be divided between criminal and civil. And this is a civil case. We don't work with any of the criminal investigations, Judge, and we haven't seen their documents. We haven't used them in depositions. We haven't used them to prepare for depositions.

We haven't looked at anything in any of the criminal cases that's subject to privilege to prepare for our civil case. Have we asked these defendant sales reps whether they've visited pill mill doctors? Of course we did. How did we know they were pill mill doctors?

Well, Harvey said it. They're known criminals. You can get online and go to The Oklahoman and NewsOK and look up all of these doctors. That's what we did. The young lawyers in

this room that take these sales rep depositions, that's what we did. That's all we did. We didn't go look at privileged documents to find out who the pill mill doctors are.

Now, all of it is public that we've used. Now, what do we do with that information? We then cross referenced it with the documents the defendants produced to us. They gave us call notes, and we could see which of these sales reps called on these doctors that have been -- that have been brought into a criminal court, and we can tell, Hey, you all targeted these doctors after they had been brought up before the medical board for overprescribing or whatever, after it was really clear that they were running a pill mill, because you were making money off of these pill mills.

They won't tell us you this, Judge. They didn't give any of the money back. They made an awful lot of money off of these pill mills. They haven't given it back to the State of Oklahoma. They kept it.

And Judge, that raises a very important point. There are two different bad actors in these situations. The pill mill doctor situation is a rare occurrence in the state of Oklahoma. It is a small minority of physicians that are wrapped up in that, and the State has to do something about it.

It's the State's duty to do something about that. It's not what I work on. I'm not a criminal lawyer for the AG's office. But then we also have these manufacturers of these

opioids calling on those doctors and pushing them to keep on prescribing their opioid.

They know these doctors are going to prescribe opioids. It's how they're making their money. But they say, Hey, prescribe my opioid, and these defendants make their money that way.

So here's what I think Harvey is suggesting the State should do. The State should have chosen. Either it wants to be a state that brings criminal cases, or it wants to be a state that brings civil cases. Well, Judge, that's not how it works. The State cannot be made to choose.

In fact, the State is obligated by duty to pursue those criminals, those pill mill doctors, and to pursue this civil litigation, because it is -- we believe it is the defendants that caused this epidemic. The sweeping epidemic in this state was caused by the defendants.

Were there some pill mill doctors that were running very small hot spots of overprescribing in the state? Yes, absolutely. AG's office is taking care of that on the criminal side. But we are not using the privileged investigatory files that the AG's criminal division has to prepare for our depositions in this case. I've never seen the documents.

Judge, we haven't waived anything. The waiver test that Harvey walked through requires that we do exactly what I just said we haven't done, which is to bring certain documents into

the picture. We haven't done it.

So we don't have access to these documents. They want access to them. We can't give them access to them. Neither side gets to rely on these documents. That's fair. That is fair.

All right, Judge. The next point is that there's a reason why these really important privileges are being talked about today, and there is a small number of attorneys on this side of the room, we believe. We don't think that it's a coincidence.

That as Mr. Bartle pointed out, there are two U.S. attorneys that represent the defendants in this case, neither of whom is present today. At least one has always been present at these hearings.

And Judge, we put a question to him in an e-mail that Mr. Beckworth wrote. Coincidently, at least two of the firms representing the defendants in this case are on the 20i approval list to represent the State of Oklahoma in litigation.

Very recently, Mr. McCampbell represented the Department of Mental Health, one of the key agencies in this litigation. I highly doubt that these firms want to go on record, having the State of Oklahoma as one of their clients, and say that none of these very important historic privileges applies to the State of Oklahoma. I highly doubt they'll want to do that. That would open floodgates.

Now, that opening of floodgates, unleashing information

that has historically been sacrosanct is the whole point here. It's the whole policy behind why we don't let these documents out.

Judge, put yourself in the shoes of an investigator for the State. Would you want to diligently pursue every single angle, pulling at every single thread, making notes, sending e-mails to prosecutors, coming up with ideas to try to bring down the State's criminals, all the while knowing that a Judge in a civil case could just willy-nilly order all those documents be turned over. Sure, there are protective orders.

No, Judge. It would have a chilling effect on the investigation and prosecution of criminals in the state, and it doesn't just apply to criminals. There are investigators for a number of different agencies. Administrative actions also have investigators. The licensing boards at issue have investigators.

They need to be able to do their jobs the right way without fear that a Judge, who has no understanding or idea of the particular cases that they're working on, could just turn over all of their privileged information. That's why these privileges exist, and it's why we're asking you to uphold them today.

I bring up Mr. McCampbell not to pick on him, but to show your Honor where this argument that Watson has raised, where it logically leads. I hope the defendants won't be upset with me

because they did this earlier. I have a document. I didn't anticipate using it. I only have one copy of it.

But this is a document that I pulled yesterday on a whim from Purdue's production in the Kentucky litigation. This is from 2002. What Purdue did, Judge, whenever all the bad press started coming out about OxyContin around '99, 2000, is they paid employees to track every single news story that came out.

They wanted to stay on top of the PR problem they had. And so they sent weekly news updates, you know, here are the 25 stories that have come out about OxyContin and people dying, we need to stay ahead of this, we need to stay in front of it.

Well, this is from March 2002. And it references an article about online narcotics prescribing. There was this brief trend in Oklahoma and also elsewhere in the states, where due to some gray areas in the law, physicians thought were gray areas, some pill mill doctors were actually writing prescriptions online. People could log into their website and talk to a doctor online and then get a prescription.

The first trial of one of those online prescribers was here in the state of Oklahoma. And Purdue found that -- an article that was written about that trial because it was relevant to the bad press that they were receiving, and they got a conviction here in Oklahoma, Purdue circulated this article to other employees within the company to make them aware of it. Here's what the article says, Judge: In one of

the first federal convictions, an Oklahoma jury in January found Dr. Ricky Joe Nelson guilty of conspiring to distribute controlled substances over the internet. Working through planetpills.com, the Oklahoma surgeon wrote as many as 300 prescriptions a day, most for narcotics, to patients all over the country based on their answers to an internet questionnaire.

One admitted addict testified at the trial that she used the company because it was easier than lying to her family doctor, said U.S. Attorney Robert McCampbell.

Judge, the logical conclusion of where this goes, if Harvey is right, is that the very lawyer he's hired as local counsel may have relevant documents that he created while he was a U.S. attorney in the Western District of Oklahoma, because Mr. McCampbell and Mr. Coats, as U.S. attorneys, were also charged with prosecuting pill mill doctors. And that's what Mr. McCampbell was doing here.

Now, we haven't explored to what extent they actually did prosecute pill mill doctors in the state of Oklahoma. At least here it looks like Mr. McCampbell did.

Purdue thought this was relevant to their business. They tracked it. There's another one that came in February about this same trial and also quotes Mr. McCampbell. Purdue thought it was relevant to their business operations. They wanted to stay ahead of it.

They knew about these pill mill doctors. They continued their business operations in the face of it, and from the very beginning, Judge, they've said, we know about these doctors out there, this is all their fault; this isn't our fault. Yet, here we are. Purdue just this very year stopped sending sales reps into the state of Oklahoma. Just this very year. And what I read to you is from 2002.

So, Judge, I don't think that's what Mr. McCampbell and Mr. Coats, any of the lawyers that represent the State and other litigation, I don't think that's what they want, but that's the logical conclusion of what they've asked for. And I invite any of the lawyers here to stand up and say, despite the fact that we represent the State of Oklahoma in other litigation, we don't think that these privileges apply to the State of Oklahoma. I don't think they'll do it, but I invite them to do it if they will.

And, your Honor, I'll just close with this category of documents, of privileged documents, simply should not be produced. It would be very, very odd and rare if we were ordered to produce them. I don't think there's any precedent for it. I think it would cause the tides to turn in civil litigation in Oklahoma.

But there's another category of documents, the nonprivileged documents, the ones that we've already told the defendants we're going to produce and we will produce. In

fact, I think to bootstrap what we already told them, the defendants sent open records requests to some of the agencies for these documents.

We're working with the agencies to make sure that those open records requests are complied with as well. I actually think they'll get information through us that we can help them get quickly and more efficiently, and we're going to do that, the nonprivileged documents. But those two categories should not be mixed together and confused.

Thank you.

THE COURT: All right. Thank you.

Mr. Bartle?

MR. BARTLE: Again, your Honor, the State misses the point. It put the exact same prescriptions in both criminal/civil investigative against individual healthcare providers against my client. It put them at issue.

Now, perhaps the State didn't think very hard before it did that, but when it did that, it put them at issue in this case and it made them relevant to my defense. The fact that they have evidence that would undermine their case, that they're not looking at it, that it's somehow fair to my client that we can't get access to it, is ridiculous.

This isn't Russia. We don't live in North Korea where the State can say, Well, we're not going to look at that, you're responsible and you're responsible, and it doesn't matter

whether or not actually one of you is more responsible than the other; we're going to make you both, we're not going to give you any information about it.

You can order this, Judge. You have the power to order this because of the way the State pled its case. It's put it at issue. And by the way, Ms. Dillsaver, I think, prosecuted Harvey Jenkins. She has access to it.

MS. DILLSAVER: Your Honor, may I respond to that?

THE COURT: In a minute. Sure.

MR. BARTLE: She has access to it. She sits at these counsel tables every time. She has access. The fact that their civil lawyers don't -- I mean, I don't see how, Judge, you can put responsibility on one party when you know you've sought to put responsibility on another and not look at those files and not allow access to it. It's a due process violation, your Honor.

A chilling effect. The State is trying to put liability on my client when it's already put liability on someone else and won't give us the information on those cases. That's a violation of due process. They've waived it. There's no question they've waived it. There's no question they put it at issue.

These prescriptions are at issue. Their expert's going to have these prescriptions, I'm assuming, in his big chart. They're not going to take them out.

So when they are seeking to impose liability for them, they have an obligation to produce any relevant evidence in their possession to my clients with regard to this.

Due process requires it, your Honor, and we would ask you order it. Thank you.

THE COURT: Go ahead.

MS. DILLSAVER: Your Honor, if I could just correct the record. I did not prosecute Harvey Jenkins. I have never entered an appearance on behalf of the State in a criminal matter in my entire career as a state attorney.

What Mr. Bartle is referencing is when I was interviewed in a previous position as Deputy Attorney General over the public protection division of the attorney general's office. And the only reason I was put in a position of interviewing is because the attorney who was prosecuting, and to this day is the one who is prosecuting that case, was unavailable to be interviewed at the time.

My only knowledge of that case is what I was briefed based on public filings at the time in order to be interviewed by the media who was interested in the case. Thank you.

THE COURT: Thank you.

MR. DUCK: Very quickly a couple of points, Judge.

First at issue, I'm not sure what Mr. Bartle means by that, but we've put a lot of things at issue. We've put at issue whether or not these defendants misled prescribers. We

put that at issue. That is an issue in this case.

Does that mean that they also get access to my e-mails with Mr. Beckworth about our case theory on whether or not these doctors did mislead physicians? Well, many things are at issue, Judge. That doesn't open wide attorney-client work product privileges to the defendants. There are ten different examples that we could go through for that.

One point also, Judge, there are orders, sealing orders out there right now, a number of different sealing orders related to either criminal cases dealing with these pill mill doctors or some civil litigation in federal court related to opioids.

Your Honor, if you issue an order requiring the production of these documents, we will have conflicting orders on whether or not these documents can be produced. So I don't think anybody wants that. Knowing which order to follow would be very difficult for the State to determine.

Lastly, I don't know if the defendants have begun looking at what the jury charge is going to look like in this case, but the OUJI on causation is very clear. And there can be more than one cause. And here, in some limited circumstances, with these pill mill doctors, that may very well be the case.

But there is nothing inconsistent about the State prosecuting a pill mill doctor for overprescribing and also filing civil litigation against the manufacturer of opioids for

making sure that pill mill doctor prescribed certain opioids, prescribed a certain amount of them, reassured the doctor that, keep on doing what you're doing because this stuff's not that addictive, no one's going to get hurt.

The truth of the matter is, Judge, these defendants created the environment in which pill mill doctors popped up. They didn't exist before the 1996 creation of the epidemic the way they exist now, Judge.

The foundation for pill mill doctors was established by the behavior of the defendants that are sitting in this civil courtroom. Thank you.

THE COURT: Anything else?

MR. BARTLE: No, your Honor.

THE COURT: All right. Okay. Thank you very much. I will take all this under advisement, get an order out on all of these topics and motions just as quickly as I can. And I greatly appreciate the argument. I really enjoyed it. I don't know, Mr. Brody, if you're on the phone, sir, but we are now in recess. Thank you.

MR. BRODY: Thank you, your Honor.

THE COURT: You're welcome.

(Proceedings concluded at 1:23 p.m.)

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.	Case No. CJ-2017-816

CERTIFICATE OF THE COURT REPORTER

I, Angela Thagard, Certified Shorthand Reporter and Official Court Reporter for Cleveland County, do hereby certify that the foregoing transcript in the above-styled case is a true, correct, and complete transcript of my shorthand notes of

the proceedings in said cause.

I further certify that I am neither related to nor attorney for any interested party nor otherwise interested in the event of said action.

Dated this 29th day of October, 2018.

_____

ANGELA THAGARD, CSR, RPR

EXHIBIT I

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	)	
Plaintiff,	)	
	)	**Case No. CJ-2017-816**
vs.	)	
	)	***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.	)	

ORDER OF SPECIAL DISCOVERY MASTER

NOW, on this 22nd day of October, 2018, the above and entitled matter comes on for ruling by the undersigned having heard argument on October 18, 2018.

Rulings entered herein regarding the following Motions:

1. **Cephalon's Motion for State to Show Cause for Failure to Comply with Court Orders**

The undersigned entered rulings on August 31, 2018 overruling State's objections to the nature and number of interrogatories. The record and argument indicates that State

Therefore, State's request to reenter my previously withdrawn order with regard to Rhodes entities is **Sustained** to this extent.

3. Purdue's Motion to Show Cause Against the State

Findings entered with regard to this motion overlap in part with agenda item number 1 as to Cephalon's motion. Again, the undersigned has previously ordered State to answer in full and allowed State to answer only 30 interrogatories from each Defendant group if possible. Regarding interrogatories numbered 7, 8 and 9, I have previously ordered State to answer with specificity and to the extent possible. Consistent with item number 1, final and complete answers to be provided within 15 working days subject to newly discovered evidence required to be produced.

The specific medications and damage formula will be identified and fully developed in discovery as part of the State's expert reports and testimony scheduling and the model they have chosen to proceed with. This will take place according to the scheduling order.

I agree with State's argument and I have encouraged a joint Defendant group interrogatory count of 30 interrogatories to be submitted to the State from the three groups and State to Defendant groups when possible. When a "joint" interrogatory request is made, the State is required to answer the 30 interrogatories to the group as a whole. The State is not required to then answer another set of interrogatories covering the same information propounded to it by individual members of the Defendant group, unless that individual Defendant has a **clearly** unique and independent grounds for separate inquiry following a meet and confer. Once again, as indicated above, in the interest of time and judicial efficiency, it is reasonable in this case to conduct discovery, for the most part, in a three-defendant group format.

Privacy and confidentiality orders have been entered and the issue ruled upon. Therefore, by this Order I order full compliance as to each numbered interrogatory properly propounded consistent with this Order, with State to fully comply within 15 working days from the date of this Order with final and complete responses subject to newly discovered evidence required to be produced.

Purdue's motion to show cause and requests made therein are **Sustained** to this extent.

4. State's Motion to Compel Depositions and Group Topics

The undersigned has reviewed this motion and Purdue's opposition to it, Teva group's response and opposition to it, redacted and unredacted versions containing argument and record evidence relevant to State's motion and, considered Janssen group's response and objection.

This issue concerns corporate designation of witnesses for topic testimony, scope and relevant topic grouping. State argues through this date, State has only been able to reach an agreement with Defendants for designation on topics number 39 and 41

currently scheduled with Janssen group for November 9th and has taken five other depositions (Briefs indicate State has taken depositions of 9 other corporate designated witness). Notices for all of these designated witness depositions have been out since prior to the attempted removal of this case to Federal jurisdiction and subsequent remand. State is asking for a scheduling order with time limitations and grouping of 42 topics for each of the three Defendant groups pursuant to State's Ex. B to the motion. The State and each of the three Defendant groups have submitted exhibits proposing a formula for topic grouping, timing and witness designation. Defendants generally argue State cannot dictate how Defendant groups join topics for each of their representatives and urge the undersigned to set a maximum total time limit for the completion of all corporate designated depositions adopting Defendant Group topic groupings.

Having heard arguments and reviewed each suggestion the following orders are entered:

A. State is Ordered to specifically define each topic of requested inquiry and serve on counsel for each Defendant group (or a specific Defendant where a topic is unique to that Defendant) within **five (5)** working days following this Order;
B. Each Defendant group, or individual Defendant, whichever is appropriate, is Ordered to group State defined topics and designate a corporate witness who can testify to as many topics or groupings as possible. While it is appropriate to allow Defendant groups or individual Defendants to group topics, I do so recognizing the potential for abuse but with a clear Order and expectation this will minimize designated witness deposition numbers and provide State with witnesses fully informed, knowledgeable and fully prepared to testify to the designated topic or topic grouping. Each Defendant group or individual Defendant is Ordered to designate corporate witnesses consistent with this Order and provide State with a corporate witness designation matrix pairing witnesses with topic or topic groupings and to so notify State no later than **ten (10)** working days following the receipt of State topic definitions;
C. Some topics will justifiably require more deposition time than others. Generally, in similar type cases to this case, Courts have approved 6 to 10 hours of deposition time for a designated corporate witness. Under the circumstances of this case, State shall be limited to a total of **eighty (80)** hours to be divided up as State chooses. I recognize that some depositions are currently scheduled and ready to take place. However, review of these proposed depositions indicate they are offered by individual Defendants based upon their own topic definitions and groupings where topics have not been defined by State. In order to minimize delay, I encourage these depositions to proceed even though the above time limits for topic definitions and groupings have not expired.
D. Regarding State topic witness designations, the record is unclear as to the total number of topics Defendants' wish to take. Purdue's brief indicates it defines

27 topics. Therefore, it is **ordered** that each Defendant group or individual Defendant shall define each topic with State ordered to designate a corporate witness matrix pairing witnesses with topic or topic groupings and notify each defendant group or individual defendant, according to the same deadlines set forth above in paragraph (B). The same **order** is entered regarding State designated witnesses who shall be witnesses fully informed, knowledgeable and prepared to testify. State is not required to designate any corporate witness for a Defendant defined topic that will be the subject of State's expert witness claim proof and damage model and State must so state in its topic designation matrix.

E. It does appear from briefs and argument that some topics should be subject to written responses and certain Defendants have so offered. While encouraged, State has the right to accept or reject a written response for any particular topic. The same applies to Defendant groups or individual Defendants as to Defendant topics.

5. State's Motion To Reconsider April 25, 2018 Order on Relevant Time Period

State has developed and produced evidence requesting the undersigned to modify its April 25th order to reflect the general "relevant time period" to begin in 1996. State has established a relationship between Defendants and the marketing and promotional strategies some of which began taking shape and were established and ongoing as early as 1996 and moving forward. The relevant time period does cover and effect responses that have been given in various RFPs relating to creation of, funding and coordination of marketing and promotional strategies involving the sale of branded and unbranded opioid and other related drugs. Discovery therefore is relevant in this context only, back to the point in time when the evidence now shows those efforts began but no earlier than 1996. Under State's stated claims for relief and proposed proof model, State should not be limited to inquiry with regard to Oklahoma promotion, marketing and sales efforts and discovery involving Oklahoma relevant promotional representatives or entities. By this amendment, I do not intend to fully modify my previous order that was upheld by Judge Balkman. State is not allowed to request again or explore again from any Defendant group or individual Defendant records, documents and information State already has in its possession or has access to, and not related to marketing and promotional planning and strategies.

Therefore, State's request to modify is **Sustained** to this extent.

6. Purdue's Motion to Compel Witness Testimony from Department of Corrections

State has indicated in previous discovery that Department of Corrections does not prescribe opioids to prisoners. The record indicates there has been differing testimony and Defendants' Motions and argument support ordering testimony by way of deposition from knowledgeable personnel. Defendant's motion is **Sustained** and Defendants are

allowed to depose Joel McCurdy, Robin Murphy and Nate Brown to be scheduled within 30 working days of this Order. Prior to these depositions their Custodial Files are **Ordered** produced to Defendants in time for preparation.

Purdue's Motion to Compel is **Sustained.**

7. **Purdue's Second Motion to Compel Documents**

Purdue argues document production requested from various State agencies on January 12th with partial production from 17 State agencies and none from a list of 10 remaining agencies. The undersigned had previously ordered production on April 25th and August 31st as to Purdue's requests resulting in partial production. These orders did require State to produce under the rolling production process, at one time within seven days and to fully produce within 30 working days. Confidentiality orders regarding personal and private information were entered and will be more fully addressed in the "Watson" motion below.

State is **Ordered** to produce within 30 working days from the date of this order, final and complete responses and production, subject to newly discovered evidence required to be produced, relevant production in support of State's evidentiary proof model and Defendants' defense thereto, from the Office of the Medical Examiner, Oklahoma Department of Public Safety, Oklahoma State Board of Dentistry, Oklahoma State Board of Nursing, Oklahoma State Board of Pharmacy and the Oklahoma State Board of Veterinary Medical Examiners, all subject to previous orders entered regarding protection of physician and patient privacy information. State argues in its brief that the Department of Public Safety and the Oklahoma State Bureau of Investigation possessed no documents relevant to this litigation. To that extent, State must so answer but is required to produce any documentation not found protected by our Protective Order, this order or any previous order. Regarding any Agency requests, information related directly to a criminal investigation to include investigative notes, reports, witness interview notes, contacts and transcripts are deemed protected work product.

Purdue's Second Motion to Compel is **Sustained** to that extent. The same is **Denied** as it relates to The Oklahoma Office of the Governor, the Oklahoma State Bureau of Investigation, the Oklahoma Legislature and the Oklahoma Worker's Compensation Commission involving protected "deliberative process privilege", consistent with the findings made here and to be made below regarding the "Watson" motion.

8. **Purdue's Motion to Compel Custodial Files In Advance of Depositions**

Sustained consistent with findings made in agenda item No. 6 above.

9. **Watson Lab's Motion to Compel Investigatory Files**

Watson argues it made 12 requests to obtain documents as to eight physicians, one medical center and "other unknown healthcare providers" relevant to their defense because State must prove Defendants' fraudulent promotion and misrepresentation either,

1. Caused provider to submit alleged false claims; 2. Caused provider to make a false statement material to each false claim or; 3. Caused the State to reimburse a particular prescription. Watson argues the Oklahoma Anti-Drug Diversion Act has no privilege provision and expressly authorizes the State to release information contained in the central repository. However, the Act provides that any information contained in the central repository shall be confidential and not open to the public, and, to the extent the State can permit access to the information, it shall be limited to release to a finite list of State and Federal agencies listed in the statute. Otherwise, disclosure is solely within the discretion of the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs to control and only for specific purposes listed. The record does not support Watson's allegation that the State is relying on the same confidential information when taking depositions in this case. State argues it is not and will not rely on any confidential investigatory information that might be included in investigation files in this case. I must also weigh relevant access to this information against practical privacy considerations, and I have previously ordered the confidential information contained in these databases protected. Therefore, if the information Watson seeks is contained in databases I have previously dealt with, Watson has access to these databases with the personal information protected. The same considerations regarding Grand Jury information, transcripts etc., is also protected and can only be released by the Court presiding over a particular Grand Jury. Regarding the Oklahoma Medicaid Program Integrity Act, State has brought claims under this Act and it specifically allows for the Atty. Gen. to authorize release of confidential records, but, to the extent disclosure is essential to the public interest and effective law enforcement only. Any production of criminal investigatory files is likely to place ongoing criminal prosecutions or disciplinary actions in jeopardy. Investigative notes, reports, witness interviews, interview notes, contact information or transcripts are work product and protected. By their very nature they will contain prosecutor opinions and mental impressions that should be protected both in the criminal context and actions involving disciplinary proceedings. Again, State argues it will not rely on any confidential or privileged investigatory material for use in this case and the undersigned will watch carefully for any indication that State is violating this representation.

Therefore, Watson's Motion to Compel Investigatory Files is **Denied**.

It is so **Ordered** this 22nd day of October, 2018.

William C. Hetherington, Jr.

Special Discovery Master

EXHIBIT 4

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

DEFENDANT WATSON LABORATORIES, INC.'S REPLY IN SUPPORT OF OBJECTIONS TO THE SPECIAL DISCOVERY MASTER'S ORDER ON WATSON'S MOTION TO COMPEL DISCOVERY REGARDING CRIMINAL AND ADMINISTRATIVE PROCEEDINGS

Watson's due process rights under both the United States and Oklahoma Constitutions entitle it to discovery of criminal and administrative proceedings related to improper opioid prescribing by Oklahoma healthcare providers and an Oklahoma City "pill mill." Such information is vital to Watson's ability to fully defend itself against the State's sweeping allegations that it and the other Defendants are each liable for all downstream harm caused by virtually all opioid prescriptions written in Oklahoma, notwithstanding the independent criminal conduct of doctors who wrote those prescriptions.

The State has put those documents and information at issue in this case and there is no basis, statutory or otherwise, to shield them from discovery. Indeed, the State has sought discovery from Defendants related to those same prosecutions and is seeking "criminal justice costs" related to the same proceedings about which Watson seeks discovery. It would be therefore, in the words of Justice Scalia, the "height of injustice" to allow the State to proceed on its sweeping claims but deny Watson discovery of documents and information in the State's possession that unequivocally support Watson's defenses. Civil discovery is intended to be broad and "provide[] for the parties to obtain ***the fullest possible knowledge*** of the issues and facts before trial." *State ex rel. Protective Health Servs. v. Billings Fairchild Ctr., Inc.*, 158 P.3d 484, 489 (Okla. Ct. Civ. App. 2006) (internal citations and quotations omitted) (emphasis added). "A lawsuit is not a contest in concealment, and the discovery process was established so that '***either party may compel the other to disgorge whatever facts he has in his possession.***'" *Cowen v. Hughes*, 1973 OK 11, 509 P.2d 461, 463 (citations omitted) (emphasis added). As demonstrated in Watson's Objections to the Special Discovery Master's October 22, 2018 Order, the Discovery Master erred by denying Watson's Motion to Compel Discovery Regarding Criminal and Administrative Proceedings (the "Motion").

Seeking to avoid producing discovery that it knows will bolster Watson's defenses and undercut its own case, the State raises baseless objections to Watson's discovery. It first claims that all the requested documents and information are "work product" and thus, protected from disclosure. That is not true; the State of Oklahoma discloses the requested documents and information on a daily basis in criminal proceedings, as Oklahoma statutes require. Such material, by definition, is not "work product." The State's position also strains credulity given that it seeks to impose liability on Watson and the other Defendants for the ***exact same opioid prescriptions*** for which it has investigated, prosecuted, and/or disciplined Oklahoma healthcare providers. Courts have repeatedly recognized that where the government chooses to bring parallel criminal and civil proceedings related to the same subject matter, such as civil forfeiture actions, the government subjects itself to broad civil discovery related to the criminal proceedings. Here, the State has made a choice to proceed with this civil case despite the prospect of broad civil discovery. Due process and Oklahoma's discovery rules therefore require that the State produce the requested documents.

The State also contends that Watson waived any argument that this case must be dismissed or summary judgment entered because it did not raise that argument at the motion to dismiss stage or before the Discovery Master. Not so. Watson could not possibly have waived that argument at the motion to dismiss stage; it had no idea then that the State would baselessly refuse ***during discovery*** to provide relevant documents and information. Nor did Watson waive that argument before the Discovery Master, who has no power to either dismiss this case or grant summary judgment. Indeed, it is only ***because*** the Special Master ruled in the way that he did that Watson is entitled to argue ***to this Court*** that dismissal or summary judgment is appropriate

if the Court agrees that the requested documents and information are shielded from disclosure. Watson did not waive anything.

In sum, the State may not sue Watson, demand broad discovery against Watson related to criminal prosecutions, and then seek to impose massive retroactive liability (including punitive damages, monetary penalties and "criminal justice costs") – all while simultaneously refusing to allow Watson access to information that is critical to its defenses. The Discovery Master erred and the State should be ordered to produce the requested documents within 30 days.

I. ARGUMENT

A. The Documents And Information Requested By Watson Are Not Protected Work Product Immune From Discovery.

The State does not dispute that it put the documents and information requested by Watson at issue by raising sweeping allegations regarding every opioid prescription dispensed in the State of Oklahoma over a twenty-two-year period. As such, the State has waived any "law enforcement" privilege or statutory protection by putting "at issue" the documents and information requested by Watson,

In order to avoid disclosure of information that is harmful to its case and helpful to Watson's defenses, however, the State argues that the documents and information requested by Watson are "work product". To be clear, and as noted in Watson's opening brief but ignored by the State, Watson ***does not*** seek discovery of *attorney* work product or *attorney-client* privileged communications. That is, Watson is not seeking discovery of "legal work product of either attorney which is deemed to include legal research or those portions of records, correspondence, reports, or memoranda which are only the opinions, theories, or conclusions of the attorney or the attorney's legal staff." Okla. Stat. tit. 22 § 2002(E)(3). Although the State suggests that

attorneys and their staff prepared all the materials requested by Watson, that is not remotely accurate.

For example, much of what Watson seeks was prepared by law enforcement officers, rather than attorneys. Watson's RFPs seek, among other things, "initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings." Because they are not privileged, those are exactly the types of documents that the State is ***required*** by law to turn over in criminal matters:

> a. the names and addresses of witnesses which the state intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement,
>
> b. law enforcement reports made in connection with the particular case,
>
> c. any written or recorded statements and the substance of any oral statements made by the accused or made by a codefendant,
>
> d. any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons,
>
> e. any books, papers, documents, photographs, tangible objects, buildings or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused,
>
> f. any record of prior criminal convictions of the defendant, or of any codefendant, and
>
> g. Oklahoma State Bureau of Investigation (OSBI) rap sheet/records check on any witness listed by the state or the defense as a witness who will testify at trial, as well as any convictions of any witness revealed through additional record checks if the defense has furnished social security numbers or date of birth for their witnesses, except OSBI rap sheet/record checks shall not provide date of birth, social security number, home phone number or address.

Okla. Stat. tit. 22 § 2002(A). Moreover, the State is required to produce any "evidence favorable to the defendant if such evidence is material to either guilt or punishment." *Id.* By definition, if materials are not produced by attorneys or their staff and if the State is obligated to produce such documents and information, they cannot be protected from disclosure as "work product" in a civil case. Further, the other documents sought by Watson, such as Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders, and judgments, concerning any disciplinary, civil, or criminal proceedings, are in no way "work product," and the State does not even argue otherwise.

Even if the State could claim that some of the information requested by Watson is "work product" (which it cannot), the State has also failed to properly raise that privilege. The Oklahoma Discovery Code requires the State to produce a privilege log that enables the other parties to assess the applicability of its asserted privilege with respect to each document or piece of information for which it claims privilege protection. *See* Okla. Stat. tit. 12 § 3226(B)(5)(a) ("When a party withholds information otherwise discoverable under the Oklahoma Discovery Code by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection). The State has not produced any such log and has therefore also failed to properly assert that privilege.

The *Fritz* case relied upon by the State is inapposite. That case involved the post-conviction review of a murder conviction and whether the State's failure to produce a report involving a co-defendant's prior violent behavior with someone other than the murder victim

was material that should have been produced pursuant to *Brady v. Maryland*, 373 U.S. (1963). *Fritz v. State*, 811 P.2d 1353, 1357-60 (Okla. Ct. Crim. Appeals 1991). The *Fritz* court found that the document was not *Brady* material and was not required to be turned over. *Id.* at 1358. *Fritz* is therefore completely unlike this case, where Watson seeks discovery in the State's possession about criminal and improper conduct involving ***the exact same prescriptions*** for which the State is seeking to hold Watson entirely liable.

Also, *Fritz*, unlike this matter, was a criminal case. It is well-established that while a criminal defendant is entitled to very limited discovery, in a civil case, by contrast, a party is entitled to broad discovery of any information if it is "reasonably calculated to lead to the discovery of admissible evidence." *Degen v. United States,* 517 U.S. 820, 825-26 (1996); *see also* Okla. Stat. tit. 12 § 3226(B)(1)(a) ("Parties may 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."). There can be no dispute that the discovery sought by Watson is relevant and reasonably calculated to lead to the discovery of admissible evidence. Even the State does not claim otherwise.

Indeed, the State has sought, and the Discovery Master has compelled, Defendants to produce wide-ranging ***nationwide*** discovery in their possession on ***all*** opioid-related cases, including investigations and prosecutions. The State's proportionality and burden objections therefore ring hollow. In its first document requests the State sought, among other things:

1. "All Documents produced by You, whether as a party or non-party, in other litigation related to the promotion, marketing, distribution, and/or prescription of opioids, including, without limitation, any and all Documents produced by You in the Other Opiod Cases."

2. "All discovery responses, investigative demand responses, deposition transcripts, witness statements, hearing transcripts, expert reports, trial exhibits and trial transcripts from prior litigation related to the promotion,

marketing, distribution, and/or prescription of opioids, including, without limitation, the Other Opioids Cases."

See the Teva Defendants' Responses and Objections to the State's First Set of Requests for Production of Documents, attached as Exhibit A.[1]

Watson, and the other Defendants, objected to those requests for, among other reasons, the fact that the nationwide geographic scope and time limit (since 1996) was not proportional and unduly burdensome. Argument was heard by the Discovery Master on March 29, 2018 and he issued his order on April 4, 2018. In that Order, the Discovery Master overruled Defendants' objections to geographic scope and time period (with the exception of limiting the Teva Defendant's relevant time period to 1999 to the present) and sustained the State's motion to compel on Requests for Production Nos. 1 and 2, specifically finding as to Request for Production No. 1 that the Defendants' "production shall include any information about public, nonpublic, or confidential government investigations or regulatory actions pertaining to any Defendants that have been produced in any other case." April 4, 2018 Order, attached as Exhibit B. The State therefore cannot be heard to complain about proportionality or burden when it sought, and the Discovery Master compelled, Watson and the other Defendants to produce all documents related to any other opioid-related case, nationwide, since 1996 (1999 for the Teva Defendants), including those related to confidential and non-public investigations. If the protective orders are sufficient to protect those documents, they are more than sufficient to protect the documents and information requested by Watson.

[1] The State also has issued a corporate deposition topic requesting that Watson produce a witness to testify about "The amount of revenue and profits earned by You attributable to and/or derived from the prescription of opioids by any Oklahoma doctor criminally investigated, charged, indicted, and/or prosecuted for prescribing practices related to opioids. For purposes of this topic, "prosecution" includes any administrative proceeding." *See* Exhibit C.

Nor is there, as the State contends, a basis to shield the requested documents and information from discovery because they involve on-going criminal proceedings. As an initial matter, as explained above, the State has sought, and the Discovery Master has compelled, the Defendants to produce documents related to opioid cases up to "the present." *See* Exh. B at 2. There is no basis to relieve the State of that same obligation. Further, where, as here, there are parallel related criminal and civil proceedings, such as civil forfeiture actions, courts and the government have routinely recognized that the broad civil discovery rules allow a civil defendant access to investigation documents and information in the government's possession. For example, in *United States v. All Funds on Deposit in Suntrust Account Number XXXXXXXXX8359*, 456 F. Supp. 2d 64, 66 (D.D.C. 2006), the court granted the government's request for a stay of a parallel civil forfeiture action and recognized that:

> If the civil case continued the Government ***would be subject to the breadth of civil discovery . . .. Such discovery would include any existing confidential informants*** and/or interfere with the Government's ability to obtain confidential information from others.

Id. Likewise, the court in *United States v. $160,280.00 in U.S. Currency,* 108 F. Supp. 3d 324 (S.D.N.Y. 2015), reached the same conclusion, finding a stay of the civil forfeiture proceeding was warranted because, among other things, civil discovery would require "the Government in this civil case to answer interrogatories concerning facts related to the criminal investigation or produce testimonial declarations from officers who conducted the investigation of [defendant's] home . . ." *Id.* at 326; *see also Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009) ("A district court may also stay a civil proceeding in deference to a parallel criminal matter for other reasons, such as ***to prevent either party from taking advantage of broader civil discovery rights*** . . .") (emphasis added).

So too here. By seeking to impose sweeping retroactive civil liability on Watson for all costs, including criminal justice costs and punitive damages, related to opioid prescriptions for which it has investigated, prosecuted, or disciplined healthcare providers, the State has put at issue and made relevant to this case (and, therefore, subject to discovery) the documents and information related to pending and resolved criminal and administrative proceedings against Oklahoma healthcare providers for opioid prescribing. Those documents and information are critical to Watson's defenses and there is no basis for the State to refuse to disclose them. This Court should order the State to do so.

B. Watson Did Not Waive Anything.

A defendant's constitutional right to mount a full defense to government action is so paramount that if the government successfully invokes privilege and that "privilege ***deprives the defendant of information*** that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1083 (9th Cir. 2010) (collecting cases). Although that has generally applied in the context of state secrets, it would apply with equal force here if the Court agrees with the State that public policy or statutory provisions preclude the disclosure of the documents and information requested by Watson. Indeed, Oklahoma's Rules of Evidence similarly provide for the dismissal of an action if, as the State asks the Court to do here, the Court sustains a finding of governmental privilege and thereby deprives Watson of "material evidence." Okla. Stat. tit. 12 § 2509(C) ("If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue

as to which the evidence is relevant or ***dismissing the action***.") (emphasis added).[2]

In response to Watson's alternative argument that this case should be dismissed or summary judgement should be granted if the Court agrees that the documents and information requested by Watson are protected from disclosure by privilege or otherwise, the State first makes the wildly unsupported contention that Watson waived that argument at the pleading stage. That is preposterous. At the pleading stage, Watson was only required to raise or assert defenses to the State's Petition, *see* 12 O.S. § 2012(B), and cannot be expected to anticipate the State's stonewall tactics during discovery. Only certain defenses are waived if not raised at the pleading stage, *see id.* § 2012(F), and none of those involves a challenge to the State's assertion of privilege ***during discovery*** that would vitiate Watson's defenses. Indeed, in *General Dynamics v. United States,* the action was dismissed on state secrets grounds ***after*** the government asserted the state secrets privilege to discovery related to the one of the defendant's defenses. 563 U.S. 478, 483 (2011). This case presents the same circumstances. The State is asserting privilege ***in response*** to Watson's RFPs to obtain discovery to support its properly raised defenses. That is no basis to find that Watson waived its argument that the case should be dismissed or summary judgment granted because it did not preemptively raise it at the pleading stage.

Next, the State claims that Watson waived its request for dismissal or summary judgment because it did not raise it before the Special Discovery Master. But the Special Discovery Master's powers are limited to discovery matters; he has no power to dismiss or grant summary judgment. *See* Okla. Stat. tit. 12 § 3225.1; January 29, 2018 Order Appointing Special

[2] Oklahoma's Rules of Evidence also prohibit the creation of any "governmental privilege . . . except as created by the Constitution of statutes of this state." Okla. Stat. tit. 12 § 2509(B).

Discovery Master, attached as Exhibit D. That power resides solely with this Court. It was not until ***after*** the Discovery Master issued his October 22, 2018 Order denying Watson's Motion that the dismissal argument became ripe for adjudication ***by this Court***. There was no waiver.

Further, the Supreme Court's decision in *General Dynamics* is worth repeating, given what the State is asking this Court to do. As Justice Scalia wrote:

> It seems to us unrealistic to separate . . . the claim from the defense, and to allow the former to proceed while the latter is barred. It is claims and defenses *together* that establish the justification, or lack of justification, for judicial relief; and ***when public policy precludes judicial intervention for the one it should preclude judicial intervention for the other as well.*** If, in *Totten* [*v. United States*, 92 U.S. 105 (1875)], it had been the Government seeking return of funds that the estate claimed had been received in payment for espionage activities, ***it would have been the height of injustice to deny the defense because of the Government's invocation of state-secret protection, but to maintain jurisdiction over the Government's claim and award it judgment.***

Id. (emphasis added). The State of Oklahoma is attempting to hold a defendant responsible for every opioid dispensed in Oklahoma – whether that defendant produced that opioid or not – yet at the same time is asking this Court to deny Watson discovery of indisputably relevant material. Watson is entitled to discovery so that it can ***fully*** defend this case. A partial defense is not enough. This Court should not allow the State to work such an injustice by refusing to turn over material in its possession that is critical to Watson's valid defenses.

II. CONCLUSION

In sum, due process and Oklahoma's discovery rules entitle Watson to discovery of documents and information in the State's possession related to Oklahoma healthcare providers' improper prescribing of opioids. This Court should therefore reconsider the order of the Discovery Master and compel the production of complete, non-attorney-client privileged files from all of its relevant databases so that Watson may fairly defend this case. In the alternative, if

the Court agrees with the Discovery Master, it should dismiss this case or grant summary judgment in favor of Watson. It would be the "height of injustice" to do otherwise.

Dated: November 27, 2018

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EXHIBIT 5

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.	Case No. CJ-2017-816

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

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P R O C E E D I N G S (9:00 a.m.)

THE COURT: (JUDGE HETHERINGTON): Okay. Welcome all. Good morning. Good morning. Welcome. Some new faces here, Mr. Ottaway. Mr. Neville, I think, is also in this now. They vapor locked also and decided to get in this, I guess.

So we don't waste 30 minutes, Judge Balkman will be ready at 9:30. Parties have agreed to go ahead and let's argue the protective order request on the Hassler matter. And I think probably it would be good to go through the agenda real quick so at least we'll be organized a little bit.

What Judge Balkman has on the agenda is defendants' objections to my order of having to do with the claims data information; Watson laboratory's objection to my order on Watson's motion to compel that deals with criminal and administrative proceedings; and then he also has a request for status conference to hear, and I'll let him talk about it, but Jami was mentioning that.

I think if there are proposals from either side on the status conference issues, then he would hear it, but if there's going to be lengthy, lengthy argument on the status conference issue, he's got some time on Monday afternoon. So that would cause everybody to come back, but he's thinking about that. I'm just giving you a warning on that one.

Then for me is the Hassler protective order request; Purdue's motion for partial reconsideration of my Rhodes order

from October 22nd; Purdue's motion to compel corporate witness testimony; Purdue's motion for clarification. The fifth one is what I'll call F.A.T.E. F-A-T-E, and Lampstand, the fifth and sixth items.

And my understanding on those, and you all help me, but those were Drew Neville, and since he's not here, didn't know about it, didn't get notice, didn't know about the protocol and all, as to our times that we set up for this, that we're not going to hear that today. Is that correct?

MR. LAFATA: Yes, your Honor. That's my understanding.

THE COURT: Okay. And then the emergency motion for sanctions. So I think that's what's on the agenda. Is there anything else?

MR. BECKWORTH: Yes, sir. Brad Beckworth. There's one thing missing on the agenda for Judge Balkman. The defendants and -- Purdue did it and everybody joined in -- appealed your order on the 30(B)(6) depositions that we've been trying to take since May. And so we briefed that so it could be heard today. We think it has to be heard today; otherwise, we're just going to end up -- so we're ready to roll on that.

THE COURT: I assume he knows that then, correct?

MR. BECKWORTH: Well, it's fully briefed. We sent an e-mail. Then when they sent their agenda, Mr. Duck responded to add that. So that was one thing that was missing. You and

both Judge Balkman were on it. But it's fully briefed, so we need to address it for sure.

THE COURT: All right. I'll make sure he's aware of that. Okay.

Angie, you got all the appearances?

THE COURT REPORTER: Yes.

THE COURT: All right. Well, let's go ahead and get started then. Thank you for doing this, by the way. That way we won't waste 30 minutes here.

MR. BARTLE: Good morning, your Honor. Harvey Bartle, Morgan, Lewis & Bockius, on behalf of the Teva defendants.

Your Honor, I'm here to argue the Teva defendant's motion for a protective order to preserve the confidentiality designations of the deposition of John Hassler that we filed in this case.

Judge, the protective order in this case allows the defendants to designate certain portions of testimony by their corporate witnesses as protected, as confidential whether it be a trade secret or a confidential research, development, or commercial information. The designations that Teva has made for Mr. Hassler fall into those categories and should remain confidential.

Now, what I'm not saying, your Honor, is that the plaintiffs can't use that information. I'm not saying they

can't use it in a brief.

THE COURT: Mr. Bartle, let me interrupt. And I apologize. You know I do this from time to time. Just sort of help get to the heart of this. When I did my outline, of course, in your briefing and then the response to it, you know, you referenced all the, of course, page and line for every designated portion of it.

And I want to be sure that what you have put in your brief is what we're talking about. In other words, the Group 1, what I'm calling Group 1; internal -- then 2 is internal marketing and sales strategy and designations. And then the product development and unreleased products designations from that part of the transcript.

MR. BARTLE: Yes, your Honor.

THE COURT: Is there anything else?

MR. BARTLE: No, your Honor.

THE COURT: As long as I'm following the brief as to those specific citations to page and numbers for that testimony, that's what we're talking about?

MR. BARTLE: That's right, your Honor. And I think it's good to start with the last category. There's absolutely no question that's confidential. These are trade secrets. This is what Teva is developing, what drugs are in the pipeline. It's not public. It certainly would harm Teva for that to be in the public domain, and I actually don't see any

reason, any basis for the State to argue otherwise.

So there's absolutely no reason -- those are specifically trade secrets and confidential commercial information, and there's absolutely no reason for that information to be not designated confidential.

Similarly, with regard to internal structure and internal marketing, Judge, Teva did not lose -- those documents are otherwise not available to the public. Teva does not lose those protections for that type of information just because the State sued it.

The State has -- we'll have a jury who will decide ultimately whether or not there is any liability for Teva, and there's no restriction on the State using that information to develop its case. There's no restriction on the State to use that information in a brief. There is no restriction on the State to use that information in argument.

But what there is a restriction on, your Honor, is the State being able to publicly disclose information that it otherwise would not have the opportunity to obtain because of this lawsuit to the public.

They could put it on a website, they could put it in the newspaper, they could do whatever they want with that information if you take the confidentiality designation off of it.

THE COURT: Well, isn't that covered under the

protective order, though?

MR. BARTLE: That's why I'm here, yes, because we designated it confidential.

THE COURT: Well, okay.

MR. BARTLE: That's exactly right. That's exactly my point, your Honor.

THE COURT: Okay.

MR. BARTLE: Because we designated it confidential. And that's why we believe, your Honor, that all the categories that we've listed -- and we have not blanketed Mr. Hassler's testimony. We haven't designated the whole thing. We put thought into this. We reviewed the testimony. We decided specifically which portions we thought fell within the confidential -- the definition of confidential in the protective order, and we designated it and we believe they're appropriate.

Frankly, we're perplexed a little bit by the reason why the State objected to these confidentiality designations. It's not limiting the State in any way. The only person, only entity that would be harmed by the disclosure of this information to its competitors, to the public, is Teva.

And we just ask the Court sustain our objections and grant our protective order and allow us to have these designations remain.

THE COURT: What was Hassler's corporate

identification? Who is he?

MR. BARTLE: He is -- he works for Teva, your Honor. He works in Teva's --

THE COURT: That part I got.

MR. BARTLE: CNS, which is -- I forget the acronym, but it deals with neurological and neuroscience, general manager. He lives in Kansas City. He's a present employee.

THE COURT: Bear with me. Let me sort of wade through this a little bit more. You have met and talked about it?

MR. BARTLE: We have met and conferred. We have, yes. I will make one other point, Judge. There actually is no harm to the State, as I mentioned earlier. But to the extent these documents ever get into public view if there is a trial, they're going to be in public.

THE COURT: How is corporate --

MR. BARTLE: They're going to be part of the public record. And to ultimately -- if it's determined that they're relevant and important for this case, such that they're presented to a jury, they will be public. But there's no need to allow them to be public now.

THE COURT: Part of it deals with corporate structure.

MR. BARTLE: Certainly, your Honor.

THE COURT: How is that protected under the order?

MR. BARTLE: Because how Teva structures itself, how it structures its sales course, how it has decided to deploy its resources, vise its competitors, some of whom are actually sitting to my left, but there are many more out there, is how -- is a business plan for Teva.

A stockholder can't get access to the information. People can't get access to that information. How Teva decides to deploy its resources is part of its business plan. It is protected commercial information, and we believe it should be protected here.

THE COURT: Is all the Group 1 testimony pretty much -- I mean, you've characterized it and I summarized it as corporate structure, corporate operations to include internal reporting, corporate decision-making processes, and proprietary operational information.

MR. BARTLE: Yes, your Honor.

THE COURT: Now, I didn't have the time to read all of that specific testimony line by line, which, of course, I will have to here. But is all of that then grouped in group -- what I call Group 1?

MR. BARTLE: Yes, your Honor. Yeah.

And, again, your Honor, we thought about this. We weren't trying to overly blanket Mr. Hassler's deposition testimony. We were strategic, we thought about it, and believe all those categories fall within the confidentiality protections of the

protective order and should remain that way.

THE COURT: All right. Mr. Bartle, thank you, sir.

MR. BARTLE: Thank you, your Honor.

THE COURT: Mr. Duck? Oh, not Mr. Duck.

MR. PATE: Morning, your Honor.

THE COURT: Good morning.

MR. PATE: Drew Pate for the State.

THE COURT: Good morning.

MR. PATE: You just mentioned what was going to be my first question, your Honor, which was whether or not you had the opportunity to look at the actual testimony.

THE COURT: No. And it was too much.

MR. PATE: Which doesn't surprise me.

THE COURT: I got hit with a whole bunch yesterday afternoon too, and so I tried to get that --

MR. PATE: I understand, your Honor. The reason I ask and the reason I bring it up is because it's important. It's important to look at the difference between how Teva describes the testimony and what was actually said. So I think we can look at just a --

THE COURT: Well, and I know I'm running the risk here of having to spend -- that's why I kind of asked, because I don't necessarily need for you to go through line by line, but I know you're probably prepared for that because that's --

MR. PATE: I would rather not.

THE COURT: -- probably what I'm going to have to do.

MR. PATE: But I would like to give you a couple of examples.

THE COURT: Yeah. So I guess if there's a way to somehow capsulize that to where we don't have to go line by line through all of it, that could be helpful.

MR. PATE: Absolutely, your Honor. All I would like to do is give you a couple of examples. I'll go in reverse order, what they call corporate structure. Let's look at one portion of testimony that they've called corporate structure. It's where they tell us the name of their CEO. It's on page 253.

I asked the question -- I took this deposition, your Honor. I asked the question: Who would be responsible for that at Teva. The answer was: Ultimately, the CEO would be responsible for what products we choose to continue or not.

Who's the CEO of Teva?

ANSWER: In the U.S., it would be Brendan O'Grady as the executive vice president. I believe it's for the U.S. and maybe for the North -- North America.

That's it. It's who their CEO is and what his job title is. That information, your Honor, I checked last night, can be pulled up on LinkedIn, a publicly available website. This is not confidential corporate structure and strategy. Okay?

So let's move to the next category that Mr. Bartle raised.

Product development. They have a whole list of things that they characterize as product development testimony and drugs that are in the pipeline, and except all the drugs that Mr. Hassler was discussing are not in the pipeline. They have been abandoned by Teva. That was Mr. Hassler's testimony.

Teva also tried to sell these products to other people because they abandoned them. They're old products that are no longer being pursued. They are not trade secret pipeline products.

But I would like to read one other thing that they say, is product development:

QUESTION: Do opioids also carry the potential for addiction?

ANSWER: Yes.

That's it. How is that product development? More importantly, how is it confidential under the protective order when the defendants are saying that everyone should know that opioids are addictive. That was the question. Not a specific opioid, not any opioid; that wouldn't be confidential either.

But just: Do opioids also carry the potential for addiction?

ANSWER: Yes.

So the question was asked: Why are we here? Why do we care? Which is a question we get a lot when we have to go through this challenge process with defendants. The reason why

we care is because that's not confidential. They have a burden to meet under your protective order to show that certain things meet the definition, and that doesn't.

And that is a significant answer that they just don't want a corporate rep coming in and offering testimony that we can -- that will be made publicly available, acknowledging the simple fact that, yes, opioids, unlike what we were telling people for years, actually do carry the risk of addiction. So one, it's not product development. Two, it's certainly not confidential under your order.

I would like to give you one more example, if I may, your Honor, and that's an exhibit that we talked about with Mr. Hassler during the deposition. It's an exhibit I think you're familiar with. May I approach, your Honor?

This was Exhibit 2 to Mr. Hassler's deposition. I think you're familiar with this exhibit, your Honor. It's a piece of marketing material that we've brought into court a couple of times and argued about, and every time, we were told, This is a confidential document.

We had a hearing where we used this document. Mr. McCampbell, I believe, asserted that it needed to remain confidential. We challenged it at that hearing, and we had to go through this process. They refused to withdraw the designation.

We met and conferred about whether or not this exhibit was

confidential. They said it's confidential. They filed a motion. We had to respond. And then weeks later, on a separate matter, when we challenged this document, finally, on that meet and confer, Teva says, Okay, we'll withdraw the confidentiality designation of this document.

So I assume they're now dropping that in their motion as well and are no longer seeking to protect this document. But that's after a motion and two hearings where they tried to hide this document that talks about -- or at least hide it from the public, your Honor, where it talks about a low risk of addiction with opioids.

But in their motion, not only did they try to protect this document and seal it up; they try to protect everything that was said about it. I haven't heard from Teva yet, and maybe we should ask them, whether or not they're going to withdraw all their attempts to designate this document confidential and all of Mr. Hassler's testimony about this document confidential. Because if it's not a confidential document, I don't know why his testimony, going through the document, answering questions about it would be in any way confidential. It absolutely shouldn't be.

I think -- I mean, that's really the point, your Honor. You can't just look at how they describe the documents. You've got to look at the actual testimony. And I think the examples I've given you are illustrative of why none of this information

is actually confidential. None of it actually meets the definition under the protective order.

There's no commercial value to any of this. These aren't trade secrets. The limited testimony that is about products that may have at one point in time been a trade secret were long since abandoned and even tried to be sold to other companies. There's no commercial value to any of this.

There's no commercial value to acknowledging that there's an addiction risk with opioids. That's just stuff that they don't want us to be able to publicly put in briefs and don't want other people to see.

It doesn't meet the protective order, your Honor. So if you would like me to go through any other portions of testimony or ask me any other questions, I'm happy to, your Honor.

THE COURT: No, not right now. Thanks. Let me get a response, and then I'm going to spend a couple of minutes staring at this and then I might. Thanks.

MR. BARTLE: Your Honor, just two very quick points.

Number one, a product does not lose its trade secret protection because Teva no longer continues to develop it. It's still a trade secret. We haven't abandoned anything with regard to trade secrets. And the fact that we were trying to sell it to another entity does not mean we've abandoned the trade secret there either. These products have remained confidential. They are not public. That is a trade secret.

It is protected commercial information.

The fact that Teva developed and/or tried to develop a certain product and it didn't work is protected, and it should not be allowed to be in the public. That's exactly what the confidentiality order is intended to be.

And then the last thing, your Honor. I think Mr. Pate started off this way, you know, opioid -- about a question of John Hassler, opioids being addictive.

You know, that's been on the label of all Teva's opioids since they were ever produced that they're addictive. It's been on the label. Every doctor knew it. Every patient knew it. Every person at the State who reimbursed every one of those opioids knew it. This case is not whether or not -- about whether opioids are addictive. So I just note that for the record.

Thank you, your Honor.

THE COURT: All right. Thank you.

Mr. Pate, anything else?

MR. PATE: Well, I would just point out that if it's on the label, why are they trying to designate it confidential? Doesn't make any sense, your Honor.

THE COURT: Okay. Anything else, Mr. Bartle, on that?

MR. BARTLE: No, your Honor.

THE COURT: Wherever you went? There you are.

Thanks.

MR. PATE: No, your Honor.

THE COURT: All right. Thanks. All right. That helps. So let's stop now and let him take over here whenever he's ready, and we will reconvene here whenever he says to.

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

THE COURT (JUDGE BALKMAN): Good morning. All right. Just to make sure I understand the things I've been asked to address today, I understand that there are two requests for de novo reviews of the discovery master's rulings regarding to the motion to compel discovery regarding claims data, as well as the motion to compel discovery regarding privileged criminal and administrative proceedings.

I also have the request for scheduling conference or status conference. Are those the three matters that both the State and the defendants are prepared to address with me?

MR. BECKWORTH: Your Honor, Brad Beckworth for the State. There's one other issue that we are prepared to argue today that also dovetails I think with the status conference.

If you'll recall, back in May, we started trying to take corporate representative depositions of the defendants.

THE COURT: Yes.

MR. BECKWORTH: Multiple hearing upon hearing on that. Judge Hetherington issued another order a week or so

ago. They've appealed that order to you. We've fully briefed it so it can be argued.

THE COURT: I've got it. I'm glad you reminded me of that. I have that as well.

MR. BECKWORTH: Yes, sir. Okay. Thank you.

THE COURT: Okay. I think we should probably just delve into these requests for de novo reviews. I think that would hopefully help us maybe whittle down the issues needed for other conferences.

Do we want to start with the claims data? Okay? We'll go ahead and recognize defendant.

MR. BRODY: Good morning, your Honor.

THE COURT: Good morning.

MR. BRODY: In order to walk through this, we have a deck here that I think will be helpful. I've given Mr. Whitten a copy of that. And I want to start with a quote from the Oklahoma Supreme Court that I think frames what we're looking at, what we're talking about here. And that's from Cowen v. Hughes, and it's quoting a couple of other cases going all the way back to a 1947 Supreme Court case.

And that's that a lawsuit is not a contest in concealment. The discovery process was established so that either party may compel the other to disgorge whatever facts he has in his possession. And this motion is about getting information that the State has that the defendants do not have that is directly

relevant to the claims that are being advanced and the allegations that are being made by the State in this case.

And so the issue is really simple. And we frame the issue. It's, you know, should the State be compelled to produce relevant, nonprivileged Medicaid and related claims data for patients who received opioid prescriptions and substance abuse and related services in the state of Oklahoma. And just so that there's no question about the answer to that question, the answer to that question is, yes, they should.

And so the standard that we analyze that under is the discovery code. And we are, as defendants in this case, entitled to discovery of nonprivileged, relevant information that's proportional to the needs of the case. And all three of those standards are met here.

I want to start with the first one. Not privileged. There's been a lot of focus in the briefing, and your Honor is aware, on whether this information is, you know, protected health information, patient privacy information, that is somehow entitled to be masked and protected when it is produced by the State.

And the answer to that question is no. Takes a little bit of time, but I think it's important to walk through the applicable provisions of the HIPAA statute, and that's the Health Insurance Portability and Accountability Act of 1996. And what's important here are the implementing regulations.

The implementing regulations, which as you see, are found in 45 CFR 164.512(e), and that's disclosures for judicial and administrative proceedings. And they run through permitted disclosures from a covered entity.

As a starting point, the State here, the State Medicaid program and the State public assistance programs are covered entities pursuant to 45 CFR 160.103. There is HHS guidance specifically on that issue that says that State Medicaid programs like the Oklahoma Medicaid program, Soonercare, and these government assisted programs are covered entities for purposes of the HIPAA statute.

So when can a covered entity provide public health information. We also have that explicitly set out in the regulations. In response to a discovery request, if one of two provisions are met, the applicable one is found in subpart B. And that's if the covered entity, in this case the State, has an assurance that efforts have been made to secure a qualified protective order.

So that gives rise, obviously, to the next question. What is a qualified protective order. And the statute speaks explicitly to that as well. If we go to subsection 5 of the statute, it's defined and there are two requirements for a qualified protective order.

One, the order has to prohibit the parties from using or disclosing the protected health information for any purpose

other than litigation or proceeding for which it was requested. And two, it has to require the return to the covered entity or destruction of the information at the conclusion of the litigation.

Now, these requirements have been passed on by courts. The Northern District of Oklahoma has run through and said, you just -- you look to the regulation. You look to 164.512(e) Subsection 5(A) and (B), those two requirements. The Oklahoma Supreme Court has done the same thing; has said that the clear language of the HIPAA regulation anticipates not only that there may be disclosures pursuant to the filing of a lawsuit, but that they may be allowed where a Court order so provides.

So what do we have here. We have a HIPAA qualified protective order. And the order that was entered in this case specifically provides that it is going to apply to documents and information produced in this action. It covered entities and their business associates that the State has defined in 45 CFR 160.103; is authorized to disclose public health information.

It's necessary for the litigation, and the public interest and the need for the disclosure outweigh any potential injury to the patient, the physician/patient relationship, and treatment services.

And as to those two requirements, Subsection 5(A) and (B) for a HIPAA qualified protective order, both of those are met

as well. The information has to be designated as confidential. It can't be disclosed or used outside of the litigation. And paragraph 16, at the conclusion of the litigation, it has to be returned or destroyed.

So all of those requirements under HIPAA are met by the order in this case, and there is no impediment to discovery of that information.

In addition, Medicaid statute speaks to this as well. It contains program requirements, information that a provider who is being reimbursed under the Medicaid program has to provide to the State in order to participate in the program. And you know, even 11 years before HIPAA was enacted, courts -- and this is just an example -- have held that a patient who participates in the Medicaid program implicitly waives the physician/patient privilege for that information that the provider is required to share with the State. And again, that was decided 11 years before HIPAA was enacted in 1996.

So both state and federal law authorize the disclosure of the information, and the State's suggestion in its briefing, they never cite to anything that would explicitly require this, but the implicit suggestion that somehow they would have to go out and secure authorization from every patient whose information is contained in any of the data is specifically contradicted by the statute and by case law that has interpreted HIPAA. So that's the first issue. Not privileged.

The second issue is relevance. Before I turn to that, I do want to address one other thing. It's a very large part of the briefing. And that is the State's concern that if they were to turn this information over -- and I think this may be the most important point of the argument today, because so much of the State's briefing on this question, both particular briefing, A, in response to our objection, focused on this idea that if this information is provided, that counsel for defendants are going to be knocking on doors around the State of Oklahoma, contacting patients who have received opioid prescriptions, or that what this is going to mean is we're going to have to have 950,000 or 9 million or 42,000, depending on which metric for prescription claims you use, mini trials.

Nobody is suggesting that that is going to happen. Nobody is suggesting that that needs to happen, and that is certainly not implicated by the motion to compel that the defendants have filed. And if the Court shares a concern that has been expressed by the plaintiff in this case, by the State, that the Court doesn't want to have a situation where there is the potential for counsel for the defendants in this case to be knocking on doors, interviewing patients, taking discovery from patients based on data that is provided by the State, your Honor can do exactly what the MDL Court did when confronted with precisely this issue, which is enter an order.

And we have part of the MDL Court's order excerpted here

that prohibits the parties, their agents, anybody from going out and conducting any formal or informal third party discovery of individuals or entities revealed in the data. And you can see the language there. Including, not limited to, requests to or about individual patients who may be disclosed in the data, request the healthcare providers to talk about; well, what about your treatment for this patient. And what the Court can do is adopt exactly that language, put exactly that language into an order governing the production of that information.

THE COURT: Mr. Brody, let me stop you there.

MR. BRODY: Sure.

THE COURT: If there were an order from this Court that compelled discovery information regarding these records that you seek and the State were compelled to produce them but they protected the recipients' identifying data, wouldn't that address what the MDL addressed in that order?

MR. BRODY: It would not. And I'm going to explain that. If they mask the data, no.

THE COURT: Okay. Tell me about that.

MR. BRODY: It would not. And so if I may, your Honor, one thing that I did do is I drafted a proposed order that includes specifically a provision modeled on the MDL provision. If I can hand you a copy of it?

THE COURT: Sure.

MR. BRODY: And so we can talk about the data. We

can talk about why the data is relevant and why it would not be sufficient simply to say, Okay, we're going to come up with some identifying number that we're going to use, we're going to mask, hide all of the identifying information about doctors and patients, and I'll tell you why that's not going to be sufficient.

The Court's familiar with the allegations that are raised in the petition. You've seen this in our briefing. The fact that there's allegations that patients who received opioid medications from these -- that were manufactured by these defendants suffered harmful consequences.

We see increased healthcare costs, substance abuse, ambulatory services, inpatient services, emergency department services. It goes beyond that though, and this is one area where it's important.

It goes to social and economic cost, criminal justice, lost work productivity expenses, other downstream alleged consequences from what they allege to be improper marketing of opioid medications by the defendants.

So the data speaks directly to a lot of these questions. You know, first off, did defendants promote opioid medications to doctors who wrote the allegedly false or fraudulent prescriptions for which the State seeks civil penalties. We can't tell.

They've masked the identities of the prescribers of the

physicians who wrote the prescriptions that they allege were false or fraudulent prescriptions that were medically unnecessary and inappropriate and constitute Medicaid fraud and for every single one of those for which they are going to seek a civil penalty from the Court.

And you think about that. We're being accused of fraudulent marketing, causing doctors to write unnecessary prescriptions. And they're hiding the information about who those doctors were. So there's no way to take information that we do have, which is which doctors did you promote to, and say, Did one of those doctors write a prescription that the State wants to penalize the defendants for. If they hide the information, we can't see that.

We also can't see of those doctors -- and when I say why the doctors wrote a prescription for the defendants' opioids, clearly, there is no way, without talking to a doctor, to determine that doctor's -- you know, the individualized factors, education, training, experience, evaluation of patient factors that went into it.

But what you can see is a diagnosis code in separate Medicaid claims data. They haven't produced the medical claims data to us yet. We have prescription claims data. That just tells you somebody filled a prescription. But there is an associated physician's visit that goes with the prescription claims data where you can see, Okay, Patient X got a

prescription from Dr. -- written by Dr. Y; there's a visit to Dr. Y associated with that that will have a diagnosis code there. There are not diagnosis codes in prescription claims data.

But the reason why this is important then is what were doctors -- you know, if there are doctors in this data who were receiving promotional information, promotional visits that the State is targeting in its lawsuit from the defendants' representatives or communications from any of the defendants, why were they writing prescriptions? What diagnoses were they writing prescriptions for? Did that change as a result of any promotional activity?

You know, did a sales rep visit them, and did they all of a sudden write opioid prescriptions for different diagnoses. We can't tell that without knowing who the doctors are.

Now, as to patients, the data is directly relevant because it speaks to the question of what happened next. After a particular patient received an opioid prescription, did that patient subsequently need substance abuse treatment, or did that patient, you know, go back to work.

Was that patient then able to get out of bed in the morning, return to work, be a productive member of society, enjoy time with their families, or did they need ambulatory services, inpatient hospital services, emergency department services, among others, at a higher rate than patients who did

not receive prescription opioids.

You know, again, looking to the paragraph 119 of the petition, did they -- did those patients require the State of Oklahoma to bear increased social and economic costs, including criminal justice costs. Are there differences from one medication to another.

And this case only involves the manufacturers, three manufacturers. There are many, many manufacturers of opioid medications. For whatever reason, the Attorney General elected to sue only three manufacturers.

So are there -- you know, one, are there differences between the medications and the impact of the medications of the defendants in this case. You know, Duragesic, a Janssen product, is a long-acting patch. It's not a pill. They come in a bottle that you put in a medicine cabinet.

The Court has heard a lot about Teva's medications and about the specialized indications and specialized focus of some of the cancer pain medications marketed by Teva. Are there differences. Are there differences between these defendants' medications, what happened to patients who took them, and others.

Are the patients utilizing these services, patients who received a prescription opioid under a doctor's care, at all. And significantly, for the public nuisance claim that's being advanced here, is the alleged harm a single indivisible injury,

or are the injuries in fact divisible; and does the data speak to the fact that the injuries are divisible such that there is no viable public nuisance claim on the facts here.

Now, the State in its briefing spends a lot of time focusing on the fact that defendants get IMS Health data, which is estimates as to physician prescribing activity based on pharmacy level data that is collected by IMS Health.

But that does not contain any information about the diagnoses for the patients who received prescriptions, about the doctors who wrote the prescriptions that the State alleges should be subject to civil penalties. It doesn't contain information about what happened to the patients about these subsequent utilization of services.

So any suggestion that, Well, the defendants have IMS data, that's all they need, it just -- the record does not support that. The nature of the State databases, and you've seen this in the briefing, does not lend any support for the idea that IMS data should be enough.

So the plaintiff has said, Well, you can track. Well, we use a unique identifier that will allow you to track across these systems, and you can follow a patient from, you know, Point A to Point B. Well, that doesn't get them there for a number of reasons.

First, and I'll go through three primary reasons. First, it doesn't tell us which doctors wrote prescriptions that were

reimbursed by Medicaid for which the State seeks civil penalties. So at a threshold level, that's something that's critically important. It doesn't get us there.

Second, the numbers they've given us don't match. And this is an illustration. The Medicaid prescription claims, patient IDs, values used run from zero to 995,000. Their substance abuse treatment data runs from A-100,001 to A-659,778. You can remove the A. You can look at it any which way. They don't match. They're not identifiers that run from one system to the next.

The same thing is true for the doctors. The Medicaid prescription claims data, doctors, physicians are identified using values from zero to 42,000. Substance abuse treatment services, 1001 to 3270.

Now, the mere fact that the ranges of the numbers are different would not in and of itself necessarily mean that the same doctor could be tracked -- can't be tracked through the system, the same patient can't be tracked through the system. But in this case, every which way you run it, it doesn't get you there.

But even if it did, even if the State were able to say, you know what, we can fix that, we can deal with that, that still wouldn't get us there, because it wouldn't allow us to look at other data sources; things like law enforcement records, where there's not going to be -- first of all, the

State's not going to have all the law enforcement record that we're going to need to access during the course of the litigation.

Second of all, there's not going to be a unique number assigned, for example, to somebody who was subject to and required criminal justice services. Necessitated foster care services appears in medical examiner records.

And so even if the State were able to cure the deficiencies in what it has provided so far in its effort to mask the limited amount of data that we've gotten to date -- and it's very limited; there's still a lot that we're waiting for -- it wouldn't get us there, because it wouldn't allow us to evaluate whether patients who received opioid medications reimbursed by the State suffered these injuries that the State alleges in its petition, long list, and for which it is seeking damages in this case.

So in answer to the Court's question, why wouldn't that work, three reasons why it won't work. Doesn't identify the doctors who wrote the prescriptions; the masking process so far is inadequate; and even if there were an adequate masking process, not only would it not cover the doctor part of this, but it also would not cover the ancillary -- I'll call them ancillary injuries -- that the State alleges in its petition.

And we've even heard the suggestion from the State that not masking the data would be easier and faster. This is from

the hearing we had in front of the discovery master on August 31st and referencing a ruling on patient identities.

And it was if we have one type of ruling on the privacy issue, literally the next day, we could produce all these documents. If we get a different type of ruling, it could take us a month or longer to go through the documents and to mask patient identities.

And so when you talk about burden, the only answer on the burden question is that it will be less burdensome to produce the claims data in an unmasked form pursuant to, if the Court deems it necessary, an order like the proposed order that I have provided to the Court.

Now, the last thing, I do want to address any argument this morning, your Honor, is the State's argument that, Well, we intend to use some as of yet undisclosed method of statistical sampling to try to prove our case. And let's sort of step back and think about that for a second.

If the defendants came to the State and said, We're going to defend our case, but we're not going to use this certain type of relevant information that we have and so we're not going to give it to you, we know what the result would be, and we know that that is not the way the civil adversarial system works, we know that that is inconsistent with the discovery code. And it's inconsistent with the Cowen case that we started with, which talks about the very purpose of discovery

and the fact that this is not an exercise in concealment.

And so every single factor, every single relevant factor -- not privileged, HIPAA covers it; we have a HIPAA qualified protective order. Relevant, there's no question that it's relevant. There's no question that it's necessary and proportional.

There is certainly no question, given the sweeping allegations that have been raised in this case, which seeks to hold three defendant manufacturers liable for the impact of the opioid crisis, the entire impact of the opioid crisis in the state of Oklahoma, there's no question that it is proportional.

And on the proportionality argument, your Honor, the State is willing to give us the data. The State just wants to hide the information in the data. So it's not even a question as to whether this discovery is going to occur. The discovery's going to happen.

The only question is will all of the information the State has available be provided. And there is no reason why that should not be provided. There's no basis to withhold that information from the defendants. HIPAA covers it, the qualified protective order covers it, and it is critical information for defendants to have if defendants are to fairly defend this case, fairly evaluate and rebut the sweeping allegations that have been raised by the State.

Unless the Court has any questions, I will yield to

Mr. Whitten.

THE COURT: So you've handed me the order. Can you tell me that -- I haven't obviously read it yet, but tell me this. You say this order meshes the MDL order, but it also is specific to the previous discovery orders that have been put in place?

MR. BRODY: Well, the previous discovery order that took place does say you can produce masked versions of the data. This says the data will be unmasked and it adds a paragraph prohibiting any contact, any outreach, any further use of the data in the discovery process.

You can't, you know, notice a doctor for a deposition and say, Here's where your patients show up in the claims data, I want to ask you about, you know, Mr. Smith, I want to ask you about Ms. Jones. It prohibits that from happening.

It prohibits anybody from knocking on a patient's door and saying, you know, I work for Janssen and I understand you received opioids, what was it like. None of that can happen.

THE COURT: All right. Thank you, Mr. Brody.

MR. BRODY: Thank you.

MR. WHITTEN: Anybody on your side going to argue too?

Good morning, your Honor.

THE COURT: Good morning, Mr. Whitten.

MR. WHITTEN: The reason I asked that is last time

this was argued in front of Judge Hetherington, there were several other lawyers that went before me, so.

I would like to follow the same pattern we did in front of Judge Hetherington last time, if it's okay with your Honor.

THE COURT: Sure.

MR. WHITTEN: Which means I will argue part of what Mr. Brody has brought up, and Mr. Duck will address part of it.

I would like to start out, if I may, and just -- even though this is de novo, I think it's still significant to point out, number one, Judge Hetherington is in the audience. Number two, Judge Hetherington heard a lot more argument than this from a lot more people than just my friend, Mr. Brody.

He put a lot of work into this, reading all the briefs, hearing all the argument. You've also got to put this in context with all the other discovery motions. So you know, they're the ones that wanted the special master, and we actually objected to that procedure.

Ironically, what we're seeing is them appealing over and over again from the special master. As you can probably tell, I'm going to argue that Judge Hetherington made the right decision, but I do want to put this in context.

If you step back for just 30 seconds and look at what's happening in this case, here is why we're getting such a vigorous, vigorous attack on discovery.

They want this case to be heard in the MDL. We all know

that. They tried to remove it to the MDL. We are being told that the MDL lawyers maybe on both sides are doing everything they can to delay and move this trial date.

That's what this is all about. They want to move this trial date. And that's relevant to what I'm going to argue today. It all comes down to this trial date.

So I'm going to tell you first the six reasons that we advocated to Judge Hetherington, and then Mr. Duck and I will talk about those individually. Judge Hetherington, we argued to him, there were six reasons this request by the defendants should be denied.

Number one, they already have the names of all the doctors. In fact, they targeted doctors; they used IMS data. This is coming out in the depositions, and Judge Hetherington has seen this. You may not have.

But they were using IMS data, and they even could tell who the high prescribers were. And they were visiting some of these high prescribers 50 and 60 times while their patients were dying from overdoses. They know who the doctors are, and they know who they sold opioids to.

Number two, the discovery request is unduly burdensome.

Number three, it is not proportional to the needs of the case.

Number four, which I still think is the most important, and Mr. Brody addressed it, these requests are after

confidential, highly protected patient data. These are patients who are not party to this case. They have not sued. They have not placed their personal injury or their mental or physical condition into issue, like we see in our typical case.

Number five, this request is totally unnecessary based on the way the State intends to prosecute the case. And I don't know if you remember this, Judge; it's been many months, and I can't tell you the exact date. But I volunteered maybe six or nine months ago in a hearing before you -- I believe this was well before you appointed Judge Hetherington as the special master. And there were no secrets, and I was under no obligation to say it. But I went ahead and told you and the folks in the room here how we intended to try our case.

We don't represent a human being. We don't represent a patient. We don't represent someone who took opioids. We represent the innocent State of Oklahoma and its taxpayers. And the State of Oklahoma is required to pay for these prescriptions.

So that's totally different from a case where a plaintiff walks in here -- and you've tried many of those -- where they, you know, I hurt my back or I hurt my neck. Once they put their medical condition into issue, they've waived it. And you know, typically, the patient is asked questions about their medical records, and the doctor can testify as well. That's not what we have here.

We have the right to prove our case by statistical sampling, and I'm sure you've seen those cases. The law -- there's numerous cases saying that when a state or any other entity that has a false claims law like, for example, the City of Chicago has their own false claims law.

But here, we have a False Claims Act, and the cases allow an entity like the State of Oklahoma to prove its case by statistical sampling. We don't have a human client. And so in addition to that, when you just have one client or let's say you had two plaintiffs in one case, it is rather simple to try that case. We've all done it.

But here, we're talking about -- and they know this, we furnished them the data -- over 9 million prescriptions, over 900,000 human beings in the state of Oklahoma that were prescribed opioids, and over 42,000 doctors. That's what we're dealing with.

We intend, and I told you months ago, to take a statistically meaningful sample. I don't have the hard and fast numbers before me today, but that's all expert testimony, and it will be provided pursuant to the Court's scheduling order. They'll get all this. They'll be able to defend it. And they've tried cases like this before, and I have too.

And that statistically meaningful sample, we will be able to tell how many of those were false claims. It's very simple. And indeed -- I even told them the case we were relying upon in

Oklahoma that allowed us to do this, and it was Burgess vs. Farmers Insurance.

It's a case I tried and Judge Burrage tried some years ago. I think it went to the Supreme Court in 2008. It was a class action, but that's not the point. This is not a class action, but -- and I believe it's Footnote 23, the Court approved statistical sampling, and that's how that case was tried.

So there's no secrets here. We said that long ago. That's the only way this case can be tried in May of 2019. If we have to try over 900,000 mini trials and 42,000 doctors, we're not going to trial in May. We're not going to trial in 2020. It's impossible.

The last point, the sixth point, is that these requests fall squarely into premature expert witnesses. And indeed, I told Judge Hetherington we had asked for certain depositions and we wanted some corporate rep depos. And the defense objected and said, You're getting into expert witness areas. And that's exactly what they're doing here.

Now, let me go into some of the details, and then Mr. Duck will address some of them. Your Honor, you haven't seen everything that was argued in front of Judge Hetherington. I, again, want to say this. The defense keeps objecting to anybody bringing into the Court demonstratives and powerpoints and things like that that have not been given to us before.

I've never seen this powerpoint today. I've never seen that order that they handed you until they came in here. I was reading along with your Honor on the powerpoint. But why am I saying that? I'm okay with them doing that.

But the thing you need to know is this. They are shucking and jiving, juking and dodging. This is not the same argument that they presented in their briefs. And let me tell you why. On page 2 of their brief, Footnote 4, this is what they told Judge Hetherington.

It says: The only way that defendants can defend against claims that hinge on the alleged impact of defendants' marketing on prescribers and patients is by identifying and taking discovery from the prescribers and patients involved in the allegedly false claims the State has put at issue. That's a quote.

Then they go on to say: Identifying prescribers and patients at issue is just the initial step.

Now, Mr. Brody has morphed this. They never even argued that orally during the argument before Judge Hetherington. I pointed it out, that they wanted to depose all 900,000 patients, it's 900-plus, and all 42,000 doctors.

So during the oral argument, after I brought it up, they pivoted for the first time, and they said, Well, maybe we won't need to depose them all. I don't recall anybody arguing that we were worried they were going to go knock on doors. I

don't -- if that came up, I don't remember it. We argued what was in their brief.

They wanted to take depositions from all of the patients and all of the doctors, and I argued to Judge Hetherington that that's impossible. You can't depose 900,000 patients. You can't depose over 42,000 doctors.

So they've pivoted today and they've really softened that up and they've tried to say, Well, we need the records, maybe we don't need to actually take depositions, but we need the records, we need the names.

Well, here's another problem. They produced a document to us in this case. It's Bates stamped JANMS00488347. And this is coming from Mr. Brody's client, where they were discussing talking points to the FDA about gathering information, making a patient registry for those who have taken opioids, which is somewhat analogous to what we're talking about. It means you have their names.

And this is what Mr. Brody's client said in Bullet Point No. 2: There should be no patient registries included in the REMS. No evidence exists to suggest that a patient registry will diminish abuse or misuse of the medications.

And here's the important point: Evidence does exist, however, showing that such an approach would stigmatize patients and impose significant burdens on all parties resulting in chilling prescribing and inadequate pain

management.

Mr. Brody's client recognized in that document that if you make public the names of people who got opioids and reveal their -- perhaps their records, that has a chilling effect. That decides the issue right there. And I think we all know that.

Indeed, I pointed this out during the argument before Judge Hetherington. First, not a single patient has come in here and said, I want to put my medical condition into issue. Not one. Second, there is one person in this case so far, just one, who was asked if they would voluntarily waive their confidential medical information. Just one. It was a sales rep.

And Winn Cutler, one of our partners, was taking the deposition of the sales rep. And Mr. Cutler asked the sales rep: Have you ever taken an opioid. And I read all this into the record last time. I won't spend very much time on it.

The defense lawyers, who were paid by one of the defendants in the case to represent this sales rep, they went nuts, your Honor. They, on the record, questioned whether Mr. Cutler had ever been to law school. They said, That's so offensive, you cannot get into this person's medical records.

It's the ultimate in hypocrisy. And all the lawyers who are in this case who were at that depo sat there and didn't say a word. Wait a minute. We, ourselves, are asking for over

900,000 people to turn over their records, and we want to question the doctors over their records. It's hypocritical and it's wrong.

So even if they had the doctors' names, which they already do, but if they got them from us, they can't go to Dr. Smith and say, Dr. Smith, I want to ask you about your patient, Sally Jones, I want to ask you about her taking opioids, why she took them, et cetera. They can't ask one question along those lines unless that patient waives that confidential privilege. That patient, he or she, can waive it if they're hurt and they file a lawsuit. They haven't done that.

They can go ask patients to do that. Indeed, Purdue made a video where they brought four or five patients in who did waive the privilege, and they talked about their medical condition. We deposed one of them in this case.

So they know who the doctors are. They can go to any doctor in the state of Oklahoma as an exemplar and say, Can you find a patient who will come in here and waive their medical condition and testify there was no false claim. They can do that. They can defend this case. But they can't waive it for everybody.

Indeed, I even pointed out during the argument last time, I think this includes every Judge in the state of Oklahoma, because the health insurance for the State is in that database. So theoretically, I don't know if a Judge in the state of

Oklahoma ever took opioids, but if they did, they want those records and they want to talk to that doctor, depose that doctor. That's wrong. It's just as wrong for them as it would be for any other citizen in the state of Oklahoma. That's totally wrong.

Now, the State is handicapped, like I said. We don't represent any of those 900,000 patients. We don't represent any of those 42,000 doctors. But does that mean that we couldn't call one of them? Does that mean they couldn't testify on nonprivileged matters? No. They can call any doctor in the state of Oklahoma that they sold drugs to or whether they sold them or not.

Indeed, we're just now having expert witness lists roll in, and several of the defendants have listed some Oklahoma doctors as witnesses. So I don't know why they couldn't ask them, Have you ever written a false claim or things of that nature. But they still can't waive the medical privilege. And that's the bottom line. And in terms -- even if the Court were to order this to happen, it's tantamount to just moving the trial.

And I think they're caught on the horns of a dilemma. They have not argued to you that they need a small subset. That would go along with my argument on statistical sampling. It's an all or nothing deal. They want all 900,000 patients' records. They want all 42,000 doctors' names so they can

juxtapose the two and they can ask Dr. No. 1, I want to talk to your patient, Sally Smith. That's wrong.

The way we've proposed doing it has been approved by the Oklahoma Supreme Court in Burgess. It has been approved by all these False Claims Act cases. And that's the only way this case can go to trial.

And I said it then, and I'll say it now. We will either succeed in proving those false claims by a statistical sample, or we will fail. We will live or die on the statistical sample on these false claims cases. And that's how it should be.

I want to move on now and talk about -- let me check my notes here, your Honor. It may be time for me to turn it over to my colleague here. Oh, I had one other point.

I believe we filed this in this case as a -- I don't know if your Honor has seen it -- but as additional authority, we have placed in front of the Court previously the Tobacco litigation in the state of Texas.

The very same question there. I don't remember the numbers, but it was a huge number of people, they wanted the same thing; the patients' names, doctors' names, and records for all those smokers, and that was denied by the trial court. And that case, now, it didn't go up on appeal, but it settled on the eve of trial.

But my point is that's a federal Judge that did look at this issue. They had the same problem. Are you going to call

every smoker in the state, are you going to call every one of their doctors. And the same arguments were made there. How are we going to try this case, you know, if we don't question every smoker; you know, if they had been warned, would they have smoked, would they have not, et cetera.

Same arguments, and it was rejected, and it was rejected because of the same reasons. And they -- the State of Texas, just like the State of Oklahoma, has the right to prove their case by statistical sampling, and that's what we intend to do.

If it's okay with the Court, I'll turn over and let Mr. Duck finish the rest of this very briefly.

THE COURT: Sure.

MR. WHITTEN: Thank you, your Honor.

MR. DUCK: Good morning, Judge.

THE COURT: Good morning.

MR. DUCK: Trey Duck for the State.

I want to cover a few entirely separate points from the ones Mr. Whitten covered and also add some context to a couple of the general points he made, because I'm the person who is actually dealing with a lot of the data that's been requested here and some of the other documents that we have been requested to produce and that we have already produced.

But first, Judge, I would like to talk about one point that Mr. Brody made, which was that they need to see all of this data to determine whether or not a patient received a

specific drug from a specific defendant because the drugs are different and they're used for different things, et cetera.

Judge, that entirely misses the point about what this lawsuit is about. The State has alleged that these defendants engaged in a massive, widespread covert conspiracy to increase prescribing of opioids generally.

So what does that mean? What will we present to a jury here in this courtroom? Well, boiled down to its essence, it means that we've got evidence, and we can show that Teva, through its marketing, caused prescriptions of OxyContin, which Teva doesn't even manufacture; and Janssen, who makes Duragesic, caused prescriptions of Cephalon's drugs, like Fentora, because they all conspired together to promote opioids in general. And they did this by using unbranded marketing.

They didn't just use branded marketing promoting their drugs specifically. They sent things into this state. They spoke to doctors directly in this state about using opioids. And their number one message was: These drugs are not dangerous, and they are the best pain relievers in the world.

We now know all of it was a lie. We now know that doctors began prescribing these because of what the defendants told them, and they prescribed opioids generally. That is why, your Honor, we have taken the approach that we've taken to prove this case on an aggregate model; to show damages on an aggregate scale. It's the only way that what defendants did

makes sense in this case and how to present it. And that's what we're going to do.

Judge, how they target doctors, they used what we've referred to throughout the day as IMS data. IMS is a private company that collects data from pharmacies about prescriptions. Purdue is owned by the Sackler family. The Sackler family helped start IMS. They still are partners in IMS, and they benefit from the profits that IMS makes. That's what we've read.

So Judge, this is a massive conspiracy. They take this data. They then target prescribers. They go after the ones who are already high prescribers, and they ask them to prescribe their drugs. Now, these prescribers prescribe a wide variety of different drugs. Some for the reasons they're indicated for, some for the reasons they're not indicated for. And there is a mixture, a cocktail, of all these opioids that all of these defendants have saddled the State with, and they all did it together. And we can show that.

Judge, they can contact these doctors if they want to. They're already doing it right now. Purdue stopped in 2018, but they contact doctors right now. They've got information that we don't have about doctors. We don't have IMS data. It's expensive. They've got it.

So what can they do if they've got doctors' names. They've already got them. They can call doctors, and they can

say, Doctor, did you know that the State of Oklahoma has filed a lawsuit against us; they're wanting to cut down on opioid prescriptions, they think you've been overprescribing, would you be willing to help us. And by the way, Doctor, do you have some patients, some good pain patients, that you think could be advocates for us that would waive their HIPAA protections and come in and testify about how good these drugs are. Could you do that for us, Doctor?

The defendants are free to do that. They can subpoena doctors. They can call doctors. They can get their hands on this information.

How do we know that? Judge, a couple weeks ago, I took a deposition of a woman named Lauren Cambra. She lives in Raleigh, North Carolina. In 1997, Purdue contacted her doctor, her pain doctor, and said, Dr. Spanos, we would like for you to be in a promotional video, and can you identify five or six of your patients that are doing well on OxyContin that would be willing to be on that video as well.

And he found five or six. One of them was Lauren Cambra. She was on that video and a follow-up video a few years later called, I got my life back. They blasted this video all over the nation, and we know it came into Oklahoma.

Judge, Lauren Cambra became addicted to OxyContin, lost everything. Lost her house, lost her job. She had to literally rebuild her life from the ground up. Now, it's