



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

STATE OF OKLAHOMA } S.S.  
CLEVELAND COUNTY }

**FILED**

JUN 03 2019

CONFIDENTIAL  
FILED UNDER SEAL  
PURSUANT TO  
PROTECTIVE ORDER  
DATED APRIL 16, 2018

In the office of the  
Court Clerk MARILYN WILLIAMS

**DEFENDANTS JANSSEN PHARMACEUTICALS, INC. AND JOHNSON AND  
JOHNSON'S MOTION PURSUANT TO 12 O.S. § 2509(C) TO EXCLUDE EVIDENCE  
OR ARGUMENT THAT JANSSEN IMPROPERLY MARKETED OPIOIDS TO  
DOCTORS FOR WHOM THE STATE REFUSED TO PRODUCE REQUESTED  
INVESTIGATIVE FILES**

**REDACTED VERSION**

THIS DOCUMENT WAS FILED IN ITS ENTIRETY MAY 28, 2019.  
UNDER SEAL PER COURT ORDER DATED APRIL 16, 2018

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IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

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STATE OF OKLAHOMA, ex rel.,  
MIKE HUNTER,  
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DOCTORS FOR WHOM THE STATE REFUSED TO PRODUCE REQUESTED  
INVESTIGATIVE FILES**

Defendants Janssen Pharmaceuticals, Inc. ("Janssen")<sup>1</sup> and Johnson & Johnson ("J&J") respectfully submit this Motion pursuant to 12 O.S. § 2509(C) to exclude any evidence or argument that Janssen improperly marketed opioids to doctors for whom the State withheld requested investigative files. In bringing this motion, the Janssen Defendants adopt and incorporate<sup>2</sup> arguments set out in the § 2509(C) motion filed by the Teva Defendants on May 24, 2019 (the "Teva Motion to Dismiss") Ex. 1. The State's withholding of full investigatory files and information maintained by Oklahoma law enforcement and medical licensing agencies related to

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<sup>1</sup> "Janssen" also refers to Janssen Pharmaceuticals, Inc.'s predecessors, Ortho-McNeil-Janssen Pharmaceuticals, Inc. and Janssen Pharmaceutica, Inc.

<sup>2</sup> 12 O.S. § 2010(C) ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

the opioid prescribing of Oklahoma health care providers prejudices Janssen and J&J's defense, and requires this Court to grant necessary relief under 12 O.S. § 2509(C).

#### **I. ADDITIONAL BACKGROUND**

Like the Teva Defendants, Janssen and J&J have long sought for their defense investigative information that the State has withheld under the state secrets privilege, and have independently requested that information in discovery.

For example, Janssen's 1st Request for Production sought "All Documents and Communications relating to Your investigation and/or enforcement of violations of laws governing the marketing of Relevant Medications and/or the use, prescribing, or request for reimbursement for prescriptions for any Relevant Medication, including documents sufficient to identify any Person arrested, indicted, charged, fined, or otherwise penalized for any activity related to the use, prescribing or request for reimbursement of any Relevant Medication." Janssen 1st RFP (Jan. 12, 2018), Ex. 2. And J&J's 1st Request for Production requested "All Documents and Communications relating to any effort by You or on Your behalf to identify, treat, reduce, or prevent Opioid abuse and illicit Opioid prescribing and dispensing." J&J 1st RFP (Jan 12, 2018), Ex. 3. Nevertheless, the State has continued to refuse to produce non-public investigatory information. *See* Teva MTD at 6-8.

#### **II. ADDITIONAL ARGUMENT**

As the Teva Motion to Dismiss correctly observes, 12 O.S. § 2509(C) requires this Court to grant needed relief to any party "deprived of material evidence" because of "a claim of governmental privilege." The Court must grant appropriate relief here.

The State's refusal to provide the full investigatory files prejudices Janssen and J&J. During a deposition, the State questioned former Janssen sales representative Drue Diesselhorst

about call notes for [REDACTED]. See Diesselhorst Dep. 124:8-138:19, Ex. 4. The State noted that [REDACTED]

[REDACTED] *id.* 134:1-3, and asked Diesselhorst whether [REDACTED] *id.* 132:6-8. The State asked former Janssen sales representative Beth Hightower similar questions about [REDACTED] Hightower Dep. 148:1-2, Ex. 5. See also Deem-Eshleman Dep. (Feb. 25, 2019) at 1192:9-1217:20 (questioning about [REDACTED]), Ex. 6.

This questioning suggests the State seeks to show, or at least insinuate, that Janssen's sales calls influenced improper prescribing or that Janssen should have somehow known that these physicians were engaged in such conduct. However, the State has refused to turn over full investigatory information for these physicians. See, e.g., J. Christopher Smith Dep. 28:23-30:15, 31:14-25, 47:2-12, Ex. 7. That information could reveal the true motivations behind [REDACTED] prescribing, whether the prescribing of Nucynta or Nucynta ER was actually at issue in any of [REDACTED] alleged criminal conduct, and provide information showing the reasons why their conduct went undetected by the State and for how long.

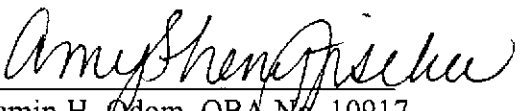
Allowing the State to present a one-sided story about [REDACTED]—or any other physician for whom the State has withheld investigatory information under the state secrets privilege—deeply prejudices Janssen and J&J's defense, and is just the sort of strategic use of privilege that 12 O.S. § 2509(C) is designed to prevent. Therefore, this Court should enter an order precluding the State from evidence or argument that Janssen improperly marketed opioids to any physician charged with opioid-related offenses for whom the State has withheld investigatory information.

**III. CONCLUSION**

Pursuant to 12 O.S. §2509(C), Janssen and J&J's motion should be granted.

Dated: May 27, 2019

Respectfully submitted,

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**CERTIFICATE OF MAILING**

Pursuant to OKLA. STAT. tit. 12, § 2005(D), this is to certify on May 27, 2019, a true and correct copy of the above and foregoing has been served via email to the following:

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# **EXHIBIT 1**

FILED

MAY 24 2017

IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

In the office of the  
Court Clerk MARILYN WILLIAMS

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 PHARMACEUTICALS, 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

**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**

## I. INTRODUCTION

Pursuant to 12 O.S. § 2509(C), the interests of justice require that the State of Oklahoma's public nuisance claim be dismissed or, at a minimum, that the State be excluded from introducing any individualized evidence that the Teva and Actavis Generic Defendants'<sup>1</sup> allegedly false marketing influenced any individual Oklahoma healthcare provider into writing a medically inappropriate, harmful, unnecessary, or otherwise improper opioid prescription. This Court previously sustained the State's invocation of privilege and refusal to produce non-public investigatory files and information maintained by Oklahoma law enforcement and medical licensing agencies related to opioid prescribing of Oklahoma healthcare providers. Section 2509 provides that where a governmental claim of privilege is sustained and thus deprives a defendant of evidence material to its defense, 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 actions." 12 O.S. § 2509(C) (emphasis added). Such orders are warranted here.

The State's central allegation is that allegedly false marketing by the Teva and Actavis Generic Defendants (and other manufacturers) of their opioid medicines (*i.e.*, the public nuisance) "convinced[d] medical professionals to prescribe more opioids to a broader range of patients," which in turn "created an opioid epidemic in Oklahoma." Pet. ¶¶ 3, 113. The non-public documents and information in the State's possession about the criminal and other wrongful conduct of Oklahoma health care providers related to their opioid prescribing is therefore

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<sup>1</sup> The term "Teva and Actavis Generic Defendants" is defined to include: Defendants Watson Laboratories, Inc., Actavis LLC, Actavis Pharma, Inc. (collectively, the "Actavis Generic Defendants") and Defendants Cephalon, Inc. and Teva Pharmaceuticals USA, Inc. (collectively, the "Teva Defendants").

undeniably relevant and material to the Teva and Actavis Generic Defendants' ability to challenge the State's sweeping allegations and defend this case. Those withheld documents likely include patient complaints and other initiating documents, investigator reports, witness statements, statements from the doctors themselves, undercover recordings, prescription drug monitoring program records, information about confidential informants, and other information regarding the healthcare providers' opioid prescribing practices.<sup>2</sup> In sum, by invoking the privilege to deny the Teva and Actavis Generic Defendants access to that material evidence in the State's possession that directly relates to the healthcare providers that the State alleges they improperly influenced, the State has consistently denied these Defendants relevant evidence that would show their marketing did not influence those doctors or cause any improper opioid prescription in Oklahoma, but rather that these Oklahoma healthcare providers engaged in improper and potentially criminal behaviors resulting in the improper distribution of opioids in the State.

Dismissal of the State's public nuisance claim is therefore appropriate. Although it does not appear that § 2509 has been applied by Oklahoma courts, the United States Supreme Court has made clear that the successful invocation of the analogous "state secrets" privilege under federal law works both ways—and comes with consequences. That is, where the government is the plaintiff and successfully invokes the privilege to deny the defendant access to discovery to defend against that action, it would be "the height of injustice" to allow the government to continue its action. *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 487 (2011) (Scalia, J.) (emphasis added). It would be the height of injustice in this case as well, where the State seeks over \$17

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<sup>2</sup> Despite the requirements of 12 O.S. § 3226(5), the State has never provided a privilege log in this case and, in fact, the Court recently ruled that the State does not have to do so. As a result, the Teva and Actavis Generic Defendants have been denied access to the full scope of the documents that have been withheld.

billion from the Teva and Actavis Generic Defendants because, it asserts, they are liable for the entirety of the decades-long, multifaceted opioid crisis in Oklahoma. The State's public nuisance claim therefore should be dismissed.

In the alternative, the State should be precluded from introducing any evidence that the Teva and Actavis Generic Defendants' marketing influenced the opioid prescribing of any individual Oklahoma healthcare provider. As noted above, the State's case hinges on its allegation that the Teva and Actavis Generic Defendants' false and deceptive marketing of their opioid medicines to Oklahoma healthcare providers was a public nuisance that "created an opioid epidemic in Oklahoma." Pet. ¶¶ 3, 118. The State cannot have it both ways. It cannot, on the one hand, assert that the Teva and Actavis Generic Defendants caused a decades-long statewide opioid crisis by improperly influencing doctors but, on the other hand, invoke the privilege to deny the Teva and Actavis Generic Defendants access to important documents and information in the State's possession that would challenge and potentially rebut the State's claim. Principles of due process and fundamental fairness prevent the State from using the government privilege as both a sword and a shield over such critical information. .

The State chose to bring its sweeping claims yet also assert the governmental privilege over critical individualized evidence that challenges these very claims—and that is critical to support the Teva and Actavis Generic Defendants' defenses. It must now bear the consequences of that decision. Section 2509 has empowered Oklahoma courts to dismiss claims or exclude evidence for this very reason: to protect parties from being denied due process because of the State's invocation of government privilege. The Teva and Actavis Generic Defendants' motion should be granted.

## II. BACKGROUND

### A. **The Teva And Actavis Generic Defendants Have Long Sought Discovery Into The State's Investigations About Improper Prescribing, Distribution, And Dispensing Practices—Over Which The State Has Asserted The State Secrets Privilege.**

On May 10, 2018, Watson Laboratories, Inc. served the State with Requests for Production (the “RFPs”). The RFPs sought documents pertaining to criminal investigations, administrative investigations, and other documents in the State’s possession related to the opioid prescribing practices of eight specifically identified Oklahoma healthcare providers, other Oklahoma healthcare providers, and a specifically identified Oklahoma pain management clinic. Ex. 1, Watson’s RFPs (5/10/18). After the State objected to producing this relevant information on the basis of the “state secrets” privilege, among other reasons, Watson filed its Motion to Compel Discovery regarding production of criminal and administrative files on October 4, 2018. Ex. 2, Watson’s Motion to Compel (10/4/18). The Special Discovery Master issued an Order denying Watson’s Motion to Compel on October 22, 2018, and Watson filed its Objection to the Special Discovery Master’s Order on November 13, 2018. Ex. 3, Watson’s Objection to Special Discovery Master's Order (11/13/18).

In its objection, Watson argued, among other things, that its due process rights under both the United States and Oklahoma Constitutions would be violated if it was refused access to relevant information that directly contradicted the State’s claim that its alleged false marketing “convinced” Oklahoma healthcare providers to wrongfully prescribe more opioids. *See* Exs. 3 and 4, Watson’s Reply in Support of Objections to Special Discovery Master’s Order. In support of its arguments, Watson cited to civil forfeiture cases with parallel criminal proceedings where the courts stayed civil discovery because, otherwise, the government would be required to “to answer interrogatories concerning facts related to the criminal investigation or produce testimonial declarations from

officers who conducted the investigation . . .” *United States v. \$160,280.00 in U.S. Currency*, 108 F. Supp. 324, 326 (S.D.N.Y. 2015); *see also Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009)(“A district court may 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).

Watson also explained that the Supreme Court’s decision in *General Dynamics* supported its position. There, the Supreme Court held that when, to protect state secrets, a court dismisses a valid affirmative defense to the government’s claims, the case could not continue, and the parties should be put into the same position as they were on the date of the filing. In discussing the implications of the invocation of the state secrets privilege, the Supreme Court made clear that if the shoe were on the other foot—that is, if it had been the government, like the State here, seeking to recover while invoking the state secrets privilege in a way that prevented the defendant from presenting a defense—it would be “the height of injustice” to allow the government to proceed:

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 (1876)], 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*:

*Gen. Dynamics Corp.*, 563 U.S. at 487 (emphasis added).

**B. The Court Sustained the State’s Assertion of the State Secrets Privilege.**

On November 29, 2018, this Court heard argument on this dispute. After hearing argument, this Court sustained the State’s objection as to the production of documents and

information related to on-going criminal and administrative investigations, and investigations that did not lead to formal charges or administrative proceedings. Ex. 5, Hearing Transcript (11/29/18) at pp. 77-121. The Court narrowly limited the State's required production to publicly available, unsealed documents from criminal, civil, and administrative hearings related to the prescription of opioids. *Id.* The Court then followed up with a written order on December 20, 2018. Ex. 6, Balkman Order (12/20/18). The Order required the State to produce documents from criminal, civil and administrative proceedings by the State against doctors relating to the prescription of opioids that were either (a) filed with a tribunal or (b) produced to an opposing attorney. *Id.* In sum, because of the State's invocation of privilege and the Court's resultant ruling requiring only limited production based on that privilege assertion, the Teva and Actavis Generic Defendants were improperly and unfairly denied access to highly relevant information in the State's files that was not already public.

The Order also directed the State to produce to Special Discovery Master Judge Hetherington, *in camera*, a list of healthcare professionals investigated by the State relating to opioid prescriptions but where the investigation did not result in proceedings. The Teva and Actavis Generic Defendants were not allowed access to these materials. On January 17, 2019, Judge Hetherington reviewed the list provided by the State *in camera* and held that the State may withhold all of these materials pursuant to its governmental privilege. Ex. 7, Hetherington Order (1/17/19). That list has never been disclosed to the Teva and Actavis Generic Defendants.

**C. The State Has Continued To Withhold Critical Discovery And Information On The Basis Of The State Secrets Privilege.**

Based on these orders sustaining the State's exercise of governmental privilege, the State continued to withhold material evidence during deposition of the State's corporate representatives. On May 21, 2019, the State presented four corporate representatives to provide testimony on the



topic of the State's investigation into, civil or criminal prosecution of, and/or discipline of doctors and pharmacists for the improper prescribing or diversion of opioids. Ex. 8, Amended Depo. Notice on Topic 17. The State presented representatives from the Oklahoma Medical Board (Lawrence Carter), the State Board of Osteopathic Examiners (Richard Zimmer), the Oklahoma State Board of Pharmacy (Gary Larue), and the Oklahoma Bureau of Narcotics and Dangerous Drugs (Chris Smith) to testify regarding this topic.

During those depositions, the State continued to invoke the privilege and this Court's prior order and instructed those witnesses not to answer no fewer than *64 different questions* by the Teva and Actavis Generic Defendants, including questions seeking details about several relevant topics:<sup>3</sup>

- Non-public investigatory files maintained by these agencies;
- Whether certain doctors or pharmacists had been criminally prosecuted;
- Whether State agencies received information about improper opioid prescribing by healthcare providers and chose not to initiate any disciplinary action;
- Why the State agencies allowed certain doctors and pharmacists to maintain their license once it received information about improper opioid prescribing; and
- Whether a recommendation was made for criminal prosecution of certain doctors or pharmacists.

In short, the State continues to assert the state secrets privilege over key investigative documents and information that directly rebut the State's theory of causation for its lone public nuisance claim.

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<sup>3</sup> Mr. Zimmer was given this instruction approximately 29 times; Mr. Carter was given this instruction 16 times; Mr. Larue was given this instruction approximately 10 times; and Mr. Smith was given this instruction approximately 9 times. The final deposition transcripts were not available at the time of this filing. The Teva and Actavis Generic Defendants will provide them when they are final, if requested by the Court.

### III. ARGUMENT

12 O.S. § 2509(C) provides that:

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.

This language is mandatory. A court “shall” issue all orders necessary to remedy the prejudice that flows from the assertion of a government privilege over material evidence. *Id.*

#### **A. The Teva And Actavis Generic Defendants Have Been Deprived Of Material Evidence And Severely Prejudiced By The State’s Assertion Of The Privilege.**

Here, the evidence of criminal, civil, and administrative investigations into the opioid-prescribing practices of Oklahoma healthcare providers withheld pursuant to the State’s governmental privilege goes to the essence of the State’s lone remaining public nuisance claim. The State alleges that Defendants “falsely represented and/or omitted the risks of addiction and falsely touted the benefits of [its] opioids.” Pet. ¶ 53. The State further alleges that these purported misrepresentations and omissions “convinced[d] medical professionals to prescribe more opioids to a broader range of patients,” which, in turn, “created an opioid epidemic in Oklahoma.” *Id.* ¶¶ 3, 75, 83, 118. The State “seeks to abate the public nuisance Defendants created and all necessary relief to abate such public nuisance.” *Id.* ¶ 120.

To succeed on its lone remaining public nuisance claim, the State must prove (among other things) that the Teva and Actavis Generic Defendants acted “unlawfully” and that this nuisance, in turn, affected “at the same time an entire community or neighborhood or considerable number of persons.” 50 O.S. §§ 1–2. The State has chosen to proceed on a theory that the Teva and Actavis Generic Defendants’ purported “false” marketing influenced Oklahoma doctors to improperly prescribe opioids. The Teva and Actavis Generic Defendants will defend this case,

among other ways, by contending that they did not improperly influence any Oklahoma healthcare provider's prescribing, including that they bear no liability where an Oklahoma doctor engaged in independent criminal or improper prescribing. In other words, the Teva and Actavis Generic Defendants cannot be held liable for illegal acts such as diversion of prescription medicines, willful ignorance of prescribing guidelines by doctors, and self-motivated acts by irresponsible and/or criminal doctors operating pill mills or otherwise knowingly distributing opioid medications for improper reasons. That is the real nuisance, not the alleged marketing by the Teva and Actavis Generic Defendants. Yet the evidence withheld by the State pursuant to governmental privilege is perhaps the *only* kind of evidence that would contain this fundamental information.

This Court sustained the State's invocation of governmental privilege over two types of evidence: (1) non-public investigator reports, evidence summaries, and witness statements for *all* criminal, civil, and administrative investigations related to the opioid prescribing practices of Oklahoma healthcare providers; and (2) *all* evidence related to such investigations where the investigation is either pending or closed without any finding of liability. *See* Exs. 6-7. The number and breadth of investigate materials withheld pursuant to the governmental privilege—and the identities of the Oklahoma healthcare providers involved in them—were also withheld from Defendants. *Id.*

Both of the categories of evidence withheld by the State are likely to contain evidence of willful, knowing and, indeed, criminal misbehavior by individual Oklahoma healthcare providers showing that the Teva and Actavis Generic Defendants' marketing did not cause the harm the State claims. By way of example, if the State investigated an Oklahoma healthcare provider who wrote a prescription for one of Cephalon's medicines (Actiq or Fentora) while operating an illegal pill mill, such evidence would help show that the independent conduct of that doctor caused harm to

the community—not the conduct of the Teva or Actavis Generic Defendants. That doctor's unlawful conduct would be the nuisance—not any marketing. Yet the State has asserted the state secrets privilege over all of this critical information.

This critical information also is precisely what the State further withheld during the deposition of its corporate representatives. The State instructed its four corporate representatives—which were required to provide testimony on the State's investigation into, civil or criminal prosecution of, and/or discipline of doctors and pharmacists for the improper prescribing or diversion of opioids (Ex. 8, Amended Depo. Notice on Topic 17)—not to answer approximately **64** different questions (or any follow-up questions) on the basis of the state secrets privilege. The State denied the Teva and Actavis Generic Defendants key information regarding, among other things: (1) whether certain doctors or pharmacist had been criminally prosecuted; (2) whether State agencies received information about improper opioid prescribing by healthcare providers and chose not to initiate any disciplinary action; (3) why these State agencies allowed certain doctors and pharmacists to maintain their license once it received information about improper opioid prescribing; and (4) whether a recommendation was made for criminal prosecution of certain doctors or pharmacists.

Given these assertions of privilege, the Teva and Actavis Generic Defendants do not even know the full universe of Oklahoma healthcare providers whom the State has investigated for improper and/or criminal conduct involving the distribution of opioids. But that information is in the possession of the State and was the proper subject of discovery. Absent this basic information, the Teva and Actavis Generic Defendants have no way of knowing which Oklahoma prescribers who wrote prescriptions of their medicines were investigated by the State for improper and/or criminal conduct and, thus, no way to do any follow-up discovery or analysis of these prescribers.

This is particularly prejudicial because the Teva and Actavis Generic Defendants have been denied discovery as to the names of each of the physicians who wrote the allegedly harmful prescriptions that the State contends are at issue.<sup>4</sup> By preventing the Teva and Actavis Generic Defendants from obtaining information that is crucial to show that they did not engage in any public nuisance or cause any harm in Oklahoma, the State has clearly deprived the Teva and Actavis Generic Defendants of material evidence. This raises serious due process concerns.

The State is likely to argue that withheld evidence is not material because (i) the State does not seek to introduce any evidence at trial regarding the individual Oklahoma healthcare providers implicated by the withheld evidence or (ii) the contents of the withheld evidence do not reveal any misbehavior that is relevant to the damages it will seek at trial. The State is simply wrong. The withheld evidence is critical to the State's obligation to show that the Teva and Actavis Generic Defendants caused harm to an "entire community" of Oklahomans, as required to support its public nuisance claim. 50 O.S. § 2. The Teva and Actavis Generic Defendants have the due process right to defend the case as they see fit, including showing that their marketing (the alleged nuisance) did not cause individual doctors to write improper prescriptions of opioid medicines. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Worse yet, the State has conceded that *it has not reviewed* the materials it has withheld, Ex. 5, Hearing Transcript (11/29/18) at pp. 72, 88-89, and, thus, has no basis to claim that the withheld evidence fails to reveal any misbehavior relevant to its public nuisance claim. Because the State has no basis to avoid the mandatory language of § 2509(C), the Court must issue an appropriate remedy for the State's assertion of the privilege.

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<sup>4</sup> *See* Ex. 9, Order of Special Discovery Master (10/10/18) (denying Defendants' motion to compel discovery of claims data which would contain the names of the physicians who wrote the allegedly harmful prescriptions at issue in this action and the names of relevant patients); Ex. 5, Hearing Transcript (11/29/18) at pp. 74-75 (overruling Defendants' objection to Order of Special Discovery Master (10/08/18) and holding that claims data is "not relevant to this case.")

**B. The Appropriate Remedy Is Dismissal Of The State's Public Nuisance Claim, Or, Alternatively, A Severe Preclusion Order.**

The solution to the State's assertion of the state secrets privilege over relevant and material evidence is clear: dismissal of the State's lone remaining public nuisance claim. Indeed, in this very context, 12 O.S. § 2509(C) expressly empowers the Court to issue any order as the interests of justice require, including "dismissing the action[s]." That is the necessary remedy here because, without such information about the criminal conduct of doctors, pharmacists, and others, the Teva and Actavis Generic Defendants have been denied the due process right to defend against the State's claim. The State is seeking billions of dollars from the Teva and Actavis Generic Defendants in this action. They must be allowed to present all evidence to challenge and negate the State's claim. Because they have been denied that fundamental right by the State's assertion of the privilege, the interests of justice require dismissal.

Critically, other courts across the country have reached the same result in response to similar assertions of the "state secrets" privilege by the federal government. This Court should do the same. *See, e.g., Gen. Dynamics Corp.*, 563 U.S. at 487 (holding that government's invocation of governmental privilege required dismissal of all affected claims and counterclaims); *United States v. Moussaoui*, 382 F.3d 453, 474 (4th Cir. 2004) (holding that "[i]f the government refuses to produce the information [subject to governmental privilege]—as it may properly do—the result is ordinarily dismissal"); *Jencks v. United States*, 353 U.S. 657, 671 (1957) (holding that "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free . . . [S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense") (alterations in original) (citations omitted); *Liuzzo v. United States*, 508 F. Supp. 923, 940 (E.D. Mich. 1981)

(interpreting language identical to 12 O.S. § 2509(C) and holding, in case where government defendant asserted privilege against plaintiffs, that “if protection of the [evidence subject to governmental privilege] truly deprives the plaintiffs of material evidence to prove their allegations, the court will follow the suggested procedure . . . and enter a finding of liability on the part of the defendant as to the claims dealt.”)

If the Court declines to dismiss the public nuisance claim (and it should dismiss such a claim), the interests of justice require a severe preclusion order that prevents the State from benefitting from its privilege assertion at trial. In particular, the State should be precluded from introducing any evidence that the Teva and Actavis Generic Defendants’ marketing influenced any individual Oklahoma healthcare provider into writing a medically inappropriate, harmful, or otherwise improper opioid prescription. 12 O.S. § 2509(C) (giving broad discretion to fashion a strong order, including “striking the testimony of a witness” or “declaring a mistrial”). At a minimum, such an order is necessary because the State’s privilege assertion has deprived the Teva and Actavis Generic Defendants of material evidence needed to refute the State’s core causation theory in support of its public nuisance claim. It would be the height of injustice to allow the State to profit from its privilege assertion.


#### **IV. CONCLUSION**

The Attorney General’s assertion of the state secrets privilege as discussed herein belies the State’s position that it wants the fact finder to have all the evidence upon which to judge this case. Clearly, the State would prefer to selectively reveal the facts and relevant evidence. Pursuant to 12 O.S. § 2509(C), because the State’s exercise of the state secrets privilege has deprived the Teva and Actavis Generic Defendants of material evidence needed to refute the State’s allegations that individual Oklahoma healthcare providers were influenced by their alleged marketing, the

interests of justice require dismissal of the State's public nuisance claim (which is founded on this very premise). In the alternative, the State should be precluded from introducing any evidence at trial that the Teva and Actavis Generic Defendants' marketing influenced any Oklahoma provider into writing a medically inappropriate, harmful, unnecessary, or otherwise improper opioid prescription.

Dated: May 24, 2019

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was emailed this 24rd day of May, 2019, to the following:

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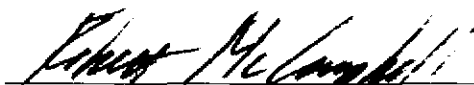
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Robert G. McCampbell

# **EXHIBIT 2**

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

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

Plaintiff,

vs.

Case No. CJ-2017-816

PURDUE PHARMA L.P., et al,

Defendants.

**DEFENDANT JANSSEN PHARMACEUTICALS, INC.'S FIRST SET OF REQUESTS  
FOR PRODUCTION OF DOCUMENTS FROM PLAINTIFF**

Pursuant to 12 O.S. § 3234, Defendant Janssen Pharmaceuticals, Inc. ("Janssen") requests that the Plaintiff State of Oklahoma ("the State") respond to Janssen within 30 days to this request to produce the below-described documents which are in the State's possession, custody, or control.

**INSTRUCTIONS**

1. Unless otherwise set forth, the documents requested include all documents created within the Relevant Time Period and continuing through the date of this request.
2. The documents requested shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond with the categories in the request.
3. You should produce electronically stored information ("ESI") and hardcopy documents in a single-page TIFF-image format with extracted or OCR text and associated metadata—a standard format in e-discovery—known as TIFF-plus. Produce electronic spreadsheets (e.g., Excel), electronic presentations (e.g., PowerPoint), desktop databases (e.g., Access), and audio or video multimedia in native format with a slip sheet identifying Bates labels and confidentiality designations.

4. These requests are directed toward all documents known or available to the State, including records and documents in its custody or control or available to it upon reasonable inquiry. Your response must state, with respect to each item or category, that inspection and related activities shall be permitted, unless the request is objected to, in which event you must state your reasons for objecting. If you object to part of an item or category, specify the part.

5. This request is continuing in character, and Janssen requests that you amend or supplement your response in accordance with the Oklahoma Rules of Civil Procedure if you obtain new or additional information.

6. If any document is withheld for any reason, including but not limited to any alleged claim of privilege, confidentiality, or trade secret, or for any other reason or objection, provide a description of the document being withheld which includes the following:

- a. The date of the document;
- b. The author of the document;
- c. The recipient of the document;
- d. All persons to whom copies of the document have been furnished;
- e. The subject matter of the document;
- f. The file in which the document is kept in the normal course of business;
- g. The current custodian of the document; and
- h. The nature of the privilege or other reason for not producing the document and sufficient description of the facts surrounding the contents of the document to justify withholding the document under said privilege or reason.

7. Where you have a good faith doubt as to the meaning or intended scope of a request, and your sole objection would be to its vagueness, please contact counsel for Janssen in advance of asserting an unnecessary objection. The undersigned counsel will provide additional clarification or explanation as needed.

### **DEFINITIONS**

1. "Claim" is any request for payment or reimbursement.
2. The term "chronic pain" is used herein consistent with the meaning of "non-cancer related pain" or "long term pain" as those terms are used in the Complaint, e.g., ¶¶3, 22, 51, 67, 122.
3. "Communication(s)" is any unilateral, bilateral, or multilateral assertion, disclosure, statement, conduct, transfer, or exchange of information or opinion, including omissions, however made, whether oral, written, telephonic, photographic, or electronic.
4. "Complaint" refers to your Original Petition filed June 30, 2017, and exhibits, as well as any subsequent amendments.
5. "Defendants" are the individual Defendants named in the Complaint.
6. "Document(s)" is used in the broadest sense permissible under 12 O.S. § 3234(A)(1), and includes without limitation "writings," "recordings," "photographs," "original[s]," "duplicate[s]," "image[s]," and "record[s]," as those terms are set forth in 12 O.S. § 3001.
7. The term "document(s)" includes all drafts and all copies that differ in any respect from the original; information stored in, or accessible through, computer or other information retrieval systems (including any computer archives or back-up systems), together with instructions and all other materials necessary to use or interpret such data compilations; all other Electronically



Stored Information; and the file-folder, labeled-box, or notebook containing the document, as well as any index, table of contents, list, or summaries that serve to organize, identify, or reference the document.

8. "Drug Utilization Review Board" is used herein consistent with its meaning in Section 317:1-3-3.1 of the Oklahoma Administrative Code.

9. "Educational Activity" refers to publications, programs, continuing medical education, or other forms of communicating unbranded, educational information about Opioids or treatment of chronic pain.

10. "Electronically Stored Information" is used in the broadest sense permissible by the Oklahoma Rules of Civil Procedure and includes without limitation all electronic data (including active data, archival data, backup data, backup tapes, distributed data, electronic mail, forensic copies, metadata, and residual data) stored in any medium from which information can be obtained.

11. The term "employee" includes all current and former employees, independent contractors, and individuals performing work as temporary employees.

12. "Healthcare Professional(s)," "Health Care Provider(s)" or "HCP(s)" is any person who prescribes, administers, or dispenses any Relevant Medication or Medication Assisted Treatment to any person or animal.

13. "Key Opinion Leader(s)" or "KOL(s)" is used herein consistent with its meaning in the Complaint, ¶58.

14. "Medication Assisted Treatment" is the use of medications with counseling and behavioral therapies to treat substance abuse disorders and prevent Opioid overdose.

15. "Medical Necessity" has the same meaning as defined in Section 317:30-3-1(f) of the Oklahoma Administrative Code.

16. "Oklahoma Agency" or "Oklahoma Agencies" collectively refers to any State entity involved in regulating, monitoring, approving, reimbursing, or prosecuting the prescription, dispensing, purchase, sale, use, or abuse of controlled substances in Oklahoma, including, but not limited to, the Oklahoma Office of the Governor, Oklahoma Legislature, Oklahoma Office of the Attorney General, Oklahoma Department of Corrections, Oklahoma Department of Public Safety, Oklahoma State Department of Health, Oklahoma State Bureau of Investigation, Oklahoma Bureau of Narcotics and Dangerous Drugs Control, Oklahoma Department of Mental Health and Substance Abuse Services, Oklahoma Health Care Authority, Oklahoma State Board of Dentistry, Oklahoma State Board of Medical Licensure and Supervision, Oklahoma State Board of Nursing, Oklahoma State Board of Pharmacy, Oklahoma State Board of Veterinary Medical Examiners, Oklahoma Workers' Compensation Commission, Office of the Medical Examiner of the State of Oklahoma, and their respective predecessors, supervisory and subordinate organizations, and current or former employees.

17. "Opioid(s)" refers to FDA-approved pain-reducing medications consisting of natural or synthetic chemicals that bind to receptors in a patient's brain or body to produce an analgesic effect.

18. "Patient(s)" is any human being to whom an Opioid is prescribed or dispensed.

19. "Person(s)" is any natural or legal person.

20. Pharmacy and Therapeutics Committee ("P & T Committee") or formulary committee means any committee, group, board, person or persons with responsibility for determining which drugs will be placed on any prescription drug formulary created, developed or utilized by the State of Oklahoma or any Program, the conditions and terms under which the State of Oklahoma or any Program will authorize purchase of, coverage of, or reimbursement for those

drugs, who can prescribe specific drugs, policies and procedures regarding drug use (including pharmacy policies and procedures, standard order sets, and clinical guidelines), quality assurance activities (e.g., drug utilization review/drug usage evaluation/medication usage evaluation), adverse drug reactions/medication errors, dealing with product shortages, and/or education in drug use.

21. "Prior Authorization" is any program that implements scope, utilization, or product based controls for drugs or medications.

22. "Program(s)" is every program administered by an Oklahoma Agency that reviews, authorizes, and determines the conditions for payment or reimbursement for Opioids, including, but not limited to, the Oklahoma Medicaid Program, as administered by the Oklahoma Health Care Authority, and the Oklahoma Workers Compensation Commission.

23. "Relevant Time Period" means January 1, 2007 to the present, or such other time period as the parties may later agree or the Court determines should apply to each side's discovery requests in this action.

24. "Relevant Medication(s)" includes any and all drugs, branded or generic, consisting of natural or synthetic chemicals that bind to opioid receptors in a Patient's brain or body to produce an analgesic effect, whether or not listed in the Complaint, including, but not limited to, codeine, fentanyl, hydrocodone, hydromorphone, methadone, morphine, oxycodone, oxymorphone, tapentadol, and tramadol.

25. "Third-Party Group(s)" is used herein consistent with its meaning in the Complaint, including any "seemingly unaffiliated and impartial organizations to promote opioid use." Complaint, ¶¶58, 63, 72.

26. "Vendor" means any third-party claims administrator, pharmacy benefit manager, HCP, or person involved in overseeing, administering, or monitoring any Program.

27. "You," "Your," "State," "Oklahoma," and "Plaintiff" refer to the sovereign State of Oklahoma and all its departments, agencies, and instrumentalities, including current and former employees, any Vendor, and other persons or entities acting on the State's behalf.

28. The words "and" and "or" shall be construed conjunctively as well as disjunctively, whichever makes the request more inclusive.

29. "Any" includes "all" and vice versa.

30. "Each" includes "every" and vice versa.

31. The term "including shall be construed to mean "including but not limited to."

32. The singular of each word includes its plural and vice versa.

#### **DOCUMENTS REQUESTED**

1. All Documents, Communications, and Claims identified, referred to, or relied upon in Your answers to Interrogatories served by any Defendant.

2. All minutes, transcripts, agendas, notes, monographs, dossiers, analyses, or other documents relating to meetings of the Drug Utilization Review Board or any P & T Committee, formulary committee, or other equivalent committee(s) or group(s) acting on Your behalf regarding any of the Relevant Medications, including any document containing a discussion relating to (a) the formulary status of the Relevant Medications, (b) restrictions on the purchase, coverage, reimbursement, utilization, use, or prescription of the Relevant Medications, or (c) the safety, efficacy, economic, or other concerns related to any of the Relevant Medications.

3. All Communications with physicians, providers, Health Care Providers, plan sponsors, Medicaid beneficiaries, beneficiaries of any Program, or pharmacies relating to the Relevant Medications.

4. All Documents and Communications concerning statistics relating to addiction, abuse, or overdose relating to the Relevant Medications in the State of Oklahoma, including but not limited to Documents and Communications relating to any evaluation, assessment, analysis, modeling, or review of any financial or economic impact associated with addiction, abuse, or overdose relating to the Relevant Medications.

5. All Documents and Communications relating to any educational efforts You or anyone acting on Your behalf sponsored or engaged in pertaining to the Relevant Medications.

6. Participant level claims data showing the full Medicaid or other Program claims history for prescription medications and other health care services submitted to Medicaid or any other Program, whether reimbursed or not, for all patients who received a prescription for any Relevant Medication, including data sufficient to show the price, Medicaid or other Program payments, co-payments, deductibles, rebates, discounts or any other offsets or adjustments to the price paid by You for any Relevant Medication.

7. All Documents and Communications with or relating to any Key Opinion Leader or Third-Party Group whom You claim communicated or consulted with, or was organized, retained, contracted, sponsored, funded, or controlled, in whole or in part, by any Defendant, including but not limited to the Key Opinion Leaders and Third-Party Groups identified in the Complaint.

8. All Documents and Communications concerning Opioids and misuse, diversion, abuse, addiction, overdose, or death, including Communications and Documents provided or made

available by the State of Oklahoma, the Oklahoma Attorney General, or any Oklahoma Agency or Program to any Person, Patient, or Health Care Provider that discuss substance abuse, diversion, prescribing practices, prescription safety, Opioids, or the treatment of pain, including but not limited to any Documents or Communications for which you provided grants, sponsorships, or other funding.

9. All Documents and Communications relating to Your investigation and/or enforcement of violations of laws governing the marketing of Relevant Medications and/or the use, prescribing, or request for reimbursement for prescriptions for any Relevant Medication, including documents sufficient to identify any Person arrested, indicted, charged, fined, or otherwise penalized for any activity related to the use, prescribing or request for reimbursement of any Relevant Medication.

Dated: January 12, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of January 2018, I caused a true and correct copy of the following:

**DEFENDANT JANSSEN PHARMACEUTICALS, INC.'S FIRST SET OF  
REQUESTS FOR PRODUCTION OF DOCUMENTS FROM PLAINTIFF**

to be served by U.S. mail upon the counsel of record listed on the attached Service List.

/s/

  
Jennifer D. Cardelus



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# **EXHIBIT 3**

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

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

Plaintiff,

vs.

Case No. CJ-2017-816

PURDUE PHARMA L.P., et al,

Defendants.

**DEFENDANT JOHNSON & JOHNSON'S FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS FROM PLAINTIFF**

Pursuant to 12 O.S. § 3234, Defendant Johnson & Johnson ("J&J") requests that the Plaintiff State of Oklahoma ("the State") respond to J&J within 30 days to this request to produce the below-described documents which are in the State's possession, custody, or control.

**INSTRUCTIONS**

1. Unless otherwise set forth, the documents requested include all documents created within the Relevant Time Period and continuing through the date of this request.
2. The documents requested shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond with the categories in the request.
3. You should produce electronically stored information ("ESI") and hardcopy documents in a single-page TIFF-image format with extracted or OCR text and associated metadata—a standard format in e-discovery—known as TIFF-plus. Produce electronic spreadsheets (e.g., Excel), electronic presentations (e.g., PowerPoint), desktop databases (e.g., Access), and audio or video multimedia in native format with a slip sheet identifying Bates labels and confidentiality designations.

4. These requests are directed toward all documents known or available to the State, including records and documents in its custody or control or available to it upon reasonable inquiry. Your response must state, with respect to each item or category, that inspection and related activities shall be permitted, unless the request is objected to, in which event you must state your reasons for objecting. If you object to part of an item or category, specify the part.

5. This request is continuing in character, and J&J requests that you amend or supplement your response in accordance with the Oklahoma Rules of Civil Procedure if you obtain new or additional information.

6. If any document is withheld for any reason, including but not limited to any alleged claim of privilege, confidentiality, or trade secret, or for any other reason or objection, provide a description of the document being withheld which includes the following:

- a. The date of the document;
- b. The author of the document;
- c. The recipient of the document;
- d. All persons to whom copies of the document have been furnished;
- e. The subject matter of the document;
- f. The file in which the document is kept in the normal course of business;
- g. The current custodian of the document; and
- h. The nature of the privilege or other reason for not producing the document and sufficient description of the facts surrounding the contents of the document to justify withholding the document under said privilege or reason.

7. Where you have a good faith doubt as to the meaning or intended scope of a request, and your sole objection would be to its vagueness, please contact counsel for J&J in advance of asserting an unnecessary objection. The undersigned counsel will provide additional clarification or explanation as needed.

### **DEFINITIONS**

1. "Claim" is any request for payment or reimbursement.
2. The term "chronic pain" is used herein consistent with the meaning of "non-cancer related pain" or "long term pain" as those terms are used in the Complaint, e.g., ¶¶3, 22, 51, 67, 122.
3. "Communication(s)" is any unilateral, bilateral, or multilateral assertion, disclosure, statement, conduct, transfer, or exchange of information or opinion, including omissions, however made, whether oral, written, telephonic, photographic, or electronic.
4. "Complaint" refers to your Original Petition filed June 30, 2017, and exhibits, as well as any subsequent amendments.
5. "Defendants" are the individual Defendants named in the Complaint.
6. "Document(s)" is used in the broadest sense permissible under 12 O.S. § 3234(A)(1), and includes without limitation "writings," "recordings," "photographs," "original[s]," "duplicate[s]," "image[s]," and "record[.]," as those terms are set forth in 12 O.S. § 3001.
7. The term "document(s)" includes all drafts and all copies that differ in any respect from the original; information stored in, or accessible through, computer or other information retrieval systems (including any computer archives or back-up systems), together with instructions and all other materials necessary to use or interpret such data compilations; all other Electronically

Stored Information; and the file-folder, labeled-box, or notebook containing the document, as well as any index, table of contents, list, or summaries that serve to organize, identify, or reference the document.

8. “Drug Utilization Review Board” is used herein consistent with its meaning in Section 317:1-3-3.1 of the Oklahoma Administrative Code.

9. “Educational Activity” refers to publications, programs, continuing medical education, or other forms of communicating unbranded, educational information about Opioids or treatment of chronic pain.

10. “Electronically Stored Information” is used in the broadest sense permissible by the Oklahoma Rules of Civil Procedure and includes without limitation all electronic data (including active data, archival data, backup data, backup tapes, distributed data, electronic mail, forensic copies, metadata, and residual data) stored in any medium from which information can be obtained.

11. The term “employee” includes all current and former employees, independent contractors, and individuals performing work as temporary employees.

12. “Healthcare Professional(s),” “Health Care Provider(s)” or “HCP(s)” is any person who prescribes, administers, or dispenses any Relevant Medication or Medication Assisted Treatment to any person or animal.

13. “Key Opinion Leader(s)” or “KOL(s)” is used herein consistent with its meaning in the Complaint, ¶158.

14. “Medication Assisted Treatment” is the use of medications with counseling and behavioral therapies to treat substance abuse disorders and prevent Opioid overdose.

15. “Medical Necessity” has the same meaning as defined in Section 317:30-3-1(f) of the Oklahoma Administrative Code.



16. "Oklahoma Agency" or "Oklahoma Agencies" collectively refers to any State entity involved in regulating, monitoring, approving, reimbursing, or prosecuting the prescription, dispensing, purchase, sale, use, or abuse of controlled substances in Oklahoma, including, but not limited to, the Oklahoma Office of the Governor, Oklahoma Legislature, Oklahoma Office of the Attorney General, Oklahoma Department of Corrections, Oklahoma Department of Public Safety, Oklahoma State Department of Health, Oklahoma State Bureau of Investigation, Oklahoma Bureau of Narcotics and Dangerous Drugs Control, Oklahoma Department of Mental Health and Substance Abuse Services, Oklahoma Health Care Authority, Oklahoma State Board of Dentistry, Oklahoma State Board of Medical Licensure and Supervision, Oklahoma State Board of Nursing, Oklahoma State Board of Pharmacy, Oklahoma State Board of Veterinary Medical Examiners, Oklahoma Workers' Compensation Commission, Office of the Medical Examiner of the State of Oklahoma, and their respective predecessors, supervisory and subordinate organizations, and current or former employees.

17. "Opioid(s)" refers to FDA-approved pain-reducing medications consisting of natural or synthetic chemicals that bind to receptors in a patient's brain or body to produce an analgesic effect.

18. "Patient(s)" is any human being to whom an Opioid is prescribed or dispensed.

19. "Person(s)" is any natural or legal person.

20. Pharmacy and Therapeutics Committee ("P & T Committee") or formulary committee means any committee, group, board, person or persons with responsibility for determining which drugs will be placed on any prescription drug formulary created, developed or utilized by the State of Oklahoma or any Program, the conditions and terms under which the State of Oklahoma or any Program will authorize purchase of, coverage of, or reimbursement for those

drugs, who can prescribe specific drugs, policies and procedures regarding drug use (including pharmacy policies and procedures, standard order sets, and clinical guidelines), quality assurance activities (e.g., drug utilization review/drug usage evaluation/medication usage evaluation), adverse drug reactions/medication errors, dealing with product shortages, and/or education in drug use.

21. "Prior Authorization" is any program that implements scope, utilization, or product based controls for drugs or medications.

22. "Program(s)" is every program administered by an Oklahoma Agency that reviews, authorizes, and determines the conditions for payment or reimbursement for Opioids, including, but not limited to, the Oklahoma Medicaid Program, as administered by the Oklahoma Health Care Authority, and the Oklahoma Workers Compensation Commission.

23. "Relevant Time Period" means January 1, 2007 to the present, or such other time period as the parties may later agree or the Court determines should apply to each side's discovery requests in this action.

24. "Relevant Medication(s)" includes any and all drugs, branded or generic, consisting of natural or synthetic chemicals that bind to opioid receptors in a Patient's brain or body to produce an analgesic effect, whether or not listed in the Complaint, including, but not limited to, codeine, fentanyl, hydrocodone, hydromorphone, methadone, morphine, oxycodone, oxymorphone, tapentadol, and tramadol.

25. "Third-Party Group(s)" is used herein consistent with its meaning in the Complaint, including any "seemingly unaffiliated and impartial organizations to promote opioid use." Complaint, ¶¶58, 63, 72.

26. "Vendor" means any third-party claims administrator, pharmacy benefit manager, HCP, or person involved in overseeing, administering, or monitoring any Program.

27. "You," "Your," "State," "Oklahoma," and "Plaintiff" refer to the sovereign State of Oklahoma and all its departments, agencies, and instrumentalities, including current and former employees, any Vendor, and other persons or entities acting on the State's behalf.

28. The words "and" and "or" shall be construed conjunctively as well as disjunctively, whichever makes the request more inclusive.

29. "Any" includes "all" and vice versa.

30. "Each" includes "every" and vice versa.

31. The term "including shall be construed to mean "including but not limited to."

32. The singular of each word includes its plural and vice versa.

#### **DOCUMENTS REQUESTED**

1. All Documents and Communications that identify, describe, quantify, evidence, or relate to any loss, damage, or harm for which you seek monetary relief, penalty, fine, or any other form of relief from each Defendant.

2. All Documents reviewed by, relied on, or provided to the Drug Utilization Review Board or the members of any P & T Committee, formulary committee, or other equivalent committee(s) or group(s) acting on Your behalf regarding any of the Relevant Medication.

3. All Documents and Communications that You or anyone acting on Your behalf considered, used, consulted, or relied on in determining the extent to which any Program would provide, restrict, or deny coverage for any Relevant Medication.

4. All Documents and Communications identifying, referring to, or concerning any Patients whom You allege received, obtained, or were harmed by a prescription for a Relevant Medication that You claim was unnecessary, excessive, improper, and/or not a Medical Necessity.

5. All Documents and Communications relating to any studies, reviews, or data maintained by You, any of Your divisions, subdivisions, or agencies, or anyone acting on your behalf relating to the Relevant Medications, including without limitation cost-benefit studies, pharmacoeconomic studies, studies regarding overdoses, misuse, abuse, or prescription drug use for Opioids, utilization reviews, and any analyses or plans related to findings from any of the foregoing studies or reviews.

6. All Documents and Communications relating to Medicaid or other Program beneficiaries switching between any of the Relevant Medications and any other drug or therapy.

7. All Documents and Communications describing the Programs, including Documents and Communications that describe the funding, changes in prescription drug coverage, and budgeting for the Programs.

8. All Documents and Communications with or relating to any Defendant concerning Opioids or any Educational Activity.

9. All Documents and Communications relating to any effort by You or on Your behalf to identify, treat, reduce, or prevent Opioid abuse and illicit Opioid prescribing and dispensing.

10. All Documents and Communications: (1) that caused or contributed to Your payment or reimbursement of any prescription for one of Defendants' Opioids pursuant to the Oklahoma Medicaid Program; or (2) which states income or expense and was used to determine a rate of payment pursuant to the Oklahoma Medicaid Program for a prescription for one of

Defendants' Opioids; or (3) made as part of an application for payment for one of Defendants' Opioids by any person from the Oklahoma Medicaid Program or its fiscal agents.

Dated: January 12, 2018

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Janssen Pharmaceuticals, Inc. n/k/a Janssen  
Pharmaceuticals, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of January 2018, I caused a true and correct copy of the following:

**DEFENDANT JOHNSON & JOHNSON'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS FROM PLAINTIFF**

to be served by U.S. mail upon the counsel of record listed on the attached Service List.

*[Handwritten Signature]*  
/s/ Jennifer D. Cardelus

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Watson Pharma, Inc.*

# **EXHIBIT 4**

**[FILED UNDER SEAL]**

1           IN THE DISTRICT COURT OF CLEVELAND COUNTY  
2                           STATE OF OKLAHOMA

3       STATE OF OKLAHOMA, ex rel.,  
4       MIKE HUNTER,  
5       ATTORNEY GENERAL OF OKLAHOMA,

6           Plaintiff,

7       vs.

8                           Case No. CJ-2017-816

9       (1) PURDUE PHARMA, L.P.;  
10       (2) PURDUE PHARMA, INC.;  
11       (3) THE PURDUE FREDERICK COMPANY;  
12       (4) TEVA PHARMACEUTICALS USA, INC.;  
13       (5) CEPHALON, INC.;  
14       (6) JOHNSON & JOHNSON;  
15       (7) JANSSEN PHARMACEUTICALS, INC.;  
16       (8) ORTHO-McNEIL-JANSSEN  
17       PHARMACEUTICALS, INC., n/k/a  
18       JANSSEN PHARMACEUTICALS, INC.;  
19       (9) JANSSEN PHARMACEUTICA, INC.;  
20       n/k/a JANSSEN PHARMACEUTICALS, INC.;  
21       (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC,  
22       F/k/a ACTAVIS, INC., f/k/a WATSON  
23       PHARMACEUTICALS, INC.;  
24       (11) WATSON LABORATORIES, INC.;  
25       (12) ACTAVIS, LLC; and  
26       (13) ACTAVIS PHARMA, INC.,  
27       f/k/a WATSON PHARMA, INC.,

28           Defendants.

29           VIDEOTAPED DEPOSITION OF DRUE DIESELHORST

30                   TAKEN ON BEHALF OF THE PLAINTIFF

31           ON SEPTEMBER 5, 2018, BEGINNING AT 8:41 A.M.

32                   IN OKLAHOMA CITY, OKLAHOMA

33  
34       VIDEOTAPED BY: C. J. Shelton  
35       REPORTED BY: D. Luke Epps, CSR, RPR

3 Q (BY MS. BALDWIN) I understand you're  
4 represented by Janssen's counsel today for  
5 purposes of this deposition, but do you have  
6 your own independent counsel?

7 MR. SPARKS: Object to the form.

8 THE WITNESS: I do not.

9 Q (BY MS. BALDWIN) Do you have a criminal  
10 defense attorney?

11 MR. SPARKS: Object to the form.

12 Argumentative.

13 Q (BY MS. BALDWIN) Has Janssen ever  
14 offered you a criminal defense attorney?

15 MR. SPARKS: Object to the form.

16 Argumentative, you know, and also objection also  
17 to the extent that it's privileged information.

18 THE WITNESS: Okay.

19 MR. SPARKS: Remember, you -- so I'm  
20 instructing you not to discuss anything we spoke  
21 about.

22 THE WITNESS: Okay.

23 MR. SPARKS: But if there's information  
24 beyond what we spoke about that you think is  
25 responsive to that question, you can -- you can

1 answer if you know.

2 THE WITNESS: They are my attorneys. I  
3 don't have another attorney.

4 Q (BY MS. BALDWIN) Has Janssen ever  
5 offered you at any time during your employment  
6 or after your resignation from the company a  
7 criminal defense attorney?

8 MR. SPARKS: Same objections as to form  
9 and as to privilege, attorney-client privilege.

10 THE WITNESS: I do not have another  
11 attorney besides the attorneys that are here  
12 present with me.

13 Q (BY MS. BALDWIN) Did they ever offer  
14 you one?

15 MR. SPARKS: Same objections.

16 THE WITNESS: They did not.

17 Q (BY MS. BALDWIN) Do you have the means  
18 to pay for independent counsel?

19 MR. SPARKS: Object to the form.

20 THE WITNESS: I am -- these are  
21 attorneys that are representing me today.

22 Q (BY MS. BALDWIN) You understand you  
23 have the right to counsel that's also not  
24 represented by Janssen -- not also representing  
25 Janssen?

1 MR. SPARKS: Object to the form.

2 THE WITNESS: These are my attorneys  
3 that are with me today.

4 Q (BY MS. BALDWIN) Has anyone told you  
5 about your due process rights against  
6 self-incrimination?

7 MR. SPARKS: Object to the form. That  
8 I'm instructing you not to answer. That would  
9 directly be protected by attorney-client  
10 privilege.

11 MS. BALDWIN: Are you instructing her  
12 not to answer?

13 MR. SPARKS: I'm instructing her not to  
14 answer.

15 MS. BALDWIN: Are you going to follow  
16 your attorney's instruction?

17 THE WITNESS: I'm going to follow my  
18 attorney's instructions. Are we done with this  
19 one?

20 MR. SPARKS: Probably. I don't know.  
21 Is that Number 6? Just leave that in the stack  
22 over there to the left.

23 THE WITNESS: Okay.

24 MR. SPARKS: Watch out. It's going to  
25 get under the exhibit sticker here.

1

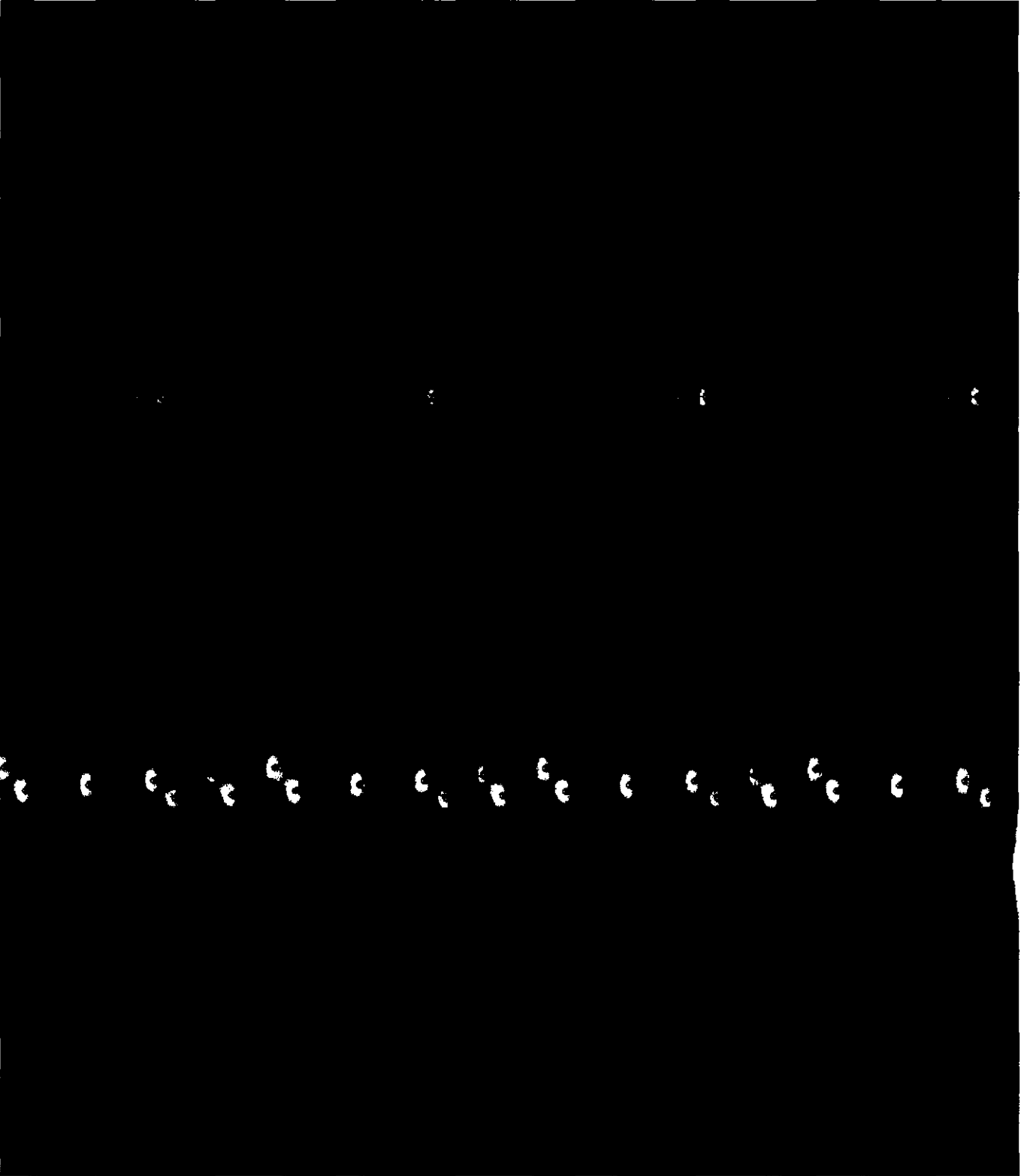
THE WITNESS: Okay.

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MR. SPARKS: Let's push that down.

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There we go.



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CERTIFICATE

I, D. LUKE EPPS, Certified Shorthand Reporter, do hereby certify that the witness was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, in the case aforesaid; taken in shorthand and thereafter transcribed; that the same was taken, pursuant to stipulations her-inbefore set out; that I am not an attorney for nor relative of any of said parties or otherwise interested in the event of said action; and that the transcript is a full, true, and accurate record of the proceeding.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of September, 2018.



D. Luke Epps, CSR, RPR

CSR No. 1841



# **EXHIBIT 5**

**[FILED UNDER SEAL]**

# **EXHIBIT 6**

**[FILED UNDER SEAL]**

1 IN THE DISTRICT COURT OF CLEVELAND COUNTY

2 STATE OF OKLAHOMA

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

5 Plaintiff,

vs.

No. CJ-2017-816

- 6 (1) PURDUE PHARMA, L.P.,  
7 (2) PURDUE PHARMA, INC.,  
8 (3) THE PURDUE FREDERICK COMPANY;  
(4) TEVA PHARMACEUTICALS USA, INC.;  
9 (5) CEPHALON, INC.;  
(6) JOHNSON & JOHNSON;  
10 (7) JANSSEN PHARMACEUTICALS, INC.;  
(8) ORTHO-McNEIL-JANSSEN  
11 PHARMACEUTICALS, INC., n/k/a  
JANSSEN PHARMACEUTICALS, INC.;  
12 (9) JANSSEN PHARMACEUTICA, INC.;  
n/k/a JANSSEN PHARMACEUTICALS, INC.;  
13 (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC,  
f/k/a ACTAVIS, INC., f/k/a WATSON  
14 PHARMACEUTICALS, INC.;  
(11) WATSON LABORATORIES, INC.;  
15 (12) ACTAVIS LLC; and  
(13) ACTAVIS PHARMA, INC.;  
16 f/k/a WATSON PHARMA, INC.;

Defendants.

17  
18 CONTINUED VIDEOTAPED DEPOSITION OF

19 J&J 3230(C)(5) WITNESS KIMBERLY DEEM-ESHLEMAN

20 TAKEN ON BEHALF OF THE PLAINTIFF

21 ON FEBRUARY 25, 2019, BEGINNING AT 10:03 A.M.

22 IN OKLAHOMA CITY, OKLAHOMA

23  
24 VIDEOTAPED BY: Kaleb Pianalto

25 REPORTED BY: Jane McConnell, CSR RPR CMR CRR

8 (Exhibit 93 marked for identification.)

9 Q (BY MR. DUCK) I'm going to hand you  
10 Exhibit 93.

11 A I'm done. I'm ready.

12 Q Okay. This is a news article that we  
13 pulled off the Internet from NewsOK.com, and the  
14 title of the article is, "Doctor who worked at  
15 alleged 'pill mill' in Roland charged with murder."

16 Do you see that?

17 A I see that, yes.

18 Q And the doctor being referred to here is  
19 the one that still lives in Oklahoma which is George  
20 B. Howell. Right?

21 A Howell is listed here, yes.

22 Q It says, "A doctor whose patient died of  
23 a drug overdose in 2012 was charged Thursday with  
24 murder. George B. Howell, Sr., worked at the time  
25 for the Wellness Clinic in Roland near the

1 Oklahoma/Arkansas border. The clinic no longer  
2 exists by that name. It was an alleged pill mill.  
3 So well known -- so well known that some patients  
4 drove 1,800 miles round trip records show.

5 A state multicounty grand jury  
6 investigation of the operation resulted Thursday in  
7 an indictment against the clinic's owner, Bernard  
8 Tougas, age 43, and three doctors, Howell aged 80,  
9 Ronald V. Myers, age 60, and John C. Friedl, age 58.  
10 All four were charged with racketeering."

11 Did I read that right?

12 A Yes.

13 Q If you skip down to the third to the last  
14 paragraph that starts, "Friedl and Myers..." Do you  
15 see that?

16 A Yes.


17 Q "Friedl and Myers are charged in the  
18 indictment with two counts each of unlawful  
19 distribution of a controlled dangerous substance.  
20 Tougas also is charged with maintaining a building  
21 where drugs are sold unlawfully.

22 "Myers, who now lives in Mississippi,  
23 surrendered his Oklahoma medical license last May.  
24 He has in the past denied wrongdoing, saying that he  
25 was being blamed for the irresponsible actions of

1 others. Friedl has also in the past denied  
2 wrongdoing, saying he was trying to change the  
3 place for the better."

4 Did I read that paragraph right?

5 A You did.



16 Q And this is in 2012 that this article came  
17 out --

18 MR. ALLAN: Wrong, wrong.

19 Q (BY MR. DUCK) -- and that these criminal  
20 charges were brought

21 MR. ALLAN: 2016.

22 Q (BY MR. DUCK) Excuse me, the person who  
23 died was in 2012, right? Very first line.

24 A There was a drug overdose in 2012, yes.  
25 The article was written in '16.



15 Q Isn't high cash pay, a high volume of cash  
16 pay, one of the primary indicators of a pill mill?

17 A Not necessarily.

18 MF. WAY: Object to the form.

19 Q (BY MR. DUCK) Really?

20 A Really. not necessarily.

21 Q Okay. You've never heard that having a  
22 lot of cash patients is an indicator of a pill mill?

23 A I'm saying that it's not necessarily like  
24 the indicator that it is a pill mill.

25 Q This one was a pill mill, wasn't it?

1 MR. ALLAN: Objection to form.

2 A Again, it's labeled a pill mill in this  
3 article in 2016.

4 Q (BY MR. DUCK) Do you have any reason to  
5 think it wasn't a pill mill?

6 A I don't know what it looked like in 2009,  
7 '10 and '11.

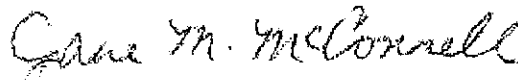


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C E R T I F I C A T E

I, Jane McConnell, Certified Shorthand Reporter, do hereby certify that the above-named KIMBERLY DEEM-ESHLEMAN was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the case aforesaid; that the above and foregoing deposition was by me taken in shorthand and thereafter transcribed; and that I am not an attorney for nor relative of any of said parties or otherwise interested in the event of said action.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 26th day of February, 2019.



---

Jane McConnell, CSR RPR RMR CRR

# **EXHIBIT 7**

**[FILED UNDER SEAL]**