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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

Monday, February 26, 2018
3:00 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAN AARON POLSTER,
UNITED STATES DISTRICT JUDGE, AND THE HONORABLE
DAVID A. RUIZ, UNITED STATES MAGISTRATE JUDGE

APPEARANCES: David Rosenblum Cohen,
Special Master
Law Office of Dave R. Cohen
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Cleveland, Ohio 44122
216-8331-0001

(Appearances continued to Page 2.)

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Certified Realtime Reporter
United States District Court
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7-178 U.S. Court House
Cleveland, Ohio 44113
216-357-7092

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produced by computer-aided transcription.

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1 AFTERNOON SESSION, MONDAY, FEBRUARY 26, 2018 3:00 P.M.

2 THE COURT: This is a hearing in the Opiate
3 MDL, 1:17-md-2804, regarding the production of ARCOS data.
4 I want to make sure I have everyone; I think I do.

5 For the plaintiffs we have Mr. Farrell, Mr. Mougey,
6 and Mr. Weinberger over to my right.

7 For the defendants we've got Ms. Mainigi, Mr. Pyser,
8 Mr. Hobart, Mr. Emch, Ms. Rendon, and Mr. Blair.

9 For the DEA and the U.S. Attorney's Office we've got
10 Mr. Forrest, Mr. Bennett, and Ms. Swanson Haan, who are in
11 the back.

12 MR. BENNETT: That's correct, Your Honor.

13 THE COURT: And I'm sorry, you got sort
14 of -- you should come up to the closer table.

15 MR. BENNETT: Yes, Your Honor.

16 THE COURT: I don't need to say a great deal
17 for introduction other than I essentially picked up this
18 aspect of the litigation from Judge Sargus, who was actively
19 litigating a subpoena that the plaintiffs had issued to DEA
20 for the ARCOS data in the case he had, and that case, that
21 litigation was suspended when his case was transferred into
22 my MDL. So I picked it up at the point where DEA had
23 interposed a number of objections.

24 I issued an order at the end of January, picking up on
25 what DEA said in their last filing after they detailed the

1 objections, that they were willing to sit down with the
2 plaintiffs and discuss with them specifically what the
3 plaintiffs wanted and needed, and what could be provided,
4 and directed the parties to have those discussions; to
5 report the status of the discussions to me by last Friday,
6 and then if there were still issues, to have a hearing
7 today.

8 So I appreciate the hard work of the parties. I did
9 read the status reports, and I see there is agreement on a
10 number of points, but still some issues of disagreement, so
11 I'm going to hear from the parties and then make a decision.

12 While I don't think there's any question about the
13 plaintiffs' need for some of this data, I think it probably
14 makes sense just so the hearing record is complete for
15 someone from the plaintiffs to just articulate what it is
16 that you want, and why it's essential to have it.

17 So Mr. Farrell.

18 MR. FARRELL: Yes, Your Honor. Thank you.
19 Paul Farrell, Jr., on behalf of the plaintiffs.

20 As you're aware, we have filed a number of cases on
21 behalf of governmental entities, geographical districts; for
22 instance, Campbell County, West Virginia. And in the
23 process of the case that we filed we've asked for production
24 of the ARCOS database.

25 The ARCOS database is a mandatory reporting

1 requirement by the manufacturers and distributors of
2 prescription opioids, and each transaction that is made from
3 the manufacturer to the distributor, and then from the
4 distributor to the pharmacy, is reported through a portal
5 into a database maintained by the DEA pursuant to federal
6 law.

7 What we have asked for is we have asked for the
8 production of the database so that we can identify within
9 each jurisdiction, within each government entity that is
10 here pending before you, can identify the market share and
11 the market conduct of the manufacturers, as well as the
12 distributors.

13 Eric Eyre, the Charleston newspaper reporter that won
14 the Pulitzer prize, got access to a limited portion of the
15 ARCOS database from West Virginia, and it is that which we
16 are trying to replicate across the country for each of the
17 cases pending before you, as well as more granular data that
18 will allow us to identify with specificity the volume that
19 was distributed into each community.

20 We believe this information is necessary for a number
21 of reasons. One of them is to identify the market share of
22 the manufacturers. As this Court is well aware, there are
23 allegations and claims made against the manufacturers for
24 misbranding and marketing. By identifying the market share
25 within each of the geographical boundaries of each

1 governmental entity we can then begin identifying which
2 manufacturers should be at the table for each jurisdiction.

3 In addition to the market --

4 THE COURT: That may be manufacturers who have
5 been named and it may be others. Is that correct?

6 MR. FARRELL: Absolutely.

7 THE COURT: Okay.

8 MR. FARRELL: Part of the purpose of the ARCOS
9 database would be for us to identify those manufacturers
10 that were producing prescription opiates that wound up in
11 these jurisdictions who have yet to be identified and
12 brought into the lawsuit, let alone brought into settlement
13 discussions.

14 Secondly, once they do come to the table, a
15 discussion needs to be had about market share; which of the
16 companies produced the most pills that wound up in each
17 community. So when we say market share, it's not merely
18 identifying those that should sit at the table, but to have
19 meaningful settlement discussions, also for an allocation of
20 responsibility for the settlement proceeds based upon the
21 conduct.

22 Secondly, with the distributors, what we are also
23 interested in is looking to see which distributors delivered
24 which volume of pills to which jurisdiction. And again, for
25 purposes of settlement, it allows us to understand for

1 market conduct purposes which of the defendants are likely
2 to be most culpable for purposes of discussing settlement.

3 Importantly, only the data in West Virginia on the
4 distributors has been revealed, and it's been in annual
5 aggregates, which as you can see from the style of the
6 pleadings resulted in more than just the big three being
7 named in West Virginia. That same analysis needs to be
8 repeated for all 49 states. In the absence of the ARCOS
9 data, we're unable to do that.

10 THE COURT: So in other words, there may be
11 distributors who haven't been named.

12 MR. FARRELL: Absolutely; that's likely the
13 case. The way that we argued and alleged in our complaints
14 in Ohio is that we understand the big three have a presence
15 in Ohio, but in the absence of this data we don't know, say,
16 Miami-Luken, CVS, Walgreens, the distributors across the
17 state that are actually involved.

18 We know anecdotally they have been delivered to some
19 of the pill mills, say in Portsmouth, Ohio, that resulted in
20 indictments, but without the ARCOS data we just don't know
21 which defendants delivered which pills into which home
22 county.

23 So what we have asked for, we have attempted to jump
24 through and overcome all of the procedural hoops to be here
25 today. We've been asking for the data for over a year, and

1 today is the culmination of that effort.

2 We have a system in place to be able to receive the
3 data, to collate the data, sort the data, and perform an
4 analysis so we can advise our clients, as well as the Court,
5 regarding market share and market conduct that will not only
6 enable settlement discussions, but also lay the framework of
7 the infrastructure if this case proceeds to litigation, it
8 will absolutely be necessary.

9 THE COURT: Okay. Thank you.

10 All right. Does anyone wish to respond to that,
11 anyone, you know, wants to argue that the plaintiffs don't
12 need it, or contend that they could get the same information
13 from some other source?

14 MR. BENNETT: Your Honor, James Bennett on
15 behalf of the Drug Enforcement Administration.

16 I would like to first say regarding the Court's point,
17 and I don't know if the Court wants our whole position at
18 this point, but regarding the question the Court just asked,
19 it would definitely be the government's position that this
20 information is available from the defendant manufacturers
21 and distributors themselves; that they are the better source
22 of information, and in fact some of the cases specifically
23 say that it's more appropriate to get that from the
24 individual defendants themselves than from the government.

25 THE COURT: But Mr. Bennett, to be fair, what

1 I've learned is that the defendants in this case, the
2 manufacturers and the distributors have -- the estimate is
3 50 to 60 percent of the market. So yes, while it is
4 possible to get that data from these parties, it's not
5 possible to get it from parties who aren't in the case, so
6 that's the weakness to your argument.

7 MR. BENNETT: Your Honor, just so the Court is
8 aware, and there's been some very recent developments, and
9 I'm happy to go through the whole presentation I have for
10 the Court and the position of the government, but the
11 government offered at the meeting and today authorized the
12 DEA to disclose to the parties a list of all manufacturers
13 per state that comprise 95-plus percent of the market share
14 for that individual state.

15 So for example, in Ohio, the DEA would release to the
16 Court and to the parties a list of all of the manufacturers
17 whose opioids were sold in Ohio that had up to 95 percent of
18 the market share. So if you had one manufacturer that had
19 25, another that had 25, another had 25, and another that
20 had 20, they would list those. That would give you the 95
21 percent. If it's 5 percent but we're still below the market
22 share of 95 percent, they will add that. So basically
23 calculate the market share, add defendants -- or add
24 manufacturers until you get to the 95 percent.

25 So the need for the ARCOS data, DEA is actually

1 willing to provide that to the Court without the parties
2 needing to calculate that. And so that was authorized
3 today, there was an authorization letter that was issued.

4 THE COURT: Well, I mean, that's something,
5 but again, the important thing is to track whose pills went
6 where specifically, as apparently was obtained in West
7 Virginia, because that's the 24,000-dollar question. There
8 are certain areas of the country where there are hundreds
9 and thousands of pills per person, per year, for every man,
10 woman, and child. Everyone knows that was wrong, it
11 shouldn't have happened. The question is, whose pills. So
12 the ARCOS data will -- the only way to know that is the
13 ARCOS data, that I know of.

14 MR. BENNETT: Your Honor, I think we all agree
15 that our country is facing an opioid epidemic right now, and
16 there are people dying every single day. The Department of
17 Justice has made this a high priority, and we have engaged
18 in efforts to combat this opioid crisis. This includes,
19 among other things, prosecuting those who overprescribe
20 opioid painkillers, and those who flood our streets with
21 drugs.

22 The DOJ has launched a pilot program to utilize data
23 and focus prosecutions on opioid-related healthcare fraud,
24 including pill mill schemes and pharmacies that unlawfully
25 divert or dispense prescription opioids for illegitimate

1 purposes.

2 To combat the opioid crisis DOJ also had provided
3 millions of dollars in grants to state and local law
4 enforcement agencies to take heroin, methamphetamines,
5 cocaine, and other illicit and diverted drugs off of our
6 streets. We welcome the efforts of the Court and the
7 parties in this case to combat this epidemic, and we want to
8 assist in any way that we can.

9 I want to make this clear for the Court, that the
10 Department of Justice and the DEA is willing to provide
11 ARCOS data. We are willing to provide this to assist the
12 Court in obtaining a settlement in this case, and we're
13 willing to continue to provide information that is needed
14 throughout the case.

15 However, the Department of Justice and the DEA must
16 also protect its ongoing and its future prosecutions and
17 investigations, and it must also protect the privacy and the
18 commercial interests of innocent businesses. And so the DEA
19 came to the meeting that the Court proposed last week and
20 made an offer that was outlined in our status report. That
21 was rejected by the plaintiffs, and so today we have
22 authorized disclosure of the ARCOS data. And I'd like to
23 take a minute to explain to the Court what that
24 authorization entails.

25 First, the authorization, it would be subject to a

1 protective order. We have a draft protective order that is
2 still being internally reviewed but that we can share with
3 the Court --

4 THE COURT: I've already -- I mean, I was
5 already contemplating if I ordered the production of the
6 data to put it under a protective order. Essentially it
7 would be short and simple, it can be used for one of two
8 purposes only, this litigation or state and/or local law
9 enforcement. For example, if an Attorney General or county
10 sheriff or county prosecutor looks at this data and believes
11 that there's a pill mill in their jurisdiction, they can use
12 it. Lawyers can use it for this litigation.

13 It's not going to be public, so there will be a
14 protective order.

15 MR. BENNETT: Thank you, Your Honor.

16 The second part of the authorization is what we just
17 discussed about the manufacturers that have 95 percent or
18 more of the market share in each individual state. So this
19 would be 51 reports, all 50 states plus Puerto Rico, that
20 would show the manufacturers; not the market share, but it
21 would show the manufacturers that have up to 95-plus percent
22 of the market share in each one of those jurisdictions.

23 We also are providing transactional data. This
24 transactional data will include the date of the transaction,
25 it will include the buyer and the seller to the transaction.

1 That information will be de-identified using a unique number
2 for the totality of the database. So in other words, the
3 manufacturers, rather than saying a particular name, they
4 would each have a unique identifier in that state. This
5 would allow the parties to track from manufacturer to
6 distributor to retail transactions within the state and
7 where the drugs are going, from which number.

8 Once they are able to identify a potential bad actor
9 or a potential soft spot, they could then come back to the
10 DEA with that information, and the DEA could review to
11 determine whether or not there are legitimate law
12 enforcement sensitive concerns because they have an
13 investigation, they're able to deconflict the information to
14 determine whether there's other law enforcement --

15 THE COURT: I'm going to short circuit that,
16 because I'm not going to order the production of any data
17 for the last two or three years because I don't want to
18 interfere with any investigation that you've got. I was a
19 former prosecutor, I understand that, and quite frankly, the
20 patterns and the problems were apparent with earlier years.

21 And so I don't think it's going to -- whatever was
22 going on in 2010, '11, '12, '13, you know, there's no law
23 enforcement objective there now; that's historic, but it's
24 important for this litigation. So I think that's how I'm
25 going to deal with that.

1 MR. BENNETT: Respectfully, Your Honor, it's
2 the position of the DEA, and it's explained in the
3 authorization letter, that you can't put a time frame on the
4 investigations. There's a five-year statute of limitations,
5 and investigations often involve data outside of that range,
6 and so --

7 THE COURT: Mr. Bennett, I'm balancing that.
8 Okay? So I think it's essential, and I think it's been
9 identified that the parties need the actual transaction data
10 and to track whose pills went where.

11 MR. BENNETT: Your Honor, the unique
12 identifier would allow them to do that without -- in
13 addition to the law enforcement interests, there are also
14 trade secret interests for the individual manufacturers and
15 distributors, some of whom are not parties here and can't
16 represent their interests, and some of whom presumably are
17 innocent, who have provided a service to the communities
18 lawfully. And to have all of their Privacy Act-protected
19 information and all of their trade secrets disclosed in this
20 database --

21 THE COURT: First of all, there are no trade
22 secrets here. This is a controlled substance, they're
23 pills. We're not going to ask the formulation of any pills,
24 that shouldn't be in the data. Where the pills went is not
25 a trade secret. It can be found at -- it's a balancing, I

1 understand that.

2 MR. BENNETT: Your Honor, I'm sure that the
3 defendants can better articulate this than I can.

4 THE COURT: I'll hear from them, but I
5 understand the government's position.

6 MR. BENNETT: Regarding the trade secrets, the
7 customers, this ARCOS data would allow someone to look at
8 the data and determine the customers of the manufacturers
9 and the distributors for an extended period of time.
10 Obviously the customer lists aren't going to change over
11 year to year, most successful businesses would build a
12 customer base.

13 It also would allow individuals to look and see the
14 marketing and the strategic plans the businesses have by
15 showing how they have had growth in certain areas, where
16 they are putting certain businesses, certain distribution
17 sites. And so respectfully, Your Honor, and again, I will
18 let the defense explain this better --

19 THE COURT: My view is I think the
20 distributors, they obviously know which pharmacies they're
21 selling to and which they aren't, and I think they probably
22 have a darned good idea which of their competitors are
23 supplying the pharmacies they're not. You just go in and
24 find out. And look, probably it's easy to inquire. I don't
25 think there are a lot of secrets.

1 MR. BENNETT: Your Honor, I also believe that
2 the subpoena that was issued by the defense is unduly
3 burdensome to the DEA. The discussion that I understand has
4 been that any ongoing investigations the information related
5 to, those would be protected, and any information that would
6 disclose the location of facilities where large quantities
7 of drugs are stored --

8 THE COURT: That's something that was agreed,
9 I made that clear from the outset. No one is going to
10 disclose to anyone the physical location of any warehouse.

11 MR. BENNETT: And understandably, Your Honor.
12 The practical problem comes from the fact that there's over
13 300 million entries just of opioids, and DEA would have to
14 go through those entries to determine whether or not they're
15 going to disclose the location of large quantities of drugs
16 or whether that particular transaction is involved in an
17 investigation.

18 Obviously investigations are conducted out of field
19 offices around the country. It's involved law enforcement
20 partners who are working with the DEA. And so to go through
21 those 300 million, I did a little bit of math last night, if
22 you pulled all the 4,600 agents that the DEA has and you
23 gave them one minute to look at every one of the
24 transactions, it would take them over six months to go
25 through those transactions.

1 So it's the position of the DEA that that would be
2 unduly burdensome for them to go through, and that the
3 compromise offer that the DEA has offered, where the
4 information initially is de-identified, allows the parties
5 to get the information they need to determine where the
6 drugs are going by this code. The only thing that changes
7 is instead of having the name, they have a unique code.

8 Then when they have found the actors --

9 THE COURT: Are you saying there's no fairly
10 simple way to delete, white out, mask out the street
11 address, the physical location of a warehouse? In fact,
12 everyone knows that the pills go from a manufacturer to a
13 warehouse, to a warehouse, to a distributor, to a
14 distributor, maybe to a warehouse, then to a pharmacy.
15 Okay? Big deal, that's not confidential. What is is the
16 address of those warehouses, which clearly is, and no one
17 wants to reveal those to anyone.

18 MR. BENNETT: Your Honor, knowing the city,
19 county, and state of where those warehouses are in many
20 situations would allow identification of that warehouse. It
21 certainly would narrow the target area that you have to look
22 for it by knowing the number coming into it.

23 So you're certainly correct that one of the fields is
24 a street address, and that street address could certainly
25 not be provided as a field to the parties, and that would

1 take care of the actual street address, but I don't believe
2 it solves the DEA's problem with being able to identify to
3 that specific of an area, especially when you're dealing
4 with what potentially could be small towns, rural areas. It
5 might be very easy for criminals to figure out where these
6 warehouses are located.

7 It also doesn't do anything for the fact that they
8 still would have to go through the information to determine
9 whether or not it's related to a pending investigation or
10 prosecution, which would be a lot easier to do if the
11 parties would look at the data first and then point out
12 those transactions or those actors who they believe are
13 committing the torts that they allege in their complaints.

14 THE COURT: In and of itself that data isn't
15 -- the data is simply going to point out where the drugs
16 have come from, okay? I mean which company. The plaintiffs
17 are going to have to do a lot more. So I mean, I'm trying
18 to avoid a lot of back and forth. All right? So let's
19 focus on dealing with the location of warehouses.

20 MR. FARRELL: Judge, Paul Farrell. I don't
21 mean to interrupt, but I think I have something critical to
22 say on this very matter.

23 THE COURT: All right.

24 MR. FARRELL: The address for these warehouses
25 is publicly available.

1 THE COURT: It is?

2 MR. FARRELL: Yes, sir. I have with me here
3 today documents, this is from Cardinal Health itself.

4 May I approach?

5 THE COURT: Yes.

6 MR. FARRELL: And I've tabbed for you, and
7 I've brought copies for everyone else, Cardinal Health in
8 its manufacturer reference manual actually has a table that
9 identifies each of its distribution facilities as well as
10 the address, the street address.

11 In addition to that, I brought with me the MOU --

12 MR. BENNETT: Mr. Farrell, may I also have a
13 copy?

14 MR. FARRELL: Yes. I also brought the
15 administrative memorandum and agreement that the DEA DOJ had
16 with McKesson, and in it it identifies -- I lost
17 count -- maybe 15 or 20 of the warehouses that were subject
18 to the McKesson fine, and in it this public document
19 identifies the exact street address for each of the
20 warehouses.

21 In addition to that, if you get on all three of the
22 companies' websites, they have job application sections
23 where they post the warehouse that has job opportunities by
24 city and state. Many of their public statements, for
25 instance, AmerisourceBergen recently announced in June of

1 2007, they put out a press release talking about the opening
2 of a new distribution center in Orlando, Florida.

3 And in addition to that, Your Honor, what I found is
4 that the Office of Diversion Control, the DEA through the
5 National Technical Information Service, which I'm presenting
6 to the Court as well, the DEA registrant database is online
7 and publicly available for a substantial fee.

8 So what you can do is you can pay -- and the fee
9 schedule is listed in there -- you can identify -- for
10 \$3,000 you can get access to this data. And as an example
11 of that, I have with me a proprietary group called DEA
12 Lookup, and what it has is it lists every DEA wholesaler in
13 the country, and it identifies for them not the street
14 address, but the city that each of these warehouses are in.

15 So what I'm proposing to the Court is that if the
16 information about where these locations are -- we don't need
17 their street address. To be honest with Your Honor, we
18 don't even need to know the city and state. If they want to
19 delete where these warehouses are and just tell us it's
20 Cardinal Health facility number 17, that's all we really
21 need to know.

22 THE COURT: Well, that's what I thought in the
23 first place, but it looks like, Mr. Bennett, a lot of these
24 companies don't seem to care about disclosing the exact
25 street address of their warehouse.

1 MR. BENNETT: Which I think, Your Honor, is
2 more reason why we need to not disclose the actual
3 transactions, because now that the information of where
4 these warehouses is located, knowing when they're receiving
5 shipments and how much, and which are getting big
6 shipments --

7 THE COURT: No, we are not going to do that.
8 The companies are so lax they're letting everyone know, it's
9 too bad for them.

10 We can delete -- you can just call it Cardinal
11 warehouse 1, Cardinal warehouse 2, whatever; but I'm not so
12 worried about the warehouses anymore, because sadly it looks
13 like the companies themselves haven't bothered to keep them
14 confidential.

15 MR. BENNETT: Your Honor, in addition to the
16 distributors, which I also still think that the DEA's
17 information shouldn't be used to facilitate the crime, but
18 in addition to the distributors you also have all of the
19 individual doctors and small retail pharmacies whose
20 information would be disclosed as well if it's not
21 de-identified.

22 So while the distributors may have put their --

23 THE COURT: This is a controlled substance,
24 all right? This is not, you know, tires or widgets, or
25 whatever, so everyone understands that this information can

1 be accessible for certain purposes.

2 MR. BENNETT: Your Honor, and government,
3 again, wants to reiterate that we do want to make this
4 information available to the Court and the parties to assist
5 in settling this case, but with the Privacy Act concerns,
6 with the trade secret concerns, with the law enforcement
7 concerns, with the burden on the agency, with the ability to
8 use this information --

9 THE COURT: I'm not trying to burden the
10 agency; they just turn it over. If there's not a way to
11 simply delete the -- I mean, just call it warehouse. There
12 should be a way to do it, but if not, quite frankly, since
13 the companies haven't made any effort to keep these
14 locations secret, it doesn't really matter when particular
15 shipments come. Anyone knows there's always going to be a
16 lot of pills in those warehouses, that's what they're there
17 for.

18 MR. BENNETT: And I guess the burden I was
19 talking about, Your Honor, was also related to the ongoing
20 investigations and prosecutions, in reviewing the ARCOS data
21 to determine which transactions would relate to those
22 ongoing investigations and prosecutions, which I don't think
23 are limited to just the past three years. Certainly there's
24 data relevant to that --

25 THE COURT: Well, I've got to balance it,

1 Mr. Bennett, and my balance I think is going to be not
2 requiring the production of anything for the last three
3 years. I mean, I've got to strike a balance between the
4 plaintiffs' need, and the plaintiffs include the cities and
5 counties, but also this will go to Attorneys General, and
6 they have a legitimate law enforcement interest and need in
7 shutting down pill mills.

8 And I'll just say I appreciate all the steps that you
9 outlined that the Department of Justice and DEA is now
10 taking, but it's a matter of record that those steps haven't
11 significantly stemmed the crisis, so a lot more is needed.
12 And I think that's why we have all these lawsuits; so I'm
13 trying to balance everything.

14 MR. BENNETT: Your Honor, two final points.
15 One, I want to reiterate that all this information is
16 available to the Court and to the parties from the
17 defendants. And the defendants who aren't present, the
18 manufacturers, DEA is willing to identify so the Court can
19 get that information from them.

20 The second thing is that the authorization has been
21 issued by the Department of Justice authorizing the
22 disclosure. I know neither the plaintiff nor the defense
23 have had an opportunity to review that authorization and to
24 oppose it, to present arguments to the Court, and it would
25 be our position that in order for them to proceed to get the

1 information they would need to first show that the decision
2 by the U.S. Attorney was arbitrary and capricious.

3 THE COURT: I understand that position, but I
4 think this is covered by the Rules of Civil Procedure. I'm
5 managing this litigation. If I decide that the data needs
6 to be produced I'll so order, and that's how it is. So I've
7 looked at the case law, and I believe I have the authority
8 to do that.

9 Number one, I'm not compelling any government agent or
10 officer or employee to give testimony at all, and number
11 two, all this is is data which is received by DEA from
12 private sources. I'm not asking for any government
13 analysis. So this is simply DEA's data because it's been
14 received by the government, but there's absolutely nothing
15 whatsoever that's been generated by any government office or
16 agent or employee. So if I decide it is relevant and
17 important for the litigation, I have the authority to order
18 it. It is as simple as that.

19 MR. BENNETT: Your Honor, I appreciate the
20 Court's position. And just for the record, I want to say we
21 would object to providing that for the reasons set forth
22 today in our arguments, as well as set forth in the
23 authorization letter and status report to the Court.

24 THE COURT: Thank you, and I appreciate that,
25 everyone.

1 MR. BENNETT: Thank you for your time.

2 THE COURT: I appreciate everyone's hard work,
3 and I appreciate your position. I guess does anyone from
4 either the manufacturers or the distributors want to make
5 any comments or arguments?

6 MR. EMCH: I guess, Your Honor, by some
7 process which we can't tell, I'm elected to begin. My name
8 is Al Emch. I'm with the firm Jackson Kelly located in
9 Charleston, West Virginia. Bob Nicholas is on the Steering
10 Committee on behalf of AmerisourceBergen Drug Corporation.
11 Bob is in trial this week. Shannon McClure is one of the
12 liaison counsel, and she is also representing
13 AmerisourceBergen, but she also is in trial this week. So
14 it falls --

15 THE COURT: So you're not in trial, so you're
16 here.

17 MR. EMCH: I'm here, Your Honor. That's
18 exactly correct.

19 I represented AmerisourceBergen Drug Corporation in
20 the West Virginia litigation that's been referred to several
21 times I think before the Court. Mr. Farrell has probably
22 mentioned it a couple times. He and I have known each other
23 for a long time.

24 I would like to state the position of
25 AmerisourceBergen Drug Corporation with respect to the issue

1 that is before the Court today, and I appreciate the
2 opportunity to do that, Your Honor.

3 I would begin by simply stating that we have not had
4 the opportunity to state our position on this issue yet, as
5 Your Honor is aware. We did attend -- a representative from
6 one of the other distributors and I did attend the meeting,
7 we appreciated the cooperation of the DEA as well as the
8 cooperation of plaintiffs' counsel in permitting us to be
9 there so that we could participate in and listen to the
10 discussions that were had about the ARCOS data.

11 I will say that I'm speaking now, Your Honor, only on
12 behalf of AmerisourceBergen Drug Corporation, not any of the
13 other defendants that are in the case. They can either
14 agree or not with what I'm about to say to the Court, but I
15 do appreciate the opportunity to say it.

16 Many positions are attributed to us and have been
17 attributed to us. Among other things, allegations are made
18 all the time about us. We like to have the chance on
19 occasion to state our position ourselves.

20 AmerisourceBergen Drug Corporation understood that the
21 Court's interest in the ARCOS data was primarily in
22 connection with the Court's effort at this time, which is
23 directed toward a prospective list, if you will, or a
24 discussion among stakeholders of what might prospectively be
25 done, what actions could be taken, what things cooperatively

1 might be done, what initiatives might be thought of that
2 haven't been thought of before, that could be attempted with
3 the Court's imprimatur and with the Court's support, that
4 might help to alleviate the opioid epidemic and problem in
5 this country. That is our understanding of what process we
6 are in at this moment.

7 Particularly regarding the ARCOS data, the ARCOS
8 database, AmerisourceBergen Drug Corporation supports
9 sharing of ARCOS data on a prospective going-forward basis.
10 AmerisourceBergen Drug Corporation does not support the
11 effort to discover the entire ARCOS database that has been
12 undertaken by the plaintiffs. We don't support that for a
13 number of reasons.

14 The DEA's objections -- and let me say, Your Honor,
15 the DEA is our regulator. We don't always see eye to eye
16 with the DEA, there are occasions when we disagree about
17 things, but we respect the DEA's obligations under our
18 system and with respect to the closed system, and we respect
19 the immense responsibility that the DEA has. And yes, we
20 respect the efforts that the DEA has made and continues to
21 make in order to do their duty.

22 And their duty is two things, Your Honor, two things.
23 You heard this at the information day. Their two prime
24 directives are, number one, to take all the steps they can
25 in the regulatory arena, as well as law enforcement, to try

1 to impede, interdict, stop, prevent, diversion of legal
2 controlled substances from those who have the legal right to
3 touch them to those who do not have the legal right to touch
4 them.

5 And equally important, and Your Honor hasn't heard any
6 discussion about this yet, equally important is the DEA's
7 task of assuring that adequate supplies of these controlled
8 substances are available in this country for legitimate
9 medical, scientific, and industrial purposes.

10 The ARCOS database is probably the primary tool, one
11 of the primary tools that the DEA has at its disposal and
12 that it makes available, as it has stated to the Court in
13 its filings, to law enforcement agencies around the country
14 that need that data or need access to that data because of
15 investigations or suspicions or complaints that they may
16 have, and of course they all the time use it with the U.S.
17 Attorneys around the country for their prosecutions. They
18 don't tell us how they use it. They don't publish how it is
19 that they look at the data, scan the data, organize the
20 data, what conclusions they draw from the data, because
21 obviously if they tell us and if they tell the public, and
22 if they tell anybody else, that compromises in some ways
23 their ability to use that data for those purposes.

24 So we understand the DEA and we support the DEA's
25 position; however, we would respectfully say that we think

1 the effort right now, and even the DEA's proposal, starts
2 down a slippery slope that we do not need to be on at this
3 point for the Court's purposes. And that, we would
4 respectfully say, is an unfair slippery slope, and let me
5 tell you the two reasons why we so say that is the case.

6 Your Honor indicated that you saw the need for this
7 data for this litigation, in your protective order that it
8 would be for this litigation and for law enforcement, and I
9 assume regulatory purposes. I would submit to the Court
10 that the data has always been available for law enforcement
11 and regulatory purposes, and I would also submit to the
12 Court --

13 THE COURT: I don't think most of the state
14 Attorney Generals have this. There may be one, Mr. Emch,
15 but to my knowledge, most of the states don't have it.

16 MR. EMCH: They can get it, Your Honor, in
17 connection with any investigation they're involved. Now, I
18 know --

19 THE COURT: I'm not sure of that.

20 MR. EMCH: Your second purpose was -- or
21 statement was for this litigation, which again we
22 understood, Your Honor, was at this point about prospective
23 things to be --

24 THE COURT: Exactly, but the point is,
25 Mr. Emch, at one of our earlier conferences, I'm not sure

1 you were here, it was explained to me that the distributors
2 in this case distribute 50 to 60 percent of the prescription
3 opioids in the country. Well, that means that there's a
4 very large percentage that they don't. So if we're talking
5 about prospective relief, it doesn't do much good if say all
6 of the distributors and manufacturers who were now named who
7 are working very hard -- and I compliment the lawyers and
8 the clients, there have been some very good discussions
9 going on. You know, they've come up with some very good
10 proposals, but if half of the industry ignores them, they're
11 not going to be very effective.

12 MR. EMCH: Your Honor, we don't object, and I
13 don't think the DEA objects, to providing to the Court the
14 names of the others who are either distributors or
15 manufacturers who work within the system. And our
16 presumption had been that had the Court gotten that
17 information, the names, the names and addresses of the other
18 manufacturers and maybe distributors, that the Court would
19 take it upon itself to invite those to the table.

20 THE COURT: But I need to know, and the
21 plaintiffs -- first of all, it's up to the plaintiffs. They
22 brought the cases, they named the individuals, the
23 defendants that they reasonably thought were liable. They
24 didn't just put everyone in. They've got a responsibility,
25 the lawyers have responsibility under Rule 11, to name

1 someone as a defendant you've got a good-faith basis they've
2 done something wrong, not just that they're in the field.

3 So if they get the data, it's not just the names.
4 They need to know, all right, how many pills did those
5 manufacturers end up selling into specific geographic areas.
6 So the data has to be at least as thorough as that and as
7 comprehensive as that to accomplish that purpose.

8 MR. EMCH: Well, respectfully, Your Honor,
9 that's a litigation goal that the plaintiffs have. That's a
10 discovery goal.

11 THE COURT: It's a resolution goal, because if
12 there's significant parties who are in the market and they
13 haven't been named, any relief that the parties in the case
14 now come up with will be limited impact, because others will
15 just get around them.

16 MR. EMCH: Your Honor, I'm not --

17 THE COURT: And quite frankly, it will put the
18 defendants in this case at a competitive disadvantage, and
19 that wouldn't be fair. They might agree to do certain
20 things or not do certain things, and then they'll see their
21 competitors just hop around them. I wouldn't want that.

22 MR. EMCH: Well, Your Honor, unless I've
23 missed something, I have not seen any of the possibilities
24 or proposals for things that might be done prospectively in
25 a cooperative way to help to stem or to alleviate the opioid

1 epidemic that require an understanding of market share. All
2 that is being discussed is ways that those who participate
3 in the system -- and Your Honor, you've got two areas of
4 stakeholders here, you have manufacturers and distributors.
5 You don't have doctors who prescribe, you don't have
6 organizations right now that represent doctors who
7 prescribe, and you don't have pharmacies at the pharmacy
8 level at the table.

9 THE COURT: Well, but there are ways to bring
10 them in, and directly or indirectly through the states that
11 regulate them or people who sell them the drugs can just
12 say, you want our drugs? This is what you've got to do.
13 You don't want them, you don't get them.

14 MR. EMCH: Well, a big part of what I'm saying
15 to Your Honor is we don't want to invite all of these other
16 parties into the litigation. Litigation is about blame and
17 fault and liability and pointing fingers. Your Honor saw
18 that from the very beginning.

19 Resolution, trying to do things that are helpful, is
20 about entities that accept some level of responsibility for
21 the role that they play, but are talking cooperatively about
22 what may be done.

23 So I don't want to invite and ABDC doesn't want to
24 invite other parties to the litigation, but that's precisely
25 the reason that plaintiffs have said in all of their filings

1 that they're seeking this data. They want to identify
2 additional parties that they can bring in on whatever
3 criteria they want to determine or try to use into the
4 litigation. And I would respectfully submit that that's
5 down the road, that's not now.

6 If we want to just have people to come to the table
7 who can talk about their responsibilities and how better to
8 meet those responsibilities, what the Court needs is the
9 names of those parties that might be invited to come to the
10 table.

11 THE COURT: Well, they have to be identified,
12 and there has to be a reason to -- they're not likely to
13 come, Mr. Emch, if they're not named as defendants. Okay?
14 I don't think your client, in all fairness, would have just
15 accepted someone's voluntary invitation to come and be part
16 of this.

17 You're a defendant, your client is a defendant, so
18 they're in the case. So they can decide how they want to
19 proceed, but they're here because they're named. So I think
20 that in terms of manufacturers or distributors, I can't
21 imagine anyone just saying, hey, I'd just like to sort of
22 join this and see what happens to me.

23 So I think they have to be named as a defendant, and
24 then the first step is these cooperative efforts. If things
25 break down, well, they're a defendant in the case, and

1 they'll have to defend themselves.

2 MR. EMCH: Your Honor, again, respectfully,
3 how can we talk about parties who are not in the litigation
4 and seeking discovery from a government agency regarding a
5 database that's always been confidential, always been
6 protected, because it is indeed confidential business
7 information that is submitted to them with the understanding
8 that it will be protected. How can we say that we'll permit
9 the plaintiffs to get that information and mine it to
10 discover -- I'll use the word discover -- to determine based
11 on whatever kind of criteria they want to know who to
12 sue --

13 THE COURT: They've already said they'll
14 provide it. There are certain restrictions, and they want a
15 two-step approach. If you're saying you're opposing what
16 DEA has already agreed to, okay, I'll hear your argument,
17 but it's not likely to be too persuasive.

18 MR. EMCH: I understand, Your Honor.

19 THE COURT: If your position is saying DEA is
20 wrong for agreeing to produce what they've said they'll
21 produce, okay, then that's your position.

22 MR. EMCH: Mainly at this point, Your Honor,
23 I'm simply saying that there are many -- the DEA's press
24 release that was recently put out, which does talk about a
25 step in the direction of sharing ARCOS data prospectively,

1 says, "1,500 DEA-registered manufacturers and distributors
2 will be permitted to view the number of competitors who have
3 sold a particular controlled substance to a prospective
4 customer in the last six months."

5 Very helpful information. That's a step down the road
6 of sharing ARCOS data in a way that can help.

7 My concern, and it's only expressed because we've been
8 there, is that we are dealing with the rights of parties who
9 are not in front of the Court, that's all.

10 THE COURT: All right. Well, I understand
11 that.

12 MR. EMCH: Let me say to Your Honor -- and I
13 appreciate your patience with me, I know I've not been here
14 before, but I appreciate the opportunity -- the other goal
15 of the plaintiffs is to get transactional data so that they
16 can mine that data and use that data against the distributor
17 defendants in this case.

18 And Your Honor, we would respectfully submit we have
19 never had access to the ARCOS data. No distributor has ever
20 had access to the ARCOS data. All we know about the ARCOS
21 data is the information that we submit to the DEA.

22 Plaintiffs want this information so that they can take
23 that data and use it against us, data we never had. And
24 they want to try to shift to us or accuse us or levy against
25 us knowledge that we never had the ability to get. We have

1 never been able to get and use the ARCOS data.

2 THE COURT: Obviously, if they get it you get
3 it, and the point is you know where every one of your pills
4 went because you supplied the data for your company. I'm
5 saying your client supplied the data for its company. So
6 you know something they don't know, which is you know where
7 all of your pills went.

8 MR. EMCH: We do.

9 THE COURT: They don't know where any of your
10 pills went at the moment. So they could subpoena that from
11 you, and I'd probably order it produced, okay? But the
12 advantage of getting it holistically, to get it from the
13 DEA, it's everyone. It includes the parties in this case
14 and others.

15 So yes, I mean Mr. Bennett is correct, they could
16 subpoena the exact same data from you and from all of your
17 competitors and then put it together, and I would, you
18 know -- so they could do that.

19 MR. EMCH: All I'll say, Your Honor, is to the
20 extent that full knowledge of the ARCOS database and full
21 information about all of the transactions of all of the
22 distributors that have occurred in the ARCOS database, to
23 the extent that that information might ever have been useful
24 to any distributor in trying to determine how to run its
25 order monitoring program or how to fulfill its duties and

1 obligations, we never had the benefit of that.

2 THE COURT: Understood. Well, you'll have it
3 now, and it might actually help you.

4 MR. EMCH: Well, that's what we're talking
5 about with prospective, Your Honor.

6 THE COURT: Fine.

7 MR. EMCH: The goals of this Court are our
8 goals, too. If there are ways to improve what we do and if
9 sharing of ARCOS data under a system that I'm sure the DEA
10 is thinking about that they're going to invite our comment
11 on, and that would be put in the regulations, and that would
12 be circumscribed by all of the protections that are afforded
13 when things are done that way, we think that may be useful.
14 But my point is only that the retrospective information that
15 the plaintiffs want to discover is information we never had
16 the benefit of, and we don't think that it is fair for that
17 information to be provided for the plaintiffs to use in
18 those ways at this time.

19 We have no objection --

20 THE COURT: I hear your argument, and so I
21 understand it.

22 MR. EMCH: Are you able to indulge one other
23 point, Your Honor?

24 THE COURT: Very briefly. It's already 4:00,
25 there may be others who want to speak.

1 MR. EMCH: All right. I know I've taken a lot
2 of time, and I appreciate that.

3 Your Honor has heard a little bit I think about the
4 prescription drug monitoring databases.

5 THE COURT: Yes.

6 MR. EMCH: I would simply submit to the Court
7 that another thing that's been proposed, and certainly
8 AmerisourceBergen Drug Corporation has supported to the
9 extent we had any input in it, is the ability of the ARCOS,
10 the DEA, and ARCOS database information to be shared with
11 the states and the Prescription Drug Monitoring Program
12 information. And we were a little surprised, frankly, when
13 we saw in the DEA's letter submitted on the 30th of
14 January -- not a criticism of the DEA -- when they said that
15 they make efforts to have the states share the PDMP
16 information with them, but many states do not do that.

17 Those two databases, Your Honor, from the standpoint
18 of law enforcement, from the standpoint of information that
19 can assist regulatory agencies in determining where
20 lawbreakers and diversion may be occurring, which is almost
21 always at the dispensing level, at the doctor prescribing
22 level, after that level -- I'm not accusing doctors and I'm
23 not accusing pharmacies, it is much more complicated than
24 that. I'm just saying that is where that occurs. But the
25 sharing of that data, the PDMP has everything about every

1 prescription that's dispensed in each of these states at any
2 time. They've got all of that data. They know everything
3 about every prescription, who wrote it, who filled it, what
4 drug it was, what date it was filled, how it was paid for.
5 They've got all of that information right now.

6 And when you talk about progress being made, Your
7 Honor, remember that there's so much legislation that has
8 been talked about and is being put in place today, beginning
9 really around 2012, that is making a difference, legislation
10 that permits these PDMP programs to be used in the ways that
11 they could and should be used.

12 No legislation yet, nothing that I know of at the
13 federal level certainly, that requires the coordination, if
14 you will, between these two big sources of data so that it
15 can be used to try to help in this epidemic.

16 Your Honor, we want the system to work, and we are
17 committed to doing what we can to try to help the system
18 work. We respectfully state that in this resolution stage
19 that Your Honor is engaged in now, having the names and the
20 addresses of those who maybe ought to be here to talk about
21 that is not a bad idea, and it's easy to do; but we would
22 respectfully submit that starting down the ARCOS data
23 database revealed to -- I mean, there's nothing anywhere in
24 the statutes or anywhere else that says that the ARCOS
25 database can ever be revealed to private plaintiffs'

1 counsel, law firms, for the purpose of civil litigation.

2 That's what we have here.

3 You'll get to that, Your Honor, you'll get to that,
4 but we would respectfully say that we're not there yet, and
5 we think you're starting down a slippery slope if we begin
6 to try to let this ARCOS data be produced in these ways to
7 plaintiffs' counsel.

8 Thank you, Your Honor.

9 THE COURT: All right. Anyone else from the
10 defendants?

11 MR. PYSER: Your Honor, briefly, Steven Pyser,
12 Williams & Connolly, for Cardinal Health, one of the
13 distributors, just to supplement a little bit of the points
14 that Mr. Emch has already touched on.

15 The problem that was trying to be solved here, Your
16 Honor, was the identification of other players in the market
17 who should be at the table who are stakeholders. The DEA
18 has proposed a way to do that. The DEA has offered to write
19 a list of the other manufacturers. I'm sure a similar list
20 can be done for the distributors in broad geographic areas,
21 but what plaintiffs have presented the Court with is an
22 all-or-nothing binary choice: Either we need everything
23 that's in the ARCOS database, or we won't be able to move
24 forward on the Court's prospective resolution path.

25 And we respectfully, Your Honor, don't believe that

1 that all-or-nothing choice is an accurate choice. We think
2 what DEA has presented, where all of the necessary parties
3 can be brought to the table, but information that is trade
4 secrets that does impact competitive harm -- and I'm happy
5 to explain to the Court for the Court a little bit more on
6 why that's the case -- wouldn't be revealed, especially as
7 the plaintiffs have suggested to the media or to so many
8 various --

9 THE COURT: Nothing is going to be revealed to
10 the media unless there's a trial. If there's a trial,
11 obviously trials in our country are public. Hopefully there
12 will be no trials.

13 MR. PYSER: We appreciate that and appreciate
14 the opportunity to work on a protective order, as DEA has
15 suggested.

16 THE COURT: A protective order is simple, two
17 purposes; litigation, law enforcement. That's it.

18 MR. PYSER: On the litigation front, I
19 respectfully suggest, Your Honor, that what's being asked
20 for in ARCOS goes deep into discovery. It is, in fact, part
21 of the litigation, it's not part of the resolution
22 information that's necessary now.

23 And on a law enforcement front, that information is
24 available to law enforcement when they contact DEA and say
25 we have a law enforcement concern, can we work with you --

1 THE COURT: They may not know the concern,
2 this might identify it for them. So that's one of the
3 purposes.

4 MR. PYSER: And DEA has the ability to work
5 with law enforcement --

6 THE COURT: Mr. Bennett, are you also
7 proposing producing the data for 95 percent of the
8 distribution, as well?

9 MR. BENNETT: Your Honor, when we were at the
10 meeting with plaintiffs' counsel they said they needed the
11 manufacturers data, not the distributors data, and so that's
12 why it was to the manufacturers. At least that was my
13 understanding. I don't want to speak for them, but that was
14 my understanding, is they only needed the manufacturers
15 list, not the distributors list, and so that's why the
16 authorization --

17 THE COURT: I guess if it's 95 percent of the
18 pills, but except I think they also need, and I need to see,
19 which distributors are distributing those pills, where.

20 MR. BENNETT: Your Honor, again, we don't have
21 the authority to authorize it today, but I would certainly
22 go back and recommend the same type of list for distributors
23 as we did for manufacturers. And I don't know why that
24 would be substantially different, I assume ARCOS can show
25 you distributors versus retail versus manufacturers.

1 And I did want to answer the Court's other question
2 about the Attorney Generals, what was going on with the
3 Attorney Generals.

4 So DEA has been over the last couple of months working
5 with the state Attorney Generals to get them access and
6 information out of the ARCOS database. It's very similar to
7 what's being proposed to the Court here, where they're able
8 to look at the data in the de-identified form, determine
9 where there are cases that they want to further investigate
10 and go forward with, and get the information that way.

11 So I think one of the things the Court put in its
12 order was, and one of the things the DEA put in its
13 objections, was to work similarly with plaintiffs as we have
14 with other governmental actors. And I just want the Court
15 to be aware that that's what's taking place behind the
16 scenes and also what's trying to be balanced here in this
17 case.

18 THE COURT: Well, but it hasn't happened here
19 yet. I'm putting some sense of urgency on everyone to get
20 this data out.

21 MR. BENNETT: Your Honor, I'm not sure I would
22 agree it hasn't happened.

23 THE COURT: I think there is one state that
24 has it maybe, Mr. Bennett, but I don't think it's -- I'm
25 certain that it has not been provided to most of the

1 Attorneys General. That's what they've advised me.

2 MR. EMCH: May I make a relevant comment, Your
3 Honor?

4 THE COURT: Yes.

5 MR. EMCH: The Ohio Automated Rx Reporting
6 System has since 2006 itself received the essential elements
7 of the ARCOS data that's reported to the DEA. The statute,
8 and I don't have the cite here, but since 2006 Ohio has
9 received -- and I assume the Attorney General would have
10 access to, as an example -- the wholesale drug distributor
11 registration number, the purchaser registration number, the
12 NDC or National Drug Code number, the quantity, the state of
13 sale -- or the date of sale, I'm sorry, and the invoice
14 number.

15 So again, on the subject of availability of
16 information, Ohio, among some other states, has been getting
17 essentially the ARCOS data since 2006, so they have access
18 to a large portion of what's in the database.

19 THE COURT: All right.

20 MR. PYSER: Your Honor, in addition to the
21 fact that the law enforcement functions of the Attorneys
22 General either have this information through their boards of
23 pharmacy, as Mr. Emch suggested, or can query DEA
24 separately, the Court raised the issue of the warehouses and
25 plaintiffs raised the issue.

1 The issue with the warehouses is not just their
2 physical addresses; the knowledge of exactly how much is in
3 a particular warehouse. And beyond the warehouses --

4 THE COURT: Can you answer me why Cardinal
5 Health, why they're publicly releasing the street addresses
6 of their warehouses?

7 MR. PYSER: Well, Your Honor, those
8 warehouses, having visited those warehouses myself, those
9 warehouses are heavily guarded. Those warehouses are very
10 secure, and they actually have DEA regulations about cages
11 and vaults in which material is stored.

12 THE COURT: Fine, then there's no problem with
13 revealing the locations. You've already done it. I thought
14 it was sort of a -- it was kept secret for good reason.

15 MR. PYSER: The issue with revealing locations
16 also goes to the pharmacies and exactly how much of a
17 particular opioid at a particular time or how much in
18 general a pharmacy has of opioids onsite. And that
19 information, to know which pharmacies have heavy amounts of
20 opioids, because often for legitimate purposes, there's a
21 hospice nearby or legitimate reason, a particular pharmacy
22 might have more onsite than another. And that information
23 being disclosed to the public, they do not have --

24 THE COURT: None of this is going to be
25 disclosed to the public, Mr. Pyser, I've already made that

1 clear, unless there's a trial. If there's a trial, there's
2 a trial.

3 MR. PYSER: Your Honor --

4 THE COURT: No one is proposing making all
5 this publicly available.

6 MR. PYSER: The information that the
7 plaintiffs are seeking in this choice, where they seek the
8 ARCOS data, is discovery information. It's not the
9 information necessary for the settlement, especially the
10 discussions for prospective relief going forward.

11 THE COURT: I've got to have the right people
12 at the table.

13 MR. PYSER: And Your Honor, respectfully, I
14 believe we can get the right people at the table without the
15 data that the plaintiffs are asking for.

16 DEA just told the Court that they would get the 95
17 percent of all manufacturers, and believe they can get a
18 very similar list of distributors. That puts the right
19 people at the table without opening up discovery.

20 THE COURT: Without the names, what good is
21 it?

22 MR. PYSER: I believe the point, Your Honor,
23 is they provide the names. They would provide the names of
24 the manufacturers, the names of the distributors. The
25 information that DEA is not providing is the detailed

1 discovery that plaintiffs are seeking --

2 THE COURT: But the point -- Mr. Bennett, are
3 you going to provide the names, the names of all the
4 manufacturers that supply 95 percent of the prescription
5 opioids?

6 MR. BENNETT: In each state?

7 THE COURT: In each state. The names of the
8 distributors in each state that distribute 95 percent of the
9 opioids in that state, and how much, you know, what share
10 each of them have, so that we'll know who needs to be in
11 these discussions.

12 MR. BENNETT: Yes, Your Honor --

13 THE COURT: If you have one percent, we don't
14 really care. If they have ten percent, they should be here.
15 If they're not, they'll be brought in.

16 MR. BENNETT: Your Honor, I want to break
17 those into pieces, because the answer to some of it is yes,
18 some of it is no.

19 The manufacturers, yes, we would provide the names.

20 No, the DEA would not provide the percentage or market
21 share for each of those, although they certainly would know
22 how many drugs they send into a state, and the Court could
23 ask them. The DEA wouldn't provide market share.

24 The distributors hasn't been authorized; however, I
25 would recommend to the Department of Justice and the DEA

1 that they authorize that, but it was something that
2 plaintiffs' counsel said wasn't necessary at our meeting, my
3 understanding of our discussions, but it's certainly
4 something that I think fits with what we've done already.

5 We would not again --

6 THE COURT: Then what? All right, so they've
7 got this, and then it shows, just say -- what good -- it's
8 not going to do much good to say, all right, in Ohio we've
9 got 50 different distributors, A through Z and double A
10 through double Z, 52 of them, and that accounts for 95
11 percent of the pills distributed in Ohio. What good is
12 that?

13 MR. BENNETT: Your Honor, my understanding of
14 what the Court needed and what the parties needed was to
15 find who needs to be in those empty chairs --

16 THE COURT: Right.

17 MR. BENNETT: -- the parties who manufacture
18 drugs that are in these states that aren't at the table.
19 This will give the Court and the parties a list of all the
20 manufacturers who manufacture drugs for every state. It may
21 be the --

22 THE COURT: But wait a minute, the point is
23 not to just sue 50 companies that have a fraction of the
24 market. All right? The idea is to focus on those that have
25 some significant responsibility for the pills that went into

1 certain states, and those people should be at the table.

2 MR. BENNETT: We can certainly do it for 75
3 percent to make sure --

4 THE COURT: No. What needs to be identified
5 is how many, and without getting the specific data, I don't
6 see how we're going to get that. So if that's the position,
7 then so be it, I'll make my decision. All right?

8 If you're saying that all you're going to provide is
9 just labels 1 through 52 with letters, I mean, I understand
10 that, I don't think that's going to be particularly helpful.

11 MR. BENNETT: First of all, I don't believe it
12 will be that many different manufacturers. I could be
13 wrong, but I don't think it will be that long a list. I
14 think it could be a shorter list than that for each
15 particular state.

16 THE COURT: Again, without knowing whose pills
17 went where, I don't see that it's productive at all.

18 MR. BENNETT: Your Honor, it would give the
19 Court the opportunity to have the parties in front of it.
20 If the Court needed more information it would have the
21 people who have the access to that information, who have
22 that information --

23 THE COURT: Mr. Farrell, is there anything you
24 want to respond to that? Am I missing something?

25 MR. FARRELL: No, Your Honor. The only other

1 issue that is open is a time frame. We understand from the
2 city of Cincinnati case that the document retention policy
3 for the DEA has been held in abeyance and that they have
4 documents, the data from 2006. And so our request would be
5 from 2006 until January 1 of 2015, giving the government a
6 three-year buffer of time frame for ongoing law enforcement
7 privileges.

8 THE COURT: Okay. I understand from the
9 documents that's your request.

10 MR. PYSER: Your Honor, just to complete our
11 point, we believe and continue to believe there's a middle
12 ground here along the lines of what DEA has suggested. What
13 the plaintiffs are asking for is full discovery. What the
14 Court is aiming at, what the Court has expressed multiple
15 times, I think fairly, is we need to know who the parties
16 are, and we need to know on a state-by-state basis, for
17 example, perhaps what their market share is. That's
18 information that could be derived without going anywhere
19 near the level of detail and full discovery that plaintiffs
20 are seeking in their request.

21 I would also be remiss, Your Honor, if I didn't just
22 finish the point on competitive harm and the pharmacies in
23 particular who aren't here, in that those pharmacies have
24 what the Court will see, what anyone who looks at the data
25 can see, is that when a pharmacy has a higher level of

1 distribution it's not necessarily that they're diverting
2 opioids, it's that it's a busy pharmacy. And if that
3 information is shared among the parties and shared out to
4 the many plaintiffs that are being discussed here, the risk
5 to the customers of Cardinal and the customers of the other
6 distributors is that that information will be used to their
7 competitive harm.

8 Those customer lists and the volume that a particular
9 pharmacy -- the volume of business that they're doing, that
10 will encourage competition, might encourage other pharmacies
11 to move into that area, and will certainly not be consistent
12 with the Court's desire to --

13 THE COURT: Quite frankly, there shouldn't be
14 a lot of competition for distributing opioids. If they want
15 to compete on something else, fine. I think everyone should
16 see there's problem if pharmacies are trying to aggressively
17 compete by how many opioids they can distribute.

18 MR. PYSER: Your Honor, in no way was I
19 implying the pharmacies are trying to distribute extra
20 opioids.

21 THE COURT: That is what it sounds like.

22 MR. PYSER: But it is a standard for how busy
23 a pharmacy is in general.

24 THE COURT: Yeah, but if it's real busy for
25 opioids, that could be a signal that there's something

1 wrong. All right? That's my point, and that's the
2 plaintiffs' point. And if a distributor knows that, then
3 maybe the distributor should have done something.

4 So the point is, this data is important to pinpoint
5 where there's a problem and where the pills have come from
6 in those problem areas.

7 MR. PYSER: And we will be able to work
8 towards those solutions with the more limited set of
9 information that DEA has proposed.

10 THE COURT: No one has made that clear to me,
11 what limited data will readily provide the information
12 that's needed now to make sure that everyone is at the table
13 who needs to be at the table.

14 MR. PYSER: I think that, Your Honor, would be
15 a list of I believe the DEA proposed 95 percent of all
16 manufacturers in a particular state, and hopefully 95
17 percent --

18 THE COURT: But they need to know how many --

19 MR. PYSER: -- of all distributors.

20 THE COURT: They need to know roughly how many
21 pills. All right?

22 MR. BENNETT: Your Honor, in lieu of providing
23 wholesale access to the ARCOS database, would the Court
24 permit the parties to discuss the possibility of providing
25 the market share? I obviously don't have the authorization

1 for that, but providing, in addition to the list, and I
2 don't know what the defense position would be on this, but
3 in addition to the list of manufacturers and the potential
4 list of distributors, their market share per state.

5 THE COURT: Well, that certainly would start
6 going a long way to identifying if there are manufacturers
7 and distributors with a significant market share in a state
8 who aren't here; they should be.

9 MR. BENNETT: And then there wouldn't be a
10 need at least at this point for the wholesale disclosure of
11 ARCOS data, which I think causes a lot of concern for the
12 DEA, as well as -- again, I don't want to speak for the
13 defendants, but the defendants as well, I presume.

14 So it's not something I can offer the Court today, but
15 something we can certainly go back and discuss internally,
16 if it would help to resolve the issue for the Court.

17 MR. PYSER: And Your Honor, that offer sounds
18 promising and potentially a good way to resolve this issue
19 without the full-blown discovery plaintiffs are seeking.

20 THE COURT: Mr. Weinberger.

21 MR. WEINBERGER: Your Honor, we've heard about
22 this being described as full-blown discovery. To be clear,
23 from the beginning, back in October when the *Touhy* letter
24 was issued, we have been requesting this information with
25 respect to the distributors and the manufacturers, so I want

1 to correct that. That has been the case since the beginning
2 of time in terms of this issue.

3 And specifically in anticipation of the meeting in
4 Washington, DC, Your Honor, we sent a letter, Paul Farrell
5 sent a letter on February 21st, indicating eight or nine
6 items that we were looking for. Not full-blown discovery,
7 just native files that contain the information that we
8 believe the Court needs and that we need to evaluate this
9 case.

10 Mr. Cohen got a copy of that e-mail dated February 21,
11 2018. I think it contains the scope, the appropriate scope
12 of the information that we desire and that I think the Court
13 needs in order to move forward in accordance with potential
14 resolution of this case.

15 I'm happy to provide the Court with another copy of
16 that, unless Mr. Cohen has already done so.

17 THE COURT: What I'm trying to do is avoid a
18 whole 'nother endless round of litigation over this.

19 MR. WEINBERGER: We are too, Your Honor.

20 THE COURT: And so I understand if I issue a
21 ruling and the DEA objects, they can appeal it. They can
22 ask for me to stay my ruling. If I don't, then they can go
23 to the Court of Appeals and ask for a stay. And if the
24 Court of Appeals gives them the stay then no one has
25 anything, and it's tied up for another year, and that

1 doesn't help anybody, which is why I had wanted the parties
2 to try and work this out. It wasn't out of laziness. I can
3 issue an order, but it's to actually accomplish something.

4 I'm turning to the plaintiffs. If you were given data
5 which identifies by each state market share, identifies by
6 manufacturer and distributor 95 percent of the pills that
7 went into a given state; we'll just talk about Ohio because
8 we're here, all right. So for -- we'll figure out the
9 years.

10 For each year, we'll just say starting in 2006, for
11 2006, we'll track 95 percent of the opioids that went into
12 Ohio, all right, which manufacturer and the distributor, and
13 it covers 95 percent of the market share. I think that
14 would identify -- obviously you look at it year by year, you
15 look at the totals. That should determine if there's anyone
16 who needs to be at the table who's not, which is what we
17 need to know right now.

18 I am not saying if we've got to have a trial. Just
19 saying hypothetically I try the Ohio case, you're not going
20 to need more. Well, there's a whole lot of things you're
21 going to need which you don't have, but we're not talking
22 about that now.

23 MR. MOUGEY: Your Honor, if I may, Peter
24 Mougey. I think that's half the equation. We're missing
25 the bridge.

1 THE COURT: What else do you need?

2 MR. MOUGEY: The problem is you don't know how
3 many pills and you don't know where in the specific state,
4 which communities, which counties, which cities. So as you
5 know, all the cities and counties that have filed you have a
6 market share for the state as a total, you still don't know
7 the market share in the cities and counties, you don't know
8 the number of the pills. At the end of the day, it is a
9 piece of information. It still doesn't give a complete and
10 accurate picture.

11 In order to fulfill the goal and objective you set us
12 down, which is let's get this thing resolved, analyze the
13 problem, you need to be able to see the number of pills
14 going into each community --

15 THE COURT: You only need that if you're going
16 to try that case for the particular community. For right
17 now, for these discussions, if you see that there's a
18 distributor that has distributed 20 percent of the pills
19 into Ohio and they're not named, you get them in the case.
20 That's easy.

21 MR. MOUGEY: The problem is --

22 THE COURT: In which case it is, you know,
23 that's the problem, too. You don't know which case.

24 MR. MOUGEY: Yes, sir, that's exactly right.
25 You don't know which city, which county. So at the end of

1 the day, city by city, county by county, jurisdiction by
2 jurisdiction, across the state of Ohio or any state, that's
3 why you need the other piece of the pie, the other piece of
4 the puzzle. And if you don't have that puzzle you don't
5 have the bridge, you can't connect the dots, you can't
6 fulfill the objective. And if the objective is city by
7 city, county by county --

8 THE COURT: We're not having discussions city
9 by city, county by county, we're having them globally. So
10 it seems to me if you see -- it doesn't really matter. If
11 you see company X that's not in this case and they've
12 distributed 20 percent of the pills into Ohio, you just name
13 them and bring them in. Okay? You've got a basis to do it,
14 and it doesn't matter which particular city those pills went
15 into.

16 MR. MOUGEY: At the end of the day we're going
17 to need -- our clients in cities and counties that have the
18 responsibility back to their own constituents, we're going
19 to need to be able to explain to them which defendant, how
20 many pills, broken out by city and county. So in order to
21 have not only the defendants agree to any resolution, we are
22 going to need our clients to agree to that as well. And in
23 order to do that we're going to need the full bridge to be
24 able to say where those pills came in and into what cities
25 and counties.

1 And at the end of the day, to have a piece of market
2 share without knowing the number of pills into the specific
3 cities and counties, and I think they do vary significantly
4 between city and counties across the state, you've got to
5 have that data when analyzing and going back to our clients
6 to address any resolution.

7 So it would be to get some numbers, some relief on the
8 table, and to address the abatement model, we've got to have
9 those pieces to the puzzle. Otherwise, just having half of
10 the market share, without knowing the number of pills and
11 where, is only a piece of the equation.

12 So respectfully, this information is already organized
13 and sitting in a database. You've already indicated your
14 willingness, your desire to put a protective order over
15 this. To give us all of the tools we need to address this
16 in the context of settlement only makes sense. It's sitting
17 in an off-the-shelf database, Your Honor. It's looking at
18 approximately four terabytes in total in an off-the-shelf
19 database that can easily be produced in its native format to
20 us. To go in and start dicing this in and cutting it up
21 without giving us all the tools we need doesn't make any
22 sense.

23 THE COURT: I know, but I don't think you need
24 to do all that to try to resolve this case. If we have to
25 try a case, fine.

1 MR. FARRELL: Judge, if I may, one quick
2 example.

3 Let's take Idaho, and for Idaho to be at the table to
4 be discussing settlement. And let's say that we identified
5 that Cardinal Health has 20 percent of the market share in
6 Idaho, and that's 20 percent. And let's say there's a
7 million people and a million pills, a pill a person. So
8 that's 20 percent of the market share in Idaho.

9 Now let's come over to my hometown in Huntington, West
10 Virginia, and it's a hundred thousand people, and Cardinal
11 Health has 20 percent of my market share, but in my market
12 there's six and a half million pills per hundred thousand
13 persons. For purposes of discussing --

14 THE COURT: Mr. Bennett, we're going to need
15 to know the aggregate number of pills, the total number of
16 pills per state, to have it mean anything, because again 20
17 percent of a small number is a small number, 20 percent of a
18 large number is a very big number.

19 MR. BENNETT: Your Honor, the de-identified
20 information that the government would provide would show the
21 total number of pills going into each community, each
22 three-digit ZIP code community.

23 MR. FARRELL: Now, in addition to that, Judge,
24 let me make another example. When H.D. Smith Wholesalers
25 comes in and sits at the table and they're going to say,

1 hey, we've got five percent of the market share, but we
2 shouldn't -- we're a little player in this, having this data
3 we'll be able to respond to H.D. Smith Wholesalers in
4 settlement and say, well, actually H.D. Smith, in West
5 Virginia you went from 400 pills a year to 498,000 pills a
6 year. That's a 98,000 percent increase. You have a bigger
7 seat at this table than Cardinal Health does.

8 THE COURT: Again, the point is that the data
9 for years will show that. Okay? It will show the aggregate
10 number in say West Virginia may have shot way up from one
11 year to the next, and it will show percentages.

12 MR. FARRELL: And then finally, Judge, in
13 bringing more parties to the table, it may show that H.D.
14 Smith Wholesalers sold those 498,000 pills to a particular
15 pharmacy, and now that pharmacy should share a seat at the
16 table, as well.

17 So what we're asking the Judge to do is give us a --

18 THE COURT: We won't bring individual
19 pharmacies into this settlement discussion.

20 MR. FARRELL: Judge, respectfully, if it's
21 CVS, I think it's a different story. But all that being
22 said is instead of piecemealing this --

23 THE COURT: You'll have the data for CVS
24 because you know that every pill that CVS distributed went
25 to its own pharmacies.

1 MR. FARRELL: Well, it depends, Judge.

2 THE COURT: They've already said that, they
3 don't sell to anyone else.

4 MR. FARRELL: CVS also at times purchased from
5 Cardinal Health. So the Florida litigation is a matrix.
6 You know, I've got the affidavit from the DEA which
7 describes the fact that the data analyst from Cardinal
8 Health to CVS Florida --

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1 THE COURT: Maybe the thing to do is step
2 by -- again, I'm trying to move this forward, and it doesn't
3 do anyone's purpose to have this thing sidetracked in
4 litigation in the Sixth Circuit for a year or two.

5 MR. FARRELL: Judge, respectfully, your order
6 will be on interlocutory appeal, they'll have to file a
7 writ.

8 THE COURT: All right.

9 MR. FARRELL: And we think you're right. So
10 this for us --

11 THE COURT: You don't know what I'm ordering
12 yet, and you may think I'm right if I rule in your favor;
13 they'll think I'm wrong and the DEA will think I'm wrong,
14 and I have no idea what my colleagues on the Sixth Circuit
15 will think, and who might grant a stay. And if they grant a
16 stay, that's the end, and no one gets anything.

17 MR. FARRELL: So can I perhaps --

18 THE COURT: That's the reality. I understand
19 it, you understand it.

20 MR. FARRELL: Perhaps your order could then be
21 separated and severable, and part one says turn over your
22 list, and part two says what you've discussed, as well. And
23 that way if they want to appeal part two they can appeal
24 part two, and if it's turned down then what we get is we get
25 the data, and we can move forward.

1 Judge, we're trying to find the truth. We're trying
2 to get to the truth here. We're trying to get facts that
3 help us understand how this turned into the largest epidemic
4 in our country, and so it's easy. Let us plug in, download
5 the data, and then let us address the facts.

6 THE COURT: All right. I've heard the
7 arguments. Anyone else want to weigh in?

8 MS. RENDON: Your Honor, if I might very
9 briefly, Carole Rendon, liaison counsel for the
10 manufacturers, and specifically counsel for Endo
11 Pharmaceuticals.

12 We submitted to the Court earlier today a letter in
13 which we described as a group our belief, which you've heard
14 today here now from three different parties, that the
15 proposal that the DEA put forward is one that makes sense,
16 that works; that will allow the Court to move the litigation
17 forward in the way the Court has directed us to do so, which
18 is to try to get to a resolution; that it addresses and
19 properly balances the issues that the DEA has raised and the
20 concerns that the distributors and manufacturers
21 legitimately have.

22 And I think Your Honor has really nailed it when you
23 were just talking about the fact that perhaps if we start
24 with this, plus have the parties discuss if there's an
25 ability to get to market share, that we have what we need

1 for resolution.

2 What we need for litigation I hope we never need.
3 That's the whole goal here, trying to get to resolution. If
4 we are going to get to resolution we have to focus all of
5 our attention and energy on that process. And if instead
6 what we're going to be doing is litigating, then we need to
7 focus all our attention on that process, in which case the
8 discovery is going to be bilateral. And that's not the path
9 that Your Honor wants to be on, and I don't think its the
10 path the parties want to be on.

11 So I think your proposal that we try to get what we
12 can that allows us to answer the questions that are out
13 there that Your Honor has identified without increasing the
14 risk of interlocutory litigation, and gets all of us moving
15 forward as we have been, is where the Court, respectfully,
16 should be.

17 And I think that if that ends up not being sufficient,
18 Your Honor, we'll be back here again in a couple of months,
19 and we'll tell you, you know what, we were all wrong, that
20 wasn't what we needed we to do; we need to do more, and here
21 is why. But we have such momentum going, Your Honor, that
22 let's try to keep that momentum going forward.

23 THE COURT: Well, I appreciate that.

24 Well, already DEA has acknowledged that what they have
25 offered isn't sufficient; maybe they will offer more. It's

1 become very fluid.

2 MR. HOBART: Your Honor, Jeffrey Hobart from
3 McKesson Corporation. I would like to put on the record
4 McKesson supported the DEA's original position that they
5 mapped out at the meet and confer. We join Ms. Rendon's
6 comments. We think the compromise solution that Mr. Bennett
7 just proposed to the Court is a sensible one.

8 One practical approach, Your Honor, that might be
9 beneficial to all, if the DEA can get authorization for that
10 approach, would be to perhaps provide some sample reports to
11 all the parties.

12 THE COURT: First of all, I don't want
13 to -- DEA -- Mr. Bennett, you proposed 2000-what, '13 and
14 '14 or '12 and '13? I think it's important to go back a
15 number of years, and there's no worry about interfering with
16 law enforcement in 2006 to 2010, the statute has long since
17 gone.

18 So I think it's important, because one of the things
19 it's going to show is there might be, you know, huge bumps
20 in certain states, like you go from a very small amount to
21 some huge amount. All right? That's strange, that's
22 suspicious. Why is that? The state's population is the
23 same, roughly. All right? Well, all of a sudden you have
24 two, three, four, ten times the number of pills going in
25 from 2006 to 2010. That doesn't make a lot of sense.

1 MR. BENNETT: Your Honor, just so I can report
2 back to the decision makers, what time frame is the Court
3 proposing? Is it 2006 through 2015?

4 THE COURT: The plaintiffs have proposed
5 January 1, 2006 to December 31, 2014. That's nine years.
6 All right? I think that makes sense to me. That's going
7 back more than three years, so I think it's very unlikely
8 that it would interfere with an investigation. And if it
9 turns out that it is, what you can do is come to me *ex*
10 *parte*, and if I really think that -- I don't want to
11 interfere with a critical investigation; if there is
12 something, we'll figure out how to deal with it. Okay? I
13 can tailor it.

14 MR. BENNETT: Yes, Your Honor.

15 THE COURT: I think January 1, 2006 to
16 December 31, 2014.

17 MR. BENNETT: 2014, Your Honor?

18 THE COURT: Yes. December 31, 2014. That's
19 nine years. So we're now in '18, so we don't get anything
20 for '15, anything for 2016, anything for 2017, and obviously
21 nothing for 2018. So I think that's reasonable.

22 MS. RENDON: Your Honor --

23 THE COURT: Yes.

24 MS. RENDON: If I might suggest perhaps a way
25 to move forward would be to have DEA go back and see what

1 they're willing to authorize, share that with the parties,
2 and allow us an opportunity to review and respond in a short
3 time frame.

4 THE COURT: Well --

5 MR. WEINBERGER: Your Honor, we've been at
6 this for all this time.

7 THE COURT: Well, there was a break, but --

8 MR. WEINBERGER: There was, but --

9 THE COURT: -- I'm accelerating this. So I'm
10 going to issue an order soon, but if the parties can agree
11 on something, I think that's preferable; but it has to be
12 enough data with enough specificity to identify whose pills
13 went where, and an aggregate. I'll just use round numbers,
14 say we've got Ohio, 2008. There will be the total, total
15 number of prescription opioids, and the manufacturers,
16 totaling 95 percent.

17 So just say, I'm going to use round numbers, just say
18 there were one million pills. We'll just make simple
19 numbers. One million pills, so we'll have manufacturing
20 totaling 950,000 pills, and the market share; and the
21 distributors totaling 950,000, and their market share -- all
22 right, that's what we're talking about -- for each year,
23 each state.

24 MR. FARRELL: Judge, one of the issues that
25 we're going to be addressing that we think is important is

1 whether or not manufacturer A was selling 5 milligram pills
2 or manufacturer B was selling 80 milligram pills. So that's
3 why we need the ARCOS database --

4 THE COURT: I understand the ARCOS database
5 will give everything. All right? And if I decide to do it,
6 that's fine, but --

7 MR. WEINBERGER: And Your Honor, we are not
8 asking the DEA to do any work other than to transfer the
9 information to us, and we have experts prepared to create
10 reports for us that will identify the very information that
11 I think this Court needs ultimately for resolution purposes.

12 THE COURT: The easiest thing is just transfer
13 the data, DEA doesn't have to do anything.

14 MR. WEINBERGER: Right.

15 THE COURT: We already determined inexplicably
16 the addresses of the warehouses have been revealed, although
17 I would still prefer not to further divulge those.

18 MR. FARRELL: The protective order, Judge, I
19 believe is clear.

20 THE COURT: No, I don't even think we
21 need -- I mean anyone needs -- to have those floating
22 around, so you probably just excise the location or the
23 street addresses of the warehouses. The cities, fine, if
24 there's some warehouse in Cleveland generically, that's all
25 right.

1 MR. BENNETT: Your Honor, understanding the
2 Court wants to move this case forward, understanding the
3 Court wants the parties to agree rather than issuing an
4 order and litigating it, and listening to Ms. Rendon's
5 suggestion about getting some of the information and working
6 towards making a decision on the rest of it, I'm wondering
7 if the Court would entertain, we have a draft protective
8 order that we could circulate to the parties.

9 Once that protective order is in place we would be
10 able to share the information that's already been approved,
11 and while we're doing that process we can simultaneously go
12 back with the Court's comments about asking --

13 THE COURT: Is it like a 20-page protective
14 order?

15 MR. BENNETT: Your Honor, we can give you a
16 copy of the draft. Again, this is still just in the draft
17 stage, but I think it's four pages. But again, none of the
18 parties have seen this yet, but we do have copies for them.

19 THE COURT: Well, you can start with that. I
20 mean, I've already said I want -- there's two purposes,
21 there's this litigation and there's law enforcement, and
22 beyond that, that's it, so no public dissemination of any of
23 this.

24 MR. BENNETT: Your Honor, may I approach the
25 bench?

1 THE COURT: All right. You can provide it to
2 the parties.

3 MR. BENNETT: You want it just to the parties
4 now, or to you?

5 THE COURT: I might as well look at it, too.

6 All right, this is what I'm going to do. I can issue
7 an order any time, and that will be it. If someone wants to
8 appeal, they can appeal, seek permission, and they can
9 interlocutory appeal, but I'd rather not have a lot of
10 litigation.

11 So I want the parties very quickly to agree on a
12 protective order. Okay? This is at least only four pages,
13 and the first page is a bunch of whereases, so who cares
14 about the whereases. It is really only about two pages
15 actually.

16 I commend Mr. Bennett, it's actually shorter than our
17 standard one in our local rules. Maybe we should go with
18 this.

19 MR. BENNETT: As I said, Your Honor, there are
20 some people still reviewing it.

21 THE COURT: We don't need the Court's
22 whereases, it could be two pages; but anyway, agree on this,
23 and then I want you to produce what you said you would
24 produce.

25 MR. BENNETT: Yes, Your Honor.

1 THE COURT: Which is state by state, with the
2 totals, from January 1, 2006 to 12-31-2014, the aggregate;
3 and then the market, the breakdown of the market shares for
4 95 percent of the pills, and see what that looks like to the
5 plaintiffs, and I'd like to see it, too.

6 MR. BENNETT: Yes, Your Honor. We'll
7 certainly provide the Court with a copy. We do have
8 authorization for I think 2012-2013. We'll go back and look
9 at 2006 to 2012.

10 THE COURT: Well, get it fast.

11 MR. BENNETT: Yes, Your Honor.

12 THE COURT: If there's foot dragging, I'll
13 just do what I have to do.

14 MR. EMCH: Your Honor, do we understand that
15 the transactional data that you're suggesting would be
16 de-identified and that the listing would be separate? The
17 market share listing is separate, but the actual individual
18 transactions are not identified as to buyer, seller, et
19 cetera?

20 THE COURT: I'm not sure what format they're
21 producing at this point. I'll see what it is, and then
22 you're going to see it, and the plaintiffs are going to see
23 it, and the Court will see it. All right. Today is Monday
24 the 26th. I want the protective order to be agreed on by
25 Friday at noon, and then DEA is to start producing.

1 When will this be produced, Mr. Bennett, so I can see
2 it and the parties can see it, and we can determine if
3 that's enough for now?

4 MR. BENNETT: Your Honor, my understanding is
5 once the protective order is issued DEA will start producing
6 it on a rolling basis. We're not going to wait until
7 everything is done to get it to the parties.

8 I think we were talking approximately two to three
9 weeks for that to start rolling out, for them to go through
10 the process and get all of that; but I think they were
11 talking about doing five states at a time, and I don't think
12 it would take longer than a month for everything total once
13 it starts coming.

14 The problem is the actual person who is going to do
15 this --

16 THE COURT: I want them to tell you which
17 states for the start.

18 MR. BENNETT: That's fine.

19 THE COURT: All right. Mr. Farrell, what five
20 states should be the first five? I can guess some of them.

21 MR. FARRELL: Ohio, Kentucky, West Virginia,
22 Florida, Alabama.

23 THE COURT: Okay. Those will be the first
24 five.

25 MR. BENNETT: Yes, Your Honor.

1 THE COURT: And I suggest, Mr. Farrell,
2 Mr. Weinberg, if you have the second five, just provide them
3 to Mr. Bennett since it's going to be on a rolling basis.
4 We've got the first five, and the plaintiffs can provide the
5 second five.

6 MR. BENNETT: Your Honor, I assume the Court
7 and the parties would prefer us to get the manufacturer list
8 first before we start on the states so you have the actual
9 parties, or do you want the individual states' data first?

10 I'm sorry, Your Honor, it will come together.

11 THE COURT: Yes. It's got to be state by
12 state, or it's not really going to be intelligible.

13 MR. BENNETT: No, it will be, Your Honor.

14 THE COURT: All right. And you are going to
15 get authorization for 1-1-06 to 12-31-14. All right. Quite
16 frankly, we'll see with the first five states, we'll see
17 exactly what it is we're getting and whether that's going to
18 be satisfactory for this for the present. And if it's not,
19 I'll have to order something more, and if you appeal, you
20 appeal.

21 So I want to make sure, look, and I need to know very
22 quickly if the DEA is agreeing to these nine years, and the
23 market share, and the names, the names of the manufacturer
24 and distributor, so the market share of each.

25 MR. FARRELL: The aggregate as well, Judge?

1 THE COURT: Yes, the aggregate and the
2 individual.

3 MR. FARRELL: So when you say aggregate and
4 individual, we're talking about the individual transactions?

5 THE COURT: We're not going to have individual
6 transactions. We're going to say, all right, for Ohio,
7 let's say there are a million pills in the year 2006. We're
8 going to have total pills in 2006, one million. You're
9 going to have the names of all the manufacturers that total
10 950,000 pills, and you're going to have their market shares.
11 You're going to have the names of the distributors totaling
12 950,000 pills and their market shares. All right?

13 That's what we'll have, and that may be enough for now
14 or it may not be. If you tell me there's still something
15 more I have to have for right now, then I'll consider it.
16 And obviously anything, the defendants will have it, too.

17 MR. FARRELL: And so time frame, you are
18 expecting this within the next --

19 THE COURT: Well, Mr. Bennett said he's going
20 to start producing it as soon as the protective order is
21 going to be signed by this week, by Friday at noon. And
22 then they'll start coming on a rolling basis, and the first
23 five states are going to be Ohio, Kentucky, West Virginia,
24 Florida, and Alabama.

25 Mr. Bennett, how soon do you think we'll get the first

1 five states?

2 MR. BENNETT: Your Honor, I think that's going
3 to depend on whether we're doing the two years, which is
4 what I asked for the time frame, or whether we are doing
5 nine years, which I assume will take longer.

6 The two years, I was given a two or three-week basis
7 for that to start coming in. I don't know if that is the
8 same for the nine-year period or if it will be longer if
9 we're doing nine years for Ohio. So I'd like to maybe --

10 THE COURT: The problem is I could probably
11 get all the data faster because there it is, you don't have
12 to sort it out, you don't have to do anything, just here is
13 the data. I'm concerned this is going to take months and
14 months and months, and we don't have months and months.

15 MR. BENNETT: I don't think the anticipation
16 is that it's going to be months and months and months, and I
17 will certainly explain to my client the Court's desire for
18 them to do this as expeditiously as possible.

19 So I'd be happy to kind of provide the Court with an
20 update once I have had a chance to talk to the technical
21 person and group that's doing this.

22 THE COURT: Well, I need that in a week, too.
23 I need that in a week, how long this is going to take.

24 MR. BENNETT: Yes, Your Honor.

25 THE COURT: Because if it's too slow then I

1 just will order the data to be produced electronically. You
2 don't have to do any sorting, and you've got it, and it is
3 up to the plaintiffs.

4 MR. MOUGEY: Your Honor, we have Ph.D.s ready
5 to go with the data crunchers that can have this data turned
6 around within 30 days.

7 THE COURT: That's the easier thing,
8 Mr. Bennett, you just produce it, and they do what they want
9 with it. The speed is important because we --

10 MR. BENNETT: I understand, Your Honor. We
11 will do it as expeditiously as possible.

12 THE COURT: That's what I want. We will have
13 a protective order by noon on Friday, and I'm going to just
14 say noon on Monday I need you to file a report as to how
15 long it's going to take.

16 MR. BENNETT: Yes, Your Honor.

17 THE COURT: All right? As to how long
18 production will take.

19 Well, I guess that's part of your response,
20 Mr. Bennett. It's whether DEA will voluntarily provide the
21 nine years and the distributor data and the market share
22 that we discussed, and if so, how long it's going to take.
23 All right?

24 MR. BENNETT: Yes, Your Honor.

25 THE COURT: And based on that, I'll decide

1 what to do.

2 MR. BENNETT: Yes, Your Honor.

3 THE COURT: And hopefully the answer will be
4 yes, and it won't take a real long time.

5 MR. BENNETT: Yes, Your Honor.

6 THE COURT: But if it's no and/or it takes a
7 long time, you are not giving the Court much choice. I'll
8 just have to do what I need to do, and let the chips fall
9 where they may.

10 MR. BENNETT: Understood, Your Honor.

11 THE COURT: Okay. All right.

12 Anything further that anyone wants to say for the
13 record? I appreciate everyone's appearance. And I think I
14 said it at the outset, if I didn't I apologize, I appreciate
15 everyone's very detailed and thoughtful submissions leading
16 up to today, which I and all the special masters and Judge
17 Ruiz have reviewed very carefully.

18 Okay. Thank you. We're adjourned then.

19 DEPUTY CLERK: All rise.

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21 (Proceedings adjourned at 4:56 p.m.)

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