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IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY
FILED In The
Office of the Court Clerk

APR 25 2019

In the office of the
Court Clerk MARILYN WILLIAMS

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

Plaintiff,

vs.

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

Defendants.

Case No. CJ-2017-816

Honorable Thad Balkman

**DEFENDANTS JANSSEN PHARMACEUTICALS, INC. AND JOHNSON AND JOHNSON'S MOTION FOR EVIDENTIARY SANCTIONS BASED ON THE STATE'S FAILURE TO COMPLY WITH DISCOVERY ORDERS**

## MOTION

Defendants Janssen Pharmaceuticals, Inc. ("Janssen")[1] and Johnson & Johnson ("J&J"), by and through their attorneys, hereby move this Court for an order excluding from trial all evidence or argument that prescriptions for Janssen's opioid medications led to opioid overdose deaths. The State has ***twice*** failed to comply with the Discovery Master's order to produce data that would allow patients to be tracked across prescription claims and overdose death data. Thus, Janssen and J&J have been deprived of the ability to test one of the central allegations of the State's case. Admission of argument or supposed evidence that Oklahomans who were prescribed Janssen opioid medications later died from opioid overdoses would unfairly prejudice Janssen and J&J and should therefore be excluded. *See* Okla. Stat. tit. 12, § 3237(B)(2)(b). It would also reward the State for its blatant disregard for the Court's orders. If this Court's authority and mandates are to mean anything, the State must be sanctioned for its repeated refusal to do what the Court has required. Janssen and J&J respectfully request that the Court grant this Motion and award other relief the Court deems just and proper.

## BRIEF IN SUPPORT

In support of this Motion, Janssen and J&J show the following:

## I. INTRODUCTION

The State alleges that Janssen's conduct caused an increase in opioid overdose deaths. *See, e.g.*, Pet. ¶¶ 32, 119. The State is in sole possession of two categories of evidence that would prove or refute that allegation. The first category is prescription claims data, which includes SoonerCare (Medicaid) and HealthChoice (State employee) data. The State has produced this prescription

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[1] "Janssen" also refers to Janssen Pharmaceuticals, Inc.'s predecessors, Ortho-McNeil-Janssen Pharmaceuticals, Inc. and Janssen Pharmaceutica, Inc.

claims data in ***de-identified*** form, meaning that patients are referenced only by ***numbers***. The second category is opioid overdose death data from the Office of the Chief Medical Examiner and the Fatal Unintentional Poisoning Surveillance System. The State has produced this data in its ***ordinary*** form, meaning that patients are identified by ***name***. When one set of data identifies patients with numbers, and the other set of data identifies patients by name, it is impossible to see whether or how one patient moves through both data sets.

The State has had more than a year to produce prescription claims and overdose death data in a format that would permit tracking of patients between the two data sets (that is, in a cross-walked or cross-referenced form). Despite representing to Defendants, to Special Master Hetherington, and to the Court that it would provide this information, it has consistently refused to do so. To address the deficient productions, in February 2019, Janssen filed a motion to compel the State to complete its database productions in fully crosswalked form. The Discovery Master granted the motion on February 25[2] and ordered the State to either produce data in its "ordinarily maintained" form or some other "reasonably usable" form that would allow Janssen to "obtain the relevant information." Feb. 25, 2019 Order of Special Discovery Master at 4 (Exhibit 1); *see also id.* at 3 ("[T]o the extent State can provide identification numbers ***or link information in any form***, State continues to be Ordered and compelled to provide the 'cross-walked' information.") (emphasis added). The Discovery Master ordered the State to produce this data no later than March 1. *Id.* at 4.

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[2] Exhibit 1, titled Order of Special Master, was filed on February 25, 2019, but appears to have been decided and signed by Judge Hetherington on February 18, 2019.

The State failed to meet that deadline, so Janssen again brought the issue before the Discovery Master. The Discovery Master granted Janssen's motion on March 29[3] and ordered the State to "provide usable information" to Defendants, noting that "Defendants are ***entitled*** to . . . information sufficient to allow for Defendants to identify how many individuals died from an overdose and from which opioid drug," specifically granting Janssen's demand that the State link patient identifiers in SoonerCare and HealthChoice data to individuals in Medical Examiner records. March 29, 2019 Order of Special Discovery Master at 3 (Exhibit 2) (emphasis added). In flagrant violation of the Discovery Master's orders, the State continues to refuse to provide Defendants with data that will permit patient tracking between prescription claims and overdose death data.

Even as the State has refused to produce this information, it has repeatedly told the Court that it could and would produce data that would permit patient tracking. Specifically, the State has represented that it could produce data in a way that would allow Janssen to track individuals across different databases. Yet the State still has not done so. Twice, the Discovery Master has ordered the State to produce this evidence. Twice, the State has refused. Such willful violation of the State's discovery obligations warrants exclusion of this evidence as a discovery sanction.

## II. ARGUMENT

Because the State alone possesses the ability to link patients from prescription claims and overdose death data (something that is necessitated only by the State's insistence that it de-identify the prescription claims data before producing it to Defendants), because this Court has ***twice ordered*** the State to link these datasets, because the State has ***twice refused*** to obey this Court's

[3] Exhibit 2, titled Order of Special Master, was filed on March 29, 2019, but appears to have been decided and signed by Judge Hetherington on March 28, 2019.

orders, and because the State's refusal deprives Janssen and J&J of the ability to test the State's allegations, this Court should exclude any arguments about or evidence pertaining to opioid overdose deaths in Oklahoma allegedly occurring in patients who received prescriptions for Janssen's opioids.

The Court has the authority to do so because Oklahoma courts can exclude evidence where, as here, a party has disobeyed a discovery order. *See* Okla. Stat. tit. 12, § 3237(B)(2)(b). Under section 3237 of the Oklahoma Code of Civil Procedure, when a party fails to comply with a discovery order, a court can issue an "order . . . prohibiting [the disobedient party] from introducing designated matters in evidence." *Id.* Factors the Court should consider prior to choosing the most severe sanctions include "willfulness, prejudice, whether there was a warning that failure to cooperate could lead to dismissal, whether less drastic sanctions were imposed or considered, and the amount of interference with judicial process." *Barnett v. Simmons*, 2008 OK 100, ¶26, 197 P.3d 12, 21 (citing *Hotels, Inc. v. Kampar Corp.*, 1998 OK Civ. App. 93, ¶ 11, 964 P.2d 933, 935). "[W]illfulness of party's conduct is relevant to the severity of the sanction to be imposed, not whether a sanction should be imposed." *Id.* ¶17, 197 P.3d at 19.

***The State's actions were willful.*** Here, the State violated the Discovery Master's February 25 and March 29 orders, the latter of which noted that Janssen and J&J are "entitled" to the cross-referenced information the State has failed to produce. March 29, 2019 Order of Special Discovery Master at 3 (Exhibit 2). And the State has repeatedly maintained to this Court and the Discovery Master that it ***could*** produce the data in a cross-referenced form. May 22, 2018 Meet-and-Confer Tr. at 34:4-37:5 ("[I]f we have databases where we are producing information, we will connect—we will use the same consistent patient identifier for the same patient across those databases.") (Exhibit 3); Oct. 3, 2018 Hearing Tr. at 58:23-59:8 ("[W]e reidentified each patient with a unique

number. So there's an identifier. Our intention is to use the same number across all databases so they can track how those patients moved through the State's data.") (Exhibit 4). In light of the State's continued representations that it can and will produce the information, and of its continued refusal to do so, this failure to comply must be deemed willful.

***Janssen will be unduly prejudiced if the State is not precluded from offering evidence and argument at trial.*** The State has produced data from various databases relating to overdose deaths and medical and pharmacy claims. Had the State produced the data in the form in which it is maintained, Janssen and its experts would be able to track patients from system to system and answer questions central to this case, such as whether any individual in Oklahoma who was prescribed a Janssen medication died from an overdose of that medication—or any opioid, licit or illicit. Janssen would be able to see whether an individual listed in the Fatal Unintentional Poisoning Surveillance System also had a paid SoonerCare or HealthChoice pharmacy claim for a Janssen product. Instead, the State produced one half of the data—the overdose death data—in an unredacted form. But it produced the other half of the data—the prescription claims data—in de-identified form. Because the State produced mismatched data sets, Janssen has no way to establish how many overdose deaths, if any, its products are connected to in any way.

By refusing to produce overdose death data with a "consistent patient identifier for the same patient across those databases," ***as the State has promised*** (Exhibit 3, May 22, 2018 Meet-and-Confer Tr. at 34:4-37:5) and ***as the Court ordered*** (Exhibit 2, March 29, 2019 Order of Special Discovery Master at 3), the State has made it impossible for Janssen to disprove the extent to which its medications have contributed to Oklahoma's opioid overdose deaths. And the State has concealed the only means available to answer a key question: how many Oklahoma opioid overdose

deaths, if any, have any connection at all to Janssen's opioid products. This undue prejudice stems from the State's brazen discovery production insufficiencies.

Even if the State were to comply with the Special Master's two discovery orders on the eve of trial, such a late disclosure would be inherently prejudicial and would only amplify the need for exclusion. Janssen and J&J's experts have already submitted reports and opinions without the benefit of analyzing properly produced and cross-referenced data. That analysis is essential to Defendants' defense at trial. As such, exclusion of evidence of opioid overdose deaths is a reasonable and well-tailored remedy. In a recent Tenth Circuit case, the court upheld a lower court's exclusion of documents that were not produced in discovery "despite requests and orders" and that were ultimately produced "only just before trial." *Dale K. Barker Co., P.C. v. Valley Plaza*, 541 F. App'x 810, 816 (10th Cir. 2013) (Exhibit 5).[4] Therefore, even if the State does ultimately produce this evidence after failing to comply with two Court orders requiring it to do so, evidence of opioids overdose deaths should still be excluded because such a delayed disclosure is inherently prejudicial to Janssen.

The State refuses to produce patient-trackable data, flouting this Court's orders, contradicting its prior representations, and depriving Janssen and J&J of the ability to refute the State's claims. The Court should preclude the State from presenting evidence or argument that prescriptions for Janssen opioids led to opioid overdose deaths, lest the State be rewarded for its egregious discovery delinquencies.

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[4] Because section 3237 tracks its federal counterpart, Rule 37 Federal Rules of Civil Procedure, this Court can and should look to federal cases interpreting this federal rule as persuasive authority. *See Barnett*, 2008 OK 100, ¶16, 197 P.3d at 18 ("Section 3237(B)(2) is patterned after Rule 37(b)(2) of the Federal Rules of Civil Procedure; therefore, federal jurisprudence is instructive when interpreting the Oklahoma provisions."); *Payne v. DeWitt*, 1999 OK 93, ¶¶ 9-10, 995 P.2d 1088, 1092-93.

## III. CONCLUSION

For all these reasons, the Court should grant Janssen and J&J's Motion and bar the State from introducing any evidence of or arguments about opioid overdose deaths.

Respectfully submitted,

By: ______________________


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## CERTIFICATE OF MAILING

Pursuant to Okla. Stat. tit. 12, § 2005(D), and by agreement of the parties, this is to certify on April 25, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:


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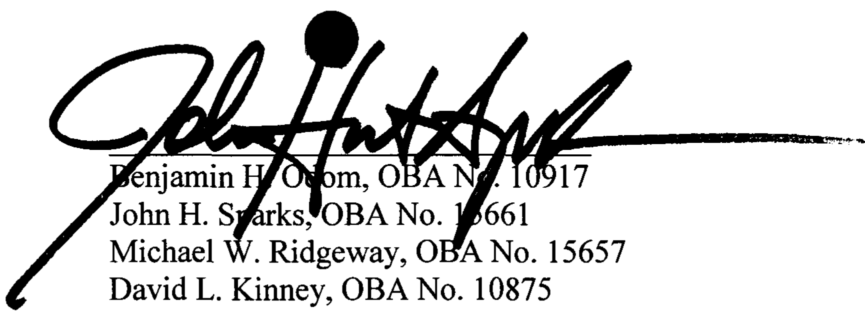

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# EXHIBIT 1

*1042903056*

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

| | |
|---|---|
| **STATE OF OKLAHOMA, ex rel.,**<br>**MIKE HUNTER,**<br>**ATTORNEY GENERAL OF OKLAHOMA,**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**(1) PURDUE PHARMA L.P.;**<br>**(2) PURDUE PHARMA, INC.;**<br>**(3) THE PURDUE FREDERICK COMPANY,**<br>**(4) TEVA PHARMACEUTICALS USA, INC.;**<br>**(5) CEPHALON, INC.;**<br>**(6) JOHNSON & JOHNSON;**<br>**(7) JANSSEN PHARMACEUTICALS, INC,**<br>**(8) ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS;**<br>**(9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;**<br>**(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.;**<br>**(11) WATSON LABORATORIES, INC.;**<br>**(12) ACTAVIS LLC; and**<br>**(13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,**<br><br>**Defendants.** | **Case No. CJ-2017-816**<br><br>**Judge Thad Balkman**<br><br>STATE OF OKLAHOMA } S.S.<br>CLEVELAND COUNTY }<br>FILED<br>FEB 25 2019<br><br>In the office of the<br>Court Clerk MARILYN WILLIAMS |

**ORDER OF SPECIAL DISCOVERY MASTER**

NOW, on this 18th day of February, 2019 the above and entitled matter comes on for ruling by the undersigned having heard argument thereon on February 14, 2019.

Argument was heard and Orders are entered as to the following motions:

**State's Motion to De-Designate Confidential Documents**

Counsel announced an agreement to strike confidential designations that were the subject of this motion, however, argument was heard regarding State's concern that "this is a systemic problem with blanket designations." Blanket and inappropriate confidential designations can rise

to the level of an abuse of discovery process and subject to sanctions. In the context of this motion, there was no affirmative sanction relief requested and this motion is found to be moot.

**Defendants' Motions to Compel Regarding Requests for Admissions and Interrogatories**

Janssen Group

RFAs 1, 2 and 3 requests to compel are **Sustained** with a finding that State is only compelled to admit or deny the requests made without identifying any doctors or patient personal information, or ongoing, past or present investigatory information or confidential investigative file content.

Interrogatories 20, 21 and 22 requests to compel are **Overruled**.

Teva, Cephalon Requests for Admissions

RFA No. 4 - **Sustained** with State compelled only to admit or deny.

RFA No. 9 - **Sustained** with State compelled only to admit or deny.

RFA No. 10 - **Sustained** with State compelled only to admit or deny.

FRA No. 11 - **Sustained** with State compelled only to admit or deny.

Watson & Actavis Requests for Admissions

RFA No. 3 – **Sustained** with State compelled only to admit or deny.

RFA No. 8 – **Sustained** with State compelled only to admit or deny.

RFA No. 9 – **Sustained** with State compelled only to admit or deny.

RFA No. 10 - **Sustained** with State compelled only to admit or deny.

Purdue

Purdue's motion asks the undersigned to review State responses to produce request for admissions number 1, 3, 6, 7, 8, 9, 16, 17, 18, 19 & 20, make findings that they are insufficient, deem the requests admitted and awarded attorney fees.

RFAs Numbered 1, 3, 6, 7, 8 & 9 are announced agreed-to by the parties.

RFA No. 16 – Purdue's Motion is **Overruled.**

RFA No. 17 - **Sustained** with State compelled only to admit or deny.

RFA No. 18 – Purdue's Motion is **Overruled.**

RFA No. 19 – **Sustained** with State compelled only to admit or deny.

RFA No. 20 - **Sustained** with State compelled only to admit or deny.

As indicated in previous Orders, the allegations pled and proof model elected by State raise allegations that all Defendants misled all physicians in a joint marketing and promotion effort. State has elected not to prove through individualized proof and adopts a statistical proof model. As previously Ordered, State is required to continue to produce all public, non-privileged requests. State has timely submitted written answers or objections and under Title 12 O.S. §3236(A), Purdue's request to deem admitted and for attorney fees is **Denied.**

**State's Motion for Order Permitting Service of Requests for Admission to Authenticate Documents Produced in Discovery**

The parties, with argument from Purdue and Teva Group, announced an agreement to permit service of requests for admissions in order to authenticate as many documents that have been produced by the parties as possible. The agreement indicates it does not cover documents produced by third parties, not a party to the litigation. Purdue argued that authentication is premature and that we should not consider authenticating documents until after parties have completed and exchanged exhibit lists. A record was made that similar to designating portions of depositions and getting rulings for admission at trial, a document authentication process for the tremendous volume of documents to be admitted in this case is critical. A process for obtaining deposition designation rulings and rulings on authentication of documents must be addressed as soon as possible and to the extent necessary, deposition designation objections and objected-to document authentication would be presented to the undersigned for consideration and ruling. With this reality in mind, the undersigned entered an Order that allowed the State to proceed with RFA requests to authenticate documents and exceed the thirty limit to do so, with the understanding that we should be dealing with documents that will be trial exhibits anyway and do so in an effort to get the process started and continue after exhibit lists are completed.

**Janssen's Emergency Motion To Compel**

Argument was heard regarding Janssen's emergency motion to compel and State agreed the undersigned could rule without the benefit of a State response.

Janssen moves the undersigned to compel (1) State to complete its claims data production in fully "cross-walked form" within seven days; (2) immediately certify that State has produced data dictionaries, field definition tables and user manuals that identify all fields and codes in its claims databases or produce all such materials within seven days accompanied by a certification of completion that identifies by Bates number.

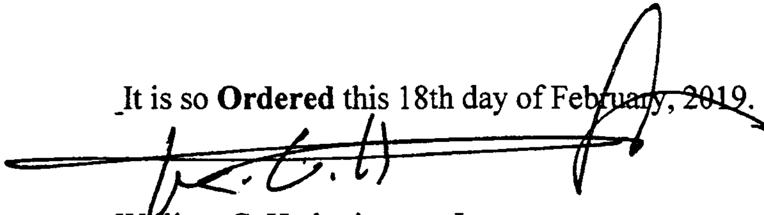
Argument indicated the databases that can be linked up or cross-referenced have been produced by State, and again, to the extent State can provide identification numbers or link information in any form, State continues to be **Ordered** and compelled to provide the "cross-walked" information. Certain diagnosis codes, procedural codes and detail status codes can be publicly accessed by Defendants, if not, State is **Ordered** to produce. Argument is that some databases such as the Medical Examiner's database and Health Choice database (which as argued, is relevant to State's fraud and public nuisance claims) cannot be so identified.

Defendants make reference in their brief to the "MDL" Special Discovery Master and Judge's Orders regarding these issues. State argues that part of the basis for the MDL's decision was the fact that, based on what the Plaintiffs had already provided, Defendants were unable to match patients across databases. State argues the Defendants in this case have already been provided with a set of unique identifiers which will facilitate the cross reference across State databases. The plaintiffs in the MDL did not use a de-identified numbering scheme as is being attempted in this case. Pharmacies and distributors are not defendants in this case however, patient-level claims data and description codes, are relevant and argument indicates necessary for Defendants to complete their expert analysis in defense, and there arguably remains an inability to link to some relevant databases.

Therefore, as to the identified databases Defendants cannot access by any "cross-walked" link method or by unique identifiers and, data code dictionaries and field definition tables, State continues to be **Ordered** to produce and Janssen's emergency motion is **Sustained** to the extent State is Ordered to complete database and code production pursuant to statute in a form that is either ordinarily maintained or in a de-identified form which is reasonably usable with Defendants able to obtain the relevant information. If Defendants continue to be denied access to necessary databases, while delay may be the result, the undersigned will revisit and consider further Defendant requests to compel and a different database identifying scheme.

State is **Ordered** to complete this identification process on or before March 1, 2019 at 4pm.

It is so **Ordered** this 18th day of February, 2019.



William C. Hetherington, Jr.

Special Discovery Master

# EXHIBIT 2

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

| | |
|---|---|
| **STATE OF OKLAHOMA, ex rel.,**<br>**MIKE HUNTER,**<br>**ATTORNEY GENERAL OF OKLAHOMA,**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**(1) PURDUE PHARMA L.P.;**<br>**(2) PURDUE PHARMA, INC.;**<br>**(3) THE PURDUE FREDERICK COMPANY,**<br>**(4) TEVA PHARMACEUTICALS USA, INC.;**<br>**(5) CEPHALON, INC.;**<br>**(6) JOHNSON & JOHNSON;**<br>**(7) JANSSEN PHARMACEUTICALS, INC,**<br>**(8) ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS;**<br>**(9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;**<br>**(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.;**<br>**(11) WATSON LABORATORIES, INC.;**<br>**(12) ACTAVIS LLC; and**<br>**(13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,**<br><br>**Defendants.** | **Case No. CJ-2017-816**<br><br>**Judge Thad Balkman**<br><br>STATE OF OKLAHOMA<br>CLEVELAND COUNTY } S.S.<br>**FILED**<br>MAR 29 2019<br>In the office of the<br>Court Clerk MARILYN WILLIAMS |

**ORDER OF SPECIAL DISCOVERY MASTER**

**NOW,** on this 28th day of March, 2019, the above and entitled matter comes on for ruling by the undersigned having heard argument thereon by phone conference on March 25, 2019.

The undersigned heard argument on Janssen Defendant's Emergency Motion For Order To Show Cause why evidentiary preclusion orders should not be imposed against State for failing to comply with previous Orders regarding data

base production and, Teva Defendant's Motions to Compel Corporate Witness Testimony regarding Topics 5, 6, 7, 9 and 36; Topics 30, 32 and 33, and Topic 27.

**Janssen Defendant's Emergency Motion For Order To Show Cause**

This emergency motion again deals with Defendants' argument that State has been ordered by the undersigned and by Judge Balkman to produce claims data in a de-identified form which reasonably allows Defendants' to be able to obtain relevant information to defend State's claims. The undersigned last entered an order on February 18, 2019, for State to complete production by March 1, 2019, in a form that is either ordinarily maintained or in a de-identified form which is reasonably usable with Defendants able to obtain the relevant information. Janssen argues Defendants continue to be unable to access necessary database information, in this motion, particularly focusing on their inability to cross-reference data from the Medical Examiner and the Fatal Unintentional Poisoning Surveillance System to prescription or medical claims data. Janssen argues Defendants still have no way to access data concerning deaths purportedly linked to opioids against any other database produced by the State, particularly the medical and pharmacy claims data contained in the Oklahoma Medicaid Management Information System. Janssen argues there still remains a mismatch of data between pharmacy and medical claims which cannot be cross referenced to patients in the State's HealthChoice data system and that State has produced HealthChoice pharmacy claims data containing 347,972 de-identified patient IDs but only 223,631 of those IDs are found in the HealthChoice medical claims data.

State responds it has produced all of the de-identified usable data in a form that would allow Defendants access across various databases to the extent possible to include: 1. Medicaid claims data (MMIS database) for over 9 million claims; 2. Medicaid claims data for all medical visits and procedures related to all of the SoonerCare beneficiaries who received an opioid prescription; 3. Medicaid claims data for all non-opioid prescriptions received by all SoonerCare beneficiaries who ever received an opioid prescription; 4. The Medicaid Lock-in Program database showing Medicaid patients who have been "locked-in" to a single prescriber to prevent doctor shopping; 5. The "prior authorization" database which shows the decision made by SoonerCare and Pharmacy Management Consultants related to whether to grant or deny a prior authorization request for opioid prescriptions. State argues Defendants have received the entirety of the MMIS historical record for every SoonerCare beneficiary; 6. Opioid pharmacy claims from HealthChoice

database for State employees insurance, some data which is not housed within State databases; 7. Medical visit and procedural claims for HealthChoice beneficiaries who ever received an opioid prescription; 8. The Oklahoma Department of Mental Health and Substance Abuse Services online query system revealing patients who have received addiction treatment; 9. The Oklahoma Department of Mental Health and Substance Abuse Services treatment episode data; 10. The Oklahoma Chief Medical Examiner's database showing opioid related overdose deaths and related de-identified investigation files for each and, further identified those patients who were SoonerCare recipients; 11. Databases or other State agencies to include the Fatal Unintentional Poisoning Surveillance System Database. State argues Defendants have received from State or have access to all data relied upon by State to prove their claims made. Argument indicated that in some cases, certain databases do not link-up or "talk to" each other such as the State SoonerCare Medicaid database cannot link up with the HealthChoice database, but that Defendants have received or have access to both databases. Counsel for the State indicated that with regard to the difference between the 347,972 HealthChoice pharmacy claims where Janssen argued only 223,631 of those can be found in the HealthChoice medical claims data that State will continue to identify the difference either by linking them up or identifying in another usable way. State is **Ordered** to continue to provide usable information in this context to Defendants. As Janssen argues, Defendants are entitled to the de-identified medical claims history for the approximately 123,000 missing medical claims histories and database information sufficient to allow for Defendants to identify how many individuals died from an overdose and from which opioid drug, if the information is available. This would be information obtainable through the Medical Examiner records and the Fatal Unintentional Poisoning Surveillance System (State maintains this has already been produced, see No. 10 & 11 above), in other words, production pursuant to statute in a form that is either ordinarily maintained or in a de-identified form which is reasonably usable.

I do not find sufficient evidence to establish that the HealthChoice database can be "cross-walked" with the MMIS database. The MMIS/ SoonerCare database contains insurance claims of indigent Oklahomans and HealthChoice database contains the insurance claims of gainfully employed State employees. The evidence shows there is no overlap to be able to provide Defendants with some form of "cross walked" link protocol and, I must accept State's representation that this information has been provided in a de-identified form from both databases.

The record is clear State is not seeking any damages or penalties for false claims related to HealthChoice claims. Other than Ordered herein, I further find there is insufficient evidence to establish Defendants have been denied production of or they do not have access to sufficient data to allow for reasonable tracking of patient claim information through the relevant State claim databases for a patient, sufficient to fairly defend each claim raised by State.

I find it premature and not for the undersigned to determine at this point if evidentiary preclusions should be imposed on State as a sanction.

Therefore, Janssen's Emergency Motion is **Sustained** in part and **Denied** in part.

**Corporate Witness Topic Motions To Compel**

Oklahoma case law on the requirements for corporate testimony and the extent of judicial authority to compel testimony of a corporate witness is scant. However, the Oklahoma Discovery Code, particularly the discovery sanctions provision at 12 O.S. §3237(A)(2) generally provides the discovering party may seek the entry of an order compelling a deponent's answer to a deposition question when that deponent has failed to answer a question.[1]

---

[1] 12 O.S. §3237 (A)(2) provides in pertinent part as follows:

> **If a deponent fails to answer a question propounded or submitted under Section 3230** or 3231 of this title, or a corporation or other entity fails to make a designation under paragraph 6 of subsection C of Section 3230 or subsection A of Section 3231 of this title, or a party fails to answer an interrogatory submitted under Section 3233 of this title, or if a party, in response to a request for inspection and copying submitted under Section 3234 of this title, fails to produce documents or respond that the inspection or copying will be permitted as requested or fails to permit the inspection or copying as requested, or if a party or witness objects to the inspection or copying of any materials designated in a subpoena issued pursuant to subsection A of Section 2004.1 of this title, **the discovering party may move for an order compelling an answer**, or a designation, or an order compelling inspection and copying in accordance with the request or subpoena. The motion must include a statement that the movant has in good faith conferred or attempted to confer either in person or by telephone with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

*Id.* (emphasis added).

An order compelling a corporate witness to appear at a deposition and/or provide deposition responses is subject to an abuse of discretion standard of review. *See Swinton*, ¶12; *see also Barnett v. Simmons*, 2008 OK 100, ¶23, 197 P.3d 12, 20 (noting the standard of review for a trial court's grant or denial of discovery sanctions is abuse of discretion).[2] "A trial court also has inherent authority to impose sanctions for abuse of the discovery process. . . . The trial court has the power to sanction for abusive litigation practices or for abuse of judicial process, even if an order compelling discovery has not been made." *Barnett,* ¶14. There is a presumption of legal correctness of discovery sanctions issued by the trial court and "cannot be disturbed unless it is contrary to the weight of the evidence or to a governing principle of law." *Hicks v. Cent. Oklahoma United Methodist Ret. Facility, Inc.*, 2017 OK CIV APP 23, ¶3, 423 P.3d 684, 689. The trial court's discretion to determine discovery sanctions is described as "broad, [but] not unbridled." *Barnett*, ¶26. Secondary authority additionally provides the trial court has "wide discretion" in ruling on the motion to compel deposition responses. Paul M. Lisnek, J.D., Ph.D., *Depositions: Procedure, Strategy & Technique,* §8:30 (3d ed. November 2018).

As noted in the Teva Defendants' various Motions to Compel Corporate Witness Testimony, Federal case law construing the similar Federal rule (Fed.R.Civ.P. 30(b)(6)) on the subject of corporate testimony provides some guidance. "The corporate entity has an affirmative duty to designate the representative to speak on its behalf, answering questions that are within the scope of the matters described in the deposition notice and which are 'known or reasonably available' to the company." *ZCT Sys. Grp., Inc. v. Flightsafety Int'l*, 2010 WL 1541687, *2 (N.D. Okla. April 19, 2010) (citation omitted). A corporate party is obligated by the Federal rule "to prepare its designee to be able to give binding answers on its behalf." *Id.* "If the organization fails to produce a designee with sufficient knowledge, it is required to produce an additional designee with adequate

[2] To the extent the issue concerns the boundaries of the trial court's authority concerning statutorily delineated terms, such a legal question involving statutory interpretation is subject to *de novo* review on appeal. *See Heffron v. District Court of Oklahoma County*, 2003 OK 75, ¶15, 77 P.3d 1069, 1076 (construing the boundaries of the trial court's authority concerning a deponent's entitlement to the ordinary witness fee or an expert witness fee as set forth in statute).

knowledge." *Id.* The corporate entity "was obligated to make a 'conscientious good-faith endeavor to designate the persons having knowledge of the matters sought' . . . and 'to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed' by . . . counsel." *Id.* (citations omitted).[3]

Not unlike most depositions of both State and Defendant witnesses in this case, the deposing party frequently gets an answer to a question they don't like and then chooses how much time to spend re-asking the question, rephrasing the question or challenging the answer received from the witness. That is a strategy and choice made by the deposing party on how to deal with a witness's answer that the deposing party gets. When an answer is given the deposing party, be it the State or Defendants, routinely challenges the answer and/or objection as being completely evasive, a refusal to answer based upon unpreparedness or an improper refusal to answer when no privilege is involved. In many circumstances, the answers have been good faith attempts to answer a question or are really questions to a fact witness who is also an expert witness, in an attempt to strategically bind the expert to his or her corporate answer and then the witness does not answer in his or her corporate capacity a question calling for an expert opinion or basis for the expert opinion. Review of the motion transcripts shows this is not always the case. Many times a question is asked and the witness appears to be unprepared to answer the question because the witness has prepared for the deposition factually based upon the claims made by State and the proof model State is choosing to use. A good example is Topic 6 that asks for the witness to describe the "nature and circumstances regarding any prescription of any Opioid manufactured by any Teva Defendant , including Actiq and Fentora, that the State contends caused it harm and for which it is seeking to recover damages in this lawsuit." This is a very broad question seeking "nature and circumstances"

[3] The U.S. District Court in Kansas has determined a corporate designee "was under an affirmative obligation to educate himself" regarding the case and "implicitly requires persons to review all matters known or reasonably available to it in preparation for the 30(b)(6) deposition." *T&W Funding Co. v. Pennant Rent-A-Car Midwest, Inc.*, 210 F.R.D. 730 (D. Kan. 2002). A corporate witness' lack of preparation or inability to testify as to certain issues may rise to the level of sanctionable conduct. *Id. See Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)(noting that if the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation). "An inadequate Rule 30(b)(6) designation amounts to a refusal or failure to answer a deposition question." *Id.* "Among the other remedies, the Court can require the corporation to re-designate its witnesses and mandate their preparation for re-deposition at the corporation's expense." *Id.*

testimony for very specific drugs. Same for Topic 7 seeking specifics for every circumstance surrounding every coverage reimbursement or denial decision. In many cited transcript portions I have read, the witness cannot answer that question as phrased. This is usually because the witness has not prepared his or her testimony in that manner as he or she will not testify at trial that specifically based upon State's proof methodology. If a witness does then testify differently and with specifics at trial, having answered this way in their deposition—I wish them luck! The deposing party will then make use of that answer in a manner they so choose. None I have read reserved the right to further review and change or expand their testimony at a later time. There have been some that by agreement, the witness was offered for further deposition at a later date after more research and preparation. Unless it is truly an improper refusal to answer, completely evasive or a circumstance where the corporate witness was clearly unprepared for a proper noticed topic (and there is some), the deposing party is stuck with the answer it gets. Defendants are entitled to discover facts and data knowledge which support the underlying claims and damage determinations State seeks to prove, with more specific detail used as a basis for expert testimony to be testified to at the expert witness deposition.

Therefore, the following Orders will be entered on a topic by topic basis consistent with this analysis:

**Teva Defendant's Motions to Compel Corporate Witness Testimony Regarding Topics 5, 6, 7, 9 and 36 (The motion listsTopics 6, 7, 9 and 36 but 5 is included in the argument and does overlap)**

Topics 5, 6 and 7: Motion To Compel is **Overruled**;

Topic 9: **Sustained** to the extent this data is still being or has been produced pursuant to previous Orders. Database production is still Ordered and ongoing regarding false or fraudulent claims submitted for payment through the Oklahoma Medicaid Program or any other payment Program;

Topics 11 and 12: Motion To Compel **Overruled**. Defendant's brief does not argue these topics except in a general fashion and I find no transcript testimony where proper prescribing and appropriate use or the risks of Teva products was explored other than discussion concerning potential for addiction. A lot of questions were asked concerning the witness's knowledge of harm caused by Teva

products which the witness made some attempts to answer even though not a noticed topic.

Topic 36: Motion To Compel **Overruled** consistent with previous rulings regarding "unnecessary" or "excessive".

**Topics 30, 32 and 33**

Topics 30 and 32:

State presented Mr. Travis Tate in his capacity as the Director of Pharmacy for the Oklahoma Employee Group Insurance Division (EGID) to testify to re-noticed topics more narrowly focused on the nature and circumstances behind coverage or reimbursement of prescription opioids manufactured by Teva Defendants. He was to also testify to the design and administration of any pharmacy benefit program or plan, to include changes thereto during the relevant time period relating to the management of reimbursement policy and coverage limits for prescriptions manufactured by Teva Defendants. Review of the brief and cited portions of the deposition transcript reveals this witness was not prepared to testify. It appears this witness's role as Director of Pharmacy for the Oklahoma Employee Group Insurance Division made him the appropriate fact witness to testify to these two topics. Further, the morning of this deposition, State submitted four binders of documents presumably relevant to this deposition. It is unreasonable to expect proper preparation for these two topics in that time period and questioning of this witness demonstrated he had not reviewed the documents himself.

Therefore, regarding Topics 30 and 32, Teva Defendant's motion to compel further deposition is **Sustained** and State is **Ordered** to produce this witness or another witness fully prepared to testify for a period not to exceed four hours.

Topic 33: Motion To Compel **Overruled**

**Topic 27**

Topic 27 was noticed to produce a witness as previously ordered by the undersigned on this topic. Ms. Holderread testified that she had learned she was going to be testifying about this topic 10 minutes before arriving at her deposition. She stated she had done nothing to prepare herself for this topic and had no time to communicate with anyone else together information relevant to this topic. The

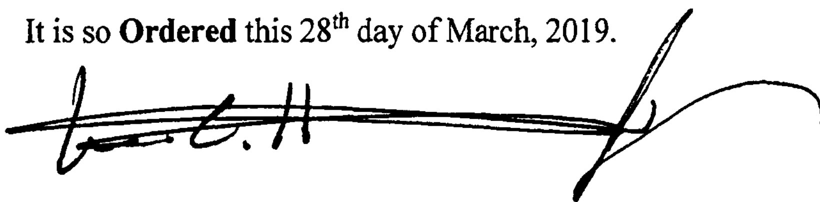
same occurred with Mr. Tate that his preparation for Topic 27 consisted of one phone call lasting 5 to 6 minutes with Mr. King. Testimony was offered by Ms. Holderread that she believed most communications between The Oklahoma Health Care Authority and third-party insurers took place by electronic means and would be included in the claims database. However, she did not inquire and really did not know if that was true or had taken place.

The way Topic 27 as phrased it can be interpreted different ways as argued to the undersigned. State interprets the topic to mean a witness that could describe how and under what circumstances there is communications between pharmacy benefit managers, third-party insurers and the different agencies. State argues there are no separate or individualized claims that had not been provided to defendant's if that is what they are seeking. The form of Teva Defendant questions seems to seek inquiry into all communications with third-party insurers and/or pharmacy benefit managers from the Oklahoma Bureau Of Narcotics; the Attorney General's Office; The Oklahoma State Board of Medical Licensure and Supervision; the Oklahoma State Board of Osteopathic Examiners; the Oklahoma Dental Board; the Oklahoma State Department Of Health; the Oklahoma Department of Mental Health and Substance Abuse Services; the Oklahoma State Board of Pharmacy; and the Oklahoma Department Of Corrections. If this is the intent, it is overbroad, burdensome and virtually impossible to comply with.

Therefore, as to Topic 27, I find that neither witness was prepared to testify to the topic however interpreted, and State is **Ordered** to present a witness to testify to Topic 27 consistent with this Order and limited to four hours.

The witness is **Ordered** to be prepared to testify and describe how and under what circumstances there is communications between the above listed agencies and benefits managers/third-party insurers. The State is further **Ordered** to provide no less than 48 hours before the deposition a sampling of electronic communications and/or written communications from each of the above listed agencies thus identifying types of communications used. The sampling is to include communications from each year 2010 through 2018 in order to cover a fair period of time and describe with reasonable certainty content and who the third-party insurers and pharmacy benefits manager were.

It is so **Ordered** this 28th day of March, 2019.



William C. Hetherington, Jr.

Special Discovery Master

# EXHIBIT 3

1 IN THE DISTRICT COURT OF CLEVELAND COUNTY
2 STATE OF OKLAHOMA
3

4 STATE OF OKLAHOMA, ex rel., )
MIKE HUNTER, ATTORNEY GENERAL)
5 OF OKLAHOMA, )
)
6 Plaintiff, )
)
7 vs. ) Case No. CJ-2017-816
)
8 PURDUE PHARMA, L.P.; et al., )
)
9 Defendants. )
)
10
11
12
13
14
15 REPORTER'S TRANSCRIPT OF
16 TELEPHONIC MEET AND CONFER PROCEEDINGS
17 Tuesday, May 22, 2018
18
19
20
21 Reported by:
22 KATHY PABICH
23 CSR No. 5021
24 Job No. 2924727
25 PAGES 1 - 47

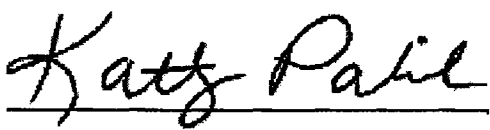
1 to identify where there is overlap between a person
2 who are referenced in those records and Medicaid
3 beneficiaries who are referenced in records within MMIS?
4 MR. DUCK: I don't know, but if it's possible,
5 we're going to do it. I don't have the two sets of data
6 in front of me, Steve. It sounds like maybe you're
7 looking at something that I don't have.
8 But we have various patient identifiers that we
9 can use, name, birth date, potentially a Medicaid number
10 that we can use that you talked about in your
11 deposition. So long as there's a common number or
12 identifier, we can build a bridge.
13 MR. BRODY: And will that extend to, you know, if
14 necessary, using names and dates of birth?
15 MR. PATE: Names and dates of birth of who?
16 MR. BRODY: Of particular individuals. Because I
17 can foresee a circumstance where, you know, obviously
18 you're going to have beneficiary numbers, and
19 potentially Social Security numbers, but certainly
20 beneficiary numbers contained within MMIS. You may not
21 get that.
22 If you're talking about, you know, for example,
23 OCME reports of overdose, the OCME reports any, you
24 know, non-accidental death, that data goes back and
25 forth between various Oklahoma programs and agencies or

1 that information, I can foresee a circumstance where an
2 OCME report, which is the source for the Fatal
3 Unintentional Poisoning Surveillance System records,
4 does not contain a, you know, super simple, you know,
5 here's the patient's -- here's the decedent's Medicaid
6 beneficiary identification number, so in that
7 circumstance, there are going to be other sources of
8 information that are going to align with information
9 contained within the MMIS system such as, you know,
10 first name, last name, date of birth, that would allow
11 that process to occur, would allow that kind of
12 identification.
13 So I guess the question really boils down to when
14 you say, you know, if it's feasible, what is the
15 standard for feasibility going to be, one? And two, how
16 can we get a window into the standard that is applied
17 for the assessment of the feasibility?
18 MR. BECKWORTH: So this is Brad. With all due
19 respect, your questions are so long and mixed between
20 asking questions and making statements and just general
21 observations that that was impossible for us to follow,
22 so -- and then you finish with something totally
23 unrelated to what it was you were talking about, so we
24 can't follow that.
25 If you want to put an e-mail or letter out about

1 what it is you're wanting to know, that's fine, but it's
2 spelled out so obtuse that it makes us incapable of
3 responding to it.
4 MR. BRODY: Well, this is Steve. Let me see if I
5 can break it down for you and make it a little simpler
6 for you.
7 Trey, you indicated that, if it's feasible, there
8 will be a way to create a bridge between different
9 systems to identify when records concerning the same
10 patient occur in two different systems.
11 When I hear the statement "where it's feasible,"
12 I wonder what your definition of feasible is. I'll
13 start there. You say if it's feasible. What do you
14 mean if it's feasible?
15 MR. PATE: This is Drew. I mean I think that
16 that's pretty self-explanatory of when we're going to
17 use -- we're talking in a very abstract level right now,
18 I think, which is part of the difficulty on our side.
19 But what that means is if we have databases where
20 we are producing information, we will connect -- we will
21 use the same consistent patient identifier for the same
22 patient across those databases.
23 We don't -- I don't think -- and what we need to
24 know from you, Brad's question, is if you will lay out
25 all of these questions or different sources of

1 information that you think you need or databases or
2 other sources where you are going to be -- where you
3 think you need information about different patients or
4 people and what you need from that, we will be able to
5 look at this a lot more carefully and respond to you.
6 MR. BECKWORTH: This is Brad again. You know,
7 you've asked a bunch. If there's something you want,
8 tell us. If there's something you want from a priority
9 basis, tell us that. We're not going to just sit here
10 and answer these obtuse questions or even try to. It's
11 way too conceptual what you're asking.
12 If you want to be specific, be specific, and if
13 we have something, we'll get it to you, if we can. If
14 it's something you want that we don't have, we'll tell
15 you that. I mean I think we've been pretty cooperative
16 thus for, so I think that's where we are on that.
17 MR. BRODY: This is Steve. We asked the question
18 in our letter what methods will be undertaken to allow
19 them to either be identified or correlated across
20 different State programs or for different types of
21 relevant services.
22 It's just I'm giving examples to try to make that
23 clearer, to the extent that question needs to be
24 clearer, but it was a question that we posed in Dave's
25 letter of May 9th, and it's, you know, it's important,

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:
3 That the foregoing proceedings were taken
4 before me at the time and place herein set forth; that
5 any witnesses in the foregoing proceedings, prior to
6 testifying, were administered an oath; that a record of
7 the proceedings was made by me using machine shorthand
8 which was thereafter transcribed under my direction;
9 that the foregoing transcript is a true record of the
10 testimony given.
11 Further, that if the foregoing pertains to the
12 original transcript of a deposition in a Federal Case,
13 before completion of the proceedings, review of the
14 transcript [ ] was [ ] was not requested.
15 I further certify that I am neither financially
16 interested in the action nor a relative or employee or
17 any attorney or party to this action.
18 IN WITNESS WHEREOF, I have this date subscribed
19 my name.
20 Dated: 5/24/2018
21
22
23



24 KATHY PABICH
25 CSR No. 5021

# EXHIBIT 4

1

IN THE DISTRICT COURT OF CLEVELAND COUNTY

2

STATE OF OKLAHOMA

3

| | | |
|---|---|---|
| 4 STATE OF OKLAHOMA, ex rel., | ) | |
| MIKE HUNTER | ) | |
| 5 ATTORNEY GENERAL OF OKLAHOMA, | ) | |
| | ) | |
| 6 Plaintiff, | ) | |
| | ) | |
| 7 vs. | ) | Case No. CJ-2017-816 |
| | ) | |
| 8 (1) PURDUE PHARMA L.P.; | ) | |
| (2) PURDUE PHARMA, INC.; | ) | |
| 9 (3) THE PURDUE FREDERICK COMPANY; | ) | |
| 10 (4) TEVA PHARMACEUTICALS USA, INC; | ) | |
| 11 (5) CEPHALON, INC.; | ) | |
| (6) JOHNSON & JOHNSON; | ) | |
| 12 (7) JANSSEN PHARMACEUTICALS, INC.; | ) | |
| 13 (8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., | ) | |
| 14 n/k/a JANSSEN PHARMACEUTICALS; | ) | |
| (9) JANSSEN PHARMACEUTICA, INC. | ) | |
| 15 n/k/a JANSSEN PHARMACEUTICALS, INC.; | ) | |
| 16 (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, | ) | |
| 17 INC., f/k/a WATSON PHARMACEUTICALS, INC.; | ) | |
| 18 (11) WATSON LABORATORIES, INC.; | ) | |
| (12) ACTAVIS LLC; AND | ) | |
| 19 (13) ACTAVIS PHARMA, INC., | ) | |
| f/k/a WATSON PHARMA, INC., | ) | |
| 20 | ) | |
| Defendants. | ) | |

21 **PORTIONS OF TRANSCRIPT MAY BE COVERED UNDER PROTECTIVE ORDER**

**TRANSCRIPT OF PROCEEDINGS**

22 **HAD ON OCTOBER 3, 2018**

**AT THE CLEVELAND COUNTY COURTHOUSE**

23 **BEFORE THE HONORABLE THAD BALKMAN**

**DISTRICT JUDGE**

24 **AND WILLIAM C. HETHERINGTON, JR.,**

**RETIRED ACTIVE JUDGE AND SPECIAL DISCOVERY MASTER**

25

REPORTED BY: ANGELA THAGARD, CSR, RPR

1 So why did we need that order in the first place, Judge.
2 It's a good question. As lawyers for the State, we represent a
3 multitude of agencies during this production. All of them
4 possess different types of information. All of them maintain
5 that information in different databases. And all of them
6 require HIPAA protective orders for that information to even be
7 removed from the database. We had to have that order just to
8 get the information.
9 Now, I personally have not seen patient names in any of
10 the data we've produced. The lawyers here aren't looking at
11 it. But we had to have that order in place just to move this
12 stuff around. It's then redacted; that's when we receive it.
13 And then we produce it to the defendants in redacted form.
14 So I don't want this HIPAA protective order that we worked
15 hard to get in place to be misconstrued as some preliminary
16 motion to compel or order compelling the State to produce
17 protected information, because that's not what it is.
18 If your Honor orders us to produce some protected
19 information, we've got that order. It's there as a net. If we
20 accidently produce protected health information, we've got that
21 order there. It's a net. But it certainly doesn't require it
22 in the first instance.
23 Now, I would like to discuss what we've actually already
24 produced that Mr. Brody went into. He mentioned MMIS data. I
25 just want to link this up for the Court. That's the 9 million

1 claims. That is every claim for an opioid that was paid by
2 State Medicaid. It's been redacted. But honestly, redacted is
3 not the right word, Judge, because we reidentified each patient
4 with a unique number.
5 So there's an identifier. Our intention is to use those
6 same numbers across all databases so they can track how those
7 patients moved through the State's data. But that doesn't
8 identify who these patients are.
9 We've also produced what Mr. Brody refers to as the
10 OOnQues data. I believe it's actually pronounced "OOnQues."
11 But we've produced that. It's also De-identified. Our
12 intention is to produce additional information.
13 And this is really important. The next thing in the
14 hopper, Judge, for us to produce is the HealthChoice
15 information. It's already De-identified. We're working out
16 the logistics on how to get it to them.
17 Our suspicion is -- we don't know, we haven't looked, we
18 won't look, we don't have any interest in looking at who's in
19 these databases. Our suspicion, Judge, is that potentially
20 your information, any other state employee's information is in
21 this HealthChoice database. And we have not gone to everyone
22 and asked them to waive their HIPAA rights, and we don't intend
23 to do it.
24 HealthChoice is on deck. We're going to produce it soon.
25 Your Honor, this is so much information that we've produced, we

1 IN THE DISTRICT COURT OF CLEVELAND COUNTY

2 STATE OF OKLAHOMA

3

4 STATE OF OKLAHOMA, ex rel., )
MIKE HUNTER )
5 ATTORNEY GENERAL OF OKLAHOMA, )
)
6 Plaintiff, )
)
7 vs. ) Case No. CJ-2017-816
)
8 (1) PURDUE PHARMA L.P.; )
(2) PURDUE PHARMA, INC.; )
9 (3) THE PURDUE FREDERICK )
COMPANY; )
10 (4) TEVA PHARMACEUTICALS )
USA, INC; )
11 (5) CEPHALON, INC.; )
(6) JOHNSON & JOHNSON; )
12 (7) JANSSEN PHARMACEUTICALS, )
INC.; )
13 (8) ORTHO-McNEIL-JANSSEN )
PHARMACEUTICALS, INC., )
14 n/k/a JANSSEN PHARMACEUTICALS; )
(9) JANSSEN PHARMACEUTICA, INC.)
15 n/k/a JANSSEN PHARMACEUTICALS, )
INC.; )
16 (10) ALLERGAN, PLC, f/k/a )
ACTAVIS PLC, f/k/a ACTAVIS, )
17 INC., f/k/a WATSON )
PHARMACEUTICALS, INC.; )
18 (11) WATSON LABORATORIES, INC.;)
(12) ACTAVIS LLC; AND )
19 (13) ACTAVIS PHARMA, INC., )
f/k/a WATSON PHARMA, INC., )
20 )
Defendants. )

21

22 CERTIFICATE OF THE COURT REPORTER

23 I, Angela Thagard, Certified Shorthand Reporter and

24 Official Court Reporter for Cleveland County, do hereby certify

25 that the foregoing transcript in the above-styled case is a

1 true, correct, and complete transcript of my shorthand notes of
2 the proceedings in said cause.
3 I further certify that I am neither related to nor
4 attorney for any interested party nor otherwise interested in
5 the event of said action.
6 Dated this 5th day of October, 2018.
7
8 ______________________________
9 ANGELA THAGARD, CSR, RPR
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# EXHIBIT 5

541 Fed.Appx. 810
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Tenth
Circuit Rule 32.1. (Find CTA10 Rule 32.1)
United States Court of Appeals,
Tenth Circuit.

DALE K. BARKER CO., P.C., Plaintiff–Appellant,
v.
VALLEY PLAZA, Defendant–Appellee,
Larry J. Sumrall, individually and d/b/a North Valley Feed; Patricia A. Sumrall, individually, Defendant–Cross–Claimants–Appellees,
v.
Dale K. Barker, Jr., an individual, Cross–Claim–Defendant–Appellant.

No. 12–4147.
|
Sept. 17, 2013.

**Synopsis**

**Background:** Accountant and his accounting firm brought diversity action against clients for breach of contract, alleging clients' failure to pay for professional help with past-due tax returns and with amounts owed to Internal Revenue Service (IRS). Clients counterclaimed for breach of contract, negligence, and breach of fiduciary duty. After bench trial, the United States District Court for the District of Utah, Clark Waddoups, J., determined that accountant's bills were unjustified and that clients were entitled to compensation on their counterclaims, and granted in part client's motion to clarify, 2012 WL 2176235. Plaintiffs appealed.

**Holdings:** The Court of Appeals, Neil M. Gorsuch, Circuit Judge, held that:

[1] counterclaims against accountant, in amended pleading, related back for limitations purposes, and

[2] award of damages to clients was not speculative.

Affirmed.

West Headnotes (9)

[1] **Federal Civil Procedure**
Sufficiency of Counterclaims
**Federal Courts**
Particular persons

Court of appeals, when determining the timeliness, under statute of limitations, of defendant clients' counterclaims against plaintiff accountant in his individual capacity for breach of fiduciary duty and negligence, in action in which clients initially lodged claims only against plaintiff accounting firm, was not compelled to repeat clients' taxonomical mistake in identifying the accountant, in their amended pleading filed with leave of court, as a cross-claim defendant rather than as a counterclaim defendant; rather, court of appeals could construe the pleading as though it had been correctly designated and so as to do justice. Fed.Rules Civ.Proc.Rules 8(c)(2), (e), 13(g), 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Limitation of Actions**
Set-offs, counterclaims, and cross-actions

Defendant clients' amended pleading, adding counterclaims against plaintiff accountant in his individual capacity for breach of fiduciary duty and negligence, related back for limitations purposes, under federal rules of civil procedure or Utah rules of civil procedure, to filing of original counterclaims against plaintiff accounting firm for breach of fiduciary duty and negligence; counterclaims against accountant arose out of same conduct, transaction, or occurrence as original counterclaims against accounting firm, and accountant had notice of counterclaims when they were first filed against accounting firm. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.; Rules Civ.Proc., Rule 15(c).

1 Cases that cite this headnote

[3] **Account Stated**
Assent of parties in general

Boilerplate signed by clients of accountant when they received periodic statements reflecting sums due to accountant, which boilerplate acknowledged and accepted the terms of service agreements, did not constitute an account stated under Utah law, in absence of acknowledgment of an agreement about the amount due and its correctness.

1 Cases that cite this headnote

[4] **Accountants**
Damages

District court's award of $70,296.91 in damages to accountant's clients, for accountant's negligence and breach of fiduciary duty in failing to promptly resolve the underlying civil matter regarding clients' past-due tax returns and the amounts they owed to Internal Revenue Service (IRS), was not speculative; clients' experts provided at least two estimates they believed were reasonable "starting points" for use as a "frame of reference" in calculating the cost to clients of not settling earlier.

Cases that cite this headnote

[5] **Federal Civil Procedure**
Evidentiary matters

To testify as an expert, plaintiff accountant was required under discovery rules to disclose his expert opinions, in his action against clients for breach of contract in failing to pay for professional help with past-due tax returns and with amounts owed to Internal Revenue Service (IRS), even if accountant was not retained or specially employed to provide expert testimony. Fed.Rules Civ.Proc.Rule 26(a)(2)(B)(i), (a)(2)(C)(ii), 28 U.S.C.A.

Cases that cite this headnote

[6] **Federal Civil Procedure**
Depositions and Discovery

Denial of request by plaintiff accountant, to extend the expert filing deadline, was not an abuse of discretion, in action against clients for breach of contract in failing to pay for professional help with past-due tax returns and with amounts owed to Internal Revenue Service (IRS); accountant produced only a "preliminary" report from his expert witness by the expert filing deadline, and accountant did not show good cause for extension, since he did not identify when he had retained the expert, what work, in any, expert had done up to that point, or even what expert's opinions would be, and extending the filing deadline would have required postponement of trial.

1 Cases that cite this headnote

[7] **Federal Civil Procedure**
Evidentiary matters

It was not inherently impermissible for clients' experts to file a joint report, with respect to clients' claims against accountant for negligence and breach of fiduciary duty in providing professional help with past-due tax returns and with amounts owed to Internal Revenue Service (IRS); experts reviewed the same materials and, working together, came to the same opinions, and they were both prepared to testify to all the opinions in the joint report.

9 Cases that cite this headnote

[8] **Federal Civil Procedure**
Failure to Comply;Sanctions

District court's discovery sanction, prohibiting accountant's use of certain documents in his case-in-chief seeking payment from clients, while allowing clients to use the documents for rebuttal and cross-examination, was not an abuse of discretion, in action relating to accountant's professional help with clients' past-due tax returns and with amounts they owed to Internal Revenue Service (IRS), where accountant failed to

produce the documents in discovery despite requests and orders, and he disgorged them only just before trial and well after close of discovery. Fed.Rules Civ.Proc.Rule 37(b)(2)(A)(ii), 28 U.S.C.A.

Cases that cite this headnote

[9] **Costs**

Form and requisites of application in general

Clients were not required, in order to recover attorney fees from accountant under Utah law, to categorize all fees as attributable to compensable, possibly compensable, or non-compensable claims, in action for breach of contract, negligence, and breach of fiduciary duty, relating to professional help with past-due tax returns and with amounts owed to Internal Revenue Service (IRS), where fees incurred in connection with compensable claims and non-compensable claims were closely related and inextricably tied together.

Cases that cite this headnote

**Attorneys and Law Firms**

***812** Shawn D. Turner, Turner & Stamos, Salt Lake City, UT, for Plaintiff–Appellant.

Derek A. Coulter, Law Office of Derek A. Coulter, P.C., Draper, UT, for Defendant–Appellee.

Before TYMKOVICH, HOLLOWAY, and GORSUCH, Circuit Judges.

**ORDER AND JUDGMENT** *

NEIL M. GORSUCH, Circuit Judge.

We can't say exactly when the trouble started for Larry and Patricia Sumrall, but it had to be by the time they hired Dale K. Barker, Jr. and his accounting firm. The Sumralls needed professional help with past-due tax returns and other amounts they owed the IRS, and they turned to Mr. Barker. At the end of the day, though, the Sumralls found themselves having to pay the IRS over $222,000 in taxes, penalties, and interest. And then they found themselves named as defendants in a lawsuit brought by Mr. Barker (for simplicity's sake we use his name to refer to him and his company collectively, except where the distinction is relevant). In a diversity breach of contract claim, Mr. Barker contended that the Sumralls failed to pay their bills in full. By this time, however, the Sumralls were convinced that Mr. Barker had contributed to their problems with the IRS. So they replied with counterclaims ***813** of their own—for breach of contract, negligence, and breach of fiduciary duty, among other things.

After a bench trial, the district court concluded that Mr. Barker's services had been deficient and cost the Sumralls dearly. The court held that Mr. Barker's bills were unjustified; that he was entitled to no fees beyond those he'd already been paid; and that the Sumralls were entitled to compensation from Mr. Barker for their counterclaims. Mr. Barker now appeals virtually every aspect of that judgment. We have considered all of his arguments closely, but we find none persuasive and discuss here only the most salient.

I

Mr. Barker begins by arguing that the district court should have dismissed as time-barred the Sumralls' claims for breach of fiduciary duty and negligence against him personally. As he points out, the counterclaims the Sumralls originally filed named only his accounting firm as a defendant. Not until well into the litigation—and well after the applicable statute of limitations had run—did the Sumralls seek (and obtain) the district court's leave to amend their counterclaims to add Mr. Barker personally as a counterclaim defendant.

[1] Before analyzing this argument, it's important to clear up a question of classification. For reasons we'll likely never know, after they received authorization from the district court to add Mr. Barker as a counterclaim defendant, the Sumralls instead styled Mr. Barker in their pleadings as a *cross-claim* defendant. While this surely was wrong—cross-claims are filed "by one party against a coparty," Fed.R.Civ.P. 13(g), and Mr. Barker most certainly was *not* the Sumralls' coparty—no one did anything about it. The Sumralls' taxonomical mistake,

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however, does not compel us to repeat the error. We may "treat the [Sumralls'] pleading as though it were correctly designated" and "construe[ ][it] so as to do justice." *Id.* R. 8(c)(2), (e). In other words, we proceed as if the amendment added Mr. Barker as a counterclaim defendant, as instructed by the district court.

**[2]** With that much cleared up, we reach the question of the amended counterclaim's timeliness. The addition of Mr. Barker was, we think, timely—despite its late filing—because it "related back" to the filing of the Sumralls' original counterclaims. Under the federal rules governing civil procedure, an amended pleading "relates back to the date of the original pleading when ... the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." *Id.* R. 15(c)(1)(B). Practice under Rule 15 also usually involves an "inquir[y] into whether the opposing party has been put on notice regarding the [amended] claim." 6A Charles Alan Wright et al., *Federal Practice & Procedure* § 1497 (3d ed.2010). In this case, both of these inquiries are easily satisfied, just as the district court held. There's little question the amended counterclaims against Mr. Barker arise out of the same conduct, transaction, or occurrence as the original counterclaims against his accounting firm: the amended counterclaims are *identical* but for the addition of Mr. Barker as a defendant alongside his company. Just as clearly, Mr. Barker had notice of the counterclaims when they were first filed against his firm.

Neither does a different result obtain if Utah's corresponding relation-back rule applies, because Utah R. Civ. P. 15(c) and Fed.R.Civ.P. 15(c) are substantially similar. *See Tucker v. State Farm Mut. Auto.* ***814** *Ins. Co.,* 53 P.3d 947, 950 n. 2 (Utah 2002) (federal rules and interpretations are persuasive where Utah rules are "substantially similar"). So while there may be "considerable uncertainty whether a federal court sitting in diversity jurisdiction is free to apply the relation-back principle embodied in Rule 15(c) instead of a conflicting state rule on the subject," it matters little because both rules ask the same questions and lead to the same result. 6A Wright et al., *supra,* § 1503.

Mr. Barker argues that Utah law requires a different result. The case he cites, however, isn't on point. *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.,* 931 P.2d 127, 132–33 (Utah 1997), doesn't address the question we face, but a much trickier one: When does a defendant's *cross-claim* against a co-defendant concern the same subject matter as *the plaintiff's complaint?* As we have already seen, our case—properly understood—involves counterclaims, not cross-claims, and the question we face thus concerns whether the Sumralls' amended counterclaim arises out of the same transaction or occurrence as their first. As we've explained, it does.

## II

**[3]** Mr. Barker says the district court erred in denying him damages for his breach of contract claim. After trial, the court held that the Sumralls had already paid the full value of his services and owed Mr. Barker no more. Mr. Barker argues this was error because he sent periodic statements to the Sumralls reflecting sums due, which they signed. It seems Mr. Barker is seeking to rely here on "account stated" principles under which the parties to a contractual relationship may form a new and separate binding agreement about the correctness of the amount due. *See Dementas v. Estate of Tallas,* 764 P.2d 628, 634 (Utah Ct.App.1988). But, as the district court observed, Mr. Barker faces a difficulty in deploying this theory: the Sumralls never acknowledged any agreement about the amount due and its correctness. The boilerplate they signed had the Sumralls "acknowledge[ ] and accept[ ] ... the terms of ... [the] Service Agreement[s]" and the like. Aplt.App. at 1914. But none of this constituted "an agreement between the parties as to *the amount due* and *the correctness* of that amount." *Dementas,* 764 P.2d at 634 (emphasis added).

Alternatively, Mr. Barker contends that the district court erred in finding the Sumralls had already paid the full value of his services because (among other things) the district court relied on payments the Sumralls made outside the statute of limitations. We see no evidence of this in the record, however. The district court explicitly stated it was excluding payments the Sumralls made outside the limitations period. *See* Aplt.App. at 142. And Mr. Barker points to nothing that suggests the court didn't do what it says it did.

In his reply brief, Mr. Barker offers still other reasons why, he thinks, the district court's estimation of the value of his services was flawed. The Sumralls have asked us to strike these arguments on the ground that they have been raised

too late in the process. Though the Sumralls have a point, even considering Mr. Barker's late-blooming arguments they do not persuade us (as they must to warrant reversal) that the district court's factual findings about the value of his services were "more than possibly or even probably wrong but pellucidly so." *See United States v. Ludwig,* 641 F.3d 1243, 1247 (10th Cir.2011).

III

**[4]** Next, Mr. Barker challenges the district court's calculation of damages on the Sumralls' negligence and breach of ***815** fiduciary duty claims. The district court awarded $70,296.91, and Mr. Barker says this award was speculative. In fact, however, the Sumralls ultimately paid the IRS $222,001.27 in taxes, interest, and penalties. Relying on the Sumralls' expert's testimony, the district court found that, but for Mr. Barker's misconduct, the Sumralls could have settled the claim with the IRS for $151,704.36, meaning they needlessly incurred $70,296.91.

Mr. Barker replies that there's no proof that the Sumralls' tax liability could have been settled, and no proof showing the Sumralls incurred additional interest and penalties because of him. But one of the Sumralls' experts testified that Mr. Barker owed the Sumralls a duty to complete their civil matter "promptly after 1996," and that a resolution at that time "should have been vigorously pursued ... and [the matter] settled fairly quickly." Aplt.App. at 1445, 1448. The Sumralls' experts also provided at least two estimates they believed were reasonable "starting point[s]" for use as a "frame of reference" in calculating the cost to the Sumralls of not settling earlier. *Id.* at 1530–33, 1548, 2269. Although Mr. Barker disputes the best method of estimating damages, there is no question that evidence exists in the record to support the positions the district court took. It is settled, too, that a "precise" amount of damages need not be proven; a district court may estimate damages "based upon approximations, ... reasonable assumptions[,] or projections." *Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.,* 709 P.2d 330, 336 (Utah 1985). In our view, that's what happened here.

IV

Mr. Barker next pursues various complaints about the exclusion and admission of expert testimony.

**[5]** To begin, Mr. Barker says the district court shouldn't have struck his expert report and excluded him from testifying as an expert. But Mr. Barker's report did not disclose a single expert opinion, as required by Rule 26, and the district court acted within its discretion to prohibit him from testifying as an expert as a result. *See* Fed.R.Civ.P. 26(a)(2)(B)(i). Mr. Barker replies that he didn't need to file an expert report in the first place because he wasn't an expert "retained or specially employed to provide expert testimony." *Id.* R. 26(a)(2)(B). But even experts who aren't required to file reports still need to disclose "a summary of the facts and opinions to which [they are] expected to testify"—something Mr. Barker failed to do. *Id.* R. 26(a)(2)(C)(ii).

**[6]** Mr. Barker says the district court also erred in excluding his (other) expert, Michael Kaplan. When Mr. Kaplan had produced only a "preliminary" report by the expert filing deadline, Mr. Barker sought an extension of time. The district court denied the request and effectively excluded Mr. Kaplan from the case after concluding that Mr. Barker had failed to show good cause for an extension of time because he hadn't identified when he had retained Mr. Kaplan, what (if any) work Mr. Kaplan had done up to that point, or even what Mr. Kaplan's opinions would be. Extending the filing deadline, the court also found, would require postponing the trial. On these essentially undisputed facts we fail to see any abuse of discretion in the district court's chosen course.

**[7]** Turning from his experts to the Sumralls', Mr. Barker says the district court erred by allowing their experts, Keith Prescott and Val Oveson, to file a joint report. We see no reason to think the practice always and inherently impermissible, as Mr. Barker seems to suppose. Co-authored expert reports aren't exactly ***816** uncommon. *See, e.g., Miller v. Pfizer, Inc.,* 356 F.3d 1326, 1332–34 (10th Cir.2004); *103 Investors I, L.P. v. Square D Co.,* 372 F.3d 1213, 1215 (10th Cir.2004); *Ruff v. Ensign–Bickford Indus., Inc.,* 168 F.Supp.2d 1271, 1286–87 (D.Utah 2001). Here, Mr. Prescott and Mr. Oveson reviewed the same materials and, working together, came to the same opinions. Because they were both prepared to testify to all the opinions in the report, we see no reason why it would be inherently impermissible for them to file a joint report. Perhaps the practice could prove problematic

in other circumstances—if, for example, it isn't clear whether both experts adhere to all of the opinions in the report and they do not delineate which opinions belong to which expert—but Mr. Barker identifies no reason to fear such confusion here. *Cf. Dan v. United States,* No. CV–01–25MCA, 2002 WL 34371519, at *2–3, *5 (D.N.M. Feb. 6, 2002) (rejecting joint report that included collective and individual opinions but didn't identify an individual expert).

Alternatively, Mr. Barker says the district court abused its discretion in permitting various aspects of Mr. Prescott's and Mr. Oveson's testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and due process principles. After carefully reviewing these claims, we can report that none warrants reversal. By way of example, Mr. Barker says the experts were allowed to testify about "a number of [professional] standards purportedly violated," despite having listed only one such standard in their report. Aplt. Br. at 28. But the testimony Mr. Barker points us to includes each expert's statement that they *reviewed* multiple accounting standards in preparing their report—not that, in their expert opinion, Mr. Barker *violated* all those standards. *See* Aplt. Reply Br. at 8 (citing Aplt.App. at 1398, 1549). And it is not our role to hunt through the record for testimony Mr. Barker doesn't himself identify. *See Aquila, Inc. v. C.W. Mining,* 545 F.3d 1258, 1268 (10th Cir.2008) ("[R]eading a record should not be like a game of Where's Waldo?").

V

**[8]** Mr. Barker contests still other pre- and post-trial rulings. He contends, for example, that the district court abused its discretion when it prohibited him from using certain documents at trial. But Mr. Barker failed to produce these documents in discovery, despite requests and orders, and he disgorged them only just before trial and well after the close of discovery. The decision to exclude these materials from Mr. Barker's case-in-chief (and permit the Sumralls to use them for rebuttal and cross-examination) was, in these circumstances, easily within the district court's discretion. *See* Fed.R.Civ.P. 37(b)(2)(A)(ii); *Lee v. Max Int'l, LLC,* 638 F.3d 1318, 1320 (10th Cir.2011).

**[9]** Turning to the district court's post-trial decision to award the Sumralls attorney fees, Mr. Barker says the Sumralls didn't properly categorize all fees as attributable to compensable, possibly compensable, or non-compensable claims, as parties generally must under Utah law. *See Foote v. Clark,* 962 P.2d 52, 55 (Utah 1998). But categorization like that isn't required when the fees incurred in connection with compensable claims and non-compensable claims are closely related and inextricably tied together. *See Brown v. David K. Richards & Co.,* 978 P.2d 470, 475 (Utah Ct.App.1999). That's the situation here. As the district court explained: "Because the factual overlap among the[ ] causes of action is significant, ... it would not be feasible to allocate attorneys fees ***817** among them." Other than merely disagreeing with the court's factual finding on this score, Mr. Barker doesn't try to explain how it is clearly erroneous, as he must for us to reverse. *See Ludwig,* 641 F.3d at 1247. Neither do his many line-item challenges to the fee award convince us that the district court abused its discretion in any of these particulars.

The appellees' motion to strike is denied. The judgment is affirmed.

**All Citations**

541 Fed.Appx. 810

Footnotes

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

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