



STATE OF OKLAHOMA } s.s.  
CLEVELAND COUNTY }

**FILED**

**MAY 15 2019**

IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

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

Plaintiff,

v.

PURDUE PHARMA L.P., *et al.*,

Defendants.

In the office of the  
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816

Judge Thad Balkman

William C. Hetherington  
Special Discovery Master

**DEFENDANTS JANSSEN PHARMACEUTICALS, INC.**  
**AND JOHNSON AND JOHNSON'S MOTION *IN LIMINE* NO. 16 TO EXCLUDE**  
**EVIDENCE OF CALL NOTES**

## BRIEF IN SUPPORT

The State has consistently represented that it would use aggregate evidence to prove its case. Those representations deprived Defendants of the discovery needed to disprove causation on an individual level. Now that it has failed to present an aggregate model of causation, the State is attempting an about-face: It seeks to introduce dozens of individual call notes—rough notes from individual sales representatives’ contacts with individual doctors.<sup>1</sup> Having insisted and obtained rulings that individualized evidence related to any individual doctor’s decision to prescribe a medication to a particular patient is “not relevant,” the State should not be allowed to cherry-pick that exact same evidence and introduce it at this late stage. Allowing the State to present this type of evidence now would severely prejudice Defendants, which were and continue to be deprived of the evidence they would need to refute allegations based on these individualized interactions.

In opposing Defendants’ request for individualized claims data, the State represented to this Court that it “intends to prove its claims *in the aggregate* by using the well-adopted methodology of statistical sampling, *negating the need for individualized proof.*” State’s Resp. to Defs.’ Objections at 1 (Oct. 24, 2018) (emphases added). Based on representations like these and the assumption that the State would “use sampling,” this Court held that individualized claims data—records about the medical history of individual patients and the prescribing history of individual doctors—was “not relevant to this case,” and denied Defendants’ motion to obtain such data. Nov. 19, 2018 Hr. Tr. at 75.

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<sup>1</sup> Those call notes include proposed exhibits 109, 134, 153, 155, 204-207, 312, 416, 598, 1029, 1343-44, 1362, 1481-82, 1573, 1575, 1577, 1581, 1587, 1591, 1615, 1632, 1634, 1636, 1542, 1666, 2481-2509, and 2572 on the State’s Proposed Exhibit List.

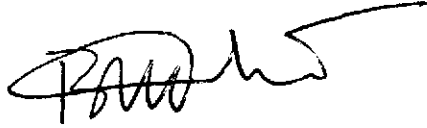
As the Court is well aware, the State did not keep its promise to employ “the well-adopted methodology of statistical sampling”—the State has no statistical evidence to prove causation. Yet it now seeks to present evidence about individual conversations between sales representatives and doctors. But the details of one-on-one talks with individual doctors cannot be allowed into evidence as long as the medical histories of the patients those same doctors treated remain excluded. Nothing a sales representative said to any doctor in Oklahoma is relevant unless the State can show that the communication caused harm—*i.e.*, that the statement was improper, that a doctor relied on it, that it caused an improper prescription, and that it caused harm to a patient. Yet, relying on the State’s assurances that it would forgo such evidence, the Court denied Defendants access to evidence about individual prescribing decisions that would allow Defendants to show that none of the communications at issue in the call notes caused harm. Allowing call notes that reflect some contacts with individual physicians would severely prejudice Defendants, which were unilaterally disarmed from defending against claims that sales representatives’ communications with a particular doctor caused any harm in Oklahoma. The State should not be allowed to present a partial and distorted picture of prescribing decisions by sifting through the very evidence it insisted was irrelevant.

Moreover, because Defendants have been deprived of the evidence they need to defend against such evidence, allowing the State to present it would violate due process. Defendants have a due process right to defend against the State’s evidence—they must have the opportunity to fully and fairly rebut the State’s claims. *See, e.g., Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932) (“Due process requires that there be an opportunity to present every available defense . . .”); *accord Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *Lindsey v. Normet*, 405 U.S. 56, 66

(1972). Letting the State present evidence about individual interactions between sales representatives and Oklahoma doctors, while depriving Defendants of information in the State's possession showing what happened *after* those conversations, would compromise Defendants' fundamental due process right to defend themselves. *See, e.g., W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("to deny [defendant] the right to present a full defense on the issues would violate due process"). For that reason, too, the Court should block the State's attempt to backtrack from its prior commitments.

Dated: May 15, 2019

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 May 15, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:

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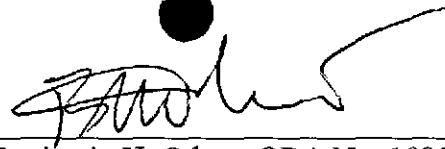
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