



IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

PART D

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

vs.

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

Defendants.

**For Judge Balkman's  
Consideration**

**Case No. CJ-2017-816  
Honorable Thad Balkman**

**William C. Hetherington  
Special Discovery Master**

STATE OF OKLAHOMA } S.S.  
CLEVELAND COUNTY }  
**FILED**

**MAY 24 2019**

In the office of the  
Court Clerk MARILYN WILLIAMS

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

# EXHIBIT E



specifically reserves the right to supplement, amend and/or revise these Responses and Objections in accordance with 12 O.S. 3226.

### **GENERAL OBJECTIONS**

1. By responding to Defendant's discovery requests, the State concedes neither the relevance nor admissibility of any information provided or documents or other materials produced in response to such requests. The production of information or documents or other materials in response to any specific interrogatory does not constitute an admission that such information is probative of any particular issue in this case. Such production or response means only that, subject to all conditions and objections set forth herein and the requirements of 12 O.S. 3234, following a reasonably diligent investigation of reasonably accessible and non-privileged information, the State will produce or permit the inspection and copying of the reasonably accessible, responsive, non-privileged documents within the State's possession, custody or control that the State is reasonably able to locate at a time and place mutually agreeable to the parties.

2. To the extent the State is able to locate responsive, non-privileged documents, the State will produce or permit inspection of such documents in the forms in which they are ordinarily maintained by the State in the regular course of business. *See* 12 O.S. 3234.

3. The State provides the responses and objections set forth herein solely based upon information presently known to and within the possession, custody or control of the State. Subsequent discovery, information produced by Defendant and/or the other named Defendants in this litigation and/or third parties, investigation, expert discovery, third-party discovery, depositions and further analysis may result in additions to, changes or modifications in, and/or variations from the responses and objections set forth herein. Accordingly, the State specifically

and expressly reserves the right to supplement, amend and/or revise the responses and objections set forth herein in due course and in accordance with 12 O.S. 3226.

### **OBJECTIONS TO INSTRUCTIONS**

1. The State objects to Defendant's Instruction Number 1, which purports to require the State's Responses to "include all documents created within the Relevant Time Period and continuing through the date of this request" as overbroad, unduly burdensome, disproportionate to the needs of the case and improperly seeking information created after this lawsuit was filed that is protected from disclosure as attorney work product or trial preparation materials.

2. The State objects to the part of Defendant's Instruction Number 2 that purports to require the State to organize and label any documents the State produces "to correspond with the categories in the request." Any responsive, non-privileged documents that the State produces will be produced in the form in which they are kept in the usual course of business.

3. The State objects to Defendant's Instruction Number 3 as overly broad, unduly burdensome, disproportionate to the needs of the case and an effort to impose a greater burden on the State than what is permitted under 12 OKLA. STAT. §3234 by requiring the State to create new information or convert information in the State's possession, custody or control into forms in which such information is not maintained by the State in its usual course of business. The State will produce electronically stored information ("ESI") in accordance with the ESI protocol agreed to by the parties.

4. The State objects to Defendant's Instruction Number 4 as vague, ambiguous, overly broad, disproportionate to the needs of the case and seeking to impose a burden on the State that exceeds what is permissible under Oklahoma law by instructing the State to produce "all documents known or available to the State," on top of and in addition to any documents within the

State's possession, custody or control. Subject to all conditions and objections set forth herein and the requirements of 12 O.S. 3234, following a reasonably diligent investigation, the State will produce or permit inspection and copying of the responsive, non-privileged documents within the State's possession, custody or control that the State is reasonably able to locate and access at a time and place mutually agreeable to the parties.

5. The State objects to Defendant's Instruction Number 5, which states that Defendants' requests are "continuing in character," as seeking to impose a burden upon the State that is beyond what is permissible under Oklahoma law, and as inconsistent with Defendant's Instruction Number 1. The State will reasonably construe this ambiguity to mean that the requests seek documents created through the date the requests were served (excluding documents created to assist in the prosecution of this case under the attorney-client and/or work-product privileges), and the State will amend or supplement its responses, if necessary, in accordance with 12 O.S. 3226.

6. The State objects to Defendant's Instruction Number 6 as ambiguous, vague, unreasonable, overbroad, unduly burdensome and an impermissible attempt to impose a burden upon the State beyond what is allowable under Oklahoma law. To the extent the State withholds otherwise discoverable information from production on the basis of any claim of privilege or work-product trial material, the State will supply Defendant with the information required under Oklahoma law related to such information at the appropriate time and/or in accordance with the orders of the Court. *See* 12 O.S. 3226(B)(5)(a). To the extent the State withholds any document "for any other reason or objection," the State will state its objection or "other reason" for withholding the document with specificity at the appropriate time and as required by Oklahoma law.

7. The State objects to Defendant's Instruction Number 7 because it seeks to impose a burden on the State beyond those permitted or contemplated under Oklahoma law. The State will respond to Defendant's requests according to how they are written. To the extent Defendant chose to use vague or indecipherable terms, the State will reasonably construe such term based upon their plain and ordinary meaning.

#### **OBJECTIONS TO DEFINITIONS**

1. The State objects to Defendant's Definition Number 1 of the term "Claim" as vague, overbroad, ambiguous, unduly burdensome, disproportionate to the needs of the case, unreasonable, irrelevant and unworkable. "[A]ny request for payment or reimbursement" encompasses an infinitely unlimited amount of information that has no bearing whatsoever on the parties to this action or the claims or defenses asserted in this action. Based on the claims and defenses at issue in this case, the State will reasonably interpret the term "claim" to mean a request for payment or reimbursement submitted to the Oklahoma Health Care Authority pursuant to Oklahoma's Medicaid Program as related to the claims and defenses at issue in this litigation.

2. The State objects to Defendant's Definition Number 3 of the term "Communication(s)" as vague, ambiguous, unduly burdensome, disproportionate to the needs of the case, unreasonable, unworkable and seeking to impose a burden upon the State beyond what is permissible under Oklahoma law. Specifically, the State objects to the terms "conduct" and "omissions" in Defendant's purported Definition Number 3. The State will reasonably interpret the term "communication(s)" to mean the transmittal of information between two or more persons, whether spoken or written.

3. The State objects to Defendant's Definition Number 7—Defendant's second purported definition of the term "document(s)"—as overly broad, unduly burdensome,

disproportionate to the needs of the case, irrelevant and attempting to impose a burden on the State beyond what is permissible under Oklahoma law. The State will not create "instructions" or "other materials" that do not otherwise exist. Nor will the State produce: (i) "file-folder[s], labeled-box[es], or notebook[s]"; and (ii) "ind[ices], table[s] of contents, list[s], or summaries that serve to organize, identify, or reference" a document simply because a responsive document is related to or contained within such information. Pursuant to 12 O.S. §§3233-3234, following a reasonably diligent investigation, the State will permit inspection of the reasonably accessible, responsive, non-privileged documents, as that term is defined in 12 O.S. 3234(A)(1), within the State's possession, custody or control that the State is reasonably able to locate at a time and place mutually agreeable to the parties. To the extent a folder, label, container, index, table of contents, list or summary is otherwise responsive to a request and satisfies these conditions, it will be made available for inspection or produced.

4. The State objects to Defendant's Definition Number 9 of the term "Educational Activity" as vague and ambiguous because it fails to rationally indicate what is meant by "other forms of" communication. The State further incorporates its objections to Definition Number 18 ("Opioid(s)") as if fully set forth in this objection to Definition Number 9.

5. The State objects to Defendant's Definition Number 10 of "Electronically Stored Information" as overly broad, unduly burdensome, disproportionate to the needs of the case, irrelevant to the claims and defenses at issue, and seeking to impose a burden upon the State beyond what is permissible under Oklahoma law. The State will not produce ESI from sources that are not reasonably accessible or over which the State does not have sufficient custody and/or control. The State will produce or permit the inspection of ESI in the manner set forth in the parties' agreed ESI protocol.



6. The State objects to Defendant's Definition Number 11 of the term "Employee" as overly broad, unduly burdensome, disproportionate to the needs of the case, irrelevant to the claims and defenses at issue, calling for information beyond what is within the State's possession, custody and control, and seeking to impose a burden upon the State beyond what is permissible under Oklahoma law. The State will reasonably construe the term "employee" to mean an individual employed by the State during the inquired-about time period over whom the State maintains sufficient custody and control to enable the State to possess or access responsive records or information pertaining to the individual.

7. The State objects to Defendant's Definition Number 12 of the terms "Healthcare Professional(s)," "Health Care Provider(s)" or "HCP(s)." Defendant's proposed definition is overly broad, irrelevant to the claims and defenses at issue, unduly burdensome and disproportionate to the needs of the case in that the definition is not limited in any way to the State of Oklahoma or any particular time period. The State will reasonably construe the use of these terms to mean healthcare professionals or providers who provided medical or health care services in the State of Oklahoma to citizens—not "animals"—in the State of Oklahoma from January 1, 1999 to the date Defendant's requests were served. The State further incorporates each of its objection to Definition Numbers 15 (the term "Medical Assisted Treatment") as if fully set forth in this objection to Definition Number 12.

8. The State objects to Defendant's Definition Number 15 of the term "Medication Assisted Treatment." Defendant's purported definition is overly broad, unduly burdensome, irrelevant to the claims and defenses in this action, and disproportionate to the needs of this case, because it attempts to encompass treatment related to any "substance abuse disorder[]" and any effort to "prevent Opioid overdose." The State incorporates its objections to Defendant's

Definition Number 18 of the term "Opioid(s)" as if fully set forth in this objection to Definition Number 15. The State will reasonably construe the term "Medication Assisted Treatment" to mean substance abuse treatment related to the claims and defenses at issue in this litigation.

9. The State objects to Defendant's Definition Number 17 of the terms "Oklahoma Agency" or "Oklahoma Agencies" as overly broad, unduly burdensome, irrelevant to the claims and defenses in this action, disproportionate to the needs of the case, and improperly calling for information that is not in the possession, custody or control of the State. The State will reasonably construe the terms "Oklahoma Agency" or "Oklahoma Agencies" to mean agencies of the State of Oklahoma reasonably calculated to have information or materials relevant to the claims or defenses asserted in this litigation and over whom the State of Oklahoma, through the Office of the Attorney General, maintains sufficient control to allow the State to have reasonable access to and possession of responsive information maintained by the agency.

10. The State objects to Defendant's Definition Number 18 of the term "Opioid(s)" as misleading because of its use of the terms "FDA-approved" and "pain-reducing" and because it is defined without regard to any of the pharmaceutical products or drugs at issue in this case. The State will reasonably construe the terms "Opioid(s)" to mean the opioid medications or drugs related to the claims and defenses at issue in this litigation.

11. The State objects to Defendant's Definition Number 19 of the term "Patient(s)." This definition—"any human being to whom an Opioid is prescribed or dispensed"—is overly broad, unduly burdensome, irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of the case on its face because it lacks any geographical or temporal limitation that has any bearing on this case, and could be construed to seek information outside the State's possession, custody, or control. The State will reasonably construe the term "patient" to

mean an individual who was prescribed an Opioid in the State of Oklahoma from January 1, 1999 through the date these requests were served.

12. The State objects to Defendant's Definition Number 24 of the term "Program(s)" and incorporates its objections to Definition Numbers 17 ("Oklahoma Agency") and 18 ("Opioids") as if fully set forth herein. Defendant's purported definition of "Program" is similarly overly broad, irrelevant to the claims and defenses at issue in this action, unduly burdensome and disproportionate to the needs of the case, because it includes no temporal limitations and is entirely untethered to the issues involved in this litigation. The State will reasonably construe the term "Program" to mean a program administered by the State of Oklahoma that reviews, authorizes, and/or determines the conditions for payment or reimbursement for the opioid medications or drugs and related treatment relevant to the claims and defenses at issue in this litigation and over which the State possesses control.

13. The State objects to Defendant's Definition Number 28 of the term "Vendor" as overly broad, unduly burdensome, disproportionate to the needs of the case, seeking to impose a burden upon the State that exceeds what is permitted under Oklahoma law, and calling for information that is not within the State's possession, custody or control. The State further incorporates its objections to and reasonable constructions of the terms defined in Definition Numbers 12 ("HCP") and 24 ("Program") as if fully set forth herein.

14. The State objects to Defendant's Definition Number 29 of the terms "You," "Your," "State," "Oklahoma," and "Plaintiff" as overly broad, unduly burdensome, disproportionate to the needs of the case, seeking to impose a burden upon the State that exceeds what is permitted under Oklahoma law, and calling for information that is not within the State's possession, custody or control because the definition attempts to require the State to not simply

respond on its own behalf, but also on behalf of "all its departments, agencies, and instrumentalities" without regard for whether the State represents such entities in this litigation and maintains sufficient control over such entities to enable the State to have reasonable access to or possession, custody or control of such entities' records. The State will respond on behalf of the State and those State agencies reasonably calculated to have information or materials relevant to the claims or defenses asserted in this litigation and over whom the State of Oklahoma, through the Office of the Attorney General, maintains sufficient control to allow the State to have reasonable access to and possession of responsive information maintained by the agency.

#### **RESPONSES AND OBJECTIONS TO REQUESTS FOR PRODUCTION**

**REQUEST FOR PRODUCTION NO. 1:** All documents, including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders, and judgments, concerning any disciplinary, civil, or criminal proceedings brought by You against Harvey Clarke Jenkins Jr., including in the matter of the *State of Oklahoma v. Harvey Clarke Jenkins Jr.*, No. CF-2016-2325 (Oklahoma County).

#### **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable

document ever created with respect to an identified criminal proceeding, is not tailored to the subject matter of the specific claims and defenses at issue in this action. The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings.

The State further objects to this Request because it seeks information that is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent the identified criminal matter has any limited degree of relevance to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining to law enforcement agencies' investigation of this criminal matter (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), law enforcement attorneys' protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from discovery in this matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks publicly available information that is equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for

all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

Subject to and without waiving the foregoing objections (including those incorporated by reference in this response), the State responds as follows: After a reasonably diligent search of reasonably accessible sources over which the State maintains possession, custody or control, the State will produce or permit the inspection and copying of non-privileged documents pertaining to proceedings by the State against Harvey Clarke Jenkins, Jr., including in the matter of the *State of Oklahoma v. Harvey Clarke Jenkins Jr.*, No. CF-2016-2325 (Oklahoma County), if any.

**REQUEST FOR PRODUCTION NO. 2:** All documents, including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders, and judgments, concerning any disciplinary, civil, or criminal proceedings brought by You

against Regan Ganoung Nichols, including in the matter of the *State of Oklahoma v. Regan Ganoung Nichols*, No. CF-2017-3953 (Oklahoma County).

**RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to an identified criminal proceeding, is not tailored to the subject matter of the specific claims and defenses at issue in this action. The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings.

The State further objects to this Request because it seeks information that is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent the identified criminal matter has any limited degree of relevance to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining to law enforcement agencies' investigation of this criminal matter (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), law enforcement attorneys' protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from

discovery in this matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks publicly available information that is equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

Subject to and without waiving the foregoing objections (including those incorporated by reference in this response), the State responds as follows: After a reasonably diligent search of



reasonably accessible sources over which the State maintains possession, custody or control, the State will produce or permit the inspection and copying of non-privileged documents pertaining to proceedings by the State against Regan Ganoung Nichols., including in the matter of the *State of Oklahoma v. Regan Ganoung Nichols*, No. CF-2017-3953 (Oklahoma County).

**REQUEST FOR PRODUCTION NO. 3:** All documents, including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders, and judgments, concerning any disciplinary, civil, or criminal proceedings brought by You against William Martin Valuck, including in the matter of the *State of Oklahoma v. William Martin Valuck*, No. CF-2014-185 (Oklahoma County).

**RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to an identified criminal proceeding, is not tailored to the subject matter of the specific claims and defenses at issue in this action. The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings.

The State further objects to this Request because it seeks information that is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent the identified criminal matter has any limited degree of relevance to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining to law enforcement agencies' investigation of this criminal matter (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), law enforcement attorneys' protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from discovery in this matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks publicly available information that is equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

Subject to and without waiving the foregoing objections (including those incorporated by reference in this response), the State responds as follows: After a reasonably diligent search of reasonably accessible sources over which the State maintains possession, custody or control, the State will produce or permit the inspection and copying of non-privileged documents pertaining to proceedings by the State against Harvey Clarke Jenkins, Jr., including in the matter of the *State of Oklahoma v. William Martin Valuck*, No. CF-2014-185 (Oklahoma County).

**REQUEST FOR PRODUCTION NO. 4:** All documents concerning any disciplinary, civil, or criminal proceedings brought by You against Roger Kinney, M.D., including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders and judgments.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to unidentified criminal, disciplinary or civil proceedings, is not tailored to the subject matter of the specific claims and defenses at issue in this action. The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings.

The State further objects to this Request because it seeks information that, to the extent it exists, is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent any unidentified proceedings against the identified individual are in any way relevant to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining to law enforcement agencies' investigations (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from discovery in this matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks information that, to the extent it exists, is publicly available information and, thus, equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to

Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

Subject to and without waiving the foregoing objections (including those incorporated by reference in this response), the State responds as follows: After a reasonably diligent search of reasonably accessible sources over which the State maintains possession, custody or control, the State will produce or permit the inspection and copying of non-privileged documents pertaining to proceedings by the State against Roger Kinney, M.D.

**REQUEST FOR PRODUCTION NO. 5:** All documents concerning any disciplinary, civil, or criminal proceedings brought by You against Tamerlane Rozsa, M.D., including but not

limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders and judgments.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to unidentified criminal, disciplinary or civil proceedings, is not tailored to the subject matter of the specific claims and defenses at issue in this action. The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings.

The State further objects to this Request because it seeks information that, to the extent it exists, is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent any unidentified proceedings against the identified individual are in any way relevant to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining

to law enforcement agencies' investigations (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from discovery in this matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks information that, to the extent it exists, is publicly available information and, thus, equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including

specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

Subject to and without waiving the foregoing objections (including those incorporated by reference in this response), the State responds as follows: After a reasonably diligent search of reasonably accessible sources over which the State maintains possession, custody or control, the State will produce or permit the inspection and copying of non-privileged documents pertaining to proceedings by the State against Tamerlane Rozsa, M.D., if any.

**REQUEST FOR PRODUCTION NO. 6:** All documents concerning any disciplinary, civil, or criminal proceedings brought by You against Joshua Livingston, D.O., including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders and judgments.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to unidentified criminal, disciplinary or civil proceedings, is not tailored to the subject matter of the specific claims and defenses at issue in this action. The State further objects to this Request as seeking information outside the possession, custody or



control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings.

The State further objects to this Request because it seeks information that, to the extent it exists, is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent any unidentified proceedings against the identified individual are in any way relevant to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining to law enforcement agencies' investigations (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from discovery in this matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks information that, to the extent it exists, is publicly available information and, thus, equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

Subject to and without waiving the foregoing objections (including those incorporated by reference in this response), the State responds as follows: After a reasonably diligent search of reasonably accessible sources over which the State maintains possession, custody or control, the State will produce or permit the inspection and copying of non-privileged documents pertaining to proceedings by the State against Joshua Livingston, D.O., if any.

**REQUEST FOR PRODUCTION NO. 7:** All documents concerning any disciplinary, civil, or criminal proceedings brought by You against Joseph Knight, M.D., including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders and judgments.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to unidentified criminal, disciplinary or civil proceedings, is not tailored to the subject matter of the specific claims and defenses at issue in this action. The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings.

The State further objects to this Request because it seeks information that, to the extent it exists, is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent any unidentified proceedings against the identified individual are in any way relevant to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining to law enforcement agencies' investigations (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from discovery in this

matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks information that, to the extent it exists, is publicly available information and, thus, equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

Subject to and without waiving the foregoing objections (including those incorporated by reference in this response), the State responds as follows: After a reasonably diligent search of

reasonably accessible sources over which the State maintains possession, custody or control, the State will produce or permit the inspection and copying of non-privileged documents pertaining to proceedings by the State against Joseph Knight, M.D., if any.

**REQUEST FOR PRODUCTION NO. 8:** All documents concerning any disciplinary, civil, or criminal proceedings brought by You against Christopher Moses, D.O., including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders and judgments.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to unidentified criminal, disciplinary or civil proceedings, is not tailored to the subject matter of the specific claims and defenses at issue in this action. The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings.

The State further objects to this Request because it seeks information that, to the extent it exists, is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent any unidentified proceedings against the identified individual are in any way relevant to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining to law enforcement agencies' investigations (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from discovery in this matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks information that, to the extent it exists, is publicly available information and, thus, equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

Subject to and without waiving the foregoing objections (including those incorporated by reference in this response), the State responds as follows: After a reasonably diligent search of reasonably accessible sources over which the State maintains possession, custody or control, the State will produce or permit the inspection and copying of non-privileged documents pertaining to proceedings by the State against Christopher Moses, D.O., if any.

**REQUEST FOR PRODUCTION NO. 9:** All documents concerning any disciplinary, civil, or criminal proceedings brought by You against any other HCP not previously requested related to the prescription of Opioids, including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program records, hearing transcripts, grand jury transcripts, pleadings, motions, orders and judgments.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You," "HCP," and "Opioids" as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to an unlimited amount of unidentified criminal, disciplinary or civil proceedings, is not tailored to the subject matter of the specific claims and defenses at issue in this action. This vague, open-ended "catch-all" Request fails entirely to identify with any degree of particularity the universe of purported "disciplinary, civil, or criminal proceedings" brought by the State since the beginning of time for which the Request seeks information. As such, on its face, the Request is too overbroad and vague to enable the State to attempt to respond to it. By purporting to seek information related to any conceivable "proceeding[] brought by" the State against a healthcare professional "related to the prescription of Opioids," the Request fails to identify with any degree of particularity the type of proceedings contemplated by the Request. Moreover, this overbroad Request is not narrowly tailored to the claims or defenses at issue in this litigation because the Request seeks a vast amount of information related to unidentified "proceedings" that somehow "related to the prescription of Opioids[.]" Any number of "proceedings" or matters that tangentially could be characterized as "relat[ing] to the prescription of Opioids," but that have nothing to do with this litigation, could therefore fall within the all-encompassing scope of this Request. As such, the Request seeks information that is irrelevant.

Further, due to the expansive and unreasonable scope of this Request, to the extent any responsive information exists and actually has any marginal degree of relevance to the claims and defenses at issue in this litigation, this minimal degree of relevance is vastly outweighed by the substantial burden the State would incur to gather, collect, review and produce such information.



Accordingly, the State objects that this Request is unduly burdensome and disproportionate to the needs of this case.

The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State, including but not limited to, for example, information pertaining to unidentified "disciplinary" or "civil" proceedings that could conceivably fall within the expansive scope of this Request.

The State further objects to this Request because it seeks information that, to the extent it exists, is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent any unidentified proceedings against the unidentified healthcare professionals inquired about in this Request are in any way relevant to this litigation, the Request is plainly overbroad because it seeks confidential and sensitive information pertaining to law enforcement agencies' investigations (e.g., "witness statements," "reports," "evidence receipts," "video and audio recordings"), protected attorney work product or trial preparation materials (e.g., "witness interview notes"), and information that is immune from discovery in this matter (e.g., "grand jury transcripts"). The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request because it seeks information that, to the extent it exists, is publicly available information and, thus, equally available to Defendants (e.g., "pleadings, motions, orders, and judgments"). Because this information is equally available to Defendants, the Request is unduly burdensome and disproportionate to the needs of the case in that Defendants are attempting to shift the burden of gathering and collecting publicly available

information that Defendants appear to believe could somehow relate to this litigation on the State. Defendants cannot shift the burden associated with investigating Defendants' defenses on the State, most especially when that burden is the same for all parties due to the public availability of certain of the information Defendants seek with this Request.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

**REQUEST FOR PRODUCTION NO. 10:** All documents concerning any complaints or investigations by You concerning the prescribing practices of any HCP that did not result in the initiation of a disciplinary, civil, or criminal proceeding.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You" and "HCP" as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this

action and disproportionate to the needs of this case. This Request, which seeks every conceivable document ever created with respect to an unlimited amount of unidentified "complaints or investigations" that specifically did not lead to the initiation of criminal, disciplinary or civil proceedings, is not tailored to the subject matter of the specific claims and defenses at issue in this action. This vague, open-ended "catch-all" Request fails entirely to identify with any degree of particularity the universe of purported "complaints or investigations" by the State since the beginning of time for which the Request seeks information. As such, on its face, the Request is too overbroad and vague to enable the State to attempt to respond to it. By purporting to seek information related to any conceivable "complaint[]" or investigation[]" by the State against a healthcare professional concerning that individual's vaguely-described "prescribing practices," the Request is overbroad and untethered to the claims and defenses at issue in this litigation. Any number of "prescribing practices" that have nothing to do with this litigation could lead to a "complaint or investigation" that has no relation to the claims and defenses at issue in this litigation. Moreover, the Request fails to articulate with any particularity how a "complaint[]" or investigation[]" related to the undefined universe of "prescribing practices of any HCP" that "did not result in the initiation of a disciplinary, civil, or criminal proceeding" could conceivably bear upon the claims and defenses at issue in this litigation.

Further, due to the expansive and unreasonable scope of this Request, to the extent any responsive information exists and actually has any marginal degree of relevance to the claims and defenses at issue in this litigation, this minimal degree of relevance is vastly outweighed by the substantial burden the State would incur to gather, collect, review and produce such information. Specifically, the Request purports to require the State to search and account for every conceivable "complaint[]" or investigation[]" related to any "prescribing practice" of an "HCP" since the

beginning of time, regardless whether such practice relates to this litigation. Accordingly, the State objects that this Request is unduly burdensome and disproportionate to the needs of this case.

The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State. The State further objects to this Request to the extent it seeks to force the State to disclose information that is protected from disclosure under pertinent statutes intended to protect the confidentiality and/or anonymity of whistleblowers or others who submit confidential "complaints" to the State and/or its agencies.

The State further objects to this Request because it seeks information that, to the extent it exists, is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent any unidentified "complaints or investigations" against the unidentified healthcare professionals inquired about in this Request are in any way relevant to this litigation, the Request is plainly overbroad because it appears to seek confidential and sensitive information pertaining to law enforcement agencies' investigations, protected attorney work product or trial preparation materials, and information that is immune from discovery in this matter pertaining to such unidentified "complaints or investigations." Moreover, to the extent this Request seeks information about ongoing investigations, the State objects to Request as improper. The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

**REQUEST FOR PRODUCTION NO. 11:** All documents concerning any complaints or investigations by You concerning the prescription of Opioids at Vista Medical Center, 3700 S. Western Avenue, Oklahoma City, Oklahoma.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "You" and "Opioids" as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case.

The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State. The State further objects to this Request to the extent it seeks to force the State to disclose

information that is protected from disclosure under pertinent statutes intended to protect the confidentiality and/or anonymity of whistleblowers or others who submit confidential "complaints" to the State and/or its agencies.

The State further objects to this Request because it seeks information that, to the extent it exists, is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. To the extent any unidentified "complaints or investigations" against the unidentified healthcare professionals inquired about in this Request are in any way relevant to this litigation, the Request is plainly overbroad because it appears to seek confidential and sensitive information pertaining to law enforcement agencies' investigations, protected attorney work product and mental impressions or trial preparation materials, and information that is immune from discovery in this matter pertaining to such unidentified "complaints or investigations." Moreover, to the extent this Request seeks information about ongoing investigations, the State objects to Request as improper. The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure

under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

**REQUEST FOR PRODUCTION NO. 12:** All Prescription Monitoring Program records related to the Opioids prescribed by HCPs employed by Vista Medical Center.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

The State incorporates its general objections and objections to Defendant's instructions and definitions above, including the State's objections to Defendant's definitions of the terms "HCPs" and "Opioids" as if fully set forth herein.

The State further objects that this Request is vague, ambiguous, overly broad, unduly burdensome and seeks information that is irrelevant to the claims and defenses at issue in this action and disproportionate to the needs of this case. The State further objects to this Request as seeking information outside the possession, custody or control of the State and/or information that is not reasonably accessible by the State.

The State further objects to this Request because it seeks information, including "Prescription Monitoring Program records" that is protected from disclosure under pertinent State and federal statutes, rules, regulations, privileges and immunities, including but not limited to, the deliberative process privilege, the work-product or trial preparation privilege, and/or the attorney-client privilege. The State further objects to this Request because it seeks information pertaining to law enforcement agencies' investigations, protected attorney work product and mental impressions or trial preparation materials, and information that is immune from discovery in this matter. Moreover, to the extent this Request seeks information about ongoing investigations, the

State objects to Request as improper. The State will not jeopardize ongoing criminal and/or disciplinary investigations initiated or pursued by certain agencies of the State.

The State further objects to this Request to the extent that it seeks materials or information that are the subject of any other confidentiality, protective or non-disclosure Orders entered in other proceedings, investigations or litigation.

The State further objects to this Request as seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act ("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules, and regulations. The State also objects to this Request as seeking information that is privileged or otherwise prohibited from disclosure under 63 O.S. §2-309D; the Multicounty Grand Jury Act, 22 O.S. §350, *et seq.* (including specifically *id.* at §355; and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, *et seq.* (including specifically *id.* at §1004(d)).

DATED: June 11, 2018.

Respectfully submitted,



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*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, on June 11, 2018 to:

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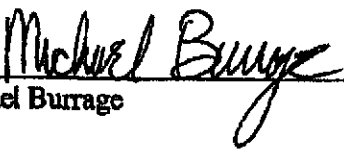
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# EXHIBIT F

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

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

Plaintiff,

v.

- (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

William C. Hetherington  
Special Discovery Master

STATE OF OKLAHOMA } S.S.  
CLEVELAND COUNTY }  
**FILED**

**OCT 04 2018**

In the office of the  
Court Clerk MARILYN WILLIAMS

**DEFENDANT WATSON LABORATORIES, INC.'S**  
**MOTION TO COMPEL DISCOVERY**

Defendant Watson Laboratories, Inc. ("Watson") respectfully moves to compel discovery from Plaintiff the State of Oklahoma ("Plaintiff" or "the State") pursuant to Okla. Stat. tit. 12, § 3237. As demonstrated herein, Plaintiff's responses to Watson's First Set of Requests for Production of Documents from Plaintiff (the "Requests") are deficient. Accordingly, Watson respectfully asks the Court to order the State to produce the documents demanded in the Requests within ten days of the entry of the Court's order.

## I. INTRODUCTION

The State contends that Watson and the other defendants in this case should be held liable for the effects of *every* medically unnecessary or excessive prescription opioid medication written in the State of Oklahoma for the past twenty years, notwithstanding that the State has brought criminal, civil and administrative proceedings against prescribing physicians, clinic owners, and other healthcare providers *for their own independent misconduct in writing unnecessary or excessive prescriptions*. By prosecuting, investigating, and sanctioning these individuals and entities, the State has necessarily discovered information—and made statements and admissions—that defeat causation in this case. This information demonstrates that rather than any alleged false marketing by Watson and other defendants, responsibility for the damages alleged in this action falls squarely at the feet of others, including healthcare providers who engaged in criminal and improper conduct.

There is thus no doubt that documents and information related to those proceedings is relevant and has been placed at issue by the State. Indeed, the State seeks to hold Watson and the other defendants responsible for “substantial social and economic costs *including criminal justice costs*,” and it has routinely used the independent criminal and improper conduct of healthcare providers to try to support its case, including asking specific questions, about specific prosecutions and administrative proceedings, involving specific doctors and specific prescriptions, during depositions of defense witnesses.

To obtain this relevant information, Watson served document requests, which consist of 12 specific and tailored requests—each aimed at obtaining documents related to disciplinary, civil, or criminal proceedings brought by the State against eight specific physicians, one specific medical center, and other unknown (to Watson and the other defendants, but not the State) healthcare providers. Yet, despite conceding the relevance of this information, the State—which

is the only party with access to it—has objected to producing it, based on the Health Insurance Portability and Accountability Act (“HIPAA”) and various state statutes, including the Oklahoma Anti-Drug Diversion Act, the Multi-County Grand Jury Act (Okla. Stat. tit. 22, § 355), and the Oklahoma Medicaid Program Integrity Act (Okla. Stat. tit. 56, § 1004(d)).<sup>1</sup> The State’s objections are meritless in the first instance because it has waived any purported privilege or other protection by putting this information at issue in this case. Further, any privilege or confidentiality objections the State has are baseless and unfounded in any event, given the Protective Order in place.

Put simply, without any basis, the State has refused to produce concededly relevant documents and information that is in its possession and that it has placed at issue in this case. It should be compelled to produce them.

## **II. BACKGROUND**

### **A. Document Requests**

Watson has requested documents and information specifically tailored to identify the documents, information and knowledge in the State’s possession regarding criminal, civil and administrative proceedings involving opioids brought by the State against healthcare providers. The Requests are attached as Exhibit A and are summarized below.

Requests Nos. 1-8 seek “All documents, including but not limited to initiating documents, witness interview notes and transcripts, witness statements, reports, documentary evidence, evidence receipts, video and audio recordings, Prescription Monitoring Program

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<sup>1</sup> While the State has also objected generally on proportionality grounds, it fails to articulate how or why the requests are not proportional to the needs of the case. Nor can it: the State’s general objection to proportionality is clearly unfounded in light of the magnitude of this case and the important public policy concerns at issue. These documents are critical to Watson’s defenses.

records, hearing transcripts, grand jury transcripts, pleadings, motions, orders, and judgments, concerning any disciplinary, civil, or criminal proceedings brought by” the State against the following healthcare providers:

- **Harvey Clarke Jenkins Jr.**, who was charged by the State with 14 counts of conspiracy to illegally possess/distribute controlled dangerous substances, six counts of making or causing to be made false claims under the Oklahoma Medicaid program, five counts of conspiracy to fraudulently obtain a personal identity of another, one misdemeanor count of conspiracy to practice medicine without a license and four counts of illegally practicing medicine without a license. See: <https://okcfox.com/news/local/warrant-issued-for-metro-doctor-accuscd-of-running-pill-mill>.
- **Regan Ganoung Nichols**, who was charged by the State with 5 counts of second-degree murder for overprescribing controlled dangerous substances, including opioids. See <https://kfor.com/2018/06/27/oklahoma-doctor-charged-with-5-counts-of-second-degree-murder-bound-over-for-trial/>.
- **William Martin Valuck**, who pleaded guilty to eight counts of second-degree murder related to the over-prescription of opioid medications. See <https://newsok.com/article/5192381/former-oklahoma-city-doctor-pleads-guilty-to-eight-counts-of-murder>
- **Roger Kinney**, who was disciplined by the Oklahoma Medical Licensure Board after two patient deaths resulted from a combination of opioid and benzodiazepine prescriptions. The State called Dr. Kinney’s prescribing practices, “At best slipshod, at worst reckless.” See: <https://newsok.com/article/5564304/sapulpa-doctor-disciplined-after-two-overdose-deaths>.
- **Tamerlane Rozsa**, whose license was suspended by the State for allegedly overprescribing opioid medications. See <https://newsok.com/article/5419244/tulsa-physician-was-known-as-queen-of-lean-for-purple-drunk-prescriptions-board-says>.
- **Joshua Livingston**, whose license was suspended by the State after prescribing nearly 25,000 prescriptions for narcotic medications in a three-month period in 2012. See <https://newsok.com/special/article/3949859/addicted-oklahoma-probation-continues-for-prolific-prescriber-linked-to-deaths>.
- **Joseph Knight**, who lost his license to practice medicine in Oklahoma after at least three of his patients died of suspected opioid overdoses. See: <https://newsok.com/special/article/3949866/addicted-oklahoma-tulsa-physician-has-most-patient-overdose-deaths>.
- **Christopher Moses**, who is allegedly tied to eight overdose deaths of his patients and is accused of writing the equivalent of *seven opioid prescriptions per hour*. The U.S. Drug Enforcement Agency has accused Moses of illegal diversion of opioids. See: <https://www.tulsaworld.com/news/crimewatch/eight-overdose->



[deaths-spur-dea-investigation-of-south-tulsa-doctor/article-64a1bfab-3fba-5e8e-91d2-f7052d68beaf.html](https://www.oklahoman.com/story/news/health/2019/07/18/deaths-spur-dea-investigation-of-south-tulsa-doctor/article-64a1bfab-3fba-5e8e-91d2-f7052d68beaf.html).

Likewise, Request No. 9 seeks the same information but for “any other HCP not previously requested related to the prescription of Opioids.” Finally, Request Nos. 10 through 12 seek similar information about complaints, investigations, and other records regarding prescribers of opioids:

- **Request Nos. 10** - All documents concerning any complaints or investigations by You concerning the prescribing practices of any HCP that did not result in the initiation of a disciplinary, civil, or criminal proceeding.
- **Request No. 11** - All documents concerning any complaints or investigations by You concerning the prescription of Opioids at Vista Medical Center<sup>2</sup>, 3700 S. Western Avenue, Oklahoma City, Oklahoma.
- **Request No. 12** - All Prescription Monitoring Program records related to the Opioids prescribed by HCPs employed by Vista Medical Center.

**B. State's Responses**

In response to Requests 1 through 8 (involving specific doctors), the State objected to the production of confidential and/or privileged information under HIPAA, Part 2, the Anti-Drug Diversion Act, the Multi-County Grand Jury Act and the Oklahoma Medicaid Program Integrity Act, but agreed to produce any non-privileged documents within its possession. In response to Requests 9 through 12, the State raised the same objections and refused to produce any responsive documents.

The State's Responses are attached as Exhibit B. To date, the State has not produced any documents in response to the Requests.

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<sup>2</sup> Vista Medical Center was the clinic at which Dr. William Valuck practiced and was cited by the State as a “problem” because it was owned by non-physicians and therefore not subject to State oversight. At least four doctors practicing at Vista, in addition to Valuck, were disciplined by the State. *See*: <https://newsok.com/special/article/5373925/addicted-oklahoma-profiting-from-pain>.

**C. The Parties' Meet And Confer**

The parties held a meet and confer on September 27, 2018. During the meet and confer, the State clarified its position with respect to the Requests, indicating that it is only willing to produce documents that are subject to disclosure under the Oklahoma Open Public Records Act ("OPRA"), and nothing more. But the OPRA only provides access to very limited information related to Law Enforcement Agency records. Okla. Stat. Ann. tit. 51, § 24A.8(A). This Court has the authority to order the release of all of the records, *id.* § 24A.8(B), and, as demonstrated below, it should do so.

**III. LEGAL STANDARD<sup>3</sup>**

The legal standard governing this discovery dispute is set forth in section 3226 of the Oklahoma Discovery Code:

Parties may obtain discovery regarding any matter, not privileged, *which is relevant to any party's claim or defense*, reasonably calculated to lead to the discovery of admissible evidence and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Okla. Stat. Ann. tit. 12, § 3226(B)(1)(a). A party "may move for an order compelling an answer, or a designation, or an order compelling inspection and copying" when a party "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." *Id.* § 3237(A)(2).

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<sup>3</sup> The Oklahoma Discovery Code closely tracks the Federal Rules of Civil Procedure, so federal decisions provide guidance. *See State ex rel. Protective Health Servs. v. Billings Fairchild Ctr., Inc.*, 158 P.3d 484, 489 (Okla. Ct. Civ. App. 2006) (analyzing completeness of a party's interrogatories).

The purpose of discovery is to “provide[] for the parties to obtain the fullest possible knowledge of the issues and facts before trial.” *State ex rel. Protective Health Servs. v. Billings Fairchild Ctr., Inc.*, 158 P.3d 484, 489 (Okla. Ct. Civ. App. 2006) (internal citations and quotations omitted). “A lawsuit is not a contest in concealment, and the discovery process was established so that ‘*either party may compel the other to disgorge whatever facts he has in his possession.*’” *Cowen v. Hughes*, 1973 OK 11, 509 P.2d 461, 463 (quoting *S. Ry. Co. v. Lanham*, 403 F.2d 119 (5th Cir. 1968), quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). ““Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”” *Metzger v. Am. Fidelity Assur. Co.*, 245 F.R.D. 727, 728 (W.D. Okla. 2007) (quoting *Hickman*, 329 U.S. at 507). “The aim of these liberal discovery rules is to make a trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” *Id.*

Here, evidence of the State’s criminal, civil and administrative proceedings involving opioids against healthcare providers is relevant and, indeed, critical to the claims and defenses in this case. Despite the State’s contentions, this information is not protected by any privilege, and it is reasonably calculated to lead to the discovery of admissible evidence and proportional to the needs of the case. See Okla. Stat. Ann. tit. 12, § 3226(B)(1)(a). This discovery is important, *inter alia*, to: (1) demonstrate that allegedly unnecessary or excessive prescriptions were caused by intervening conduct by non-parties unrelated to the allegations against the defendants, (2) understand whether the State made statements, admissions and uncovered evidence in the course of its investigations that exculpates the defendants, and (3) examine the veracity of the State’s claim for law enforcement-related damages.

The State’s refusal to produce this information, while at the same time acknowledging its

relevance, deprives Watson and other defendants of the ability to fully and fairly address these critical issues and mount their defenses. The State should be ordered to produce it.

**A. Evidence of Criminal, Civil and Disciplinary Proceedings Is Relevant to the Claims and Defenses in This Case.**

Evidence of criminal, civil and disciplinary proceedings brought by the State against healthcare providers regarding opioids speaks directly to both the State's claims and the Defendants' defenses in this case. The State alleges Defendants "knowingly caused to be presented false or fraudulent claims," and "knowingly made or used, or caused to be made or used, false statements material to a false or fraudulent claim." Pet. ¶¶ 75, 83. Because the State does not allege that Defendants directly submitted claims themselves, the State must prove that Defendants' misrepresentations either (1) caused a provider to submit each alleged false claim, (2) caused a provider to make a false statement material to each alleged false claim; or (3) caused the State to reimburse a particular prescription.

Under each of those theories, a break in the causal chain, such as criminal diversion by healthcare providers or others, defeats the State's claims. For instance, in *Ironworkers Local Union No. 68 v. AstraZeneca Pharmaceuticals LP*, plaintiffs brought RICO and state-law tort claims against the maker of an antipsychotic drug, claiming that the defendant had misrepresented its safety and efficacy. 585 F. Supp. 2d 1339, 1341 (M.D. Fla. 2008). The district court dismissed their claims, holding that the plaintiffs had failed to plausibly plead proximate cause because the "independent medical judgment" of prescribing physicians was a "key independent factor" separating the alleged misconduct from the injury. *Id.* at 1344. Notably, this is true even where the plaintiffs allege, as the State does here, that the defendants' tortious conduct was intended to deceive doctors about the dangers and benefits of the drug in question. See, e.g., *Ironworkers*, 585 F. Supp. 2d at 1341-42; *Yasmin & Yaz (Drospirenone)*

*Mktg., Sales Practices & Prods. Liab. Litig. v. Bayer Healthcare Pharm. Inc.*, No. 3:09-md-02100-DRH-PMF, 2010 U.S. Dist. LEXIS 80758, at \*7 (S.D. Ill. Aug. 5, 2010).

Defendants are therefore entitled to obtain evidence concerning the chain of causation between any allegedly wrongful conduct by any party or non-party, on the one hand, and any injury or damages suffered by the State, on the other, to demonstrate that the defendants' conduct did not cause the harm the State claims. Illegal acts like diversion, willful ignorance of prescribing guidelines by doctors, and pill mills, break the causal chain that is crucial to the State's case.

**B. Documents Related to Criminal, Civil and Disciplinary Proceedings Are Not Privileged.**

The State contends that the Requests seek privileged information subject to HIPAA, Part 2, the Anti-Drug Diversion Act, the Multi-County Grand Jury Act, and the Oklahoma Medicaid Program Integrity Act. As set forth below, the State has waived any claim of privilege and/or confidentiality by putting this information at issue, and none of these privilege claims otherwise have merit under the circumstances of this case.

**1. The State Waived Any Claim of Privilege or Confidentiality by Putting This Information Directly At Issue in the Case.**

While, as demonstrated *infra*, there is no privilege or other protection that precludes disclosure of the requested documents and information, even if there were, the State has waived them because it put that material "at issue." Courts applying Oklahoma law have applied the test set forth in *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975), to determine whether a party has waived privilege or other protection by putting a matter "at issue." *Seneca Ins. Co. v. W. Claims, Inc.*, 774 F.3d 1272, 1276 (10th Cir. 2014) (applying Oklahoma law) (*citing Gilson v. State*, 2000 OK CR 14, 8 P.3d 883, 908-09 (Okla. Crim. App. 2000) (applying version of *Hearn*

test)); *see also Lindley v. Life Invs. Ins. Co. of Am.*, 267 F.R.D. 382, 392-393 (N.D. Okla.

2010) (applying *Hearn* test). Under that test, "at-issue" waiver requires:

- (1) the assertion of the privilege or protection was the result of some affirmative act, such as filing suit, by the asserting party;
- (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; *and*
- (3) application of the privilege would have denied the opposing party access to information vital to its defense.

*Seneca Ins. Co.*, 774 F.3d at 1281-82.

All three *Hearn* factors are clearly satisfied here. First, the State asserted the protections as a result of seeking to hold Watson and the defendants liable for criminal and improper conduct of intermediaries such as prescribing healthcare providers. Second, the State put the allegedly protected information at issue by making it relevant to and using it in this case. Indeed, allowing the State to access and use materials that the defendants cannot violates due process. And, third, application of the privileges or confidentialities claimed by the State denies the defendants access to information vital to their defenses. Accordingly, the State has waived any purported privilege or protection for the documents and information sought by the Requests and it should be compelled to fully respond to them.

## **2. The Protective Order in this Case Addresses the State's HIPAA and Part 2 Concerns.**

The State objects to each of the Requests as "seeking protected health information prohibited from disclosure under the Health Insurance Portability and Accountability Act

("HIPAA"), 42 C.F.R. Part 2, and other State and federal statutes, rules and regulations." See Responses at 1-12. This objection is without merit.

The Amended Protective Order, entered by this Court on September 27, 2018 (the "Protective Order"), defeats this objection in the first instance. It applies to all documents produced in this case and prohibits any party or witness from disclosing protected health information subject to HIPAA and Part 2. By its very terms, the Protective Order ensures that patients' privacy rights are safeguarded, and the State's objections are therefore unfounded. "The [HIPAA] requirement that documents not be produced without a court order presumes that the court, in drafting any production order, will balance the patients' privacy and confidentiality interests with the documents' relevance and a party's need for the documents, before determining whether the documents should be produced and, if so, with what constraints." *Hussein v. Duncan Reg'l Hosp., Inc.*, 2009 WL 10672479 (W.D. Okla. Apr. 28, 2009) (ordering production of private patient information where "no other discoverable sources . . . could provide the information needed.").

Consistent with the Protective Order, the Court already has determined that relevant HIPAA-protected and other confidential information cannot be withheld. The Protective Order provides the appropriate measure to protect patient privacy. Indeed, the need for this information is the very reason the Protective Order was entered. The State's HIPAA objection is therefore baseless.

**3. The Anti-Drug Diversion Act Contains No Privilege and Expressly Authorizes the State to Release Information in the Central Repository.**

The State also asserts that each of the Requests seeks "information that is privileged or otherwise prohibited from disclosure under 63 O.S. § 2-309D." See Responses at 1-12. But that objection too lacks merit. The Anti-Drug Diversion Act contains no privilege provision and

expressly authorizes the State to release information contained in its central repository, which is the subject of the Requests at issue here.

Oklahoma's Anti-Drug Diversion Act (Okla. Stat. tit. 63, § 2-309, *et seq.*) requires dispensers of Schedule II, III, IV or V controlled dangerous substances (including opioid medications) dispensed pursuant to a valid prescription to transmit certain proscribed information to a central repository designated by the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control. *See id.* § 309C. The information required to be submitted to the database for each dispensation includes: Recipient's and recipient's agent's name, address, date of birth, and identification number; National Drug Code number of the substance dispensed; Date of dispensation; Quantity of the substance dispensed; Prescriber's United States Drug Enforcement Agency registration number; Dispenser's registration number; and other information as required by rule. *Id.*

Although access to repository information is limited to certain enumerated Federal and State agencies, it may be disclosed for law enforcement and other purposes as determined by the Director of Bureau of Narcotics and Dangerous Drugs Control, including disclosure to the Attorney General of Oklahoma. *Id.* § 309D. This defeats the State's assertion of privilege. In other words, the State possesses this information, has utilized this information to identify and prosecute high-prescribers and other wrong-doers with respect to opioid medication, and now seeks to withhold this very same information because it undercuts the State's theory of causation and damages. This is improper.

Even more troubling, the State is the only party with access to the information contained in the database, and has apparently been utilizing this information to question defense witnesses at depositions without first providing this information to the defendants. For example, the



following exchange, which is representative of nearly every sales representative deposition to occur in this case thus far, occurred during the recent deposition of Teva Pharmaceuticals USA, Inc. Sales Manager Brian Vaughan:

11 Q (BY MR. PATE) You're aware that  
12 Dr. Harvey Jenkins has been charged with 29  
13 felonies and a misdemeanor for running a pill  
14 mill?  
15 A I wasn't aware of the number, but I did  
16 see in the media where he was -- he was charged.

...

7 Q You're aware that he was the largest  
8 prescriber of prescription opioids in 2014;  
9 correct?  
10 MR. FIORE: Object to form.  
11 THE WITNESS: I was not aware of that.  
12 Q (BY MR. PATE) Are you aware that at  
13 least three of his former patients have died?  
14 MR. FIORE: Same objection.  
15 THE WITNESS: I don't have any knowledge  
16 of that.

...

13 Q Are you aware that Dr. Pope has been  
14 accused of writing 19 prescriptions over less  
15 than a 12-month period for a 27-year-old patient  
16 who complained of back pain and was also on  
17 Xanax at the same time?  
18 MR. FIORE: Objection to the form of the  
19 question.  
20 THE WITNESS: I don't have -- I was not  
21 aware of that. I don't have that knowledge.

*Deposition of Brian Vaughan*, 190: 11-16; 191:7-16; 211:13-21, September 19, 2018, attached hereto as Exhibit C.

The State cannot be permitted to continue to use information solely in its possession and also refuse to provide it in response to appropriate discovery requests. Nothing in the Anti-Drug Diversion Act indicates that information in the central repository is privileged and, to the extent

that the information is confidential, the Protective Order in this case sufficiently safeguards the information.

**4. The Confidentiality Provision of the Multi-County Grand Jury Act Does Not Apply When the State Puts the Information Directly at Issue.**

Next, the State objects to each of the Requests on the basis that they seek, "information that is privileged or otherwise prohibited from disclosure under... the Multicounty [sic] Grand Jury Act, 22 O.S. § 350, et seq. (including specifically id. at § 355)." Responses at 1-12. This, too, is incorrect.

The Oklahoma Multi-County Grand Jury Act provides, in pertinent part,

Disclosure of matters occurring before the multicounty grand jury other than its deliberations and the vote of any juror may be used by the Attorney General in the performance of his duties. The Attorney General may disclose so much of the multicounty grand jury proceedings to law enforcement agencies as he considers essential to the public interest and effective law enforcement.

Okla. Stat. tit. 22, § 355. The Attorney General may use this information in the "performance of his duties." As part of his "duties," the Attorney General has brought this lawsuit. The State must therefore disclose this information.

The State has put this information directly at issue by seeking to hold the defendants responsible for every "unnecessary or excessive prescription" for opioid medication written in the State of Oklahoma for the past twenty years, including those for which the State has brought criminal proceedings against prescribing physicians through the Multi-County Grand Jury. Oklahoma Courts have required disclosure of this information in an analogous situation, holding that an accused was entitled to sworn statements and transcripts of grand jury proceedings once a legal proceeding was commenced against him. *See Rush v. Blasdel*, 1991 OK CR 2, 804 P.2d 1140. Here, the State has instituted legal proceedings against Watson and the other defendants

to hold them liable for the criminal conduct of others. The State's refusal to produce information pertaining to this independent criminal conduct violates due process. This objection should be rejected as well.

**5. The State Has Brought Claims Under the Oklahoma Medicaid Program Integrity Act While Simultaneously Attempting to Claim its Privilege Protections.**

The State also objects to each of the Requests on the basis that they seek "information that is privileged or otherwise prohibited from disclosure under... the Oklahoma Medicaid Program Integrity Act, 56 O.S. §1001, et seq. (including specifically id. at § 1004(d))." Responses at 1-12. As an initial matter, the State has *expressly brought claims under the Oklahoma Medicaid Program Integrity Act*. Its reliance on that statute as a means to avoid disclosure is therefore preposterous.

Furthermore, the plain language of the Act provides that the Attorney General may authorize the release of confidential information for use in legal proceedings, and there is nothing prohibiting the State from doing so here. The Oklahoma Medicaid Program Integrity Act provides, in pertinent part:

**D. Records obtained or created by the Authority or the Attorney General pursuant to the Oklahoma Medicaid Program Integrity Act shall be classified as confidential information and shall not be subject to the Oklahoma Open Records Act or to outside review or release by any individual *except, if authorized by the Attorney General, in relation to legal, administrative, or judicial proceeding.***

Okla. Stat. tit. 56, § 1004(d) (emphasis added).

The Attorney General has the power to authorize the disclosure of this information "in relation" to this case, but he has refused to do so even though he has sued Watson and the other

defendants under this Act. The State's conduct cannot be countenanced by the Court, and this objection should be overruled.

**C. Every Balancing Factor Weighs in Favor of Discoverability.**

As described above, the evidence in the State's possession related to criminal, civil and administrative enforcement actions against healthcare providers related to opioids is non-privileged and relevant. The only remaining question is whether this information is proportional to the needs of the case. In making this determination, the Court should consider, "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Okla. Stat. tit. 12, § 3226(B)(1)(a).

The State has not, and cannot, meaningfully contest any of these factors, and each weighs in favor of discoverability. First, although the State continues to refuse to disclose its damages information, it has asserted that every prescription written for anything other than "end-of-life palliative care or for a three-day supply to treat acute pain" was false or fraudulent—and reimbursed in violation of Oklahoma law. *See* Pl.'s Resp. to Cephalon, Inc.'s Second Intros. at 1, attached hereto as Exhibit D. Therefore, the amount in controversy alone warrants a thorough fact-finding process.

Likewise, the information at issue here also should be produced because it implicates significant public policy questions. The information relates directly to the State's conduct in addressing, or failing to address, the opioid epidemic through its law enforcement and regulatory agencies. It helps disprove the State's causation theory and its efforts to blame defendants.

The remaining factors also support disclosure. Only the State has access to criminal, civil and administrative proceeding files against healthcare providers. This information is critical to

Watson's and the other defendants' affirmative defenses, and to evaluate the prescribers' actions and role in contributing to the opioid epidemic. Finally, the State has not identified any undue burden related to the production of this information. There is no reason why the State should not be ordered to produce it.

## **II. CONCLUSION**

The State's Responses to the Requests are deficient because the records at issue are not privileged or otherwise subject to any grounds for withholding. Watson respectfully requests the Court issue an Order compelling the State to fully and adequately respond to Watson's lawfully propounded discovery.

Dated: October 4, 2018.



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# EXHIBIT G

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

STATE OF OKLAHOMA, ex rel.,	§
MIKE HUNTER,	§
ATTORNEY GENERAL OF OKLAHOMA,	§
	§
Plaintiff,	§
	§
vs.	§
	§
(1) PURDUE PHARMA L.P.;	§
(2) PURDUE PHARMA, INC.;	§
(3) THE PURDUE FREDERICK COMPANY;	§
(4) TEVA PHARMACEUTICALS USA, INC.;	§
(5) CEPHALON, INC.;	§
(6) JOHNSON & JOHNSON;	§
(7) JANSSEN PHARMACEUTICALS, INC.;	§
(8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a	§
JANSSEN PHARMACEUTICALS, 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  
JURY TRIAL DEMANDED

**STATE'S RESPONSE TO WATSON LABORATORIES, INC.'S  
MOTION TO COMPEL DISCOVERY OF INVESTIGATORY FILES**

Defendant Watson Laboratory Inc.'s ("Watson's" or "Defendant's") Motion to Compel Discovery ("Motion") seeks access to the State's privileged criminal, civil, and regulatory investigation files. Defendant wants investigatory files regarding persons that are not parties to this litigation. These documents are historically and statutorily protected from such disclosure. These documents—and their continued confidentiality—are vital to the State's ongoing efforts to

combat the opioid epidemic and to investigate and fulfill its civil, criminal, and administrative duties generally. And, to the extent any such records are not protected from disclosure, the State has already agreed to provide access to them. Accordingly, this Motion should be denied.

## I. INTRODUCTION

To address the opioid crisis, the State, among other things, filed civil litigation against the manufacturers of opioids *and* filed criminal charges against certain outlier over-prescribing physicians who operated pill mills. Unlike most litigants, the State has access to civil, criminal and administrative remedies. The State alone has the power to fight this battle on all fronts. It must be allowed to do so.

Watson's Motion asks this Court to order the State to produce the privileged and confidential contents of its investigation files. If the Court grants the Motion, then the Court will be requiring the State to forfeit the tools it needs to effectively prosecute its civil, criminal and disciplinary cases. It will hamstring the State's law enforcement and compliance officers from being able to develop those files to the extent necessary to prove a case to their heightened burdens of proof. And, worse still, it will chill the willingness of witnesses to cooperate out of fear that confidential information will now be on display for the public to see. In short, if the Court grants Watson's Motion, from this point forward the State may be forced to choose between criminal investigations and civil litigation. This cannot and should not happen. For these reasons alone, the Motion should be denied.

Moreover, the State already agreed to produce the requested information that is not otherwise privileged. This is not an illusory promise. This includes any final agency action or filing made in each of the proceedings at issue. Yet instead of allowing the discovery process to proceed as ordered, Defendant has chosen to preemptively challenge the State's privileges, asking



this Court to compel the production of things it knows are privileged—things like attorney work product, patient names, and law enforcement reports in pending investigations. Then, in a contrived attempt to avoid these privileges, Watson claims the State has waived them in sales rep depositions by asking questions about doctors under criminal and administrative prosecution—doctors that Defendants constantly called on. However, Watson knows full well that the information the State has used to this point is public knowledge, frequently appearing in local newspapers and on local news programs. The State has *not* used or relied on any confidential or privileged investigation material from any investigations in this civil case.

Watson's Motion to compel is an effort to frustrate and delay in the face of the State's legitimate desire and duty to protect the privacy of its citizens and the efficacy of its ongoing law enforcement efforts. The law is with the State. The equities are with the State. Watson's Motion should be denied.

## **II. ARGUMENT AND AUTHORITIES**

Documents are only subject to discovery to the extent they are "not privileged," "relevant," and their production is "proportional to the needs of the case." 12 O.S. § 3226(B)(1)(a). The documents sought here do not satisfy those requirements.

### **A. These Documents are Protected from Discovery**

Watson seeks access to the State's files regarding ongoing civil, criminal and regulatory investigations. This includes records containing attorneys' mental impressions, adjudicatory deliberations, and the identities of undercover agents. Not surprisingly then, these documents are subject to layer upon layer of protection designed specifically to prevent their disclosure. The Court should uphold those protections here.

### 1. These Documents are Privileged Under the Work-Product Doctrine

Parties are regularly forbidden from discovering the other side's work product—*i.e.*, “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent.” 12 O.S. § 3226(B)(3). And when those materials include opinion work product, those protections are even stronger: “the Court *shall protect against disclosure* of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation.” *Id.* at § 3226(B)(3)(b). Nevertheless, these are exactly the kinds of documents Watson seeks to discover through its Motion.

Watson seeks “All documents concerning any disciplinary, civil, or criminal proceedings brought” against any healthcare provider “related to the prescription of opioids.” Watson RFP No. 9. As they admit in their Motion, this includes things like “initiating documents, witness interview notes and transcripts, . . . reports, . . . pleadings, motions, [and] orders,” Motion at 3-4, many of which (like investigation notes and reports) are blatantly work product. But Watson conveniently omits from its Motion that these RFPs also seek *all drafts* of initiating documents, pleadings, motions, and orders—things that clearly constitute work product and clearly contain the State's opinions and mental impressions. See Watson RFP Definition 7 (“The term ‘document(s)’ includes all drafts and all copies that differ in any respect from the original . . .”). Moreover, Watson is not shy about why it wants these documents: it wants to know what the State says about the merits of this case. See Motion at 7 (“This discovery is important *inter alia*, to: . . . (2) understand whether the State made statements, admissions and uncovered evidence in the course of its investigations that exculpates the defendants . . .”). This kind of request to serve up the

mental impressions of the State's attorneys, investigators, and administrative judges for Defendant to peruse is entirely inappropriate and flies in the face of the work product doctrine.

Indeed, even if this was a criminal case—where the accused are fighting for their freedom—Watson's discovery requests would *still* be improper. As the Oklahoma Court of Criminal Appeals has made clear:

[Defendant] is not entitled to discovery of the State's work product. There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigation on a case.

*Fritz v. State*, 1991 OK CR 62, ¶ 12, 811 P.2d 1353, 1358 (internal citations omitted). This example from *Fritz* is particularly instructive here as, just as in this case, the defendant was seeking an Oklahoma State Bureau of Investigation ("OSBI") report regarding another person. *Id.* at ¶¶ 7-15. The Court of Criminal Appeals held that such a report was the State's work product *and* that it was not exculpatory of the defendant, as it went to the criminality of only the person that was the subject of the report. *Id.* at ¶ 12. The fact that the other person in *Fritz* was in fact a co-defendant in the State's case is further proof that the reports sought here are beyond the scope of discovery, as the healthcare providers that are the subjects of these investigation files are not even parties to this litigation—much less co-defendants. *Fritz* was criminal; this is civil. *Fritz* involved records regarding a co-defendant; this case involves records regarding third parties. Since it was not error for the State to withhold those documents in the *Fritz* context, it most certainly would not be an abuse here. Thus, just as in *Fritz*, the State should be allowed to protect this information from disclosure.

## 2. These Documents are deemed Confidential by Statute

The second layer of protection for the documents requested consists of a litany of statutes expressly deeming these records confidential. Many of these statutes contain operative language

that is nearly identical to a statute the Oklahoma Supreme Court held created a privilege from discovery in *State ex rel. Hicks v. Thompson*, 1993 OK 57, 851 P.2d 1077.<sup>1</sup>

Watson recognizes many of these provisions, and even quotes them in its Motion. Watson's argument to get around this law hinges on the notion that the statutes authorize this confidential information to be used or disclosed in certain circumstances, for example that the Attorney General "*may* disclose so much of the multicounty grand jury proceedings *to law enforcement agencies* as he considers essential to the public interest and effective law enforcement." See Motion at 14; 22 O.S. § 355. Nowhere in Watson's Motion does it explain how the circumstances of this litigation meet those criteria, however. Instead, Watson's Motion demonstrates a fundamental misunderstanding of the difference between "may" and "shall" and the circumstances under which these documents *may* be shared.

**a. Anti-Drug Diversion Act, 63 O.S. § 2-309D**

Watson acknowledges but fundamentally misunderstands the protection provided in the Anti-Drug Diversion Act. First, Watson disingenuously argues this statute "expressly authorizes

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<sup>1</sup> The statute at issue in *Thompson* was 74 O.S. § 150.5(D), which provides:

All records relating to any investigation being conducted by the [Oklahoma State] Bureau [of Investigation], including any records of laboratory services provided to law enforcement agencies pursuant to paragraph 1 of Section 150.2 of this title, shall be confidential and shall not be open to the public or to the Commission except as provided in Section 150.4 of this title; provided, however, officers and agents of the bureau may disclose, at the discretion of the Director, such investigative information to: (a) officers and agents of federal, state, county, or municipal law enforcement agencies and to district attorneys, in the furtherance of criminal investigations within their respective jurisdictions, (b) employees of the Department of Human Services in the furtherance of child abuse investigations, and (c) appropriate accreditation bodies for the purposes of the Bureau's obtaining or maintaining accreditation.

To the extent Watson also seeks such OSBI records, the State asserts the privilege under this statute as well.

the State to release information contained in its central repository.” Motion at 11-12. The statute is clear: “The information collected at the central repository pursuant to the Anti-Drug Diversion Act *shall be confidential and shall not be open to the public.*” 63 O.S. § 2-309D (emphasis added). And to the extent the State can permit access to that information, “[a]ccess to the information *shall be limited to*” the finite list of State and Federal agencies listed in the statute—which does not include Defendants. *Id.*<sup>2</sup> Otherwise, disclosure is solely within the discretion of the Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs Control for the finite set of purposes listed under the statute—none of which Watson contends matches the circumstances of this case. *See id.* at § 2-309D(B)-(D).

Second, Watson is flat wrong when it suggests the State has been utilizing this information at depositions without first providing it to the Defendants. As discussed elsewhere in the State’s response, *the State has not used any information in these depositions that was not either public record or part of Defendants’ own production.* One need look no further than the local news to find information regarding Harvey Jenkins’s criminal past:

- Kyle Schwab, *‘Pill mill’ case headed to trial*, THE OKLAHOMAN (Jan 13, 2018), <https://newsok.com/article/5579406/pill-mill-case-headed-to-trial>
- Andrew Knittle, *Jenkins charged with 29 felonies connected to ‘pill mill,’* THE OKLAHOMAN (March 24, 2016), <https://newsok.com/article/5487203/jenkins-charged-with-29-felonies-connected-to-pill-mill>
- Andrew Knittle, *Doctor fined \$36k loses ability to prescribe drugs*, THE OKLAHOMAN (June 18, 2015), <https://newsok.com/article/5428261/doctor-fined-36k-loses-ability-to-prescribe-drugs>
- M. DeLaTorre, *Accused ‘pill mill doctor’ Harvey Jenkins has medical license revoked*, OKLAHOMA’S NEWS 4 (Feb. 4, 2015), <https://kfor.com/2015/02/04/imminent-danger-order-issued-against-accused-pill-mill-doctor-harvey-jenkins/>

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<sup>2</sup> The Statute also permits access to registrants “for the purposes of patient treatment and for determination in prescribing or screening new patients.” § 2-309D(G).

Indeed, the excerpts of the deposition in Watson's Motion illustrate this:

- Q (BY MR.PATE) You're aware that Dr. Harvey Jenkins has been charged with 29 felonies and a misdemeanor for running a pill mill?
- A I wasn't aware of the number, *but I did see in the media where he was – he was charged.*

Motion at 13 (quoting *Deposition of Brian Vaughan*, 190:11-16 (Sept. 19, 2018)). And, for the information related to Dr. Pope, one need look no further than the Federal Register. *See* 82 Fed. Reg. 14,944 (March 23, 2017). The State has not relied on any confidential information related to criminal investigations or prosecutions to assist in taking depositions in this case.

As with other information, to the extent Watson seeks documents and data that are not protected, the State is willing to produce and has been producing it. But what Watson seeks through the Anti-Drug Diversion Act repository is a database of patient names, addresses, birth dates, and sensitive medical information related to prescription-medication history. *See* Motion at 12. The Court has already ordered that the State does not have to produce patient-identifying information. Watson should not get access through the back door for things they cannot get through the front.

**b. Multi-County Grand Jury Act, 22 O.S. § 355**

The story of the Oklahoma Multi-County Grand Jury Act is much the same. As Watson recognizes, grand jury proceedings are confidential, but the Attorney General "*may*" use or disclose some of that information "*to law enforcement agencies* as he considers essential to the public interest and effective law enforcement." 22 O.S. § 355(A). Again, just like the confidentiality surrounding litigation and investigation files, the choice to disclose the confidential grand jury transcripts Watson requests is committed to the discretion of the Agency (in this case, the Attorney General). And, just like with the data in the Anti-Drug Diversion Act database, such disclosure is only appropriate when directed to specified entities (in this case, the Attorney General

and law enforcement agencies)—none of which include Defendants. Accordingly, nothing in this statute allows production of the information sought.

But Watson also omitted the rest of § 355(A), which further emphasizes the degree of protection surrounding grand jury transcripts:

*Otherwise, a grand juror, attorney, interpreter, stenographer, operator of any recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the multicounty grand jury only when so directed by the court. All such persons shall be sworn to secrecy and shall be in contempt of court if they reveal any information which they are sworn to keep secret.*

(emphases added).<sup>3</sup> And to be clear, when the statute says persons can reveal grand jury matters “when so directed by *the* court,” it does not mean any court; it means the presiding judge over the multicounty grand jury. *See* 22 O.S. § 351(B)(2). No such order has been entered here.

Finally, Watson’s reliance on *Rush v. Blasdel*, 1991 OK CR 2, 804 P.2d 1140, is just plain wrong. As Watson concedes, the person in *Rush* asking for the grand jury transcript was the accused himself, Criston Eugene Rush—it was not some third party in a separate civil litigation. *See* 1991 OK CR 2, ¶1. Moreover, the reason the Court of Criminal Appeals ordered the transcript released to Rush was not out of some nebulous and unarticulated notions of due process; it was because a statute said that “[u]pon request, a transcript of the testimony or any portion thereof shall be made available to *an accused*.” *See id.* at ¶¶ 5-6; 22 O.S. § 340.<sup>4</sup> *Rush* is entirely inapposite. Any grand jury transcripts should remain confidential.

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<sup>3</sup> *See also In re Proceedings of Multicounty Grand Jury*, 1993 OK CR 12, ¶ 7, 847 P.3d 812, 814 (“Throughout history grand jury proceedings have been conducted in, and surrounded by, secrecy. Commentators consider the basic principle, that grand jury proceedings are nonpublic, to be universal and the policies underlying that principle to be widely recognized. The United States Supreme Court has consistently recognized that the proper functioning of the grand jury system depends upon the secrecy of the grand jury proceedings . . .”).

<sup>4</sup> *See also In re Proceedings of Multicounty Grand Jury*, 1993 OK CR 12 at ¶ 10 (“We also find that . . . an accused may only request grand jury transcripts which are applicable to the crime for

**c. Medicaid Program Integrity Act, 56 O.S. § 1004(D)**

The argument under the Medicaid Program Integrity Act touches on all the points mentioned above—a general blanket of confidentiality protecting the records at issue; a discretionary authority to produce them; Watson’s attempt to convert that discretionary authority into a mandatory duty it is not. *See* 56 O.S. § 1004(D) (“Records obtained or created by the Authority or the Attorney General pursuant to the Oklahoma Medicaid Program Integrity Act *shall be classified as confidential information and shall not be subject to the Oklahoma Open Records Act or to outside review or release by any individual except, if authorized by the Attorney General, in relation to legal, administrative, or judicial proceeding.*”) (emphasis added). Moreover, a number of cases involving Medicaid fraud are protected from disclosure by virtue of a state or federal court sealing order, which cannot be set aside or ignored here.

Further, the State has already provided Defendants with the universe of potential Medicaid claims from which the State will show the Defendants caused false claims to be made—a universe of some 9,000,000 records. These are the only Medicaid records relevant to the State’s claims and the only records on which the State relies. Yet, Watson wants more. Once again, it want access to the sensitive patient records related to these claims so that they can target the individual patients as part of their campaign to harass and intimidate. In open Court, the State challenged Defendants to vow that, if given this information, they would not use it to contact the patients. Defendants would not accept that challenge.

The State, meanwhile, has remained steadfast in its promise to protect the confidentiality of these records. The Medicaid Program Integrity Act supports that confidentiality.

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which he/she is now charged. The holding in *Rush v. Blasdel*, 804 P.2d 1140 (Okla. Cr. 1991), is limited in accordance with this decision.”)



### **3. The HIPAA Protective Order does not require production**

As has become common, Watson mistakes the HIPAA protective order in this case for a production order. They are not the same. The presence of a HIPAA protective order does not magically convert privileged, confidential information into documents subject to discovery. Just because information can be protected on the back end does not mean it should be produced on the front. As the State has demonstrated before, this argument is a total red herring.

### **4. The State has not Waived these Protections by Referencing Matters of Public Knowledge**

Under any standard, the State has not waived the privileges or protections listed above because the State has never disclosed or relied on privileged information. To the contrary, as explained above, the State has pursued this action on information available to the public and from Defendants' own files.

Watson places the entire weight of its waiver argument on what federal courts "applying Oklahoma law" have said about the matter, all the while overlooking the Oklahoma state court case imbedded within its own convoluted string cite. This makes sense, however, given that actual Oklahoma law articulates a test that doesn't fit with Defendant's narrative.

In *Gilson v. State*, the Oklahoma Court of Criminal Appeals articulated the rule for "at issue" waiver to require: "1) the party asserting the privilege does so as a result of an affirmative act; 2) through the affirmative act the privilege holder has made *the substance of the confidential communications a material issue in the case*; and 3) use of the privilege to suppress privileged information needed to address the material issue brought out by the holder would be manifestly unfair to the party against whom it is asserted." As demonstrated throughout the preceding sections, however, the State has never made the substance of its litigation files or investigatory reports, grand jury transcripts, or patient data a "material issue" in this litigation.

What the State has put at issue—what *is relevant to this case*—is the fact that Defendants engaged in a massive campaign to generate and expand the market for opioids across the State and to get Oklahoma citizens hooked on their dangerous narcotics; that said campaign involved a coordinated and sophisticated marketing effort whereby Defendants collected volumes of information to target and convince Oklahoma physicians to prescribe their drugs. This does not open the door for Defendants to obtain work-product and other privileged information related to the State' criminal prosecutions and investigations.

**B. To the Extent these Documents Are Relevant and Not Protected from Disclosure, the State has Already Agreed to Provide Access to Them; Anything More would be Unduly Burdensome to the State**

To reiterate, the State has already agreed to produce non-privileged records related to the investigations Watson identified. To the extent the State further objects to the requests, it is because the requests themselves are vague, overly broad, and place an undue burden on the State.

Specifically, the State refers to Watson RFPs 9 and 10, which request “All documents concerning *any* disciplinary, civil, or criminal proceedings brought by You against *any* other HCP not previously requested related to the prescription of Opioids,” and “All documents concerning *any* complaints or investigations by You concerning the prescribing practices of any HCP that did not result in the initiation of disciplinary, civil, or criminal proceeding.” These requests seek every conceivable document ever created in relation to an unlimited number of proceedings that either did or did not take place. Moreover, with respect to the request regarding complaints that did not result in disciplinary action, there is no link whatsoever to opioids, which makes the vast majority of information culled by this request irrelevant to this case. Accordingly, the minimal degree of relevance captured by these improper catch-all requests is vastly outweighed by the substantial

burden the State would incur to gather, collect, review—redact—and produce the information. The State should not be forced to engage in such an open-ended fishing expedition.

But the heaviest burden the State would incur if ordered to produce these files is the cost to the State's ability to conduct these criminal, civil and administrative investigations going forward. The law recognizes that the contents of these files are confidential,<sup>5</sup> and the State's prosecutors and investigators rely on that confidentiality in carrying out their duties. These files contain the identities of undercover agents and witnesses.<sup>6</sup> And, as discussed above, these files contain the mental impressions and strategies of these offices and agencies, the disclosure of which would be just as harmful in those proceedings as would be ordering the State to share its litigation strategy in this one. Defendants are asking this Court to disclose the blueprints of how the State conducts its investigations.

Further, the disclosure of investigatory files would generally have negative impact on the criminal justice system at large, as it runs the risk of eroding the presumption of innocence and putting the accused on trial in the court of public opinion. Indeed, this is exactly why the Oklahoma Rules of Professional Conduct generally require prosecutors to:

refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an

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<sup>5</sup> See generally 51 O.S. § 24A.12 ("Except as otherwise provided by state or local law, the Attorney General of the State of Oklahoma and agency attorneys authorized by law, the office of the district attorney of any county of the state, and the office of the municipal attorney of any municipality may keep its litigation files and investigatory reports confidential.").

<sup>6</sup> Some of these files may also contain the identities of confidential informants, which are also protected by their own statutory privilege. See 12 O.S. § 2510 ("The United States, state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting the investigation.").

extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule[.]

ORPC 3.8(f). Requiring disclosure of this information entirely defeats that purpose.

Once those files are released, the damage cannot be undone. For instance, if the Defendants have access to the State's investigatory files, Defendants may inadvertently disclose the information in those files—including the State's ongoing strategies to conduct those investigations—to the very persons under investigation, whether during a deposition of the accused or in a public filing in this case. If the Court grants access to this information, there is nothing to stop Defendants from asking a doctor under investigation if he or she knew that a patient was actually an undercover agent, or whether the doctor knew that one of his or her employees had come forward as a witness—all of which would put both the investigation *and the persons involved* in jeopardy. And it would be in Defendants financial interests to do so given that these doctors and their continued overprescribing are exactly how Defendants built their empire. Defendants kept libraries of data on these doctors, yet none of them told their sales reps that these doctors were engaged in criminal activity or that their prescribing habits were cause for concern. Quite the contrary; even after sales reps themselves reported suspicious activity, Defendants own documents show that they continued to send reps to call on those doctors. This case demonstrates that there is no limit to Defendants' greed.

Only now are any of the Defendants interested in the criminal files of these pill-mill doctors. But the disclosure of investigation files and other privileged information would undermine the credibility of the State in other contexts. Specifically, many of the records in these criminal cases have been filed under seal. *See e.g.*, Docket Sheet, *State v. Jenkins*, CF-2016-2325 (Okla. Cnty. Dist. Ct.) (noting the transcripts of the preliminary hearings in Harvey Jenkins's case have been filed under seal). The same is true for civil litigation (such as *qui tam* FCA cases)

currently under seal pursuant to a federal or state court sealing order. If the Court were to grant the present Motion, litigants in myriad criminal and civil cases across Oklahoma could point to this case and say that this Court's decision casts doubt on the confidentiality of historically privileged documents. That would be a travesty.

Moreover, ordering disclosure also undermines the credibility of the State in the eyes of federal and out-of-state law enforcement agencies with whom continued cooperation is vital. Put simply, if those agencies are not confident in the State's ability to protect the sensitive information they share with Oklahoma, it significantly decreases their willingness to do so in the future, and thus severely hampers the State's ability to protect its citizens from the criminal acts that so often do not discriminate between one state and the next.

As noted above, forcing prosecutors and investigators to give up their notes, their contacts, their thoughts and impressions, sends an irreversible chill across the whole of the State's law enforcement and administrative bodies. It will cause invaluable civil servants to hesitate the next time they think to send one of their own under cover. It will make them think twice the next time they consider whether to press a novel argument or seek conviction under a new and untested statute. It will make them waiver the next time a witness asks if they can keep their identity safe. This is too high a price to pay in this or any litigation. It is unprecedented, and for good reason.

### **CONCLUSION**

For the reasons set forth above, the State respectfully requests the Court deny Watson Laboratories, Inc.'s Motion to Compel Discovery.

Respectfully submitted,



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