

National Prescription Opiate Litigation Meeting

Regarding Continuing Discovery Disputes

January 10th, 2019



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:)
NATIONAL PRESCRIPTION) MDL No. 2804
OPIATE LITIGATION)
THIS DOCUMENT RELATES TO:) Case No. 1:17-md-2804
ALL CASES) Judge Dan Aaron Polster
Mag. Judge David A. Ruiz

TRANSCRIPT OF THE SPECIAL MEETING
REGARDING CONTINUING DISCOVERY DISPUTES
THURSDAY, JANUARY 10, 2019

The transcript of the Special Meeting Regarding Continuing Discovery Disputes before Special Master David R. Cohen, called by the Plaintiffs pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Jill A. Kulewsky, RPR and Notary Public within and for the State of Ohio, taken at the offices of Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue East, Suite 1700, Cleveland, Ohio, commencing at 6:00 p.m., the day and date above set forth.

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SPECIAL MASTER COHEN: We're on the record. So we're here this evening to chat about continuing discovery disputes between the Plaintiffs and Walgreens regarding a number of matters which Plaintiffs say haven't been resolved, and Walgreens says these have been resolved, that we have produced everything requested or required.

We're going to go through these items one by one. Plaintiffs will tell me whether they agree with the letter from Sharon Desh, which came out yesterday, January 9th, going through topic by topic and setting out Walgreens' position that everything has been produced.

And I'll note that because this is on the record, if you look at my order of appointment, that means that if you disagree, either side, with anything that I rule, this is the formal ruling, you don't need to file a request for formalization of the ruling if either of you decide you have an objection.

Do you agree -- let me ask Plaintiffs. Do you agree that the best way to do this is to use the January 9th letter and just go through in order?

MR. SHKOLNIK: It may be easier to go through ours because -- it doesn't seem to track ours exactly, but I think if we go back and forth, it may be helpful.

SPECIAL MASTER COHEN: I don't care.

MR. SHKOLNIK: One that I think we can agree has been resolved would be number 12 on our list, which was the HDMA documents. We note that we were now advised in the letter and we confirmed that on Monday night the production of a spreadsheet for the money paid to the trade organization was provided to us. So number 12 we can -- I'm sorry, number 12 can be taken off.

SPECIAL MASTER COHEN: So I have in front of me Sharon's letter. Do you have --

MR. SHKOLNIK: Yeah.

SPECIAL MASTER COHEN: All right. I'm happy to start with this agreement.

MR. SHKOLNIK: So that one we believe is resolved.

Number 13 on our list, I didn't see a response in Sharon's letter, and maybe I misunderstood or maybe it's just semantics that

5

1 we're talking about, but as to 13, it's what we
2 call the EDI requests and the certain reporting
3 requirements from chargebacks and the like.
4 According to the request, it was 844s, 849s,
5 845s, et cetera. That wasn't, as I understand
6 it, addressed, unless I'm mistaken,
7 specifically in the letter.

8 MS. DESH: Number 13 was
9 addressed in the letter. It's under item H,
10 which is together in the HDMA documents, and
11 the history of the parties' discussion over
12 item 13, which this specifically relates to
13 Walgreens' RFP 19, is that Mr. Gaddy or maybe
14 you, actually, Hunter, contacted me about that
15 in November, and then Mr. Gaddy followed up --
16 well, so let me restate because I have the
17 letter in front of me.

18 So Joe Ciaccio -- I don't know how you
19 pronounce that.

20 MR. SHKOLNIK: Ciaccio.

21 MS. DESH: -- Ciaccio contacted
22 me about that on November 25th. I noted that
23 RFP 19 is something that Walgreens objected to
24 in our RFP responses. Plaintiffs didn't bring
25 that up for several months.

6

1 By the time you did, the way I read it,
2 it seemed to overlap with the Court's order on
3 IMS/IQVIA data. In fact, the only reason that
4 RFP 19 was in the discovery tracker and was
5 labeled as such was because it was a specific
6 item that was directed to mutual distributors,
7 Cardinal, McKesson and AmerisourceBergen.

8 Nevertheless, on November 28th, I
9 responded that with respect to RFP 19, to the
10 extent it overlaps with Walgreens, it's been
11 complied with the order on IMS/IQVIA, and
12 again, Jeff responded on November 29th in what
13 I understood to be an agreement with that
14 position, and we haven't discussed that since
15 then.

16 MR. SHKOLNIK: And I've sent
17 letters on it, and IQVIA and EDIs are two
18 different things. The EDI reports are a DEA
19 requirement. IQVIA is not a DEA requirement.
20 There are eight specific documents, and they're
21 listed in the tracker as a separate item.

22 Whatever happened with the parties going
23 way back to July or into early fall does not,
24 in our opinion, overcome the fact that this has
25 been in the tracker week after week, and we

7

1 brought it to your attention, and I did bring
2 it to your attention again, and you keep
3 morphing it into IQVIA.

4 And we understand your position on IQVIA,
5 which we still think you're way behind on, but
6 the EDIs and the series of EDIs and the
7 chargebacks are specific requests under DEA,
8 and you have never responded.

9 You said you objected to them, we
10 disagreed with the objection, and that's the
11 problem. If you have them, we're entitled to
12 them. Maybe we could just get to the bottom of
13 it now and just get past talking past each
14 other.

15 MS. DESH: So just to clarify, it
16 was my understanding that based upon our
17 correspondence and Mr. Gaddy's response from
18 November 29th, we had resolved the issue with
19 respect to RFP 19.

20 It sounds now like you're saying that
21 issue was not resolved and you had a different
22 request with respect to that RFP. That is
23 something that was never made clear.

24 I did mention to you that it was my
25 understanding that we had resolved that

8

1 request, and we had resolved it in a specific
2 way, and now it seems like you're making a
3 separate request.

4 If you would like something different
5 than what we're already doing or something
6 different than what the Court has ordered, I
7 think we would maintain that this was part of
8 our meeting to confer -- this could have been
9 part of our meeting to confer several months
10 ago with Walgreens' objections to the RFP
11 morphed in, and as such, that was how we put
12 together our entire document response and
13 production.

14 MR. SHKOLNIK: I'll give you a
15 copy of the tracker from December 28th. I just
16 don't understand how there can be a discussion
17 that we're misunderstanding this issue and that
18 it has not been discussed.

19 And there have been letters. If we turn
20 to page 2 of the tracker, EDI requests --

21 MS. DESH: Made to Cardinal,
22 McKesson and --

23 MR. SHKOLNIK: Understand, but
24 everybody was with everybody else in responding
25 to these. Walgreens has objected to the

1 production of these documents and amended
2 objections and responses in the Desh e-mail.
3 The fact that you're objecting to it, you still
4 have EDI -- you did have EDI reporting, and
5 we've been asking you for them.

6 Maybe we're just talking past each other,
7 but this has been on the tracker week after
8 week, and we did bring it up, and the fact that
9 you had a discussion with Mr. Gaddy about IQVIA
10 does not overcome the fact that we still want
11 this. We could go back and forth on this. I
12 don't see why we're not entitled to it.

13 SPECIAL MASTER COHEN: It's
14 probably not going to be helpful for all of us
15 to retrospectively look backwards and try and
16 figure out why there was miscommunication. It
17 may be helpful to look backward and find a
18 statement, okay, we're good with this, or
19 something like that, but that's not what we're
20 talking about right here.

21 The question is, it seems to me, are the
22 Plaintiffs entitled to the EDI stuff, and are
23 you willing to produce it. So let's get to
24 that.

25 MS. DESH: Thank you, Special

1 Master Cohen. Just two points to respond to
2 that.

3 First of all, Mr. Gaddy's e-mail does say
4 with regard to RFP 19, "Thank you for
5 confirming that Walgreens has complied with the
6 order." So it was my understanding that we're
7 okay and we're good with this.

8 Second, the production tracking chart was
9 the same for a distributor lead and the
10 defendant pharmacies. In Footnote 1 it says
11 that each of the categories in this chart
12 refers to a request for production, but that
13 individual defendants may have objected, and
14 nothing changes those objections.

15 The only reason why the EDI requests were
16 on this chart is because they were specifically
17 directed to Cardinal, McKesson and
18 AmerisourceBergen, and that was part of the
19 agreed language between the parties on the
20 tracker. That sat on the tracker for several
21 weeks, and only recently did Plaintiffs even
22 follow up with us about this.

23 I'm only now realizing that Mr. Gaddy's
24 confirmation from our December 5th
25 communication was not actually what Plaintiffs

1 wanted, and so respectfully, we answered these
2 RFPs many, many months ago. There was a time
3 to talk and negotiate about our specific
4 responses, and at this point in discovery, and
5 we were really trying to finish everything, you
6 know, if there are things out there that we've
7 agreed to produce that you don't think you
8 have, I would love to be able to close the loop
9 on that, but this seems like an entirely new
10 discussion where we're beginning again with our
11 RFPs, and frankly, that's something that had
12 not been communicated to me, I think, until
13 just today.

14 SPECIAL MASTER COHEN: First of
15 all, I want to focus on these EDIs. Did
16 Plaintiffs request those of distributors other
17 than the big three, that is to say, of
18 pharmacies?

19 MR. SHKOLNIK: We've been asking
20 for chargeback data, which is what EDI is,
21 that's the technical -- and it's been an issue.

22 SPECIAL MASTER COHEN: Right.
23 I've already ordered that to be produced. So
24 if EDI is equivalent to chargeback data --

25 MR. SHKOLNIK: Those are the

1 technical forms for chargeback items.

2 SPECIAL MASTER COHEN: Then this
3 is an old topic, and all of the chargeback data
4 has to be produced.

5 MS. DESH: So that was a
6 discussions, I believe, that Plaintiffs were
7 specifically having with manufacturers.
8 Walgreens had objections to this RFP for a very
9 long time. This is something we'll have to
10 look into, and I don't know what the --

11 SPECIAL MASTER COHEN: I don't
12 know what more you need than the order I just
13 gave you.

14 MS. DESH: Okay. So if you're
15 saying that we should -- we can go ahead and
16 investigate whether we have documents
17 responsive to this. I don't know what the
18 timeline will be for that.

19 SPECIAL MASTER COHEN: I
20 understand that you may need some time to do
21 what I just told you, but all the chargeback
22 data needs to be produced to Plaintiffs.

23 MS. DESH: Okay. We will look
24 into that.

25 SPECIAL MASTER COHEN: Okay. The

1 next topic.

2 MR. SHKOLNIK: Thank you.

3 MR. MOUGEY: Let's go to 3

4 because I think that flows over. We're going

5 to put a bunch of these together to make it a

6 little easier, but let's do 3 first.

7 MR. SHKOLNIK: 3, this is an

8 issue which actually popped up briefly on the

9 call last week, but it was something I think

10 that you mentioned. This deals with the word

11 "confirmed" being added to the definition of

12 "suspicious orders," and we decided to push it

13 off until today for this meeting.

14 Our big concern here is, and we'll give

15 you some context, from what we've found out

16 through the discovery process is, at least we

17 know from the 2006, '07 timeframe, Walgreens

18 had been utilizing a procedure that was

19 incorporated in what's known as the Chemical

20 Handler's Manual as their way of determining

21 what is a suspicious order, and it's a

22 variation of three times something, and as we

23 understand it now, they were relying on that

24 formula, whether rightfully or wrongfully,

25 based on their assumption that DEA said that

1 was okay.

2 We also know that they were using that up

3 through just about 2011 or 2012. It's really

4 not clear.

5 But around 2008 Walgreens developed an

6 algorithm, a very complex algorithm, and they

7 have an in-house mathematician, a Ph.D., that

8 developed that, which Peter just took his

9 deposition today, and they were running that

10 system at the same time.

11 Every document we have from 2008-ish

12 right up until 2013 refers to the algorithm

13 identifying suspicious orders, and I think we

14 may even agree with them on this, but I don't

15 want to be 100 percent on that, that it's a

16 pretty good algorithm that they came up with,

17 and it did its job, and according to the

18 witness, it was failsafe.

19 It was spitting out suspicious orders

20 right up until -- he actually thought they were

21 still using it until today, and that system did

22 do that, overlapping with the three times

23 formula from the Chemical Handler's Manual, and

24 continuing up till 2013 to 2014, when Walgreens

25 stopped distributing.

1 What we're finding out, by utilizing this

2 definition of "confirmed suspicious orders,"

3 they have internally changed their definition

4 from "suspicious orders," even though that's

5 what the algorithm said it was, to "orders of

6 interest," and they've now come up in the

7 tracker saying we can't identify anything that

8 is -- and produce to you any suspicious orders

9 because these were, in essence, unconfirmed by

10 us.

11 We know the system spit out many

12 suspicious orders. At one point in early 2013,

13 late 2012, there's e-mails where the

14 Integrity -- what they call the Pharmacy

15 Integrity Department that was now put in place

16 to start finding new suspicious orders, they

17 had so many that were in their "war room," that

18 they couldn't even read them as fast as they

19 were coming in, and they were shipping them.

20 SPECIAL MASTER COHEN: So that we

21 can be on the same page, what are we going to

22 call -- what was the name of the witness you --

23 MR. MOUGEY: Wayne Bancroft.

24 MR. SHKOLNIK: So as of --

25 SPECIAL MASTER COHEN: Bancroft?

1 MR. MOUGEY: Bancroft.

2 SPECIAL MASTER COHEN: So is it

3 fair, just so we're all using the same

4 language, to call it the Bancroft algorithm?

5 Can we all understand what that means?

6 MR. SHKOLNIK: Yes, that's fair.

7 SPECIAL MASTER COHEN: Go ahead.

8 MR. SHKOLNIK: So we know the

9 Bancroft algorithm was spitting out suspicious

10 orders, and then at some point in 2013 or '14,

11 right before they stopped distributing, they

12 actually had a meeting where they said we

13 better come up with a definition as to what is

14 suspicious versus what is an order of interest,

15 because if it's suspicious, they had to report

16 it. If it was an "order of interest," now

17 they're saying we don't have to report, even

18 though the algorithm was still spitting them

19 out under the -- it was the same algorithm.

20 MR. MOUGEY: Could I add a little

21 color here? There's document after document

22 after document that the orders flagged by the

23 system internally at Walgreens are suspicious.

24 SPECIAL MASTER COHEN: The

25 Bancroft system?

1 MR. MOUGEY: Yes, the Bancroft
2 algorithm are suspicious. That's unequivocal.
3 There are 40 years' worth of documents saying
4 algorithm flag.

5 SPECIAL MASTER COHEN: I
6 understand.

7 MR. MOUGEY: What you're seeing
8 in the response to the discovery is insertion
9 of the word "confirmed" --

10 SPECIAL MASTER COHEN: I
11 understand.

12 MR. MOUGEY: -- therefore, we
13 don't have to do any action here, and it's
14 going to dovetail into the next about what data
15 is available.

16 How many orders in Trial Track One were
17 flagged by the system that you internally
18 called suspicious but now you're calling as a
19 potentially suspicious? How many of them were
20 there?

21 SPECIAL MASTER COHEN: Is that
22 your question?

23 MR. MOUGEY: That's part of it,
24 yes.

25 SPECIAL MASTER COHEN: I'm not

1 sure I like the question, but go ahead.

2 MR. MOUGEY: The word "confirmed"
3 obviously artificially limits the entire
4 segment of documents produced.

5 SPECIAL MASTER COHEN: Here's
6 what I need to know. Have all of the orders
7 that were flagged by the Bancroft algorithm
8 been identified and produced?

9 MR. MOUGEY: We do not think so.

10 MR. SHKOLNIK: We don't see any.

11 MS. DESH: So I think we're
12 talking about a couple of different things
13 here. One is an interrogatory -- or not an
14 interrogatory response but a narrative response
15 to a combined discovery request, which is where
16 we provided the definition that Plaintiffs are
17 complaining about.

18 There are also document requests relating
19 to suspicious orders. Walgreens did produce
20 over 5,000 suspicious orders that we were able
21 to identify after a reasonable search.

22 We have also produced from our internal
23 system the flagged orders and the overrides,
24 Excel spreadsheets, which is specifically what
25 Mr. Mougey has asked about that we generated

1 for the time period at issue and for the stores
2 at issue, and we have produced those.

3 We've also, obviously, produced
4 Mr. Bancroft's custodial file and everything
5 else that would fall into this.

6 So in terms of the specific categories of
7 documents, that production is complete, and
8 we've identified them by Bates number, and they
9 have all of that information.

10 SPECIAL MASTER COHEN: So I'm
11 going to ask it again, and I think the answer
12 is yes, given what you just said, but I just
13 want to make sure --

14 MS. DESH: Yes.

15 SPECIAL MASTER COHEN: -- that
16 all of the orders that were flagged pursuant to
17 the Bancroft algorithm have been identified and
18 produced to Plaintiffs?

19 MS. DESH: So I don't know if I
20 agree completely with their characterization in
21 how it was coming out, but everything that we
22 have about suspicious orders --

23 SPECIAL MASTER COHEN: You're
24 using the term "suspicious orders". I'm using
25 a different term. I'm using the term "flagged

1 by Bancroft's algorithm".

2 MS. DESH: So everything that
3 the -- so I believe that that answer is
4 correct. I don't know if the way that they are
5 describing the algorithm is actually the way
6 that the documents were kept in the ordinary
7 course of business, but yes, we did search for
8 information about orders that were flagged and
9 the response from Rx Integrity to those orders,
10 and those spreadsheets were created and
11 produced for the purpose of this litigation.

12 MR. MOUGEY: There's a couple --
13 there's several important caveats in that
14 answer. Pharmaceutical Integrity is one of
15 them, and I've said this repeatedly.
16 Pharmaceutical Integrity wasn't formed until
17 late '12 or early '13.

18 SPECIAL MASTER COHEN: Maybe I
19 missed it, and I heard you use the term
20 Pharmaceutical Integrity, but I'm not sure how
21 that plays into --

22 MS. DESH: Maybe I could clarify.
23 Pharmaceutical Integrity group was a group that
24 was created in late 2012, early 2013. That's
25 who Mr. Bratton works -- that's the group under

21

1 which Mr. Bratton works, who is our 30(b)(6)
2 witness, Mr. Mills as well.

3 When Plaintiffs took the deposition of
4 Mr. Mills, they talked about systems at
5 Walgreens that tracked the flagged orders and
6 the ceiling overrides and those types of
7 things. They asked for the documents that --
8 well, we had already produced by -- actually,
9 by that time they were one of the very first
10 things that was produced, the reports, the
11 consolidated reports from those systems about
12 the orders.

13 Separate from that, Walgreens has
14 produced all of its suspicious order reports,
15 and these are the 5,000 documents that we had
16 that covered a previous time period up until
17 about 2012. So that's the consolidated
18 information that we have. All of that has been
19 produced.

20 Anything else that is responsive that
21 they're talking about, to the extent that it
22 exists in Walgreens' files, related to this
23 issue would have also been produced. So I
24 believe the specific categories that they have
25 identified as they are kept in Walgreens'

22

1 system, all of that has been produced.

2 SPECIAL MASTER COHEN: So I'm
3 still not sure what Rx Integrity is.

4 MS. DESH: So Rx Integrity is the
5 group that was formed at Walgreens specifically
6 for the purpose of reviewing orders and
7 determining ceiling limits and deciding whether
8 or not orders should go through. It takes into
9 account the algorithm that sets the ceiling
10 limits, and so that is the current group at
11 Walgreens that functions to review these
12 orders. It's just a business unit.

13 MR. MOUGEY: What I don't think
14 you heard, though, is the answer to your
15 question of were the orders flagged by
16 Bancroft's algorithm produced, and we heard
17 about 5,000, and we heard about what
18 Pharmaceutical Integrity is --

19 SPECIAL MASTER COHEN: She said
20 yes.

21 MR. MOUGEY: By Bancroft's
22 algorithm?

23 SPECIAL MASTER COHEN: Yes.

24 MR. MOUGEY: Have the orders from
25 Bancroft's algorithm --

23

1 SPECIAL MASTER COHEN: That were
2 flagged by Bancroft's algorithm been produced.
3 Her answer was yes.

4 MS. DESH: To the extent that we
5 have them and they're kept in the ordinary
6 course of business, yes.

7 SPECIAL MASTER COHEN: I'm not
8 sure what more you could ask that they do. If
9 you think that there is some subcategory that
10 wasn't produced because it fell into -- I don't
11 know what Rx Integrity is -- the Rx Integrity,
12 and therefore, it wasn't produced, that's okay,
13 and we'll talk about that.

14 But what I'm hearing is that they
15 produced everything that was all the orders
16 that were flagged by the Bancroft algorithm,
17 regardless of what they called them, suspicious
18 or whatever the other term was --

19 MR. WEINBERGER: Flagged.

20 SPECIAL MASTER COHEN: --
21 interesting. I don't care what they called
22 them, if they were flagged, they need to be
23 produced, regardless of what adjective you
24 apply.

25 MR. SHKOLNIK: And we don't have

24

1 anything confirming that in any of these
2 responses, other than what we're hearing today.
3 We really don't. And we've gone through what
4 we have.

5 We know they gave us test printouts for
6 the three times. We know we have 5,000, which
7 we know cannot be the full number of the
8 Bancroft run because they had tens of thousands
9 of suspicious orders. So there is something
10 wrong if we only have 5,000 reports.

11 SPECIAL MASTER COHEN: I thought,
12 Sharon, that you said there was a spreadsheet
13 that actually was a report of all of the orders
14 that were flagged by the Bancroft algorithm.

15 MS. DESH: So there were 5,000
16 documents that were suspicious order reports
17 that was pre-2012, and we did limit that to the
18 stores in the CTL jurisdictions.

19 SPECIAL MASTER COHEN: Fine.

20 MS. DESH: So that might explain.
21 Then beginning -- once Rx Integrity was
22 developed and they had their own internal
23 system for tracking these, we also ran reports
24 for all of the orders from Rx Integrity.

25 So everything we have that's kept in the

25

1 ordinary course of business about the
2 suspicious orders as they relate to the CTL
3 jurisdictions have been produced.

4 SPECIAL MASTER COHEN: So you're
5 saying that the problem is that she is saying
6 everything has been produced that has been
7 flagged by the Bancroft algorithm, and you
8 believe that there are tens of thousands of
9 orders that would have been flagged, but you
10 haven't received tens of thousands of orders?

11 MR. SHKOLNIK: And we know there
12 are 5,000 documents. 5,000 documents would be,
13 I assume -- if we're talking spreadsheets, line
14 items, is that -- because we're not seeing
15 thousands and thousands of suspicious orders
16 when this algorithm would have triggered those.

17 MS. DESH: So there are two
18 formats, and part of this goes back to 2007.
19 So the documents that were produced as
20 suspicious order reports, they could have
21 multiple different items listed in them. There
22 are 5,000 of those, I think totaling 10,000
23 pages. I don't know how many items are
24 specifically listed on them.

25 There is also the report from Rx

26

1 Integrity of the orders that were flagged by
2 the system for the CTL jurisdictions as kept in
3 the ordinary course of business.

4 I'm telling you that you have what is
5 available from Walgreens about this issue.

6 SPECIAL MASTER COHEN: Did you
7 ask Mr. Bancroft whether, for example, there is
8 a spreadsheet of all the orders that were
9 flagged by his algorithm?

10 MR. MOUGEY: He thinks that there
11 are reports flagged by his algorithm, yes.

12 MS. DESH: And we produced this
13 spreadsheet from the central controlled
14 substance ordering key performance indicator
15 tool. We have gone to the source and produced
16 this information, in addition to Mr. Bancroft's
17 custodial file.

18 MR. MOUGEY: And I believe that
19 that spreadsheet is post '13. So let me see if
20 I could go into a little bit of a broader issue
21 and bring it back into this for a second.

22 So what you heard is "kept in the
23 ordinary course of business," "what we could
24 find," "what we could locate," and several of
25 these requests are asking about reports.

27

1 When we went into depositions, what we
2 heard from witnesses repeatedly was that data
3 is still in the database. If I wanted to go
4 and pull, meaning the witness, an employee of
5 Walgreens wanted to go and pull a report on
6 overrides, suspicious orders, what the criteria
7 was for the approval of the override, I could
8 go to the database and pull up answers about
9 how many overrides over a historical period.
10 The question of how far back, "I'm not really
11 sure" is the answer we got repeatedly.

12 So what we think is happening, and the
13 answer is, go look for suspicious orders that
14 were sent out via e-mail, that were burned on
15 CD, that are in custodial files, but several of
16 our requests and what we're still struggling
17 with in response to 1, 2, 10 and 11 today all
18 have to do with what data is historically
19 available.

20 MS. DESH: And I am saying, and I
21 have said repeatedly, that in response to that
22 -- not in response to that testimony,
23 independently Walgreens did go to that database
24 and ran a report of what was available for the
25 purpose of this litigation. We did -- I don't

28

1 know how many times I could say this, but we
2 did exactly what Mr. Mougey is asking for as it
3 relates to the flagged orders and ceiling
4 overrides.

5 SPECIAL MASTER COHEN: Did you
6 show the report to Bancroft and ask him is this
7 it?

8 MR. MOUGEY: The report that we
9 think that we have as an example of is a report
10 that is predominantly post distribution period.
11 So the number of entries on a fairly thick
12 spreadsheet -- keep in mind, this algorithm was
13 being run late '08, 2009. The first entries on
14 the spreadsheet as being referenced is post
15 '13. So there's a window.

16 Either we're talking past each other and
17 we just don't understand what it is, but what
18 I'm used to in the litigation that we do is a
19 data pool based on the fields that we discuss
20 internally and pull the data. What we think
21 we're getting are bits and pieces out of the
22 database that cover different periods of time
23 and don't answer the question.

24 So I do not believe we have seen, and I'm
25 used to fairly large data pools that are fairly

1 complex, a data pool exported into Excel where
2 we discuss what fields are available, we look
3 at the historical period of time, but the
4 document that I had during the 30(b)(6)
5 deposition was a -- it might have had a few
6 entries on '13, but it was predominantly post
7 '13.

8 What I do not believe we've seen is,
9 whether it be the Bancroft trip on the
10 algorithm, the flag on the algorithm, a
11 complete override history, that we've seen the
12 fields that they keep track of that their
13 witnesses say are in the database, a complete
14 set of data pool that we could make heads or
15 tails out of from Trial Track One for 1, 2, 10,
16 11 and then spills into 3 somewhat with the
17 continued insertion of the word "confirmed."
18 We think we're getting bits and pieces, and the
19 witnesses are saying that the data is still
20 available.

21 MS. DESH: Rx Integrity group, as
22 Mr. Mougey already said, was created in late
23 2012 or early 2013. So to the extent that this
24 information existed in a centralized source
25 that the Rx Integrity witnesses talked about,

1 we pulled from that centralized source.

2 There might be -- so we have everything
3 that exists in the database that the witnesses
4 were talking about. Mr. Mougey had those
5 documents with him at Mr. Bratton's 30(b)(6)
6 deposition. I don't believe he asked these
7 questions of Mr. Bratton at all, but we have --
8 we have pulled the data that exists from the
9 database that the Plaintiffs have asked
10 questions about.

11 MR. MOUGEY: But do you hear the
12 answer?

13 SPECIAL MASTER COHEN: Yes, I do.

14 MR. MOUGEY: The answer is
15 Pharmaceutical Integrity in '13.

16 SPECIAL MASTER COHEN: When did
17 the Bancroft algorithm get put into place?

18 MS. DESH: I don't know
19 specifically. I think that there was a
20 transitory time, but the specific database that
21 he is asking about, that he asked the witnesses
22 about, we pulled everything from that database
23 available.

24 SPECIAL MASTER COHEN: You're not
25 answering the question. It was a simple

1 question. I'll say it again. When was the
2 Bancroft algorithm put into place?

3 MS. DESH: I don't have a
4 particular -- a specific date for you on that.
5 I think that there were different things that
6 were happening at different time periods
7 throughout 2008, 2009 and then into the
8 present.

9 We also did produce -- so anyway, that's
10 the answer.

11 SPECIAL MASTER COHEN: Before
12 2012?

13 MS. DESH: I think they were
14 working with algorithms prior to that time.

15 MR. MOUGEY: I'm 100 percent
16 confident the algorithm was in play -- in use
17 at Walgreens in late '08, '09 at the latest.

18 MR. SHKOLNIK: Just so you
19 understand the whole progression, they had
20 phases of the algorithm. The algorithm stayed
21 the same, and they kept tweaking ways -- we're
22 going way far afield, but the tweaks that were
23 done over the next few years were ways to
24 basically get around the algorithm.

25 But they were running the algorithm, it

1 was spitting out data, and what we don't have
2 is from 2008 to 2013. It's just not there.

3 MR. MOUGEY: And what we have
4 from '13 is piecemeal. So what we're asking,
5 and maybe I'm missing this answer, but the time
6 the algorithm was in place until Walgreens
7 stopped distributing, I'm not asking about a
8 specific database, I'm just asking about what
9 fields do you have available, and historically
10 how far back does that data go.

11 What you're hearing back is, "This is
12 what we had available," "This is what we kept
13 in the ordinary course of business," and what
14 we're hearing from the witnesses is that
15 historical data is there, and I'm not talking
16 about a specific database, I'm just talking
17 about raw data fields.

18 If we wanted to be able to look at how
19 many orders were flagged in the Bancroft
20 algorithm, what overrides, what was the
21 criteria in the data pool, the easy way to
22 answer this is what fields are available and
23 how far back. Not a specific database, not a
24 specific department, just what fields are
25 available and how far back, and that's what I

1 don't feel like we're hearing and haven't heard
2 from anybody.

3 MS. DESH: But I don't think that
4 Mr. Mougey has asked a witness the question
5 that he's asking us right now. He could have
6 presented these spreadsheets to the witness and
7 said, is this everything, or do you believe
8 that there is a centralized source of this
9 information that's not here. He hasn't done
10 that.

11 We have produced documents and reports
12 that we have run specifically for this
13 litigation from all of the sources that are
14 available that would cover Mr. Mougey's
15 requests, and he has not pointed me to anything
16 from a witness saying I know that there is
17 something else other than what is in this
18 document out there.

19 MR. WEINBERGER: Can I just -- I
20 hate to -- I'm sorry. I don't mean to triple
21 team here, but since I'm new to this, and what
22 I'm not hearing is an answer to the question of
23 where is the data between 2008 and 2012 and
24 '13, inasmuch as there was an algorithm in
25 place during that timeframe, and --

1 MS. DESH: We have produced
2 suspicious orders from 2007 through 2012.
3 Plaintiffs have.

4 SPECIAL MASTER COHEN: I don't
5 want you to use the term "suspicious orders".

6 MS. DESH: Okay. We have
7 produced all of the reports from Walgreens'
8 system identifying suspicious orders --

9 SPECIAL MASTER COHEN: You just
10 used the term again.

11 MS. DESH: Well, I believe that
12 that's what we're talking about here.

13 SPECIAL MASTER COHEN: No. I
14 have changed the terminology to orders flagged
15 by the Bancroft algorithm because I don't -- I
16 don't trust your use of "suspicious orders" or
17 your use of "suspicious orders". I don't even
18 trust the DEA's use of the term.

19 What I want to know is, has every -- I'll
20 say it again, and I've said it a bunch of
21 times, has every order that was flagged by the
22 Bancroft algorithm from its inception been
23 produced to the Plaintiffs. If the answer is
24 no, then you have to go back and do that.

25 MS. DESH: Okay. I'll respond

1 this way. It's my understanding that to the
2 extent that that information still exists, we
3 have already produced it. However, this is a
4 new formulation that I'm hearing from
5 Plaintiffs for the first time today. If they
6 would like, I could go back and confirm that
7 and just triple check that everything that is
8 available, if we have not produced it, we will.

9 MR. WEINBERGER: Well, would that
10 data have been destroyed at some point? You
11 keep saying "to the extent that it's
12 available". If orders were flagged because of
13 an algorithm prior to 2012, they should be
14 available, unless they've been destroyed.

15 MS. DESH: We can only produce
16 what we have and what is kept in the ordinary
17 course of business. I don't know. They have
18 not pointed me to any deposition testimony from
19 Mr. Bancroft describing this system as they
20 have it.

21 SPECIAL MASTER COHEN: Well, I'm
22 going to take their word that they did ask
23 those questions and that he did respond that
24 there was data running back to the time of the
25 algorithm that would have triggered these

1 flags.

2 Look, I've done the same thing with
3 Plaintiffs, I've done the same thing with other
4 Defendants, I did the same thing with
5 Cleveland, I made them rerun all their data,
6 which they are in the middle of doing, because
7 there were gaps in e-mails that had been
8 produced that didn't make sense.

9 It can't be the case that if he went back
10 to 2006 for an employee that's been there all
11 that time that there are only 130 e-mails. It
12 just doesn't make sense. You need to go back
13 and rerun it and figure out what went wrong.

14 MS. DESH: No, I'm aware of the
15 problems in Cleveland.

16 SPECIAL MASTER COHEN: Maybe
17 something went wrong or maybe there was a
18 miscommunication.

19 If the data still exists, which it sounds
20 like it does, back to 2007 or 2008 that would
21 allow an understanding of which orders were
22 flagged by the Bancroft algorithm, you need to
23 go back and look and make sure that it's all
24 been produced. Okay?

25 MS. DESH: Okay. We will do

1 that.

2 MR. SHKOLNIK: The second part of

3 the request is that -- and that's where the

4 insertion of the word "confirmed" comes up. We

5 need to also have the response to were any of

6 those -- what was shipped, were any of the

7 Bancroft flagged items shipped or not.

8 SPECIAL MASTER COHEN: Do you not

9 have the information of all orders shipped?

10 MR. SHKOLNIK: We won't know if

11 the order is shipped -- much like the problem

12 with the various databases that the Plaintiffs

13 had to produce, we can't marry -- we're not

14 going to know if it was shipped --

15 SPECIAL MASTER COHEN: You're not

16 going to know if an order that was flagged was

17 or wasn't shipped?

18 MR. SHKOLNIK: Exactly, unless

19 they give us the spreadsheet that shows that,

20 and they can do it electronically when they're

21 producing.

22 For us to go back and try to figure out

23 and tie a Bancroft flag to some shipment,

24 because we have massive amounts of shipping, we

25 just don't know how to tie it to the individual

1 suspicious orders or flagged orders or whatever

2 we want to call the order.

3 SPECIAL MASTER COHEN: Just so

4 that I could get some context, are these issues

5 across Defendants, other Defendants?

6 MR. MOUGEY: Not like this.

7 MR. SHKOLNIK: I have yet to see

8 this. We have not seen this problem.

9 SPECIAL MASTER COHEN: The

10 question you just teased out, all of the orders

11 that were identified as X, give it an

12 adjective, something along the lines of

13 suspicious or curious or perhaps over the limit

14 or whatever it is, you know that they were

15 identified and whether they were shipped for

16 other pharmacies?

17 MR. SHKOLNIK: Yes, for the other

18 Defendants. That's why this tracker became so

19 important in response to combined demands

20 because we got both and we have a whole.

21 MR. MOUGEY: When we got the

22 combined discovery request from Walgreens and

23 we had the insertion of the words "confirmed"

24 and possibly "suspicious" where we had -- and I

25 like the Bancroft algorithm test, is that the

1 lingo got so loose with possibly suspicious,

2 confirmed suspicious, that we're not exactly

3 sure at this point what's out there and what's

4 not -- and I'm going to spill into 1, 2, 10 and

5 11 again because I do think we're drilling down

6 into what the answer is for at least part of

7 this -- what information is available and how

8 far back, so that we can get a complete set of

9 data to be able to answer these questions,

10 which is going to make any trial, summary

11 judgment, whatever, so much more efficient than

12 the pieces that we have now, not one database

13 or a specific database, but to me that is the

14 easier answer, which is what fields are

15 available and to when.

16 And we can -- because the next issue is,

17 we have the Bancroft flag, now what about the

18 overrides, now what about the functionality

19 test? There's all these different pieces that

20 some of the systems were shut down and not used

21 in certain stores, you could order from another

22 vendor and not go through the algorithm. There

23 are multiple fields.

24 So the Bancroft algorithm was not used

25 across the entire Walgreens system. So if the

1 Bancroft algorithm flagged an order, the

2 pharmacy could then order from a vendor, and

3 they tracked that. So they knew if it got

4 flagged from Bancroft, then the pharmacy could

5 order from Cardinal, AmerisourceBergen, and it

6 was allowed.

7 So there are multiple fields. So Special

8 Master Cohen, this in isolation, what's a flag

9 from Bancroft, then it's a decision tree. Then

10 your next question is, well, was that order

11 then entered, another order entered matching

12 that quantity with another vendor?

13 So there is a series of fields that we

14 think Walgreens tracked, and we have no -- I'm

15 sorry, you're the one who told me I was going

16 to have a stroke at the last hearing or the

17 last deposition. We have -- I've asked these

18 questions so many times, I'm purple.

19 SPECIAL MASTER COHEN: I'm sure

20 you have.

21 MR. MOUGEY: If you think I'm

22 sitting in -- 90 percent of my litigation is

23 around data and pools and numbers. So to think

24 that I haven't asked about what databases are

25 available historically and where so we could

1 get all of these fields, this should be
2 something that we should be able to, just like
3 the other data sets that we've pulled, identify
4 fields, export the data, import it into Excel
5 and get a clean data set of what happened at
6 Walgreens with all the steps, which is how 3
7 spills into 1, 2, 10 and 11. All of those are
8 -- we have bits and pieces of data covering
9 certain times that don't tell the complete
10 story. That's the issue.

11 SPECIAL MASTER COHEN: So how do
12 you propose to find out what it is that you
13 need, meet with their IT person?

14 MR. MOUGEY: I don't think that's
15 necessary. We can do that, but I think we
16 should start with what fields are available,
17 the definition of those fields and how far back
18 is that information historically available.

19 1, 2, 10 and 11 and part of 3 gets
20 answered with what's out there. Not the
21 language "what's still available," not the
22 language of "kept in the ordinary course," but
23 what data is still -- because to me that sounds
24 like what hard reports are still out there or
25 what reports are still sitting in a file

1 somewhere, not what data is still available
2 that we could recreate that data pool.

3 MS. DESH: So could I separate
4 items 10 and 11 from what we're talking about
5 because that's an entirely different subject
6 that I think we would dispute is not relevant,
7 and that's the dispensing report. So I just
8 want to make sure that we deal with those
9 separately.

10 I think we've already talked about the
11 fact that we will go back and make sure that
12 Plaintiffs have all of the information related
13 to the data that Mr. Mougey is requesting in
14 requests 1 and 2.

15 And to the extent that they're asking
16 us -- there is also a request here regarding
17 the way that we've responded to the combined
18 discovery requests that they think is
19 insufficient based on this data. We can take a
20 look at that. If we find that there is
21 something additional that we need to produce,
22 we can obviously take a look at that, but they
23 will have -- it's our position that they do
24 have, and we will confirm that they have, all
25 of the information that's available to

1 Walgreens about the way that these systems
2 operate and work.

3 SPECIAL MASTER COHEN: So here's
4 the deal, my sense is that you haven't given
5 everything that you should for whatever reason,
6 because you were trying to adhere closely to
7 what they asked for and they didn't ask for it
8 in the way that might have produced more
9 information -- let me finish.

10 MS. DESH: I don't think that's
11 correct. I really do think we're trying to get
12 them all of this stuff.

13 SPECIAL MASTER COHEN: I tried to
14 phrase that so that it was an honest -- it was
15 just an honest misunderstanding, that they
16 asked for it in a way and you answered it in
17 that way. That's fair.

18 But I think that they didn't get
19 everything that they are entitled to get to
20 allow a full understanding of how the system
21 worked at Walgreens, and one way to give them
22 that is to enter rulings that the Judge would
23 probably affirm, despite objection if one were
24 to be brought, that would allow them to come in
25 and talk to everybody in IT, understand all of

1 the data sources, understand all of the
2 computer systems, understand all of the
3 databases, understand every computer program
4 and how it works so that they can ensure that
5 they are getting what they need, but that
6 didn't need to happen with other pharmacies.

7 So I'm telling you that you need to make
8 sure that the next time you talk to them, your
9 response is, here is everything you need to
10 understand our system, because that's the next
11 step. And if that requires you to get some IT
12 people and make sure that everybody is
13 understanding each other and/or answering Mr.
14 Mougey's questions about how far back does the
15 data go and what fields does that data include,
16 then have that conversation, because my sense
17 is that what they're entitled to they haven't
18 gotten. Okay?

19 MS. DESH: That is understood,
20 and as I said, we will check this, and we will
21 also work to include a description and an
22 explanation in our response that's thorough and
23 that addresses the questions that were raised
24 here today.

25 SPECIAL MASTER COHEN: Right.

1 And that includes the understanding that --
 2 I've said it before, you can't use careful word
 3 parsing. So whether you called an order
 4 suspicious or something else, if the function
 5 of the Bancroft algorithm was to identify
 6 orders, that needed to be addressed in any way,
 7 and that to me is a way of identifying
 8 suspicious orders, which maybe you then decided
 9 weren't suspicious for some reason or you did
 10 something else, but the entirety of those
 11 orders has to be produced and identified, and I
 12 think they are correct, then they have to know
 13 whether they were shipped.

14 That's just a plain understanding of how
 15 the system worked. Anything beyond that,
 16 you're parsing words, you're being less than
 17 complete. It's really kind of easy,
 18 ultimately.

19 MS. DESH: That's understood, and
 20 I do think that we have been trying to produce
 21 to them everything that is even in the ambit of
 22 this area, but we will check that and --

23 SPECIAL MASTER COHEN: I believe
 24 that you in good faith have done so, but
 25 something hasn't worked because the other

1 pharmacies have managed to do it without
 2 problem apparently and produce the information
 3 they're asking for, and I think that you
 4 haven't.

5 So something went wrong. I'm asking you
 6 to go back and work hard, and if there's still
 7 problems, then it's going to turn into a
 8 proctological exam of the sort that Walgreens
 9 will not appreciate.

10 How should we move on?

11 MR. MOUGEY: Could I ask for one
 12 clarification real quick? To me that's -- what
 13 we just kind of covered in that conclusion is
 14 1, 2, 3, 10 and 11. Is there --

15 MS. DESH: I did want to move 10
 16 and 11 separately.

17 SPECIAL MASTER COHEN: So
 18 dispensing information is different, as I've
 19 said several times. There is the dispensing
 20 ruling, and the dispensing ruling part of it is
 21 a caveat, and so let me just begin by saying
 22 you don't need to reargue things, I get what I
 23 said, I understand what the issues are, so now
 24 let's address that.

25 MR. MOUGEY: That's 10 and 11. I

1 think to help you, Hunter, put -- Hunter, did
 2 you pull those documents out for me? You got
 3 it in front of you, 10 and 11.

4 So 10 is automated reports generated by
 5 Walgreens that identifies high percentage
 6 prescribing doctors or data therefrom. So
 7 essentially Walgreens was running -- 11 is the
 8 high-ranking store report.

9 So we can call that a dispensing letter
 10 if that's what Walgreens -- dispensing data if
 11 that's what Walgreens wants to do, but it's
 12 clear we're not looking for the individual
 13 prescriber data that the pharmacist is looking
 14 at when they come in. These are data pools
 15 that the Pharmaceutical Integrity Department
 16 were looking at.

17 The Pharmaceutical Integrity Department
 18 was responsible for implementing Walgreens'
 19 suspicious order monitoring policies. This is
 20 how we discovered these reports. So to say
 21 now, oh, no, those are on the dispensing side,
 22 these were reports they were using.

23 MR. WEINBERGER: At the
 24 distribution level.

25 MR. MOUGEY: Thank you. At the

1 distribution level.

2 So 10 and 11 is simply asking for
 3 historical reports that Walgreens used at the
 4 distribution level in Pharmaceutical Integrity,
 5 and quite frankly, potentially before, but
 6 we're not sure.

7 MR. SHKOLNIK: If I could just
 8 add to that. I questioned the witness on that
 9 because I had actual screen shots. I was
 10 questioning an Rx Integrity witness, and we had
 11 the screen shot of how they did their job to
 12 determine if they should do an override or not,
 13 and I asked the question, so you're telling me
 14 I could just get the store number for any store
 15 in Cuyahoga County, put it in there -- type it
 16 in and a whole bunch of data fields show up,
 17 and when you get a request that's potentially
 18 or is suspicious, you then look at the store,
 19 and you can just hit a button, and it will give
 20 you the history as far back as you want to go
 21 and see what their orders are for this drug and
 22 how they dispensed it, how many overrides they
 23 had, we went through all the boxes, and they --

24 MS. DESH: Which deposition was
 25 that?

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1 MR. SHKOLNIK: I believe it was
2 Mills, if I'm not mistaken.

3 MS. DESH: Do you have the cite
4 for that because that was not in any of the
5 letters that you cited to me, and the testimony
6 that Mr. Mougey did elicit on these topics from
7 Mr. Bratton specifically said that that's not
8 how they were used.

9 MR. SHKOLNIK: I just wanted to
10 make a statement.

11 MR. MOUGEY: Go ahead.

12 MR. SHKOLNIK: Mr. Mills, in his
13 testimony, the idea was we could -- and I
14 specifically asked him, every store you could
15 go do this, and you're using -- in order to do
16 your overrides to say whether you're going to
17 ship or not, we have to know what the pharmacy
18 normally was buying, maybe it was something
19 unusual about this pharmacy, maybe there is a
20 certain doctor that we're identifying, we were
21 able to see the actual doctor and the
22 patient-level data in order to decide if we're
23 going to do an override.

24 So yes, it's pharmacy-level data, but
25 it's used up at the distribution level in order

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1 to override or not.

2 And in the period of time before
3 Integrity, they were actually doing it in the
4 warehouse itself and utilizing the same -- they
5 had the same data but a different platform.
6 They changed the name of the interface, and
7 that's how I happened to have had the screen
8 shots, because it was the training tool on how
9 to use the new interface.

10 MS. DESH: I do take issue with
11 Mr. Shkolnik's recollection of the deposition.
12 I don't have the testimony or a cite that he's
13 referring me to in which this was discussed and
14 the way he says it was discussed.

15 Mr. Mougey asked Mr. Bratton about this
16 issue twice, and both times Mr. Bratton
17 clarified that the purpose of these reports was
18 for dispensing --

19 SPECIAL MASTER COHEN: I actually
20 remember that.

21 MS. DESH: -- which is a subpart
22 of what Rx Integrity does. Yes, they do deal
23 with suspicious orders, but they also assist
24 with the pharmacists.

25 I will also respond that we have actually

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1 produced reports of high prescribers because
2 they were in e-mails and some of them were
3 combined with the IMS data, and so when we went
4 through and did that production, we gave
5 them -- we gave them a lot of information about
6 that.

7 But I don't have a cite from Plaintiffs
8 that says this was used for suspicious order
9 monitoring, and I do have pretty extensive
10 testimony from Mr. Bratton saying that it was
11 not. So I think we've more than complied on
12 that.

13 MR. MOUGEY: When you have a
14 witness that is in charge of the geographical
15 area, I forget what it was, Midwest or whatever
16 he was in charge of, for Pharmaceutical
17 Integrity that is charged with creating and
18 implementing their suspicious order monitoring
19 policy, the fact that he comes in afterwards
20 and says, "Oh, we put blinders on" --

21 SPECIAL MASTER COHEN: Could you
22 give me a cite? I don't know what you've got,
23 but I need the cite. Was it the Mills depo?

24 MR. SHKOLNIK: I don't have Mills
25 here.

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1 MS. DESH: So a cite for -- let
2 me get it.

3 A cite for Mr. Bratton is that -- it was
4 his rough transcript at 122 to 123 -- this is
5 Mr. Bratton answering Mr. Mougey's question --
6 "The prescriber data was not used to identify
7 suspicious orders."

8 And then Mr. Mougey asked, "It was used
9 to identify potential areas of diversions
10 linked to high-risk prescribers, correct?"

11 And Mr. Bratton responds, "That data was
12 used to assess prescribers and their
13 prescription habits and inform our dispensing
14 practices."

15 MR. SHKOLNIK: That does not
16 answer the question about how Rx Integrity
17 utilized it when they were doing the overrides.
18 That's two different topics you're talking
19 about.

20 MS. DESH: Well, you don't have
21 any testimony that you're able --

22 MR. SHKOLNIK: I don't have the
23 transcript.

24 MS. DESH: -- to show me that
25 they said -- he said, "The prescriber data was

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1 not used to identify suspicious orders."

2 SPECIAL MASTER COHEN: Let's
3 pretend for a moment -- we don't have the
4 deposition. Let's pretend for a moment that
5 Mills did say that. That's what your
6 recollection is. What does that mean?

7 MR. MOUGEY: When you say "he
8 said that," which part?

9 SPECIAL MASTER COHEN: That Mills
10 said essentially we used dispensing data as a
11 part of our calculus on whether an order was
12 suspicious.

13 MR. SHKOLNIK: Whether or not
14 they should override it. It's already
15 suspicious.

16 SPECIAL MASTER COHEN: Sorry,
17 override it.

18 MR. SHKOLNIK: And ship it.

19 SPECIAL MASTER COHEN: An order
20 that has been flagged by the algorithm. Let's
21 say he said that.

22 MR. SHKOLNIK: Yes.

23 SPECIAL MASTER COHEN: What is it
24 that you want that you don't have?

25 MR. SHKOLNIK: We would like to

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1 know all of that high prescriber data, the
2 doctors that were the high prescribers, which
3 is actually a very important aspect of our case
4 here and where we --

5 SPECIAL MASTER COHEN: I
6 understand that. I need to see the testimony
7 from somebody who said that we used the high
8 doctor-prescribing data as a part of the
9 override conclusion, override decision.

10 MR. MOUGEY: Could I help you a
11 little bit? Here's what's interestingly absent
12 from your claim of Pin the Tail on the Donkey a
13 little bit: There is no manual, there is no
14 policy, procedures, anything at Walgreens with
15 a checklist of what do we look at. So to
16 Hunter's point about the overrides, what do we
17 look at to approve a store going up 22 times in
18 a calendar year on OxyContin? What do we look
19 at here?

20 So what's happened is, because we don't
21 have one single document -- you would think a
22 company the size of Walgreens would have a
23 policy or procedural manual for this
24 department. Now, there is nothing going
25 through what factors do you use when deciding

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1 an override, which is what you're asking.

2 So what Walgreens wants to tell you now
3 is, oh, we took off our Pharmaceutical
4 Integrity for the distributor side hat, and I
5 put on a new hat for dispensing. We weren't
6 doing our job as suspicious order monitoring
7 folks from the distribution side. I took off
8 my hat and put on a new one.

9 That's a fallacy for this department of
10 what they were in charge of doing. This was
11 the department in charge of the suspicious
12 order monitoring policy, and part of what they
13 used in making decisions was the distinction --
14 was the prescriber data that they now claim is
15 dispensing. Think about this for a minute.

16 SPECIAL MASTER COHEN: I got you.

17 So is it correct to say that there was no
18 document anywhere that sets out exactly what it
19 is that the Rx Integrity unit or whatever
20 entity it was that did it looked at?

21 MS. DESH: I don't know if that
22 is true. I think we cited a number of
23 documents in our combined discovery requests
24 about our policies and procedures, but what is
25 true is that we have sworn deposition testimony

56

1 twice from Mr. Bratton in which Mr. Mougey was
2 asking this question, and Mr. Bratton
3 specifically answered him that it was not used
4 to identify suspicious orders and instead was
5 used to inform dispensing practices.

6 MR. SHKOLNIK: The question was
7 --

8 MS. DESH: So that is the purpose
9 of discovery, is asking these questions and
10 getting these answers, and if we're in a
11 position where Mr. Mougey is saying that --

12 SPECIAL MASTER COHEN: If you're
13 going to hang your hat on Bratton's testimony,
14 and it comes out that that's not true, then
15 you're in a lot of trouble.

16 MS. DESH: That's understood, but
17 I'm just saying --

18 SPECIAL MASTER COHEN: And I
19 understand what you're saying. I'm saying that
20 you better make sure that if that's what
21 Bratton testified to under oath, that that's
22 what actually was occurring because if, in
23 fact, there were decisions made on whether to
24 override an order that was flagged by an
25 algorithm based on high-prescribing

1 information, contrary to what Bratton said,
2 then you've got a real problem, and I'm talking
3 about summary judgment in their favor problem.

4 MS. DESH: Okay. So I'm just
5 trying to figure out exactly how we address
6 this issue based on the record that we have,
7 and as you've said, it's important to draw a
8 line between the dispensing and distribution
9 information.

10 SPECIAL MASTER COHEN: Again,
11 this can be made difficult or not. It's not
12 that difficult. The question is fairly simple.
13 Were decisions made on whether an order is
14 suspicious, or once identified as suspicious,
15 whether to ship it, based on dispensing
16 information?

17 Dispensing information includes whether a
18 prescriber was a high-volume prescriber. If
19 that data was collected, identified and used to
20 determine anything about shipping an order, it
21 needs to be produced.

22 MS. DESH: And we have produced
23 the documents from the custodial files of the
24 Rx Integrity group that includes high
25 prescribers when they're talking about this,

1 and we've also produced additional documents on
2 top of that identifying high prescribers in
3 connection with the IMS data. So based on our
4 review, to the extent that this was used, we
5 believe that we have produced that information.

6 SPECIAL MASTER COHEN: Very good.

7 MR. MOUGEY: Could I go back to
8 the question you asked? The question you asked
9 was, are there policies and procedures written
10 down in some sort of a manual or formal
11 fashion.

12 SPECIAL MASTER COHEN: You said
13 there isn't, and she said she's not sure.

14 MR. MOUGEY: Fine. So the
15 witness comes in and says, no, we're using this
16 as dispensing data. I'm dispensing. I took my
17 distributor suspicious order monitoring policy
18 hat off, and I'm just doing my dispensing side
19 data today.

20 In order for us to be able to
21 cross-examine these witnesses since there isn't
22 a checklist as to what to use for a manual --
23 or I'm sorry, for an override, or do we
24 increase the thresholds, do we turn the store
25 off the algorithm system, which they had the

1 ability to do, there is nothing in play that
2 you would go and look at for these 6, 7,000
3 pharmacies around the country, which you would
4 think that Walgreens would have. So the fact
5 that a witness comes in and says, no, this
6 isn't what we use, our ability to cross-examine
7 witnesses is awfully convenient with the
8 absence of manuals and policies and procedures.

9 SPECIAL MASTER COHEN: Here's
10 where I come down on this. Given what Sharon
11 just said, and given what the Plaintiffs have
12 done in the Track One jurisdictions with their
13 claims and their agreement in CMO-1 as to what
14 they wanted, I'm going to stand pat right now
15 on this. It may play out differently in Track
16 Two because different claims may be made.
17 Maybe you come back and get stuff that right
18 now you don't have yet because there are
19 different issues.

20 What I believe I've heard is, from
21 Sharon, is that we produced information about
22 high prescribers, and we produced everything
23 that has to do with high prescribers when that
24 information was used by Rx Integrity or any
25 other department at Walgreens that was making a

1 decision as to whether to ship an order.
2 That's what I'm hearing. That's what she said.
3 I'm going to take her at her word.

4 If it turns out in continued discovery,
5 and I'm saying this for your benefit, of
6 course, in West Virginia when perhaps there are
7 prescriber claims made, and therefore, you
8 might get some additional information, that
9 that's not true, then we'll deal with that.

10 MR. MOUGEY: Okay.

11 MR. SHKOLNIK: Unfortunately, I
12 have to try a case here in this county.

13 SPECIAL MASTER COHEN: I get it.
14 But I have to make that ruling, first of all,
15 based on Sharon's representations, and second
16 of all, as I've said repeatedly, what it is the
17 Plaintiffs have said about dispensing in this
18 case. So you need to go to the next topic.

19 MR. MOUGEY: The previous order,
20 with the understanding of what's in the
21 database and what fields there are and how far
22 back it goes, I'm assuming this is --

23 SPECIAL MASTER COHEN: That can
24 still touch on dispensing.

25 MR. MOUGEY: Pardon me?

1 SPECIAL MASTER COHEN: That can
2 still touch on dispensing. Just the question
3 of how far back does the data go and what
4 fields do we have, that's across the board.

5 MS. DESH: But just to be
6 clear --

7 SPECIAL MASTER COHEN: The
8 reports are different.

9 MS. DESH: Right. So the report
10 is, we have produced what we've identified in
11 the custodial files that the Rx Integrity group
12 actually used in the course of their job.

13 SPECIAL MASTER COHEN: Good.
14 That sounds like that's what they've asked for,
15 and --

16 MR. WEINBERGER: Did you hear
17 the --

18 SPECIAL MASTER COHEN: I heard
19 what she said, and she heard what I said.

20 MR. WEINBERGER: Okay. Okay.

21 SPECIAL MASTER COHEN: If it
22 turns out that they were using information
23 about prescriptions to make decisions about
24 whether orders were suspicious, whether they
25 were shipped, whether they should be

1 overridden, that should be produced. If they
2 haven't produced it in Track One, and it later
3 turns out that there was that information, then
4 there is going to be a very severe
5 repercussion. I can't be more clear than that,
6 I don't think.

7 MR. WEINBERGER: I doubt very
8 much that at Walgreens there is such a thing as
9 a distributor file versus a dispensing file. I
10 think that there is a database of information
11 that is available at various levels.

12 SPECIAL MASTER COHEN: I've been
13 as clear as I can be.

14 MR. WEINBERGER: Okay. I'm
15 sorry.

16 SPECIAL MASTER COHEN: Now
17 everybody knows what the risk/benefit analysis
18 is of standing pat or not.

19 MR. WEINBERGER: Okay.

20 MR. MOUGEY: 4, and again, this
21 just may be another just talking past each
22 other, but I think the way to understand number
23 4 is to first look at our letter --

24 SPECIAL MASTER COHEN: Let me
25 just add one point.

1 Hunter, if you believe there is some
2 information that you got from a deposition from
3 Mills or somebody else that would be valuable
4 for Sharon to see, then I suggest you show it
5 to her.

6 MR. SHKOLNIK: I will. We also
7 have some depositions coming up, and I think
8 they will be even more fine tuned.

9 SPECIAL MASTER COHEN: Go ahead.

10 MR. MOUGEY: 4, let's start off
11 with what I think is a fairly simplistic ask.
12 Perrysburg is one of the three distribution
13 centers across the country for Walgreens that
14 distributed Schedule II and Schedule III. At
15 various times it distributed to Trial Track
16 One.

17 Jupiter, Florida is another one of those
18 distribution centers. The DEA padlocked the
19 cage where Schedule II and III are kept in
20 Jupiter because of Walgreens' violations.
21 Walgreens started to shift some of the
22 distribution responsibilities to Perrysburg,
23 outside of Toledo, and the Perrysburg facility,
24 Walgreens, received six subpoenas and an
25 administrative warrant from the DEA. Early

1 '13, maybe late '12. Late '12, early '13.

2 We have asked the Court, whether through
3 both you and Judge Polster in CMO-1, that we
4 were entitled to receive documents produced to
5 the regulators.

6 So if you look at that, it's crystal
7 clear what we've asked for, what did you give
8 the regulators in prior production in response
9 to these six administrative subpoenas and the
10 warrant to the Perrysburg facility, and when
11 you look at the response is where we're still
12 confused sitting here right now about what the
13 answer is.

14 So if you look at Walgreens' response,
15 which is on Page 2 of 4, Government
16 Communications, Plaintiffs' Requests 4 and 5,
17 it says "Complete".

18 MR. SHKOLNIK: Here.

19 MS. DESH: I think he has my same
20 letter.

21 SPECIAL MASTER COHEN: I have
22 this letter. I'm not sure where you're
23 looking.

24 MR. SHKOLNIK: This is the
25 letter.

1 SPECIAL MASTER COHEN: Okay.
 2 Where am I looking?
 3 MR. MOUGEY: Page 2 in the middle
 4 of the page under C, Plaintiffs' Requests 4 and
 5 5. Do you got it?
 6 SPECIAL MASTER COHEN: Uh-huh.
 7 MR. MOUGEY: It says "Complete".
 8 On the second paragraph it says,
 9 "Walgreens has also produced documents from the
 10 Perrysburg distribution center." It doesn't
 11 say prior production, it doesn't say what we
 12 gave the government, it just simply says we
 13 produced documents from the Perrysburg
 14 distribution center. And it goes on,
 15 "including communications with and documents
 16 provided to the DEA."
 17 It doesn't say we gave you documents that
 18 we provided to the regulators, it just says we
 19 gave you some documents about Perrysburg.
 20 Well, of course, you did.
 21 SPECIAL MASTER COHEN: Let me
 22 just interrupt.
 23 MR. MOUGEY: Sure.
 24 SPECIAL MASTER COHEN: Other
 25 Defendants, in response to the provision

1 ordered by the Court that says you must produce
 2 all prior productions, have listed all their
 3 prior productions. Have you received from
 4 Walgreens a list of all prior productions?
 5 MR. MOUGEY: Yes. And no, there
 6 was no prior production. Yes, we received a
 7 list of -- let me do it the other way.
 8 We sent them a list of what we think we
 9 have, and Perrysburg is not on it. So if you
 10 look at the footnote --
 11 SPECIAL MASTER COHEN: That's
 12 backwards.
 13 MR. MOUGEY: That's kind of the
 14 point.
 15 MR. SHKOLNIK: We did not get the
 16 list of what was produced to the DEA.
 17 SPECIAL MASTER COHEN: Let's just
 18 back up. Has Walgreens produced a list of
 19 prior productions?
 20 MS. DESH: I believe that our
 21 only true prior production is from Jupiter from
 22 the Florida DEA matter because in that matter
 23 there was prior production put together by
 24 counsel, it was an e-mail collection, it was
 25 Bates stamped, it was provided to the DEA that

1 was produced under CMO-1 consistent with the
 2 schedule.
 3 There was nothing like that from
 4 Perrysburg. There wasn't sort of a -- to my
 5 understanding, there wasn't a counsel-directed
 6 Bates stamped e-mail collection, production,
 7 anything like that.
 8 There were subpoenas served on
 9 Perrysburg, they're correct, in February of
 10 2013 requesting documents, and we have
 11 produced -- we actually have produced inventory
 12 lists and things like that from the DEA about,
 13 okay, we came in, here's what we took, things
 14 like that. So that information has been
 15 produced to Plaintiffs.
 16 A lot of what they took are just -- so
 17 we've been -- so we've been looking at that,
 18 and actually, it was sort of difficult to get
 19 to the bottom of this.
 20 I went to Perrysburg last Friday and sat
 21 down with the people at the distribution center
 22 and went through this with them to try to
 23 really figure out kind of what we're dealing
 24 with here, and we collected from them -- we had
 25 collected from them before information relevant

1 to this, but we wanted to make sure that we
 2 collected from them everything that was
 3 produced to the DEA that was relevant to these
 4 claims. In other words, asked for by
 5 Plaintiffs' discovery requests. So we got
 6 additional documents then, we're processing
 7 them now, and we'll be producing them next
 8 week.
 9 There are additional documents, I
 10 believe, that were produced to the DEA, things
 11 like 222 forms, which are the forms that
 12 accompany a drug every time it moves, and those
 13 are pretty voluminous. They're not requested
 14 by Plaintiffs' RFPs. They're duplicative
 15 really of the transactional data.
 16 So there are certain things like that,
 17 categories of information that technically were
 18 given to the DEA. What we've done is -- but it
 19 wasn't really a prior production I think like
 20 was envisioned by CMO-1, which is whatever you
 21 have available, give to Plaintiffs right away.
 22 This is something that we had to really look
 23 into and get to the bottom of.
 24 We went there, we collected what we think
 25 is responsive, and we'll be producing the

1 remainder of that next week.

2 SPECIAL MASTER COHEN: So first

3 of all, are you concerned about stuff from

4 Lakeland or stuff from Perrysburg?

5 MR. MOUGEY: Perrysburg.

6 MR. SHKOLNIK: Actually, not just

7 Perrysburg. There were subpoenas issued to

8 Perrysburg, there were subpoenas issued in

9 California, there were subpoenas issued at

10 every single -- we only recently found out to

11 every one of the warehouses for the C-II drugs,

12 and we don't have them. We don't have any of

13 the 222s, which are hugely important here.

14 Just so you understand why I'm saying

15 California and the others, as they shut down

16 Florida, they had to switch to Perrysburg and

17 to California and the other facilities in order

18 to fill even for Ohio. They had -- they were

19 just running out of places. Then they

20 scrambled to Cardinal Health to fill in an

21 emergency stop gap.

22 SPECIAL MASTER COHEN: One

23 second, please.

24 Where is the prior production provision?

25 MS. DESH: It's in my letter,

1 actually. There's a link to it, but it's

2 also -- it's page 26 of the packet of

3 information that I gave you. It's CMO-1 at

4 page 15.

5 MR. SHKOLNIK: It's attached to

6 this file right here.

7 SPECIAL MASTER COHEN: I got it.

8 So the first sentence of the paragraph

9 that you cite yourself in your letter says,

10 "All Defendants shall review documents

11 previously produced pursuant to any civil

12 investigation, litigation and/or administrative

13 action by federal, including congressional,

14 state or local governmental entities, and shall

15 produce PEC non-privileged documents relative

16 to the claims of the subject proceeding."

17 So the way I read that, any document that

18 was given to, who was it, the DEA that issued

19 the subpoenas?

20 MR. SHKOLNIK: Yes.

21 SPECIAL MASTER COHEN: Any

22 document that was given to the DEA in response

23 to any of those subpoenas, and I would think

24 that a subpoena issued to a facility that is

25 shipping opioids -- having to do with the

1 shipping of opioids is relevant to this

2 litigation. Every document needs to be

3 produced. That's just a plain reading of it,

4 and to get to a different result is torture.

5 MS. DESH: I would like to make

6 one -- give one explanation there. That's

7 understood, and we are trying to sort of do our

8 due diligence as it relates to Perrysburg. One

9 of the aspects of it is that at the time the

10 222s were all paper, and so there was --

11 SPECIAL MASTER COHEN: Let's skip

12 the 222s for the moment.

13 MS. DESH: 222s and 106s are also

14 -- they're all paper documents about laws.

15 Actually, neither of them are requested in

16 Plaintiffs' RFPs. If we put them aside --

17 SPECIAL MASTER COHEN: I don't

18 think they had to be requested. I think you

19 were already ordered to produce them.

20 But let's ignore for a second the 222s

21 for whatever reason. I still want to make sure

22 that you've produced to the Plaintiffs all

23 documents responsive to subpoenas that were

24 served by the DEA on any facility anywhere that

25 had to do with opioids, including, for example,

1 California, which is the first time I'm hearing

2 of this.

3 I mean, I think we should start with --

4 you need to go back and make a list of every

5 single prior production that you've ever made

6 and then give them all to the Plaintiffs,

7 unless it's privileged, and if it's privileged,

8 put it on a privilege log.

9 MS. DESH: All right.

10 SPECIAL MASTER COHEN: Again,

11 it's all kind of simple. You could make it

12 complicated, but then you get in trouble.

13 MS. DESH: The subpoenas to

14 distribution centers, is that what you're

15 saying?

16 SPECIAL MASTER COHEN: A subpoena

17 to a distribution center is by definition, if

18 you responded to the subpoena, a document

19 previously produced pursuant to investigation.

20 There's no way to call it anything else. Am I

21 missing something? Am I wrong?

22 MS. DESH: Well, no. We will

23 work on that. We --

24 SPECIAL MASTER COHEN: I'm

25 hearing I'm not wrong.

1 MS. DESH: We'll work on that.
 2 I do want to address the issue, though,
 3 as we are investigating this issue with respect
 4 to Perrysburg, we have found that the --
 5 because it's just paper documentation, it's
 6 voluminous and --

7 SPECIAL MASTER COHEN: If you
 8 want to call them up and say, hey, we have an
 9 obligation under the CMO to produce this to
 10 you, and we'll do it because the Court has
 11 ordered it if you really want it, but are you
 12 sure you want all this stuff.

13 MS. DESH: That's sort of what
 14 I'm asking.

15 SPECIAL MASTER COHEN: Again,
 16 it's fairly simple. You call them up, you say,
 17 we understand we have an obligation ordered by
 18 the Court long ago to do this, but that would
 19 mean that we're going to dump all of this stuff
 20 on you, are you sure you want it, and if they
 21 say, yes, then you have to say, well, that's a
 22 pain in the ass, but the Court ordered it.

23 MS. DESH: Could we ask that now
 24 with respect to the Perrysburg one, because I
 25 have gone out there and seen the volume, and

1 it's large?

2 SPECIAL MASTER COHEN: You could
 3 talk about it if you want, but it may be better
 4 later. It's getting late.

5 MS. DESH: Yeah, I do have a
 6 flight.

7 MR. SHKOLNIK: I could answer
 8 her. We want it for each one of the
 9 facilities. We were entitled to it six months
 10 ago where we would have had a chance to go
 11 through it slowly, but now we have to go
 12 through it all quickly.

13 And we know it was also produced
 14 electronically at some point somewhere.

15 MS. DESH: So that's not true.
 16 It was not produced electronically.

17 MR. SHKOLNIK: But either way, we
 18 want it.

19 MS. DESH: Let's have a
 20 discussion about that, and there might be an
 21 opportunity for inspection. That could be
 22 another option.

23 SPECIAL MASTER COHEN: That's
 24 fine. Have the colloquy. Try and figure out a
 25 way to make it easy for each other, but my

1 ruling is my ruling, and I think that it is
 2 fairly clear. So let's move to another topic
 3 so we're not here until midnight.

4 MR. SHKOLNIK: I may have a quick
 5 one, so let me jump to -- do you mind if I
 6 interrupt?

7 MR. MOUGEY: Let's take 5 off the
 8 table, so there's another one.

9 MR. SHKOLNIK: If we go to the
 10 contracts, we seem to be playing another words
 11 going back and forth.

12 SPECIAL MASTER COHEN: I think I
 13 addressed -- is this like with IQVIA and
 14 similar matters?

15 MR. SHKOLNIK: IQVIA and Purdue
 16 contracts --

17 SPECIAL MASTER COHEN: I
 18 addressed that yesterday on the record.

19 MR. SHKOLNIK: This is not just
 20 IQVIA, this is like contracts with Purdue and
 21 other entities. I didn't hear that yesterday.

22 SPECIAL MASTER COHEN: Let's go
 23 over it real quick. I'm telling you that
 24 anything that had to do with what I was
 25 referring to as auditing yesterday, which was

1 like IQVIA, IMS and any other entity like that,
 2 the contracts between anybody and those
 3 entities had to be produced. If that's
 4 different --

5 MR. SHKOLNIK: That's part of it,
 6 so I'm not going to rehash that.

7 Even though a lot of contracts have now
 8 been produced in the last two weeks --

9 MR. WEINBERGER: Wait a minute.
 10 The contracts that you addressed yesterday had
 11 to do with basically SOMs-related information.
 12 This is broader than that because it includes
 13 contracts with Purdue that have nothing to do
 14 with SOMs.

15 MR. SHKOLNIK: I was going to say
 16 this is separate. I'm not going to talk to the
 17 IQVIA.

18 You had already entered an order about
 19 producing the contracts by, I think it was, the
 20 21st of December. A number of contracts were
 21 produced, and we know there's more contracts,
 22 specifically with respect to Purdue, who is
 23 under contract with Walgreens to provide CME,
 24 continuing medical education. We know there
 25 was information, data sharing contracts, and

1 the response --

2 SPECIAL MASTER COHEN: Do you

3 have them for Purdue?

4 MR. SHKOLNIK: We have unsigned

5 ones from Purdue, which I asked for at the

6 deposition. We would like to see the Walgreens

7 side of this.

8 We have some where Purdue signed it, but

9 we don't have the Walgreens side, and there are

10 documents out there that we -- and even

11 counsel, I think, in response says, we'll go

12 back and look now. I would just like a

13 timeframe that we could be sure as to Purdue in

14 particular or any --

15 MS. DESH: Purdue in particular?

16 MR. SHKOLNIK: Or any of the

17 manufacturers' contracts that have not been

18 produced regarding either -- any of the

19 contracts between you.

20 MS. DESH: So we produced our

21 contracts. You identified ones from Purdue

22 that, in particular, you think are missing. We

23 are working on that, and if we find any

24 additional ones, we'll produce them next week.

25 MR. SHKOLNIK: That's it.

1 SPECIAL MASTER COHEN: Next.

2 MR. SHKOLNIK: If we go to number

3 6, at the deposition, I think it was Mr.

4 Bratton's deposition, there was questioning --

5 this is Bratton as a fact witness, not as a

6 30(b)(6).

7 MS. DESH: The mortality data has

8 been produced.

9 MR. SHKOLNIK: Is it the

10 one-page? We have one page that is all

11 completely redacted except for one column of

12 numbers.

13 He talked about a lot of data regarding

14 high prescribing doctors, that they were

15 collecting it and the Chief Medical Officer was

16 doing this study, and it involved integrating

17 mortality and prescriptions.

18 What you gave us is one paper, and I

19 searched -- I'm not the best one at RICO, but I

20 had a couple other people help me. We got one

21 page with two giant columns blocked out and

22 some data on the other side. We looked this

23 morning, and that's all we found. Is that what

24 you're talking about?

25 MS. DESH: So I asked Mr. Bratton

1 after your order for the mortality reports. He

2 sent them to me. I think there were maybe six

3 total, one of which had the title Mortality in

4 it, and we've produced those. So I did ask the

5 witness for those reports.

6 MR. MOUGEY: I knew it. I kept

7 saying this. So there is no title Mortality.

8 I went back and read the transcript today. The

9 study was pulling data from Walgreens' database

10 and connecting or correlating the dispensing --

11 high-risk dispensers with the mortality data.

12 So he took the CDC data and Walgreens' database

13 and merged the two.

14 We did mention the word "mortality," and

15 I knew when we put a label on it, I've been

16 saying this for two or three weeks, guys, you

17 put a label, mortality -- what was it?

18 MR. SHKOLNIK: In the deposition

19 that was the easiest way to reference it.

20 MR. MOUGEY: That was just a

21 caption that we put on it. So really what

22 we're looking for is the study that this

23 gentleman identified in his testimony that he

24 took.

25 What I thought was awfully interesting as

1 well was, this is going to come up in expert

2 reports of taking CDC data, dispensing data,

3 shipping data and looking at those to try to

4 discern solutions to this problem, and

5 Walgreens was conducting this study all the way

6 -- this gentleman's boss reviewed the analysis

7 and sent it to the CMO.

8 So not only is this report --

9 SPECIAL MASTER COHEN: CMO is

10 Chief Medical Officer?

11 MR. MOUGEY: Yes. Thank you.

12 I'm glad I'm not the only one who asked it.

13 SPECIAL MASTER COHEN: Who was

14 testifying about this? It was Bratton as a

15 fact witness?

16 MR. SHKOLNIK: It was Bratton as

17 a fact witness.

18 SPECIAL MASTER COHEN: So I

19 already ordered that "the study" be produced.

20 MR. MOUGEY: Yes.

21 SPECIAL MASTER COHEN: And so

22 maybe because it was given a label, there's a

23 misunderstanding as to what it is that has to

24 be produced.

25 What I'm hearing is that there were

1 investigative actions undertaken to correlate
2 mortality with drugs, and Bratton knows what
3 that means. So I think you need to go back to
4 Bratton and say, okay, the Special Master of
5 the Court ordered us to produce everything that
6 you did to understand that. That is "the
7 study". All the work you did, all the reports
8 you ran, all the memos you wrote, everything
9 that has to do with that examination of that
10 fact. That's probably broader than maybe what
11 was understood earlier.

12 MR. SHKOLNIK: I don't mean to
13 interrupt, but it was the CMO, as I understand
14 it, did the study, did the actual -- he had all
15 the data, and he was doing a study or a paper
16 on that topic. So it's not just Bratton's
17 stuff, it's the CMO's.

18 SPECIAL MASTER COHEN: Right.

19 MS. DESH: But to clarify, the
20 Chief Medical Officer, I don't think he works
21 for Walgreens anymore, I don't know if we have
22 access to him. I will go back and ask Mr.
23 Bratton. I did ask him to provide me all the
24 documents that were related to that.

25 So to the extent -- and they also have

1 Mr. Bratton's e-mail custodial file as well.
2 So I can ask him to provide me everything that
3 he has collected related to that that he's
4 aware of. I thought I did that already,
5 but....

6 SPECIAL MASTER COHEN: Maybe you
7 have, but I think you should try and make sure
8 that whatever Bratton did to undertake that
9 analysis and, from what I understand, gave to
10 the CMO so that he could understand it is
11 something that needs to be produced, and you
12 should probably try and find the CMO's files to
13 see the extent to which, you know, Bratton
14 produced it, the CMO received it, same as the
15 Purdue-Walgreen contracts, get both sides.

16 MS. DESH: Okay. I'll see what
17 we're able to do on that end, but I will work
18 with Mr. Bratton on this.

19 SPECIAL MASTER COHEN: Thank you.

20 MR. MOUGEY: The other ones I
21 think are -- a couple of these are relatively
22 quick.

23 8 and 9 have to do regarding Mr. Mills.
24 Mr. Mills during his testimony said that he --
25 I don't think we have the language in our

1 packet, but essentially that he had a file that
2 he kept related to the DEA.

3 He said there were many documents, and we
4 asked him specifically what. He said documents
5 related to the DEA. Has anyone asked you or
6 did you produce this file to counsel, and I
7 believe the answer was no.

8 The answer we got from Walgreens, which
9 is on Page 3 of 4, about Mr. Mills' file --
10 it's F on Page 3 of 4 and includes 8 and 9,
11 says "Complete," and this is where I was
12 still -- when we got this last night, I was not
13 exactly sure where we were.

14 Walgreens has produced all responsive
15 non-privileged documents for Mr. Mills, as
16 confirmed on December 6th, and I'm still
17 concerned about all responsive non-privileged
18 off of his file that he said that he had not
19 produced to counsel. At least he didn't think
20 so.

21 SPECIAL MASTER COHEN: Or it's on
22 a privilege log.

23 MR. MOUGEY: I'm sorry. Or it's
24 on a privilege log, that's right. I'm still
25 wondering what exactly that means.

1 SPECIAL MASTER COHEN: Where are
2 you reading?

3 MR. MOUGEY: Ms. Desh's letter on
4 Page 3 of 4 under F, Steve Mills' Documents, 8
5 and 9.

6 SPECIAL MASTER COHEN: Page 3?

7 MR. MOUGEY: Yes. I'm not 100
8 percent certain on the privilege log, but I'd
9 like to be able to figure out which ones were
10 in his desk -- Ms. Desh told me what it became,
11 and I'll figure that out, but what was on his
12 desk in his file related to the DEA in his job
13 in Pharmaceutical Integrity, and when I asked
14 him if he produced it to counsel, and someone
15 could correct me if I'm wrong, I'm fairly
16 certain the answer was that he wasn't sure.

17 And so we asked Walgreens to go back and
18 look at the file and see if it was produced,
19 and the answer we got is all non-responsive
20 documents were produced -- I'm sorry, all
21 responsive documents non-privileged were
22 produced, but we don't know where they are and
23 we don't know if they're on a privilege log,
24 and what constitutes non-responsive -- I'm
25 sorry, I said it again -- responsive documents.

1 I'm tired. That's what happens when you fly
2 from two cities to take a deposition.

3 MS. DESH: We did go back to
4 Mr. Mills asking him for those hardcopy
5 documents. We looked at them. A lot of them,
6 I think almost all of them actually were, or
7 maybe all of them were, printouts of things he
8 had electronically, which we also have them
9 tabbed when we did his electronic production.
10 So they have everything from Mr. Mills. We
11 completed that investigation.

12 MR. SHKOLNIK: If I could just
13 add one point to that. We've had this issue
14 with Cuyahoga witnesses where there was "the
15 same documents in the person's office," but the
16 request was very clear, and no one backed off,
17 and they said we want the copies that are in
18 the office for very good reason. On the backs
19 of pages, on margins, usually when there's a
20 hardcopy versus the electronic, there's a
21 reason why people print them out, some people
22 are slow like me and need them printed out, and
23 the idea that -- the fact that you have a
24 version of it in electronic should not override
25 the fact that he says they were clearly

1 responsive documents that were in his
2 possession in his office for us to see, and we
3 would like to know if there's notes.

4 MS. DESH: And we did go and we
5 did get those hardcopies and reviewed them, and
6 they have everything that's responsive.

7 SPECIAL MASTER COHEN: I'm taking
8 her word for it. What's next?

9 MR. SHKOLNIK: I think it's the
10 last one.

11 MR. MOUGEY: You have 19 and 20.
12 What was 19, the involvement and reference to
13 files from RICO?

14 MR. SHKOLNIK: Right.

15 MR. MOUGEY: 20 we just wanted to
16 kind of give you an update of where we think we
17 are. 20 is just the attorney-client issue, and
18 I'm not going to get into the specifics on
19 anything, I just wanted to give you a little
20 report and feedback on how you would like us to
21 proceed.

22 I don't remember how long ago, but we had
23 an order from you that there was a -- that
24 Walgreens was to produce approximately 27-ish
25 documents that they had produced to the DEA but

1 were on their privilege log.

2 MS. DESH: I'm sorry. What are
3 you referring to?

4 MR. MOUGEY: 20.

5 MS. DESH: I know, but which
6 order?

7 MR. MOUGEY: I don't remember off
8 the top of my head.

9 MS. DESH: I don't think that
10 there's any order that we produce documents off
11 the privilege log.

12 SPECIAL MASTER COHEN: To me for
13 in camera inspection.

14 MS. DESH: Oh, okay.

15 MR. MOUGEY: So to you for in
16 camera inspection there were about 27 of those,
17 and then there was approximately 20, 21
18 additional documents that were exemplars of
19 documents that were on the privilege log under
20 Walgreens' SOM as examples of what we had
21 identified and sent to you as well.

22 I think you have approximately 48
23 documents to review in camera on, I'm going to
24 say testing or looking at those documents to
25 compare to the privilege log of what was

1 withheld, waiver argument with the DEA. So
2 those issues are still yet -- I think at this
3 point we have 14,100 documents on Walgreens'
4 privilege log. It's approximately 9 percent of
5 their total production on their privilege log.

6 So we were kind of anxious with the
7 impending deadline to get to the veracity of
8 some of those entries and what's been withheld
9 that spills over into some of the depositions
10 where Walgreens' witnesses are being instructed
11 not to answer questions about details on their
12 suspicious order monitoring system based on
13 attorney-client. So it's rippling into some of
14 the testimony as these depositions go on.

15 SPECIAL MASTER COHEN: I know. I
16 understand. I hear you, and I get that this is
17 really one of the more important and critical
18 issues that you all would like me to look at it
19 immediately or sooner. So I get the status
20 report. Is there anything else that I need to
21 know besides that I need to get to it?

22 MR. MOUGEY: No.

23 SPECIAL MASTER COHEN: Let me ask
24 you a question --

25 MR. MOUGEY: What could we do to

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1 help you, I guess is part of it?

2 SPECIAL MASTER COHEN: So two

3 things. One, I sent out an e-mail, I think it

4 was at 3 o'clock in the morning --

5 MR. SHKOLNIK: Yes, 2:20.

6 SPECIAL MASTER COHEN: -- saying

7 that I have the agenda, here are the 10 or a

8 dozen agenda items that have to do with

9 privilege review, confidentiality, something

10 that I'm supposed to do with documents or

11 designations and the letters that go to those,

12 but I don't always necessarily know, because of

13 the size of my Inbox anymore, where the e-mail

14 is that sent to me the documents that I'm

15 supposed to review.

16 MR. MOUGEY: Sure.

17 SPECIAL MASTER COHEN: So I need

18 that. That will help.

19 MR. SHKOLNIK: Since we're

20 talking 20 SOMs, those are the more important

21 ones obviously, 20 SOMs, would it be easier

22 having those in a binder? I know you like

23 electronically.

24 SPECIAL MASTER COHEN: Sure, I'll

25 take a hardcopy.

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1 MS. DESH: I would have to

2 provide those, I think.

3 SPECIAL MASTER COHEN: Yeah,

4 since it is only 20 documents, if you could

5 send those out, that would be great.

6 MR. MOUGEY: I'm sorry. I think

7 it's 20, 21 on the waiver issue, I think about

8 -- and I might have them wrong, but there's

9 approximately 15, half is waiver and half is

10 SOM, but I would love to be able to get those

11 to you, distinguish which ones are which, and

12 what we could do is send to Ms. Desh the

13 pleadings, and then you could have it all in

14 one, the pleadings, orders, so you can see it

15 all at once because the arguments to the two

16 are different.

17 SPECIAL MASTER COHEN: Right.

18 Hold on a second because I need to look at

19 something.

20 Am I correct that the structure of the

21 issues that were given to me was or included

22 the initial assertion that these were

23 dispensing documents and therefore irrelevant,

24 and I didn't even have to get to the privilege

25 issue? Am I remembering the correct collection

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1 of documents?

2 MS. DESH: That was correct. On

3 the first set that were included as part of our

4 Florida prior production, yes, that's correct.

5 SPECIAL MASTER COHEN: And I

6 think there were 27 of those?

7 MS. DESH: I can't recall the

8 exact number.

9 MR. SHKOLNIK: Give or take, it

10 sounds about right.

11 SPECIAL MASTER COHEN: I actually

12 think I have an answer on that from one of the

13 other Special Masters, so that might come

14 pretty quickly. But why don't you send me

15 everything, and I'll try to give it to you all

16 at once.

17 MS. DESH: That's fine. And we

18 are continuing to go through as we prep for

19 depositions and all that and make sure that

20 we're in compliance with the order. I will get

21 that to you.

22 SPECIAL MASTER COHEN: Anything

23 else?

24 MR. SHKOLNIK: Thank you so much

25 for your time.

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1 MR. MOUGEY: Thank you.

2 SPECIAL MASTER COHEN: Thank you.

3 (Proceedings concluded at 6:37 p.m.)

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REPORTER'S CERTIFICATE

I, Jill A. Kulewsky, do hereby certify that as such Reporter I took down in Stenotypy all of the proceedings had in the foregoing transcript; that I have transcribed my said Stenotype notes into typewritten form as appears in the foregoing transcript; that said transcript is the complete form of the proceedings had in said cause and constitutes a true and correct transcript therein.



Jill A. Kulewsky, Notary Public
within and for the State of Ohio
My commission expires August 31, 2020.