STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 30, 2019]

STATE OF RHODE ISLAND,	:	
by and through,	:	
PETER NERONHA,	:	
Attorney General,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. NO. PC-2018-4555**
	:	
PURDUE PHARMA L.P.; PURDUE PHARMA INC.;	:	
THE PURDUE FREDERICK COMPANY, INC.;	:	
RHODES PHARMACEUTICALS L.P.; RHODES	:	
TECHNOLOGIES; RHODES TECHNOLOGIES	:	
INC.; RICHARD S. SACKLER; INSYS	:	
THERAPEUTICS, INC.;[1] JOHN N. KAPOOR; [2]	:	
TEVA PHARMACEUTICALS USA, INC.;	:	
CEPHALON, INC.; MALLINCKRODT PLC;	:	
MALLINCKRODT, LLC; SPECGX, LLC;	:	
CARDINAL HEALTH, INC.; MCKESSON	:	
CORPORATION d/b/a MCKESSON DRUG	:	
COMPANY; and AMERISOURCEBERGEN DRUG	:	
CORPORATION,	:	
Defendants.	:	

DECISION

GIBNEY, P.J. Before this Court is a Motion by Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company, Inc., (collectively Purdue) to Compel more complete responses

[1] On June 11, 2019, the State voluntarily dismissed all claims asserted against Insys Therapeutics, Inc. (Insys) pursuant to Super. R. Civ. P. 41(a)(1)(A), which allows a plaintiff to file a notice of voluntary dismissal at any time prior to the service by an adverse party of an answer or a motion for summary judgment. As Insys did not file an answer or a motion for summary judgment in this matter, the State voluntarily dismissed all claims against Insys without prejudice.

[2] On June 17, 2019, the State voluntarily dismissed all claims asserted against John N. Kapoor without prejudice, also pursuant to Super. R. Civ. P. 41(a)(1)(A).

to its requests for production of documents and interrogatories. Purdue brings this Motion pursuant to Super. R. Civ. P. 37 and moves to overrule the State of Rhode Island's (the State) objections to Purdue's November 16, 2018 discovery requests and to order production of all responsive documents and substantive answers to interrogatories within fifteen days of entry of an Order from the Court. AmerisourceBergen Drug Corporation; Cardinal Health, Inc.; and McKesson Corporation d/b/a McKesson Drug Company (collectively Distributor Defendants or Distributors) join portions of Purdue's Motion to Compel, specifically those portions pertaining to patient- and prescription-level discovery. The State objects to both Purdue's Motion to Compel and Distributor Defendants' Joinder in Portions of Purdue's Motion to Compel. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

This motion arises from an ongoing action in which the State, by and through its Attorney General, Peter Neronha,[3] seeks to recover for damages allegedly caused by the opioid epidemic from numerous defendants comprised of opioid manufacturers, distributors, and individuals with executive positions (or former executive positions) at defendant organizations. For a more thorough recitation of the facts underlying this dispute, the Court refers readers to *State v. Purdue Pharma L.P.*, No. PC-2018-4555, 2018 WL 6074198 (R.I. Super. Nov. 15, 2018).

On June 25, 2018, the State of Rhode Island, by and through its Attorney, General Peter Kilmartin, filed a Complaint against manufacturers and distributors of prescription opioid pharmaceutical products, seeking to hold them liable for alleged damages to the State resulting

[3] Attorney General of Rhode Island, Peter Kilmartin, filed the Complaint in June 2018. He has since been succeeded by Peter Neronha.

from the opioid crisis. On September 4, 2018, the State moved to compel Defendants' responses to the State's first request for production of documents and to provide Rhode Island-specific discovery. In response, Defendants moved to stay such discovery until the Court decided a motion to dismiss that these Defendants explained was forthcoming. On November 15, 2018, this Court rendered a decision denying Defendants' motion to stay and granting the State's motion to compel, allowing discovery to move forward notwithstanding Defendants' motion to dismiss (the November Order). Discovery is ongoing pursuant to the November Order.

On May 16, 2019, Purdue moved to compel more complete responses to its requests for production of documents. Purdue argues that—in spite of the fact that is has complied with the November Order—the State has not produced a single document in response to Purdue's interrogatories and requests for production of documents served on November 16, 2018. Additionally, Purdue argues that the State has engaged in dilatory tactics and improper objections in an attempt to avoid its discovery obligations. Ultimately, Purdue maintains that it cannot adequately defend itself against the State's claims without having the opportunity to explore alternate causes of the opioid epidemic through the discovery process. The State objects to Purdue's Motion to Compel, arguing that it has properly complied with its discovery obligations and that Purdue's requested discovery is improper under Rhode Island law.

On June 18, 2019, Distributor Defendants joined Purdue's motion in part, specifically with respect to Purdue's requests for patient- and prescription-level data and discovery. The State objects to Distributor Defendants' motion. This Court heard argument on June 28, 2019.

II

Standard of Review

Pursuant to Super. R. Civ. P. 26(b), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Super. R. Civ. P. 26(b)(1). It is not ground for objection to a discovery request that the information sought may not be admissible at trial. *Id.* Under Super. R. Civ. P. 33 and 34, a party may serve any other party with interrogatories or request documents that related to any matter within the scope of Rule 26(b). If the party that received the request fails to respond, the opposing party may move for a court order under Super. R. Civ. P. 37(a), and the court may impose sanctions upon litigants who refuse to participate in discovery. Super. R. Civ. P. 37(b); *see also Senn v. Surgidev Corp.*, 641 A.2d 1311, 1320 (R.I. 1994) (explaining that "Rule 37(b) . . . affords the court very broad discretion" in imposing sanctions for refusal to participate in discovery).

It is well-settled that the trial court has broad discretion over matters of discovery. *Martin v. Howard*, 784 A.2d 291, 296 (R.I. 2001) (citing *Colvin v. Lekas*, 731 A.2d 718, 720 (R.I. 1999)); *see also Bashforth v. Zampini*, 576 A.2d 1197, 1201 (R.I. 1990). This discretion extends to motions to compel discovery, which will only be disturbed by the Supreme Court in the event it finds "an abuse of that discretion." *Colvin*, 731 A.2d at 720 (citing *Corvese v. Medco Containment Services, Inc.*, 687 A.2d 880, 882 (R.I. 1997)). In reviewing discovery orders for abuse of discretion, our Supreme Court has adopted a test "to determine relevancy . . . [that examines] 'whether the material sought is relevant to the subject matter of the suit, not whether it is relevant to the precise issues presented by the pleadings.'" *Cardi v. Medical Homes of Rhode Island, Inc.*, 741 A.2d 278, 279 (R.I. 1999) (quoting *DeCarvalho v. Gonsalves*, 106 R.I. 620, 627, 262 A.2d 630, 634 (1970)).

III

Analysis

Purdue argues that the State's lack of cooperation with the discovery process is preventing Purdue from adequately defending itself against the State's claims. Specifically, Purdue seeks to learn of possible causes of the opioid epidemic, alternate to the State's allegations of Purdue's fraudulent marketing. However, Purdue maintains that the State has not responded to Purdue's discovery requests, that the State has improperly delayed discovery, and that the Court should therefore order the State to fully respond to Purdue's discovery requests within fifteen days. Purdue submits that the State's objections on the basis of privilege are unreasonably vague and lack privilege logs and argues that these objections should, therefore, be deemed waived. Purdue adds that the State inappropriately claims information is not in its possession, custody, or control. Moreover, Purdue argues it is entitled to information available to the State, and the fact that information is in the public domain is not grounds for objection.

Purdue further contends that the State's objections to providing patient- and prescription-level discovery are inappropriate. The State has objected to providing discovery materials related to individual prescriptions of Purdue's opioid medications, individuals who were allegedly harmed by these medications, and the causal connection between Purdue's alleged wrongdoing and individual prescription matters. Purdue argues that the State's objections based on "proportionality and relevance" fail to account for the State's allegations in the case, which entitle Purdue to explore documents and information related to individual patient and prescription information, particularly in response to the State's causes of action under the State False Claims Act and public nuisance.

Finally, Purdue argues that multiple courts have found that nearly identical discovery in related opioid actions is both relevant and discoverable. For example, Purdue notes that Judge

Polster of the United States District Court for the Northern District of Ohio (the MDL Court), who is currently presiding over the national Opioid Multidistrict Litigation (the MDL), recognized that individual, prescription level data is vital in allowing defendants to establish defenses to all plaintiffs' claims, and rejected the plaintiffs' proposal to produce de-identified data.[4] Instead, Judge Polster required such information be produced on an "Identified Basis."[5] *In re National Prescription Opiate Litigation*, No. 2804, Doc #: 1051. Purdue also cites a California court facing a similar discovery motion in a related opioid action, which found that prescription-level data was relevant to the question of causation. *See People v. Purdue Pharma et al.*, No. 30-2014-00725287-CU-BT-CXC, Discovery Referee's Report & Recommendation No. 1 (Cal. Super. Ct. Orange Cty. Jan. 18, 2019). Thus, Purdue entreats this Court to compel the State to produce Purdue's requested discovery within fifteen days.

The State objects to Purdue's motion, setting forth five bases for such objection. First, the State argues that identifiable patient-level data is not relevant to the subject matter of the lawsuit and that Purdue's need for such data does not outweigh the substantial privacy concerns at stake. Second, the State argues that the remainder of Purdue's motion is contrary to the spirit of the rules because it raises arguments on issues upon which the parties agreed, submitting that the parties met and conferred by phone on March 26, 2019 during which time they agreed upon issues related to privilege logs, supplemental interrogatories, and the parameters of the State's possession, custody, and control. Third, the State argues that it supplemented its answers to interrogatories per the parties' agreement. Fourth, the State will produce a privilege log if and when it withholds

[4] "De-identified data" refers to discovery materials originally containing patient-identifying information such as names, social security numbers, and dates of birth, which has been removed prior to the production of such materials.

[5] Discovery produced on an "identified basis" refers to discovery materials which include patient-identifying information such as names, social security numbers, and dates of birth.

privileged materials. Lastly, the State argues that it previously defined the scope of its possession, custody, and control in meetings with Purdue, and is aware of its obligation to produce non-privileged materials that fall within this scope.

According to the State, Rhode Island and federal law preclude its production of the patient- and prescription-level data and do not authorize this Court to order production of individual medical histories absent patient consent. The State also maintains that its claims address the cumulative impact of the alleged overabundance of prescription opioids—rather than individual harms—therefore, individual prescription- and patient-level discovery is not relevant. The State cites the Rhode Island Confidentiality of Health Care Communications and Information Act, G.L. 1956 § 5-37.3-4(a), along with the federal Health Insurance Portability and Accountability Act (HIPAA), and submits that both prevent the disclosure of confidential health information without patient consent. The State adds that the Protective Order in the case does not ameliorate these deficiencies in Purdue's discovery requests, and that analogous MDL orders are inapplicable here as the MDL is not governed by Rhode Island law. Ultimately, the State asks the Court to allow the production of de-identified patient- and prescription-level data, rather than identified information.

In reply, Purdue asserts that the State is required to produce patient- and prescription-level data, and that Purdue's motion is timely and consistent with the rules. With respect to the relevance of prescription- and patient-level data, Purdue notes that the State must identify individual opioid prescriptions in order to (1) prevail in its State False Claims Act count, (2) to calculate damages, and (3) to establish causation in its public nuisance claim. As such, Purdue argues this discovery is highly relevant. Regarding the State's decision to rely on "aggregate modeling" to prove its claims, Purdue asserts that this strategic decision has no bearing upon the scope of discovery.

Purdue further argues that disclosure of patient- and prescription-data is not unduly burdensome, and that HIPAA and state privacy laws do not prevent production of such data. Moreover, Purdue submits that the State's conduct since receipt of Purdue's discovery requests has been unreasonably dilatory and that its arguments misrepresent the course of events. Noting that the State is correct that it has supplemented interrogatories since the parties' March 26, 2019 conference, Purdue seeks an order compelling additional outstanding discovery. Finally, Purdue argues that the State must produce a privilege log and must define the scope of its possession, custody, and control.

Distributor Defendants join Purdue's motion in portions. Specifically, Distributors join Purdue's argument concerning the need for prescription-level discovery, found on pages 15 through 19 of Purdue's Motion to Compel,[6] as well as Purdue's argument that the State must produce patient- and prescription-level data, found on pages 2 through 9 of Purdue's Reply Memorandum to the State.[7] The State objects to Distributor Defendants' joinder in portions of Purdue's Motion to Compel for the same reasons it objects to Purdue's motion, discussed above.

Under Rhode Island's Confidentiality of Health Care Communications and Information Act (CHCCIA), "a patient's confidential health care information shall not be released or transferred without the written consent of the patient, or his or her authorized representative." Sec. 5-37.3-4(a). Moreover, the CHCCIA sets forth that "confidential *health care communications shall not be subject to compulsory legal process in any type of judicial proceeding*, and a patient

[6] Pages 15 through 19 of Purdue's Motion to Compel detail Purdue's argument that the State's objections to providing prescription-level discovery are inappropriate.

[7] Pages 2 through 9 of Purdue's Reply Memorandum to the State are comprised of Purdue's argument that the State is required to produce patient- and prescription-level data because (1) patient- and prescription-level data are relevant to the State's claims and Purdue's defenses, (2) the State's decision to rely on "aggregate modeling" has no bearing on the scope of discovery, and (3) disclosure of patient- and prescription-level data is not unduly burdensome.

or his or her authorized representative has the right to refuse to disclose, and to prevent a witness from disclosing, his or her confidential health care communications in any judicial proceedings." Sec. 5-37.3-6 (emphasis added). However, the Supreme Court has found § 5-37.3-6 unconstitutional because it "rendered confidential health-care information not subject to compulsory legal process in any judicial proceedings[, thereby] . . . violat[ing] the separation of powers guarantee of the Rhode Island Constitution because it 'remove[d] from the court's discretion the determination of admissibility of otherwise relevant evidence.'" *Pastore v. Samson*, 900 A.2d 1067, 1084 (R.I. 2006) (quoting *Bartlett v. Danti*, 503 A.2d 515, 517 (R.I. 1986)). Accordingly, patient consent is not required for a court to compel the release of confidential healthcare information. *See also Washburn v. Rite Aid Corp.*, 695 A.2d 495, 498 (R.I. 1997).

Related Rhode Island statutes support the Court's ability to compel confidential healthcare information when it deems this information necessary in a legal proceeding. Under Rhode Island's Drug Abuse Reporting System, "physicians shall maintain [] confidentiality with respect to the identity of the individuals involved except where ordered to the contrary by any court of competent jurisdiction in the state." G.L. 1956 § 21-28.3-3. Moreover, § 21-28-5.10 states that

> "[p]rescriptions, orders, and records required by this chapter, and stocks of controlled substances, shall be open for inspection only to federal, state, county, and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to controlled substances. No person having information or knowledge by virtue of his or her office of any prescription, order, or record shall divulge or shall be required to divulge that information or knowledge, *except in connection with a prosecution or proceeding in court*." (Emphasis added.) Sec. 21-28-5.10.

Accordingly, this Court may compel the disclosure of confidential healthcare information. This includes individual patient healthcare information generally, as well as information related to the treatment and rehabilitation of victims of drug abuse. *Id.*; *see also Pastore*, 900 A.2d at 1084-85.

Federal law sets forth similar parameters for the discoverability of confidential healthcare information. HIPAA regulations generally prohibit disclosure of protected health information, but such disclosure is exempted if required by law. 45 C.F.R. § 164.502; *see also* 45 C.F.R. § 164.512(a)(1) ("[a] covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law"). However, under 42 C.F.R. § 2.12(a)(i)-(ii), disclosure of substance use disorder patient records is restricted if such disclosure "[w]ould identify a patient as having or having had a substance use disorder," and such information is "obtained by a federally assisted drug [or alcohol] abuse program."

Although not subject to the laws of Rhode Island, the MDL Court has faced similar issues as those raised in the within motion. In response to related motions, the MDL Court ordered plaintiffs to produce "claims information for any patient who received an opioid prescription, including records of medical treatment for that patient where no opioid prescription was provided." *In re National Prescription Opiate Litigation*, Case No. 1:17-MD-2804, Doc #: 703 (N.D. Ohio July 3, 2018) (limiting this request by requiring de-identified data with respect to "any claims records concerning the treatment of substance abuse that are within the scope of Title 42, Part 2 of the Code of Federal Regulations"). The MDL Court generally rejected the proposition that de-identified claims data was sufficient and ordered plaintiffs to produce "on an 'Identified Basis,' all prescription claims data and medical claims data . . . related to opioid prescriptions that were reimbursed or denied payment by or on behalf of Plaintiffs." *See In re National Prescription Opiate Litigation*, Case No. 1:17-MD-2804, Doc #: 1051 (N.D. Ohio Oct. 21, 2018) (defining "Identified Basis" as "the name, address, social security number, and date of birth of recipients of the prescriptions are included and in a form that readily allows each prescription to be associated with each recipient"). Finally, the MDL Court required that plaintiffs identify 500 prescriptions

that plaintiffs alleged were medically unnecessary, ineffective, or harmful and to produce claims data associated with those prescriptions. *See In re National Prescription Opiate Litigation*, Case No. 1:17-MD-2804, Doc #: 1027 (N.D. Ohio, Oct. 6, 2018) (narrowing the permissible scope of the Defendants' interrogatory from "all prescriptions" to "500 prescriptions").

Here, the Court is satisfied that the information Purdue seeks to obtain through discovery, including the patient- and prescription-level data, is relevant to the State's claims and is not exempted from discovery by state or federal law. Super. R. Civ. P. 26(b)(1). As discussed *supra*, Rhode Island law allows for the disclosure of confidential healthcare information in the face of a court order, as do federal HIPAA regulations. *Pastore*, 900 A.2d at 1084; 45 C.F.R. § 164.512. As argued by Purdue, the State has brought numerous claims against Purdue, and Purdue is entitled to conduct the discovery necessary to defend itself against these claims. Moreover, the Court is satisfied that Purdue requires identified patient information in order to investigate the possible existence of causal links between opioid prescriptions of specific individuals and subsequent harms to these persons. As such, the Court grants Purdue's motion, and orders the State to produce Purdue's requested documents and interrogatories on an Identified Basis, with the exception of any discovery requests for substance use disorder patient records obtained by a federally assisted drug abuse program as defined under 42 C.F.R. § 2.12(a). Such information must be produced in a de-identified format.

Due to the sensitive nature of the information in issue, all documents and interrogatory requests that involve identified patient- and prescription-level data must be marked "Highly Confidential – Attorneys' Eyes Only," and Purdue must safeguard such information pursuant to this Court's March 5, 2019 Protective Order. Moreover, the Court orders the State to produce these discovery materials within thirty days of entry of this Decision—rather than within the

fifteen-day period of time that Purdue requests—as the scope of the information Purdue requests is potentially broad. For all matters for which the State claims a privilege, it must produce a privilege log.

In so deciding, the Court is mindful of the State's additional argument presented on August 8, 2019 regarding the Rhode Island Office of Health and Human Services database that the State referred to as an "ecosystem." To the extent that materials in this database relate to Purdue's discovery requests at issue, the State must produce such information. As to those materials that Purdue has requested that are not held therein, the State must produce such materials as well.

IV

Conclusion

For the foregoing reasons, Purdue's Motion to Compel more complete responses to its requests for production of documents and interrogatories is granted. The State must reply to Purdue's outstanding discovery requests discussed herein and must produce such patient- and prescription-level information in an identified manner, with the exception of substance use disorder patient records obtained by federally assisted drug abuse programs as defined under 42 C.F.R. § 2.12(a), which must be produced in a de-identified format. All identified discovery materials must be marked "Highly Confidential – Attorneys' Eyes Only," and must be handled in accordance with the applicable procedures outlined in the March 5, 2019 Protective Order. The State is ordered to produce such information within thirty days of entry of this decision. If the State claims a privilege with respect to any of Purdue's requested discovery, the State must produce a privilege log, also within thirty days of this Decision.

Counsel shall present the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	State of Rhode Island v. Purdue Pharma L.P., et al.
CASE NO:	PC-2018-4555
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 30, 2019
JUSTICE/MAGISTRATE:	Gibney, P.J.
ATTORNEYS:	
For Plaintiff:	Peter F. Neronha, Attorney General
For Defendant:	*SEE ATTACHED LIST