

The Honorable Patrick Oishi
Hearing Date: July 6, 2021
Without Oral Argument

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,

Plaintiff,

v.

JOHNSON & JOHNSON; JANSSEN
PHARMACEUTICALS, INC.;
ORTHO-MCNEIL-JANSSEN
PHARMACEUTICALS, INC., n/k/a
JANSSEN PHARMACEUTICALS, INC.;
JANSSEN PHARMACEUTICA, INC. n/k/a
JANSSEN PHARMACEUTICALS, INC.;
and XYZ Corporations 1 through 20,

Defendants.

NO. 20-2-00184-8 SEA

STATE OF WASHINGTON’S MOTION
TO COMPEL PRODUCTION OF
DOCUMENTS

I. INTRODUCTION

The Johnson & Johnson Defendants (collectively, “Defendants” or “J&J”) spent decades flooding Washington’s communities with deadly, addictive narcotics, and barraging Washington’s citizens—both doctors and patients—with false and misleading information about the risks and benefits of opioids. J&J violated Washington law—and its own code of conduct—with its opioid business strategy. Now, in defense of this case, J&J has violated Washington’s discovery rules. Specifically, J&J is currently withholding more than 114,000 individual documents that are attached to plainly responsive records solely on the subjective basis of *relevance*. J&J does not claim privilege over these documents. Instead, it has stated that the documents generally relate to other,

1 non-opioid products and are purportedly irrelevant, which J&J contends makes such documents
2 nonresponsive to the State’s discovery requests. A review of a sample of the titles, subject lines,
3 and family members of these redacted or withheld “not responsive” documents reveals that many
4 of them are likely anything but. Regardless, J&J cannot selectively withhold portions of documents
5 or attachments to documents based on its own unilateral view of relevance.

6 It is now clear that J&J is violating the agreed Protective Order to withhold plainly
7 responsive documents and material, including documents related to some of the opioids mentioned
8 *by name* in the State’s Complaint (*e.g.*, Duragesic and Nucynta). Accordingly, the State respectfully
9 moves the Court to compel J&J to reproduce unredacted versions of all documents improperly
10 redacted or withheld on the basis of relevance.

11 II. STATEMENT OF FACTS

12 The State brought this action against J&J to hold it accountable for its role in causing and
13 perpetuating Washington’s opioid crisis. The State will not repeat the entirety of its allegations in
14 this Motion but briefly summarizes J&J’s wrongful conduct to put the documents at issue in context.

15 J&J engaged in a massive, multifaceted marketing campaign to promote opioids that was
16 false and misleading and designed to increase prescribing of its own opioids and opioids generally.
17 *See, e.g.*, State’s Amended Compl. (“Am. Compl.”), Dkt. 34-1, ¶ 4.22-28; 4.116–227. J&J waged
18 its campaign on multiple fronts, including:

- 19 (1) deceptively marketing its own opioids (*e.g.*, Duragesic, Nucynta, Ultram, and Ultracet)¹
20 by telling Washingtonians these drugs were safer, less prone to abuse, less addictive,
21 and more beneficial than they were;
- 22 (2) deceptively marketing opioids generally as a class of drugs² to increase prescriber and
23 patient adoption of opioids to treat chronic, non-cancer pain and to discredit the decades
24 of scientific foundations that led to these drugs primarily being used for palliative care,
cancer patients, or short-term acute pain; and

25 ¹ This type of marketing is referred to as “branded” marketing, where J&J is marketing one of
its own brand name drugs and uses the name of the drug in the marketing.

26 ² This type of marketing is referred to as “unbranded” marketing, where J&J does not mention
any of its products by name and simply refers to “opioids.”

1 (3) deceptively convincing doctors and patients that pain was “undertreated” and opioids
2 were the solution.

3 *See id.* J&J channeled millions of dollars through a variety of means into delivering these messages
4 in Washington and throughout the country. For example, J&J inundated doctors’ offices with
5 hundreds of thousands of sales calls from incentive-based sales representatives. *See, e.g., id.*
6 ¶¶ 4.120–123. It published journal articles, disseminated materials from professional societies and
7 advocacy groups that it was simultaneously funding, and used continuing medical education (CME)
8 courses as part of its marketing. *See, e.g., id.* ¶ 4.124. J&J paid speakers and sponsored dinners,
9 seminars, symposia, and conferences to deliver its false and misleading messages. *See, e.g., id.* at ¶
10 4.120. But J&J never had the science or knowledge to back up its misleading marketing, which was
11 designed to increase the prescribing of all opioids and build its opioids into “billion dollar” brands.

12 Unlike any other opioid manufacturer, however, J&J profited no matter whose opioids were
13 sold. J&J—through its subsidiaries and affiliates—was the number one supplier of opioid active
14 pharmaceutical ingredients (API) in the United States for decades. *Id.* at ¶¶ 1.9–12. J&J wholly
15 owned two subsidiaries, Noramco, Inc. and Tasmanian Alkaloids, that operated to research,
16 cultivate, develop, and supply opioid APIs to manufacturers. *Id.* at ¶ 1.9 Tasmanian Alkaloids
17 cultivated opium poppy plants necessary to manufacture opioids, while Noramco imported the
18 narcotic raw materials from Tasmanian Alkaloids, turned them into opioid APIs, and sold them to
19 other opioid manufacturers in the U.S., including Purdue Pharma. *Id.* In fact, J&J’s scientists
20 developed a mutant poppy that J&J characterized as a “transformational technology that enabled
21 the growth of oxycodone,” and that serves as the API in Purdue Pharma’s well-known drug,
22 OxyContin. *Id.* at ¶ 1.11. The more opioids that were sold, the more money J&J made from its entire
23 “pain franchise.” *Id.* at ¶ 4.108.

24 J&J’s strategy worked, and opioids proliferated throughout the State. In the years since J&J
25 first began aggressively marketing its products, over 10,000 Washington citizens have died of
26 opioid overdoses. *Id.* at ¶¶ 4.234, 4.237. Many thousands more have suffered from opioid addiction.

1 This crisis has affected not only individuals in the State of Washington, but has impacted the State
2 itself. *See, e.g., id.* ¶¶ 4.241–244. This case seeks to hold J&J accountable for its misconduct and
3 the devastation it has wrought.

4 Party discovery in this case began in January of 2021, and production of documents is well
5 underway; the State alone has produced 3,565,531 documents. *See* Declaration of
6 Jessica Underwood (“Decl.,” attached hereto as “Exhibit A”) at ¶ 2. In the Parties’ discussions
7 regarding discovery obligations in this case, J&J agreed to produce (among other things) all
8 documents that were produced by it in prior opioid litigation, including all documents it produced
9 in *In re Nat’l Prescription Opioid Litigation*, MDL 2804 (the “Federal MDL”). Decl. at ¶ 3. To
10 facilitate production of those documents, the Parties agreed to a Protective Order protocol, which
11 this Court entered on February 2, 2021. *See* Stipulation and Protective Order Regarding Discovery
12 (“Protective Order”), Dkt. 70.

13 During its review of J&J’s production, the State discovered that J&J had produced several
14 slip sheets stamped, “Withheld as Not Responsive.” The State searched for other documents that
15 had been so marked and discovered that the phrase “Withheld as Not Responsive” appears on at
16 least 114,940 documents (and counting). Decl. at ¶ 4. While the State has not been able to lay eyes
17 on all 114,940 documents, the State has thus far found only three that are not simply a slip sheet.³
18 Every other one the State has reviewed is the same “Withheld as Not Responsive” slip sheet. *Id.* at
19 ¶ 5.

20 The Protective Order provides a process for challenging relevance-based redactions
21 contained in materials produced in prior litigations. Section 17 of the Protective Order permits J&J
22 to produce documents with redactions in the first instance when those documents were previously
23 produced in redacted form in other litigation. Section 17 further notes that, “[w]here redactions were
24 previously applied to a document solely on the basis that the redacted information was not

25
26 ³ The only three non-slip sheet documents that the State has identified are deposition transcripts
that discuss one of the slip sheets. Decl. at ¶ 5.

1 responsive to a discovery request in the other litigation,” the receiving party may request production
2 of the documents and the parties are then required to meet and confer and provide a reasonable
3 opportunity for the producing party to revisit the redactions and provide an additional explanation
4 for the basis of each redaction. *See* Protective Order at 8, ¶ 17, Dkt. 70. Once that process is
5 complete, Section 18 allows the receiving party to challenge such redactions and places the burden
6 on J&J to justify them just as they would need to justify any other redactions in the production.

7 The State followed this process. The State raised the relevance issue during one of the
8 Parties’ telephonic meet-and-confers on June 3, 2021. The State expressed its concern that the
9 documents J&J had withheld should be produced. Decl. at ¶ 6. In response, J&J explained that these
10 responsiveness redactions were permitted under the protective order and ESI protocol in place in
11 the Federal MDL, and reassured the State that the only documents that were withheld were those
12 having nothing to do with opioids. *Id.* at ¶ 7. For example, J&J’s counsel explained, J&J redacted
13 references to, and withheld documents about, sensitive, non-opioid products found in large
14 PowerPoints addressing J&J’s entire product line. *Id.*

15 However, contrary to its representations to the State, J&J appears to have redacted and
16 withheld documents that are plainly relevant to opioids and the State’s claims (and easily meet the
17 applicable threshold of responsiveness). For example, J&J produced a December 24, 2008 email
18 from “Field Communications” with the subject line, “Updated: NEO Pathways: Action Required –
19 Tapentadol Launch Readiness: Developing Pain Experts.” *See* JAN-MS-00862361 (attached as
20 “Exhibit 1”). The email purports to attach five courses, or “Pain Primers,” that “all Pain
21 Representatives, Pain District Managers, Region Business Directors and Key Customer Specialists”
22 are required to review (and be tested on) as part of the launch of Tapentadol (a.k.a. Nucynta). *Id.*
23 The email stresses how important it is for these sales representatives to “become Pain Experts.” *Id.*
24 J&J, however, produced only three of the five courses: Course 1, “Anatomy and Physiology of
25 Pain”; Course 3, “Management of Pain”; and Course 5, “NEO Pathways: New Directions in Pain.”
26 J&J “Withheld as Not Responsive” the remaining two courses: Courses 2 and 4. The produced

1 parent email explains that Course 2, “Overview of Pain,” “presents key concepts of the types and
2 causes of pain,” while Course 4, “Understanding Your Key Customers,” “presents an overview of
3 the typical physician specialties that usually manage and treat pain.” *Id.* The very titles of these
4 courses, and their inclusion in a training series designed to prepare representatives to launch
5 Tapentadol (the API found in J&J’s drugs Nucynta and Nucynta ER), demonstrates their relevance
6 and their obvious responsiveness.

7 Similarly, J&J produced an August 19, 2003 cover email from Elizabeth Tarek with the
8 subject, “DURAGESIC Material for CDSRC Meeting – August 27,” which attached a series of
9 materials provided to the Core Data Sheet Review Committee in advance of a presentation.
10 *See* JAN-MS-00779579 (attached as “Exhibit 2”). There are 45 members in this document family,
11 29 of which appear to be clinical research reports, studies, or recommendations related to the use of
12 the Duragesic fentanyl patch in children and proposed label changes to encourage pediatric use.
13 *See, e.g.,* JAN-MS-00779581 (attached as “Exhibit 3”); JAN-MS-00779590 (attached as
14 “Exhibit 4”); JAN-MS-00779643 (attached as “Exhibit 5”). The remaining fifteen family members
15 are produced without metadata, and are simply blank white pages with the words, “Withheld as Not
16 Responsive.” The notion that these fifteen documents have no relevance to this case—documents
17 that are attached to an email that explicitly attaches documents relevant to Duragesic, one of J&J’s
18 most prominent opioids—strains credulity.

19 Perhaps most egregiously, J&J produced a July 28, 2000, email from Michael Grissinger,
20 VP of Business Development at J&J, purporting to attach proposals for an upcoming meeting with
21 Purdue “to explore ways in which we might work together in pain management.” *See* JAN-MS-
22 01052165 (attached as “Exhibit 6”).⁴ The substance of that proposal for a “pain management”
23 partnership with Purdue—another major opioids manufacturer, a key customer of J&J’s opioid
24 API-producing subsidiaries, Noramco and Tasmanian Alkaloids, and a convicted criminal for its

25 ⁴ Although Exhibits 1–6 are designated “CONFIDENTIAL,” on June 22, 2021, counsel for
26 Defendants consented to the State filing these Exhibits publicly and not under seal. *See* Decl. at
¶ 25.

1 own misleading marketing of opioids—is unquestionably relevant to the claims at issue in this case.
2 And yet, J&J “Withheld as Not Responsive” both attachments to this email.

3 The State is not required to take J&J at its word that all such documents are irrelevant, let
4 alone nonresponsive. The State asked J&J to reproduce the withheld documents in full and
5 explained that the State had recently briefed and won on this issue in its litigation against the Opioid
6 Distributor Defendants (the “Distributors litigation”). *See* Decl. at ¶¶ 8–9; *see also* Relevant
7 Briefing and Orders from *State v. McKesson Drug Corp., et al.*, No. 19-2-06975-9 (Wash. Super.
8 Ct.) (attached as “Exhibits 7–14”). J&J requested the State send the relevant orders from the
9 Distributors litigation and agreed to reconsider its position. On Friday, June 4, 2021, the State sent
10 the relevant decisions from the Distributors litigation to J&J and requested a response on J&J’s
11 position by June 11, 2021. Decl. at ¶ 10. Instead, on June 9, 2021, J&J demanded the State justify
12 its position that documents should not be redacted when they contain some supposedly irrelevant
13 information—in essence, asking the State simply to accept J&J’s assertions of irrelevance. *Id.* at
14 ¶ 11. The State had already explained its position, and the Protective Order requires J&J to justify
15 the redaction, not the other way around. Interpreting J&J’s response as a refusal to reproduce the
16 redacted documents, the State informed J&J of its position that the Parties were at an impasse, and
17 subsequently filed this motion. *Id.*

18 On Monday, June 7, 2021, several days after the State raised this issue during the Parties’
19 meet-and-confer, J&J produced an additional 12,028 documents, which J&J represented were either
20 Washington-specific documents or documents related to Ultram, none of which were produced in
21 the Federal MDL. *Id.* at ¶ 12. Incredibly, it appears from this production that J&J *has continued* to
22 redact or withhold documents on responsiveness grounds, in *direct violation* of the Protective Order,
23 which permits responsiveness redactions only on documents that were previously redacted and
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1 produced in prior litigation. *See* Protective Order at 8, ¶ 17, Dkt. 70. J&J’s disregard for its
2 discovery obligations must not go unchecked.

3 III. EVIDENCE RELIED UPON

4 The State relies on the Declaration of Jessica Underwood, the exhibits attached thereto,
5 and the documents on file in the case.

6 IV. CERTIFICATION

7 The State certifies that the undersigned have conferred with counsel for Defendants
8 regarding this motion, as required by CR 26(i).

9 V. ARGUMENT

10 The Court should compel J&J to produce unredacted versions of all slip-sheeted
11 documents, any portions of documents that it has “Withheld as Not Responsive,” and any
12 documents J&J has withheld in their entirety based on relevance.

13 Under Washington law, “[p]arties may obtain discovery regarding any matter, not
14 privileged, which is relevant to the subject matter involved in the pending action, whether it
15 relates to the claim or defense of the party seeking discovery or to the claim or defense of any
16 other party, including the existence, description, nature, custody, condition and location of any
17 books, documents, or other tangible things and the identity and location of persons having
18 knowledge of any discoverable matter.” CR 26(b)(1). Moreover, CR 34(b)(3)(F) requires that
19 parties produce documents and other material, including electronically stored information, “as
20 they are kept in the usual course of business.” Relying on the federal rules’ corollaries to these
21 provisions, courts have held that these discovery rules “favor the *complete* production of non-
22 privileged evidence if some portion of the evidence is deemed responsive,” and that there is a
23 “presumption . . . that if something was attached to a relevant e-mail, it is likely also relevant to
24 the context of the communication.” *Karnoski v. Trump*, No. C17-1297 MJP, 2020 U.S. Dist.
25 LEXIS 37639, at *7 (W.D. Wash. Mar. 4, 2020) (quoting *Abu Dhabi Commercial Bank v.*
26 *Morgan Stanley & Co.*, No. 08-CV-7508(SAS), 2011 U.S. Dist. LEXIS 95912 (S.D.N.Y.

1 Aug. 18, 2011), *report and recommendation adopted by* 2011 U.S. Dist. LEXIS 94727
2 (S.D.N.Y. Aug. 24, 2011)).

3 Thus, the default rule, both in Washington and in courts across the country, is that
4 documents should not be redacted on “relevance” grounds, nor should individual documents that
5 are otherwise members of a responsive family be withheld on the basis that they are not
6 responsive. “To hold otherwise is to permit the producing party to essentially unilaterally redact
7 otherwise responsive discovery.” *Karnoski*, 2020 U.S. Dist. LEXIS 37639, at *7 (collecting
8 cases). This rule was recently applied in this Court in another opioids lawsuit, *State v. McKesson*
9 *Drug Corp., et al.*, No. 19-2-06975-9 (Wash. Super. Ct.), in which both AmerisourceBergen
10 Drug Corp. (“ABDC”) and Cardinal Health Inc. were ordered to reproduce unredacted board
11 materials that the parties had previously attempted to redact on responsiveness grounds. *See*
12 Order Granting the State’s Motion for Relief at 2, Dkt. 468, No. 19-2-06975-9 SEA (Nov. 17,
13 2020) (attached as “Exhibit 10”) (holding that ABDC could “redact a document where the
14 redaction is supported by a privilege or work product claim . . . [.]” but not “for relevance,
15 responsiveness, or other non-privilege concern[s]” and awarding the State’s fees and costs
16 incurred in connection with the motion); Special Master’s Order Granting the State’s Motion for
17 Relief at 2–3, No. 19-2-06975-9 SEA (Feb. 22, 2021) (attached as “Exhibit 14”) (same).

18 Here, J&J should similarly be compelled to produce unredacted versions of any
19 documents they redacted or withheld based on relevance. Based on a review of the production
20 to date, J&J has withheld approximately 115,000 documents that are all attachments to and/or
21 family members of responsive documents. Because these documents are only known to the State
22 because they were part of non-withheld families and therefore replaced with slip sheets, the
23 number of documents withheld in their entirety based on responsiveness or relevance may be
24 much higher.⁵ J&J represented—in negotiating the Protective Order, in labeling their slip sheets,

25
26 ⁵J&J’s description of how it redacted or withheld documents based on its view of relevance
indicates there are likely many more documents that were withheld in their entirety.

1 and in their meet-and-confer with Plaintiffs—that the only documents that were withheld on
2 responsiveness grounds were documents that had nothing to do with opioids or this case. Decl.
3 ¶ 7. Of course, J&J’s view of what is relevant to this case may differ from the State’s, and J&J
4 is not the arbiter of relevance or responsiveness. While the State has not yet been able to review
5 the circumstances surrounding each of the nearly 115,000 documents withheld on
6 responsiveness grounds, a review of a sample of the titles, subject lines, and family members
7 relating to documents J&J withheld on this basis reveals that J&J’s assurance is incorrect. J&J
8 has used the State’s agreement to deviate from the standard Washington rules regarding
9 redactions to justify withholding documents that are responsive, not to mention plainly relevant
10 to the State’s claims. As discussed above, J&J has withheld (1) attachments that appear to be
11 related to the labeling and recommended use of Duragesic in children; (2) training modules
12 circulated in advance of J&J’s release of its new opioid product, Nucynta; and (3) documents
13 discussing a proposed partnership between J&J and Purdue related to pain management. J&J
14 cannot genuinely argue that these documents are properly withheld, and the fact that J&J
15 nonetheless withheld them calls into question the integrity of all of J&J’s responsiveness
16 redactions and withholdings. That J&J has *continued* to apply such responsiveness redactions to
17 documents produced for the first time in this case only underscores their disregard for their
18 discovery obligations.

19 J&J bears the burden to demonstrate that withholding or redacting portions of its
20 documents is appropriate. *See* Protective Order at 8, ¶ 18 (“The ultimate burden of persuasion in
21 any [challenges to redactions] shall be on the producing party as if the producing party were
22 seeking a Protective Order in the first instance.”). The Court should compel J&J to reproduce all
23 *newly* redacted documents without responsiveness redactions, as required by the Protective
24 Order. The Court should also compel J&J to reproduce all documents withheld or redacted as
25 nonresponsive solely on relevance grounds. To permit J&J to maintain such redactions, after the
26 State has demonstrated the speciousness of J&J’s “responsiveness” calls, would permit J&J to

1 brazenly flout Washington's discovery rules and procedures and deprive the State of responsive
2 discovery likely containing relevant evidence to which it is entitled.

3 **VI. CONCLUSION**

4 The State respectfully requests that the Court grant the State's motion. A proposed order is
5 submitted herewith.

6 DATED this 22nd day of June 2021.

7
8 ROBERT W. FERGUSON
Attorney General

9 /s/ Brad Beckworth

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I certify that this memorandum contains 3,332 words, in compliance with the Local Civil Rules.

I certify that I have met-and-conferred with counsel for Defendants regarding this motion, as required by CR 26(i).

DECLARATION OF SERVICE

I declare that I caused a copy of the foregoing document to be electronically served on using the Court's Electronic Filing System, which will serve a copy of this document upon all counsel of record.

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DATED this 22nd day of June 2021.

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