UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEIL ANAND, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Civil Action No. 21-1635 (CKK)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES

IN OPPOSITION OF THIRD MOTION FOR SUMMARY JUDGMENT

The Plaintiff, Lesly Pompy ("Plaintiff"), moves, Pro Se, in opposition to the Defendants', Health and Human Services (HHS) and Drug Enforcement Agency (DEA), Third Motion for Summary Judgement. This Defendant's Third Motion for Summary Judgement seeks Freedom of Information Act (FOIA) exemptions that are uncommon in the legal industry, exceed the scope of reasonable deniability, and confounds evidentiary general and specific causation. Exemptions to the federal Freedom of Information Act's (FOIA) disclosure requirements must be narrowly construed. *Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association Supreme Court of the United States*.532 U.S. 1 (2001)

ARGUMENT

I. DEA's Withholdings Pursuant to 5 U.S.C. § 552a(j) Are Not Appropriate.

Under exemption seven, records compiled for law-enforcement purposes are exempt from disclosure, but only if their disclosure would cause one of the following enumerated harms. The

Plaintiff's criminal case has ended. The enumerated harms do not apply. DEA's Withholdings Pursuant to 5 U.S.C. § 552a(j) are not appropriate. The data and documents are routinely used during criminal prosecutions of physicians: " the United States submits that the Arkansas PMP data is relevant to and probative of the defendant's unlawful intent to issue the charged prescriptions," [Exhibit 12 - U*nited States of America v. Lonnie Joseph Parker*. UNITED STATES DISTRICT COURT WESTERN DISTRICT OF ARKANSAS TEXARKANA DIVISION, Case 4:19-cr-40018-SOH]; [Exhibit 14, Advanced Data Analytics is Changing How Agencies Fight Fraud. – Wylie Wong. HealthTech. June 28, 2023.]

II. DEA's Withholdings Pursuant to Exemption 3 Are Not Appropriate.

FOIA Exemptions Exceptions Pursuant to 5 U.S.C. § 552(b)(3) and Fed.R.Crim.P. 6 include:

> "(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. "
>
> *[Fund for Constitutional Gov. v. Nat. Archives*, 656 F.2d 856, 867 n.24 (D.C. Cir. 1981)]

A judicial proceeding currently exists at the United States District Court, Eastern District of Michigan, Southern District of Michigan. [*Lesly Pompy M.D v Monroe Bank and Trust*, Case No. 2:19-cv-10334-DML-SDD]. Allegations of racketeering activity, illegal search and seizure likely reached the grand jury. A timely release of the information would have likely led to a dismissal of the Plaintiff's indictment, and to mitigate legal expenses. Pursuant to "C (i)" , the DEA's withholdings pursuant to Exemption 3 are not appropriate.

III. DEA's Withholdings Pursuant to Exemptions 6 and 7(C) Are Not Appropriate.

A.) Exemption 7 Threshold.

Freedom of Information Act disclosures that would constitute a warranted invasion of personal privacy are not exempt from disclosure. [*United States Department of Defense v. Federal Labor Relations Authority*. 510 U.S. 487, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994)]. For the reasons , FOIA constitute a warranted invasion of privacy since the government alleges that Practice-wide Data is Intrinsic to the Crimes Charged. [LP Exhibit 12- *United States of America v. Lonnie Joseph Parker* Case No. 4:19-CR-40018-001**].**

1. Confidential Informant
    a. Unknown Reliability of the confidential informant

At the THIRD MOTION FOR SUMMARY JUDGMENT, for the first time since 9/26/2016, the Drug Enforcement Agency (DEA) admits to the presence of an unnamed confidential informant. At the Plaintiff's criminal trial, the Plaintiff faced 38 criminal counts. During that criminal trial, the DEA testimony denied the existence, much less the reliability, of a confidential informant. Each counts carried the risk of a 20 years jail sentence, thus 38 counts multiplied by 20 years per count, for a total of 760 years. While the Plaintiff was found to be not guilty, the probability and extent of risks of a prolonged jail sentence is likely to repeat among other indicted U.S. physicians. The burden faced by the DEA to: produce exculpatory evidence, and establish the reliability of the confidential informant, under *Giglio* and *Brady*, is much less than the risks that the Plaintiff, and other physicians facing criminal indictment repeatedly face. [LP Exhibit 3- United States of America v. Patrick Titus, United States Court of Appeals for the Third Circuit No. 22-1516]

A reasonable DEA would not have had this type of investigation or would have conducted the investigation differently than was the custom in Blue Cross Blue Shield Association franchisees.

The DEA did not reveal the Confidential informant during the hearing that led to the Plaintiff's loss of property interest in his DEA Registration. The confidential informant has a duty to be truthful and accurate. The confidential informant may not be used to simply shape perception of a physician to that of being a "drug dealer in a white coat." Where a duty to disclose to a DEA registrant pursuant to a property interest, such non-disclosure constitutes a violation of the Plaintiff's Due Process. This Honorable Court can remedy the violation by denying the Third Amended Summary Judgment.

b. Assumption of Risk

The unnamed confidential informant was expected to testify at the public trial of the Plaintiff. The unnamed informant, in forming informed consent: 1) either knew, 2) should have known, or would have been explained, of the risks involved in the being of a confidential informant, or 3) may have recklessly disregarded her own safety. On the other hand, James Stewart, aka James Howell, who voluntarily assumed the risk of being an informant for Blue Cross Blue Shield Michigan Mutual Insurance Company (BCBSMMIC) money, and not an undisclosed agent, as evidenced at the Trial Court in *United States v. Pompy*, by providing: false state of Michigan Driver's License, false signed documentation in the medications needed, false social security, false medical documents from Dr. J. Alan Robertson. James Stewart was not an innocent agent. Unless the alleged confidential informant was coerced, extorted, paid, or suffered undue influence, the confidential informant would have known, appreciated, and proceeded anyway to behave in a manner consistent as the behavior of a confidential informant. The confidential informant assumed clear and obvious, known risks of being a confidential informant, expected to provide sworn testimony at a federal trial seeking the incarceration of a physician. The unnamed confidential informant reasonably lacks an expectation of privacy. The informant should be revealed.

c. Third Party Doctrine

Under the third-party doctrine, a party has no reasonable expectation of privacy in records that it has voluntarily turned over to a third party, even if the party had a subjective expectation that the third party would keep the records private. The confidential informant loses all expectation of privacy to the documents that the informant released to the DEA. The information regarding the confidential informant must be released.

d. Alternative Remedies

In the alternative, Agencies must describe documents withheld under a Freedom of Information Act exemption in enough detail to allow the court to rule on whether the document falls under the exemption. (*Judicial Watch, Inc. v. Food & Drug Administration*. United States Court of Appeals for the District of Columbia Circuit. 449 F.3d 141 (D.C. Cir. 2006)). If the DEA does not wish to release the document to the Plaintiff, the DEA can assist the Court by release the name of the confidential informant to the Court.

e. Corporate Privacy Interest

A corporation does not have protected personal privacy interests. Blue Cross Blue Shield Association (BCBSA), the corporate franchisor, aids, abets encourages their corporate franchisees [E.g. Blue Cross Blue Shield of Michigan Mutual Insurance Company (BCBSMMIC), Independence Blue Cross (IBC), Horizon Blue Cross] with undercover agents, such as James Stewart aka James Howell, in providing agents of the government to the DEA, for bargained-for exchange. Dan Loepp, as president of BCBSMMIC and a member of the Board of Directors of BCBSA, ratified the actions of BCBSA and BCBSMIC employee James Stewart. Corporations lack personal privacy interest under FOIA. Congressional intent is displayed by the term "personal privacy" rather than the term "privileged or confidential" in Exemption 7(c), indicating

that the exemption is intended to apply to individuals and not to corporations. Based both on the ordinary meaning of the term "personal privacy" and on the term's use in the remainder of the statute, FOIA Exemption 7(c) does not apply to corporations. Therefore, the exemption does not apply to BCBSMMIC, BCBSA, IBC, Independence Blue Cross. [*Federal Communications Commission v. AT&T, Inc*. 562 U.S. 397, 131 S. Ct. 1177, 179 L. Ed. 2d 132 (2011)]. Pursuant to both FOIA and federal STARK Statutes, the DEA must disclose its agreements, by word or conduct, serving as a bargained-for exchange.

B.) Exemptions 6 and 7(C) Withholdings

The public good is not currently served by the DEA, MANTIS, BCBSMMIC, IBC agreeing to use false and/or fabricated medical documents with the intent to incapacitate U.S. physicians such as the Plaintiff, with a lifetime knowledge, education, and experience regarding pain management and addiction medicine. As an agency of the United States government, the Center for Disease Control (CDC) reported that since 2019, the overdose death rate rose, and continues to rise. Physician drug dealers can be limited by the Government by clear evidence of drug sales, and/or medical malpractice litigation without using false and/or fabricated medical documents that may overcome reasonable sensitivity of a pain and /or addiction specialist.

IV. DEA's Withholdings Pursuant to Exemption 7(D) Are Appropriate.

A. Lack of Authorization – CFR 42 violation, violation of medical referrals

Under CFR 42 section 2.81- 2.87, a court order is necessary prior to the sending of an informant into a drug treatment rehabilitation center, such as that of the Plaintiff. Court documents revealed post-facto, after the 9/26/2016 raid, request to the Detroit Federal Court for James Stewart. Neither James Stewart nor the unknown DEA confidential informant complied

with CFR 42. Furthermore, the plaintiff required a valid medical referral prior to being accepted into the Plaintiff's medical practice. James Stewart, aka James Howell obtained a false and/or fabricated medical referral lacking medical necessity from J. Alan Robertson, with the intent that the Plaintiff relied on the false referral. The referral was proven false at Trial Court in *United States v. Pompy*. Both, James Stewart, aka James Howell and the DEA Confidential Informant lacked authority to enter the medical practice of the Plaintiff. The lack of authorization negates any privilege of privacy.

B. No expectation of Privacy

In November of 2015, Brian Bishop of the DEA, Marc Moore of the MANTIS, a representative of Blue Cross Blue Shield of Michigan Mutual Insurance Company, Michigan State Police officer William Chamulak acting under the direction and control of the DEA as a local DEA task force officer, William Paul Nichols of the State of Michigan Attorney General's office met, agreed to investigate the Plaintiff's prescribing habit with the intent that the investigation be executed through the use of Blue Cross Employees James Howell, Alan J. Roberson M.D., and Carl Christensen M.D. James Howell would be given a false state of Michigan driver's license, a false name and/or alias under James Stewart, a false social security number, a false medical referral by Dr. J. Alan Roberson. James Howell would enter provide, and affirm by signature, false medical documentation in his medical record. The Plaintiff's express invitation to potential people of the pain and addiction disease, is an invitation to anyone who wishes to look for treatment— and not to people who actually seeks controlled substances drugs for a non-medical purpose. Where the Plaintiff has suffered permanent harm resulting from loss of his property interest in his DEA registration to prescribe control substance, and where the DEA would have relied on the knowledge of the confidential informant in seeking conviction for 38 criminal

counts against the Plaintiff, the confidential informant either knew, should have known, or would have known with substantial certainty, that his/her sworn testimony was likely necessary at a criminal trial. An expectation of privacy by such an undercover agent would not be reasonable.

C. CONSTITUTIONAL LIMIT TO DEA ACTION

1. 14th Amendment Due Process Violation – lack of notice

i. Due process requires fair notice of the issues.

Rule Making- The DEA regularly access, analyzes review their own and third party data such MANTIS and Blue Cross Blue Shield franchisees to establish a standard of care. The DEA formulates rules, many of which are not explained to physicians, that are used to target, convict, deprive Plaintiff and other U.S. physicians of property interest in assets (e.g. state medical license, DEA registration, X

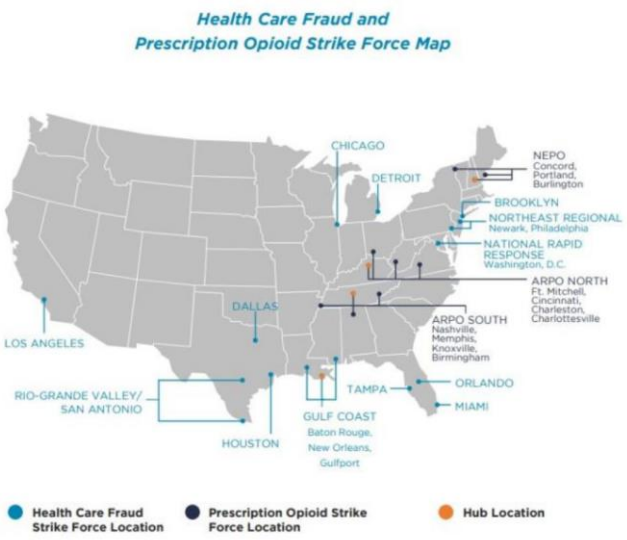
-DEA registration, financial assets). The Plaintiff was not given effective timely and notice of the undisclosed prohibited behavior. The impact of a DEA criminal prosecution on a physician amount to a professional death sentence in that physician's ability to practice the professional practice of medicine. Even if found not guilty, a DEA criminal investigation causes permanent damage to a physician (e.g. loss of hospital / health insurer's / medical malpractice insurance carriers). The Plaintiff seeks the data and documents which would establish the prohibited behaviors surrounding the prescribing of controlled substance medications. Pursuant to the right of fair notice under Due Process, the Plaintiff is entitled to the information, data, and documents.

2. Due Process Liberty Interest in Reputational Interest.

The liberty interest protected by the Due Process Clause also includes an interest in one's reputation. The challenged Defendants' data analytics have impacts beyond merely injuring an individual's reputation, under a stigma-plus test. The Defendants' data analytics that allowed MANTIS, BCBSMMIC, and IBC to distribute a list of identified drug dealing doctors in white coats to Medicare, OIG (Office of the Inspector General), state licensing medical boards wouldn't implicate due-process rights for a doctor on the list, if being placed on the list would solely do nothing more than damage the individual's reputation. However, since being placed on the DEA exclusion list affected some other interest, such as it excludes listed individuals from caring for patients insured by Medicare, Medicaid, Blue Cross, among other health insurers, then it would implicate due process. Since doctors placed on the DEA Exclusion List are unable to participate with Medicare, Medicaid, Blue Cross, among other health insurers, a harm beyond mere reputational harm occurs. Under the stigma-plus test, Due Process attaches.

3. 14th Amendment Due Process Violation – Equal Protection Violation

A Cardiologist prescribes mostly medications for the heart. A Pulmonologist prescribes medication mostly for the lungs. Pain Specialists prescribed medications mostly for pain. The prescription habits of pain doctors with regard-controlled substances does not constitute intrinsic evidence of a crime, but rather the doctor performing his duties under his education, training, and experience. Allegation of prescription rates as intrinsic evidence of criminal intent is both an impermissible inference, and 2) represent a disproportionate burden on the group of physicians who practices pain management in areas with high populations of African Americans, Indians, and Hispanics.



LP- Exhibit 16. HEALTH CARE FRAUD UNIT. An official website of the United States government. Visited 9/29/23, 3:04 PM

4. 6th Constitutional Amendment Right to know, Confront Hostile Witnesses and Evidence

Exemptions must not constitute a constitutional injury. The 6th Amendment gives accused individuals the right to know all charges and to know any witnesses and evidence. The Plaintiff was indicted, suffered pecuniary and personal property loss, confronted a criminal trial, and was found "not-guilty" in January 4, 2024 by a federal jury. Civil actions, and possible administrative actions, continue for general and special damages. Pursuant to the 6th Amendment, the Plaintiff has a constitutional interest to know the witnesses and evidence against the Plaintiff.

5. Due Process Violation under the 5th Constitutional Amendment

The Plaintiff possessed a DEA registration number license. Such forms the Plaintiff's basis and Due Process property interest in his DEA Registration Number. The Property Right represents a fundamental right. At the DEA hearing, Blue Cross Blue Shield of Michigan Mutual Insurance Company employee James Stewart aka James Howell, posed as a chronic pain patient, with complaints consistent to the complaints of chronic pain patients. As the Plaintiff

required a bona-fide medical referral to the pain clinic, Dr. Alan Robertson, acting under the scope of his employment with Blue Cross Blue Shield of Michigan Mutual Insurance company, issued a false and fabricated medical referral known to be lacking medical necessity. The referral became part of the James Stewart medical records. Under the law of the State of Michigan, the intentional production of false medical documentation violates public statutes. Additionally, it is the health industry standard that written medical referral are essential material terms of a patient's medical record. At all times relevant to the complaint, James Stewart was deemed to be working under the direction and control of Marc Moore of MANTIS (Monroe Area Narcotic Team Investigation Service). While the Plaintiff had a DEA Hearing, the presence of a DEA confidential informant was denied. The Plaintiff lacked the opportunity to be heard in a meaningful manner.

6. Deprivation of Substantial Rights in the Liberty Interest to Practice One's Profession

Plaintiff is a medical doctor with specialized education, knowledge, and experience in the medical field of anesthesiology, pain management, and addiction medicine. Those 3 medical fields generally require the use of controlled substance medications. Without a DEA registration, 1) a physician may not prescribe controlled substance medications, 2) most health insurance companies, including Medicare and Medicaid, will not credential such a physician into its health insurance network, 3) hospitals will not credential such a physician into its hospital staff, 4) the physician will continue to suffer adverse future employment prospects. A physician who possesses a state medical license but without a DEA registration, is effectively denied of his liberty interest in the practice of his profession. As the Plaintiff desires to return to work after the Plaintiff obtains a medical license which will be followed by an application for a DEA registration. In the event that the DEA denies a DEA Registration to the Plaintiff, litigation will

follow. The nature and quality of the confidential informant should be disclosed so to allow the Court to redress the Plaintiff's adverse future employment prospects. Non-disclosure under FOIA constitutes action prejudicial to the Plaintiff.

V. DEA's Withholdings Pursuant to Exemption 7(E) Are Not Appropriate.

An interpretive guideline that an agency failed to publish is improper if the guideline does change substantive rights and does adversely affect the outcomes of legal cases. For notice purposes, an agency must generally publish the rules and regulations it promulgates. The DEA, assisted by: Qlarant, IBC, HFPP (Health Care Fraud Prevention Partnership), Marc Moore of MANTIS (Monroe Area Narcotic Team Investigation Service) and BCBSMMIC, collects, accumulates, analyzes, determines sample size, and interprets the results of data-mining of the prescription and billing habits of the Plaintiff and other similarly placed pain and addiction specialist physicians within the United States. The DEA interpreted the data to formulate rules to target certain physicians for criminal indictment. The DEA has not published the data to show that physicians whose frequency of certain treatments and procedures, that may exceed those of the majority of their peers (e.g., number and strength of opioid prescriptions, incidence of high-reimbursement injections, or frequent ordering of high-complexity labs such as quantitative urine drug testing) represent intrinsic circumstantial evidence of a crime. Perfectly legitimate reasons could exist for being an outlier (e.g., the practitioner practices in a medically underserved area with limited competition, the practitioner is in network with a greater number or health insurers particularly Medicaid/Medicare, the referral base includes many individuals already on high dosages of opioids, the practitioner has developed a reputation for success with certain injections, the particular patient population is at a higher-than-average risk of drug abuse and diversion, the practitioner practices in an economically disadvantage area, the practitioner practice in a an area

with a narcotic team with an history of unconstitutional acts, variations in composition of generic and brand name drug formulations, variation in pain stimuli perceived and experienced, variation in drug metabolism and drug excretion). BCBSMMIC uses data mining via the Prescriber Block Analysis. At the Plaintiff's criminal trial in *United States v. Pompy*, the data mining programs of the DEA and Blue Cross speculated on pre-crime, and proved no guilty act, mens rea, causation, and concurrence to the federal jury. For example, BCBSMMIC, IBC and the DEA have not shown, that whether or not physicians prescribed legally or illegally, that the death rate from drug overdoses, would be affected. For notice purposes, an agency such as the DEA, must generally publish the rules and regulations it promulgates. [LP Exhibit 11- Certified Public Record of *Neil Anand v. Pennsylvania Department of Insurance* No. 318 MD 2023]

A physician licensed by the DEA must abide by known DEA rules and regulations. There is no risk for circumvention of the law. In avoidance of post-facto laws, the Plaintiff and other similarly situated U.S. physicians, want to know the exact proscribed behaviors prior so to avoid disastrous criminal prosecution.

A. Restitution allows BCBSMMIC to conceal Subrogated Claims, Contact Reimbursement Claims, etc. and is thus unconscionable.

If Health insurers, such as BCBSMMIC, have paid claims, that are later determined to be owed by someone else, (e.g., workmen's compensation, car accidents and other litigated contract claims), the health insurer is repaid for any disbursement associated with the litigated claim by the losing party. Restitution payments obtained from a convicted physician would allow BCBSMMIC to be paid again for previously subrogated claims. BCBSMMIC has financial incentives to become agents of the government in the strengthening of convictions against

physicians. Such unlawful double payments violate the public good, as the unlawful double payments unjustly enrich BCBSMMIC, and other BCBSA franchisees.

VI. DEA's Withholdings Pursuant to Exemption 7(F) Are Not Appropriate.

A. An unreasonable and substantial interference with the health safety of the community of pain has led to disastrous results. As an agency of the United States government, the Center for Disease Control (CDC) reported that since 2019, the overdose death rate rose, and continues to rise. [LP Exhibit 21]. Richard A Lawhern, PhD and Stephen E Nadeau M.D., November 2023, response to a notice posted in the US Federal Register on November 3, 2023 by the US Drug Enforcement Administration reports: "Reduced" rates of prescription opioid consumption in the US are, at least in part, an artifact of unjustified and malicious DEA prosecutions against clinicians -- not an outgrowth of any reduction in medical need. US DEA has mounted a campaign of intimidation and harassment against clinicians who prescribe opioid pain relievers. The result has been the departure of thousands of clinicians from pain management practice, and denial of pain care to millions of US citizens in dire need. Reduced rates of prescription are thus an artifact of actions by the DEA itself." [LP-Exhibit 21-Comment on Proposed DEA Production Quotas -11-27-23- November 2023 Final RAL-SN

B. US Department of Health and Human Services/Centers for Disease Control and Prevention reports: "Deaths involving synthetic opioids other than methadone (synthetic opioids), which largely consist of illicitly manufactured fentanyl; psychostimulants with abuse potential (e.g., methamphetamine); and cocaine have increased in recent years, particularly since 2013 [Trends and Geographic Patterns in Drug and Synthetic Opioid Overdose Deaths — United States, 2013–2019. MMWR / February 12, 2021 / Vol. 70 / No. 6.]. The failure to disclose,

through the use of FOIA exemptions, does not further the health, safety, and morality of the community.

C. Public Policy is Impaired.

The withholding of the FOIA data and documents is not reasonable. Held as circumstantial evidence of mens rea of criminal intent to violate the Control Substance act, the Prescription and Billing habits of the doctors, including of the Plaintiff, is accumulated, reviewed by the DEA. LP- Exhibit 15. Foundations of Mathematics]. The data analytics is used to target pain management physicians' prescribers for prosecution. While it is technically possible to practice pain management without control substance medications, the interference is often not reasonable because the interference with the medical treatment substantially impairs the doctor's medical function. The patients are forced to treatment alternatives, equally or more dangerous to the patients. [LP Exhibit 1- *Micks-Harm v. Nichols* Consolidated Action Lead Case NO. 18-12634 United States District Court Eastern District Of Michigan Southern Division]

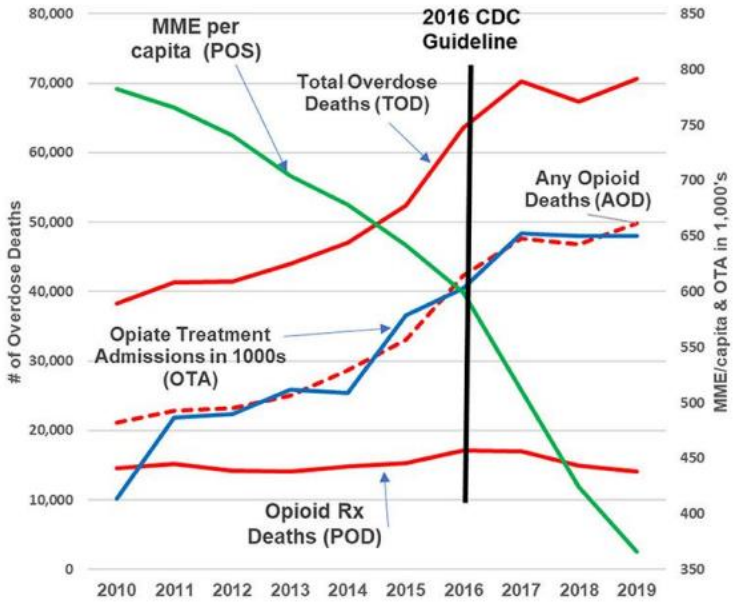
The Plaintiff and other U.S. Physician Groups wishes to study the released FOIA documents to answer: "Would the outcome, regarding drug-overdose death rate among patients, and rate of prosecution and incarceration of doctors be different, with the release of the FOIA information ; "Whether or not the doctor foresaw the risk and used reasonable care is relevant to a determination of whether the activity is criminal. The DEA likely possesses information, documents and data that can assist doctors in determining pre-crime or predict criminality in patients. If the FOIA information functions as the information is expected to, the FOIA information can save both professional and biological lives. The Court can stop concealment of

this life saving information and Order it to be released on public policy grounds to allow proper research.

Monroe County Michigan is a medically underserved community. As a result of the 9/26/2016 raid on the plaintiff. Many patients in Monroe County suffered a substantial and unreasonable interference to their access to Health Care. Richard Johnson, was a black male former patient of the Plaintiff, who suffered of the disease of sickle cell anemia. After 09/26/2016, Richard Johnson was unable to obtain sufficient medical care during a sickle cell crisis; as an actual and proximal cause of the lack of medical care, Richard Johnson, a former state of Michigan Police Officer, died. Patient X, was a known heroin addict who was being treated for his addiction by the Plaintiff. After 09/26/2016, Patient X became a MANTIS informant, with the power to distribute heroin so to flush out other heroin addicts. Patient X took sufficient amount of heroin himself and died at America's Best Hotel, in Monroe County Michigan. While his wife was listed as DEA witness at the Plaintiff's criminal trial in United States v. Pompy, the prosecution never called on Patient's X wife to testify. Patient X likely died of an overdose of heroin, given to him by MANTIS so to entrap heroin users. Specifically, Brian Bishop negligently failed to maintain an adequate level of pain and addiction care in Monroe County following 09/26/2016 raid, which foreseeably resulted in the medical loss and the emergency situation of patients experiencing unnecessary levels of incapacitating pain and drug withdrawal.

The data from the graph in [LP-Exhibit 21-Comment on Proposed DEA Production Quotas - 11-27-23- November 2023 Final RAL-SN, Figure 1, summarizes the substantial unreasonable interference with public policy. As the total of daily prescribed milligram of morphine equivalent per capital was reduced from the year 2010 to 2019, the number of overdose death rate rose. Illegal opiates alternatives and substitutes to legal prescriptions are readily available in the streets.

Figure 1: Trends in Opioid-Related Mortality and Hospitalizations vs Prescribing (Aubrey and Carr)



From Figure 1 we learn that numbers of prescription opioid related deaths remained relatively constant from 2010 to 2019 while both hospitalizations and deaths involving all types of opioids (legal or illegal) rose steadily throughout the decade. At the same time,

In conclusion, public policy disallows the exemptions. The DEA decreased production quota of legal opiates [LP-Exhibit 21. Federal Register / Vol. 88, No. 209 / Tuesday, October 31, 2023 / Notices. Page 74512] has not caused a decrease in the illegal supply of opiates.

VII. DEA Has Not Released All Reasonably Segregable Information.

With substantial certainty, substantial, material, document information remains. For example, documents related to:

1. HFPP (Healthcare Fraud Prevention Partnership)
2. MANTIS, BCBSMMIC, Independence Blue Cross, Horizon Blue Cross agreements with the DEA

VIII. DEA's Constitutional Violation Preclude Exemptions

A subpoena satisfies the Fourth Amendment's reasonableness requirement if the subpoena: first, falls within the agency's authority, second, isn't too indefinite, and third, is relevant to a proper subject of agency investigation. [*United States v. Morton Salt Co.*, 338 US 632 - Supreme Court (1950)]

A. Vicarious Liability- Acting outside of scope of employment – Inherently Dangerous Behavior.

The DEA hires agents as employees. Those employees have a duty to abide by the laws of the United States, such as clearly established laws of the 4th Constitutional Amendment. Brian Bishop acted outside the scope of his employment when Bishop performed a warrantless search and seizure at 533 N. Monroe Street, in the afternoon of 9/26/2016. The breaking and entering into the dwelling house of another with the intent to take the personal property of another is not only unlawful, but represents inherently dangerous behavior. The making of false or altering of existing of medical documents, of legal significance, with the intent to mislead the doctor, as James Stewart performed on his Initial and Subsequent Patient Questionnaires, also constitutes inherently dangerous behavior. The inherent behavior was ratified by, and relied upon by the DEA, sufficiently to induce criminal proceedings against the Plaintiff. The employer or agent of the inherently dangerous actor remains liable for the target acts, and other acts done, natural and probable committed in furtherance of the DEA. As such, the DEA improperly delegated activity to Bishop and Stewart. The DEA remains liable and must thus provide all the necessary documents. The burden of production by the DEA is less than the probability of harm multiplied by the magnitude of harm, of other U.S. physicians of the suspect class.

B. Pretextual Warrantless Administrative Subpoena of September 16, 2016, falls outside the DEA's Authority.

On 09/26/2016 at about 08:30 AM, Brian Bishop presented at the Plaintiff's office in Monroe Michigan, without a search warrant of any kind. Brian Bishop was accompanied by local DEA Task Force Officers, Marc Moore as head of MANTIS, among other officers, with apparent authority to perform an administrative audit of patients prescribed Suboxone. Brian Bishop had not informed DEA attorneys so to obtain an administrative warrant. Suboxone is used for drug

pain and addiction. Monroe is a small town of about 150,000 people. Inhabitants of Monroe generally know, and fear Marc Moore whose action in OMNI is known. OMNI was disbanded by the State of Michigan following evidence of improper threats, search and seizures with the intent to permanently deprive the rightful owner of possession. The actions of OMNI, as a multijurisdictional narcotic task force are known. [2 Ex-State Cops Sentenced For Roles In Property Embezzlement Scheme - CBS Detroit (cbsnews.com) AUGUST 10, 2013 / 10:53 AM EDT /PAGE VISITED 11/19/2023].

OMNI was disbanded and rebranded under the name MANTIS. Brian Bishop and Marc Moore seemed interested in the name and address of about 5 patients out of about 130. Bishop and Moore were not interested in the drug detoxification process, psychological support, nor did not Moore and Bishop take the complete list of the patients who were being prescribed Suboxone. DEA diversion investigations have a duty to retrieve, and preserve the patient's list. The information obtained from the administrative inspection was not relevant as to whether or not, the Plaintiff was a drug dealer. In anticipation of the wider raid already scheduled to occur at about 10:00 AM on 09/26/2016, the intent of Brian Bishop was to perform a reconnaissance of the Plaintiff's office for Marc Moore and the Michigan State Police. Such actions constitutes an unreasonable search and seizure, and thus, a violation of the Fourth Amendment. Brian Bishop performed a warrantless pretextual search without DEA authority. The exclusionary rule related to civil matters applies. The DEA must release the information.

IX. Joint And Several Liability With Contribution Under Malice

MALICE

a) DEA's conduct was unreasonable. The defendant's conduct was unreasonable as reasonable alternative means of policing of abnormal prescriptions that more likely than not would have

prevented or mitigated the Plaintiff's injury**.** For example, health insurers other than Blue Cross Blue Shield Association franchisees will typically enter into a discussion with a potentially troublesome physician and rectify issues instead of a criminal referral. A criminal referral is the actual and proximate cause of permanent damage to the health, professional status, family, and patients of the criminally referred physician. Even if the physician, is found not guilty as in the Plaintiff's case in *United States v. Pompy*, attorney costs and professional costs represent a cruel and unusual penalty. The probability and severity of personal, property, and professional injuries that other potential doctor victims might suffer is high, compared to the low cost of simply talking to and reviewing the charts of a particular physician of the suspect class. The actions of the DEA and of the members of the joint HFPP enterprise, were not reasonable. The HFPP Joint Enterprise had a reasonable, alternative way to address improper prescribing that more likely than not would have prevented or mitigated the injury to other doctors. (*United States v. Carroll Towing* Co., 159 F.2d 169 (2d Cir. 1947)).

b) Jacob Foster, Principal Assistant Chief of the DOJ's Health Care Fraud Unit, stated : "[…] data is not the truth". The DEA and the HFPP joint enterprise, knew, should have known, or would have known during its investigation that general causation does not equal probable cause of specific crimes created.

The courts emphasized that anomalies in the billing or prescription habits of a physician, could equally signify legitimate business strategies or lawful adaptations to intricate billing regulations. A criminal defendant's 's statistical methods may offer a potential explanation, not conclusive proof of fraud.[U.S. ex rel. Integra Med Analytics, L.L.C. v. Baylor Scott & White Health, et al.,

No. 19-50818 (5th Cir. May 28, 2020); Integra Med Analytics, L.L.C. v. Providence Health Servs., No. 19-56367 (9th Cir. Mar. 31, 2021).]

The Members of the joint enterprise, either knew that the data analytics was false, or disregarded the truth or falsity of the Department of Justice, DEA, BCBSMMIC data analytics. The joint enterprise proceeded anyway against the Plaintiff. Such actions constitute malice. Malice waives the privilege of FOIA Denials and qualified immunity.

c) The DEA, Marc Moore, Robert Blair, Brent Cathey, and BCBSMMIC knew that James Stewart had a problem with controlled substance medications. It was foreseeable that James Stewart would ingest at least some of the controlled substance pain medications of the Plaintiff. Voluntary ingestion of controlled substance medications prescribed to James Stewart posed a high risk of serious harm. Urine drug screens ordered by the Plaintiff did in fact contain controlled substances. The DEA, Marc Moore, Robert Blair, Brent Cathey, and BCBSMMIC consciously disregarded a known risk of serious harm. The DEA, Marc Moore, Robert Blair, Brent Cathey, and BCBSMMIC recklessly disregarded the safety of their own employee and/or agent of the government. Such behavior supports a finding of malice by the Defendant. Malice waives the privilege of FOIA Denials. As joints tortfeasors acting in concert and causing an indivisible injury, joint and several liability exists for the DEA, BCBSMMIC, IBC, MANTIS, Marc Moore, and Brian Bishop. The DEA can seek contributions from the other members of the joint enterprise for the cost of production of FOIA documents. The DEA either knew, or

would have had experience serious doubt as to the truth or falsity of actual and proximal causation in the DEA's assertions.

A Legal Issue for the DEA

> "The data portrayed in Figure 1 are important in the present context for a larger reason than the contradiction they offer to the now-ubiquitous false memes generated by the CDC and the misdirection this organization has caused in public health policy. The US Drug Enforcement Administration has also known of these data for the past four years. Figure 1 was published in a DEA Diversion Control Division conference in February2020 [7] However, this knowledge hasn't kept the DEA from aggressively pursuing and prosecuting clinicians who prescribe opioids to their patients, under the disproven CDC assumption that prescribing is responsible for the US opioid crisis. The anti-opioid testimony of so-called "expert witnesses" employed by DEA to convict pain doctors is directly contradicted by data of which the DEA was fully aware. The unscientific DEA position has provided the basis for prosecuting clinicians, only some of whom have successfully appealed their convictions on grounds of malicious prosecution."

[LP- Exhibit 18-Understanding Contributors to US Drug-Related Mortality. Richard A Lawhern PhD and Stephen E Nadeau MD. November 2023. P4]

LP Exhibit 9- United States of America v. Lonnie Joseph Parker Case No. 4:19-CR-40018-001; UNITED STATES' RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM

X . Why Full Disclosure Is Morally, Legally, Ethically, and Constitutionally Important.

a. Risk of mistake in the data is limited to the Plaintiff, as other U.S. physicians. Under the improper threat of criminal prosecution, the DEA, BCBSMMIC, HFPP partners forced the Plaintiff to assume all risks.

b. Joint Enterprise Acted in Concert So To Misrepresent a DEA Suboxone Administrative Audit

    i. The current role of the Food and Drug Administration (FDA) is to control which medications are available commercially. Historically, the Food, Drug, and Cosmetic Act (FDCA) of 1938 required only that a new medication be safe. In 1962, the Kefauver-Harris Amendment mandated that FDA-approved new drugs also must have evidence that they are effective. Therefore, the FDA approves new medications that have been shown to be safe and effective for specific indications (ie, "on-label" prescribing). The FDA drug label tends to be accurate, and provides for a reasonably safe manner to use the drug. Suboxone is a FDA- approved controlled substance medication used to treat drug addiction to opioids. Under the FDCA, a prescription drug, biologic, or medical device must be approved, authorized, or otherwise cleared by the FDA for at least one intended use before a company can market and distribute the product. Healthcare providers may, and commonly do, prescribe drugs and devices for uses that are not included in the approved product label, a practice known as "off-label use" or *off-label drug use* (OLDU). The most common form of OLDU involves prescribing currently available and marketed medications but for an indication (eg, a disease or a symptom) that has never received Food and Drug Administration (FDA)

approval. Hence, the specific use is "off-label" (ie, not approved by the FDA and not listed in FDA-required drug-labeling information). The term *OLDU* can also apply to the use of a marketed medication in a patient population (eg, pediatric), dosage, or dosage form that does not have FDA approval.

ii. The FDA does not limit or control how the medications are prescribed by physicians once the medications are available on the market. By definition, OLDU is prescribing for an indication, or employing a dosage or dosage form, that has not been approved through the FDA process. Under established legal authority, physicians can prescribe medications for off-label uses. *In re Farmacia Yani*, 80 Fed. Reg. 29053, 29064 n.29 (May 20, 2015). *Cf. Buckman Co. v. Plaintiff's Legal Cmte.*, 531 U.S. 341, 351 n.5 (2001) (acknowledging that off-label use of medical devices and medication is permissible).

iii. On 9/26/2016, at about 08:30, Brian Bishop of the DEA, Marc Moore of MANTIS (Monroe Area Narcotic Team Investigation Services), among other DEA and State of Michigan Police (MSP) officers , presented to the medical office of the Plaintiff. They alleged performing a DEA administrative inspection while actually performing a search and seizure of patients' medical records. The officers, appearing to be acting in concert under joint authority, alleged their presence as a DEA Suboxone administrative audit. The officers left at about 09:30, only to reappear at about 10:00, under loud screams: "Police, Police, Raid. No one moves."

MANTIS officer Scott Beard seized the cellphone of the Plaintiff, and declared that the intent of the first visit was in preparation of the 09:30 execution of a search warrant. Brian Bishop knew, should have known, or would have known whether sufficient evidence existed for the DEA's joint participation, with the Michigan's State Police, during the first and second raid. The Plaintiff seeks to understand the basis, the common purpose, for the joint enterprise raid.

c. Proportionality of the Burden
    i. Harm Done to the Plaintiff and the Monroe Community Outweigh the Burden to the DEA.
    ii. Judge Learned Hand introduced the concept of balance, of the burden as compared to the value. The years of enduring incarceration had the Plaintiff found guilty at the criminal trial corresponds to the time required by the DEA to produce the information. The Plaintiff financial loss of income, lost wages, normalized to an individual level correspond to the financial cost of the DEA's cost of production of the documents. Under the principle of balance, the DEA must produce the required information.

d. Clear and Obvious Risks
    i. The risks of side effects of controlled substances are objectively labelled in a clear and obvious way in Food and Drug Administration (FDA) drug label of each medication, and explained by the dispensing pharmacists under corresponding responsibility. Where there are hidden civil fines for DEA Registration license violation, the criminalization of clear and obvious potential side effects of controlled substance medications properly

disclosed by drug manufacturers to the FDA in the drug label, shocks the conscience of a reasonable person.

e. Elements of a Crime.
    i. The nature of the risk, and the magnitude of the harm to the patients are important to know if the prescription was reckless.

    ii. The Plaintiff seeks information that would comprise of effective warning to physicians as to impermissible behaviors surrounding controlled substance medications. At this time, the law on controlled substances lacks specific prohibition, regarding the doses and amounts of medications.

f. Restitution- A profiteering scheme under criminal, but not contract law. Anticipatory Repudiation Concealed for Proprietary Pecuniary Gains. [LP Exhibit 13- DOJ official (DOJ's Jake Foster): Data Analytics Resulting in More Efficient Health Care Fraud Detection. FEDSCOOP. BY JOHN HEWIT • FEBRUARY 22, 2023]

    i. Pursuant to anticipatory repudiation, once a party to a contract has reasonable basis in the formation of a secured belief that the other party will not, before performance under the contract is due, the non-breaching party must stop performance under the contract, 2) and mitigate their damages. On 11/2015, BCBSMMIC had sufficient doubt that the Plaintiff was involved in the improper prescription of controlled substances so to enter into a joint agreement with the DEA, state of Michigan Monroe County Prosecutor William Paul Nichols, Marc Moore of MANTIS, Robert Blair of the Monroe County Sheriff's Department, Brent Cathey of the Monroe City Police Department. Under the joint agreement,

BCBSMMIC would provide its employees (James Howell, Alan Robertson, Carl Christensen M.D, etc.) to jointly investigate the Plaintiff. Such conduct by BCBSMMIC would raise to the level of anticipatory repudiation of the Plaintiff to provide reasonable care to the BCBSMMIC members. At that point, BCBSMMIC was obligated to stop performance, or stop payment to the Plaintiff, pending assurance by the Plaintiff. Blue Cross continued to pay the Plaintiff for services rendered. Instead of mitigating its damages, BCBSMMIC sent James Stewart, aka James Howell, to multiple visits at the office of the Plaintiff. BCBSMMIC would rather seek, profitable penalty-sized, restitution, damages under criminal law, rather than actual damages under a breach of contract action at common Michigan Law.

ii. A valid standardized-form written contract as drafted, existed between: 1) the DEA and the Plaintiff by license, and 2) Blue Cross Blue Shield by a legal contract. The contracts were for services and thus the common laws applied. In these contracts, the Plaintiff did not have any opportunity to accept or reject the risk of data analytics, and undercover agents, of the style of James Stewart, aka James Howell.

iii. The contract was substantively unconscionable where it contains terms that are overly harsh or one-sided against one of the parties. Such is possibly the case here, where the contract provided for a high rate of medical and DEA license revocation, and 2) where a duty to treat disabling, incapacitating pain exists under the ADA (American Disability Act), the Plaintiff , and similarly

placed U.S. physicians, face forfeiture of an entire educational and financial investment in a professional degree in the event of an allegedly improper prescription. A finding that the Plaintiff, would lose a significant amount of money if forced to perform at the accepted level of DEA concealment would support a finding of unconscionability.

iv. If a party was in an unfair or inferior bargaining position because of his financial status, the resulting contract might be deemed procedurally unconscionable. Here, with the intent to have the Plaintiff actually and justifiably rely on the representation of a patient, such as James Stewart, BCBSMMIC aids, abets the DEA fake patients to blur real and fake patients. BCBSMMIC and the DEA employ far more lawyers, and have resources that dwarf the resources, and thus the ability of a pro se Plaintiffs to a fair bargain. The original contracts did not provide for the use of false patients, big data, to convict the doctor. The BCBSMMIC and DEA joint enterprise is procedurally unconscionable.

v. Under contract law, restitution and damages are meant to place a non-breaching party to the same economic position the party was, prior to the breach. Let's say a doctor bills BCBSMIC $100, that doctor may receive 40$, or some other amount, but certainly an amount less than the billed amount. As a measure of damages, Restitution damages are meant to bring a non-breaching party to a contract to the same financial position, but not a better financial position, from actual damages, as if the contract was never entered into. What if instead of using contract law, BCBSMMIC

strengthens criminal convictions of doctors? Under a scheme of maximizing profits to above actual damages via sharing of criminal forfeited assets, BCBSMIC sent James Stewart, aka James Howell, to enter traditional investigatory functions, aid and encourage the criminal conviction of doctors. BCBSMMIC thus obtains presumed damages, of much greater value than the actual value from criminally indicted physicians. In the above example, BCBSMMIC would be entitled to the $100 billed, and not simply the $40 actually paid. Following a criminal conviction, the doctor would be held to have stolen $100, and not the $40 BCBSMMIC actually paid. BCBSMMIC earns a profit of $60 for each physician visit by pursuing criminal referrals to obtain criminal restitution.

vi. Note that a threat to break a contract or wrongly institute civil action will not generally constitute duress, but it will if it is made in bad faith or if the remedy provided by the courts will be inadequate. *(e.g., Kaplan v. Keith*, 377 N.E. 2d 279 (Ill. App. 1978) ("If there is no full and adequate remedy from the courts for the breach, the coercive effect of the threatened action may be inferred."). Here, any remedy from the Courts would serve only to release the Defendant's data analytic algorithms pursuant to FOIA. Yet, this remedy is still inadequate because it would not restore the Plaintiff's opportunity to continue practice his profession in a race-neutral, equal opportunity manner. The Court can mitigate the duress on the Plaintiff by providing an adequate remedy.

vii. The DEA's and MANTIS' actions were fairly and naturally incident to BCBSMMIC's business and location of Health Care Fraud Units in Detroit

and Philadelphia. LP- Exhibit 16. HEALTH CARE FRAUD UNIT. An official website of the United States government. Visited 9/29/23, 3:04 PM

1. Brian Bishop of DEA passed medical records to Michael Hendricks of the OIG. On or about 5/26/2018, Michael Hendricks would obtain search warrants for records on OIG's possession since, or about 4/23/2018. This transfer aided and abetted the State of Michigan's transfer of the case to the federal prosecutor. Federal Prosecutors could do the work for BCBSMMIC and William Paul Nichols. State of Michigan Prosecutor William Paul Nichols voluntarily transferred State of Michigan's sovereign immunity to the Federal Prosecutors. The Federal Prosecutors Wayne Pratt and Brandy McMillian during the Plaintiff's criminal trial, the Government, the DEA and Blue Cross Blue Shield of Michigan Mutual Insurance Company sought about $17 million in restitution damages. It was foreseeable that the Government and Blue Cross would produce, in good faith, the basis for such a dollar amount. Under an implied covenant of good faith and fair dealing, the DEA, already in possession of documents in support of the $17,000,000 federal indictment sought, and caused a peril of risk of loss of $17,000,000 to the Plaintiff. At the criminal trial of the Plaintiff, the DEA did not produce evidence that the $17 million represented actual damages, and not economic duress. The DEA has a duty to produce the underlying data and documents. Under the doctrine of duty resulting from the creation of risk, where an actor subjectively perceives that his actions, even though not negligent in any way, has the effect of causing harm to another person, and thereby put that person at further risk of harm, from that point forward, the actor has a duty to use reasonable care to ensure that no further harm befalls the victim. See

Restatement (Second) of Torts § 322. Therefore, the DEA, whether or not responsible for any failure, is responsible for putting the Plaintiff at risk, after William Paul Nichols abandoned the case. The DEA has a duty to use reasonable care to assist the Plaintiff in establishing therapeutic doses.

a. Pain is Subjective and the test for whether an improper level of pain induced a party's assent to ingest a certain level of painkiller is a subjective one. Pain levels that may be sufficient to induce one person's assent to a particular dose and type of pain medication, may be insufficient to induce another person's assent. Encoded DNA genetics from ancestral trauma leading to biophysical and emotional expression with variable penetrance is often a substantial factor. Therefore, a Court must consider all of the attendant past present facts and circumstances regarding a doctor and the patient's assent in determining whether a certain pain level induced the patient's assent to a drug intake. The FOIA information will assist the instant Court, and a host of future Courts, in the issuing of a finding, as to whether or not, a doctor is practicing medicine within the medical standard for a specific patient.

b. Indemnity
    i. The DEA relied on representation of the commission of criminal activity on behalf of the MANTIS and BCBSMMIC. William Paul Nichols, MANTIS and BCBDMMIC furnished the information with the intent that the DEA would rely on that information. At the criminal trial of the Plaintiff, the representation of MANTIS and BCBSMMIC and William Paul Nichols were false and thus failed to obtain a criminal conviction. As an actual and proximate cause of the improper representation, the DEA suffered pecuniary harm arising out of the DEA's burden of production.

The DEA will be liable to the Plaintiff for both the original injuries and the subsequent harms from the malpractice William Paul Nichols, Marc Moore of MANTIS, and /or Blue Cross. William Paul Nichols, Marc Moore of MANTIS, and /or Blue Cross can indemnify DEA for costs.

XI. Bad Faith- Pecuniary Gains- Intentional Concealment

a. Standard Of Care. During medical malpractice state case law in the state of Michigan, violation of the standard must be demonstrated by a physician of similar skills, knowledge, experience, and board certification. The requirement for the same board certification, is to allow a national board of medicine to have recourse over a rogue physician who opine on the standard of care. The Plaintiff was a board-certified anesthesiologist, pain management specialist, and addiction specialist. Specialists in all three specialties deal predominantly, extensively, in the use of controlled substances. Dr. Carl Christensen was an obstetrician addictionologist fueled by a personal history of cocaine and alcohol abuse. Dr. J Alan Robertson was a physician with special training in the field of orthopedic medicine. Based in the usual course of dealing, it was foreseeable that the Plaintiff would utilize a higher rate of controlled substances than that required by physicians of other board certifications. The DEA concealed that expectation of a difference in the use of controlled substances, as expected by different medical specialties. Dr. Carl Christensen and Dr. J. Alan Robertson were of the different education, experience, and training than the Plaintiff. Dr. Carl Christensen and Dr. J. Alan Robertson opined on a standard of care other than that of a reasonable prudent physician of training in the field of anesthesiology, pain medicine, and addiction medicine combined. Pursuant to *Daubert*, the testimonies of Dr. Carl Christensen, and Dr. Robertson were impermissible.

b. DEA regulations provides for reasonable time to cure defects. Dan Loepp, the President and CEO of Blue Cross Blue Shield of Michigan Mutual Insurance Company, was an officer of said corporation: 1) had direct knowledge of the concerted action of Marc Moore of MANTIS, Brian Bishop of the DEA, Brent Cathey of the Monroe City Police, 2) directed the action of the joint enterprise, 3) provided employees such as James Stewart, aka James Howell, as agents of the government, in assisting the DEA, in furtherance of proprietary actions with the intent to share the pecuniary gains following any conviction of the Plaintiff, 4) violated CFR 42 §2.61 - 2.67 by not obtaining the court order necessary, prior to the investigation of a drug treatment office. The concerted action with a common goal, supervised by, and without the reasonable ability to cure any defects as provided by the DEA, led to foreseeable type of harms: loss of DEA registration, loss of state licensure, asset forfeiture, indictment, criminal trial, and reasonably incurred attorneys' costs and fees.

c. At the DEA Hearing for the Plaintiff's DEA registration, DEA Diversion Investigator Brian Bishop as main investigator, testified under oath as to the absence of any informants beyond James Stewart, aka James Howell of Blue Cross Blue Shield of Michigan Mutual Insurance Company. Brian Bishop acted with either actual or apparent authority so to be able to bind the DEA. On the Defendant's THIRD MOTION FOR SUMMARY JUDGMENT, the Plaintiff newly learned about the presence of an undisclosed, DEA Confidential Informant. Brian Bishop intentional concealment of the presence of a confidential informant during Court testimony suggests bad faith. Public policy prevents the use of bad faith as an instrument to further non-disclosure.

XII. Avoiding Arbitrary And Capricious Post Hoc Rationalization: Not all Atypical or Unusual Conduct is Fraudulent.

The Department of Justice (DOJ) and Health and Human Services (HHS) boast a yield of $4 or greater return on investment for every $1 spent on health care fraud detection and enforcement – and they point specifically to their reliance on data analytics as a key driver of this return. [Federal agencies using generative AI, analytics to search for health care fraud .Sep 12, 2023. Dan Martin, JD. Medical Economics. https://www.medicaleconomics.com/view/federal-agencies-using-generative-ai-analytics-to-search-for-health-care-fraud].

The Surgeon General Vivek Murthy, the Government's Chief Medical Officer, in Government Documents released to the Plaintiff admits that U.S. doctors were trained by the U.S. Government [LP Exhibit 2- *U.S. v. Levin* 973 F.2d 463 (6th Cir. 1992) Decided Aug 7, 1992] to believe that: 1) Doctors, including the Plaintiff were trained and taught that "pain was the fifth vital sign", 2) pain needed to be treated aggressively, 3) opioids were not addictive if used to treat pain. Nevertheless, data analytics are used in any arbitrary and capricious manner directed by the prosecution, despite the doctor's teaching and training and written standard of care textbooks, to seek criminal convictions against doctors. The elements of what actions or omission that constitute a felony or a False Claims Act (FCA), are not known until such action is declared illegal by the prosecutors. Such post-hoc rationalization in physicians who treat patients in a manner consistent with the Surgeon General, even if atypical or unusual in a niche population suffering from chronic pain, is not intrinsic evidence of the mens rea of a crime. [LP-Exhibit 17. Opioids Misuse Strategy. Centers for Medicare and Medicaid Services (CMS). January 5, 2017. P5]

INTRODUCTION

CMS Mission

The mission of CMS's Opioid Misuse Strategy is to impact the national opioid misuse epidemic by combating non-medical use of prescription opioids, opioid use disorder, and overdose through the promotion of safe and appropriate opioid utilization, improved access to treatment for opioid use disorders, and evidence-based practices for acute and chronic pain management.

Background

When people with opioid use disorder share their experiences, their stories often have an innocuous beginning: some needed a routine surgical procedure; others experienced a fall or were injured in a car crash. In order to manage pain during the healing process, their doctors prescribed a course of opioid medication, a practice that has become common over the past two decades. Providers were trained to think of pain as the "fifth vital sign" and were encouraged to use aggressive treatments to limit patients' pain. As stated by Surgeon General Vivek Murthy, "Many of us were even taught – incorrectly – that opioids are not addictive when prescribed for legitimate pain," he writes. "The results have been devastating."[6] In his letter to health care practitioners, the Surgeon General summarizes, "We arrived at this place on a path paved with good intentions."[7] Health care providers wanted to control their patients' pain, and opioids seemed to be a low-risk and highly effective means to do so.

Prescription Opioid Medications Commonly Linked to Substance Use Disorder:

- *Fentanyl*
- *Hydrocodone*
- *Oxycodone*
- *Oxymorphone*
- *Hydromorphone*
- *Meperidine*

The generic names for these medications are displayed. Each is also known by trade names unique to the pharmaceutical companies that manufacture them.

Source: https://www.drugabuse.gov/drugs-abuse/prescription-drugs-cold-medicines

XIII. *Brady/Giglio* Violation

Under *Brady v. Maryland*, 373 U. S. 83(1963). "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. " 373 U. S. at 87. This disclosure obligation includes evidence "that could be used

to impeach the credibility of a witness. " *Schledwitz v. United States*, 169 F. 3d 1003, 1011 (6th Cir. 1999) (citing *Giglio v. United States*, 405 U. S. 150, 154-55 (1972)). To be a *Brady/Giglio* violation, the at-issue impeachment evidence must be material, and the government must have suppressed it. *United States v. Tavera*, 719 F. 3d 705, 710 (6th Cir. 2013).

The FOIA information will more likely than not determine if the Plaintiff receives his medical license, and the return of his DEA Registration. The information is material to the Plaintiff. The Defendants commonly deal with that type of evidence, and are thus aware of its materiality. The material must be release so to avoid a *Brady*/*Giglio* Violation.

XIV. Negligence Per Se

To use negligence per se, three requirements must be met: (1) a statute must either prohibit or require the conduct at issue, (2) the plaintiff must be within the particular class of persons that the statute was designed to protect, and (3) the statute must be meant to protect people like the plaintiff from the particular injury that the plaintiff suffered.

Where an individual has an expectation of privacy, the Fourth Constitutional Amendment prohibits illegal search and seizures. Neither the State of Michigan, nor the State of New Jersey, provide for extraterritorial search warrants. On 9/26/2016, after the Monroe City Police executed an extraterritorial search warrant at the Plaintiff's house at 533 N. Monroe St, Brent Cathey of the Monroe City Police closed the house at about 12:00 noon. The execution of the search warrant had ended. Later on that afternoon, while the Plaintiff was in police custody, DEA Diversion investigator Brian Bishop returned to 533 N. Monroe Street house, broke the entrance door, voluntarily intruded into the real property, performed a warrantless search and seizure of items listed, and non-listed in particularity in the search warrant. The Police, MANTIS and the

DEA had a duty to protect the Plaintiff from the illegal search of a third person's search in the confined space of 533 N. Monroe St. In violation of Michigan Law, Brian Bishop failed to file a report with the State of Michigan Magistrate Judge of authorized the Brent Cathey search and seizure. The actions of Brian Bishop on 9/26/2016 represent 1) a violation of the 4th Amendment of the U.S. Constitution (improper search and seizure), and 2) an intentional State of Michigan Tort, trespass to land. Intentional torts, such as trespass to land, constitutes a liability under FTCA exception.

Under a theory of negligence per se, any search and seizure over the 4th Constitutional Amendment statutory limit amounted to negligence per se as a matter of law. The intentional tort and the negligence per se, negate qualified immunities, and bar exemptions under FOIA.

XV. NEGLIGENT ENTRUSTMENT – DEA TO MANTIS and JAMES STEWART, AND BCBSMMIC

OMNI preceded MANTIS. OMNI, under Marc Moore, was disbanded by the federal government and the State of Michigan, pursuant to illegal search and seizures committed with the intent to permanently deprive the rightful owner. Marc Moore became head of MANTIS, 2) provided DEA Task Force Officers, such as Christine Hicks, to the DEA, 3) continued unlawful actions started under OMNI, took James Stewart aka James Howell to the pharmacy to fill and ingest controlled substances. Brian Bishop had a duty of reasonable care and a special duty of care, under his employment as a DEA Diversion Investigator. Brian Bishop breached his duty when he, either actually or constructively: 1) employed, entrusted, MANTIS /DEA Task Force Officers in Monroe / BCBSMMIC employee James Stewart, when Bishop failed to act according to DEA hiring rules. As a result of the breach, the Plaintiff suffered: 1) personal property

damages (car, house, office, equipment, computers, medical practice), 2) asset forfeiture, 3) loss of chance of early treatment of Plaintiff's left eye. Brian Bishop, and vicariously the DEA, were negligent in their entrustment in the investigation of the Plaintiff. Similar situations existed with: 1) Carl Christensen M.D, who was admitted by AUSA Wayne Pratt during the direct examination of Dr. Christensen during the trial of the Plaintiff, to admit that Dr. Christensen's was afflicted himself with cocaine and alcohol addiction, 2) undisclosed conflict of interest with the CDC Guidelines. [LP- Exhibit 19- Resources for Clinicians in Pain Medicine: Correcting Medical Mythologies on Prescription of Opioid Analgesics. Richard A. Lawhern, PhD. P5]

The Court must find the DEA, is at least vicariously liable for the negligence, because the duty to investigate potential criminal defendants falls reasonably within State and Federal laws. Such functions are too important to be delegable to third parties. The Court can remedy the negligence by issuing damages to the Plaintiff, by the denying of the Third Motion for Summary Judgement.

XVI. PUBLIC NUISANCE

A. Omission to Act Post 9/26/2016 raid, Civil Forfeiture- Even if the members of the Joint Enterprise were Innocent.

Generally, negligence law does not impose an affirmative duty on an innocent bystander to prevent further harm to another person. However, an exception applies if an actor knows or has reason to know that his actions, even though not negligent or careless in any way, caused bodily harm to another person and thereby put that other person at risk of further harm. In that situation, even though the actor did not do anything negligent or wrong, the actor still has a duty to exercise reasonable care to prevent that foreseeable risk of further harm to the injured person. *See* Restatement (Second) of Torts § 322. On 9/26/16, the medical office of the Plaintiff was raided, trashed,

computers impaired, financial assets seized at Monroe Bank and Trust. Unknowingly by the Plaintiff, Robert Blair of the Monroe County Sheriff's Department followed the Plaintiff to the Monroe Credit Union on 9/27/16, then learned of Plaintiff personal and business account, and seized remaining financial assets. While the Plaintiff still possessed a valid State of Michigan medical license and DEA registration, the medical office of the Plaintiff was constructively closed, and unable to offer assistance to patients. The DEA participated in many previous raids other than the office of the Plaintiff, resulting in office closures where legitimate patients were abandoned. It was foreseeable that numerous patients would experience a lack of medical care after the raid by the DEA. Brian Bishop failed to set up any alternative health care delivery access point for the Plaintiff's patients. As a result, some former patients, including former Michigan State trooper, Richard Johnson, and Janet Loruss died. Public policy was destroyed. The release of the FOIA documents and data requested, can serve to alert doctors of potential DEA actions, preserve the medical care of patients, and positively advance public policy.

B. An Unreasonable Substantial Interference

An unreasonable interference with the health, safety, morals, or welfare of the community of the Plaintiff's patients among others, constitutes a public nuisance. In the usual daily treatment of patients, physicians face risks which limit health care delivery. The risks include: medical malpractice litigation in both treatments and non-treatments resulting in wrongful deaths and disability, constraints to health care delivery posed by limits to medical treatment placed by PBM (Pharmacy Benefit Managers) and health insurance companies; and risks to the physician's personal health in catching an infectious disease, such as COVID-19. The use of informants, such as James Stewart Howell, posing as legitimate patients, interfere with the ability of physicians to determine the true and accurate disease state causing the pain by

adding the risk of a criminal indictment on top of traditional risks to health care delivery. [LP Exhibit 10- *In Bad Faith: The Influence of PROP and CDC on Failed National Opioid Policy*, Chad D. Kollas, MD, FACP, FAAHPM Medical Director, Supportive & Palliative Care, Orlando Health Cancer Institute, Orlando, FL]. Commonly performed Interventional, non-pharmacologic pain procedures such as epidural steroids injections, carry material risks. [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6526135/]. Patients undergoing interventional pain procedures assume a risks of substantial body harm. [LP-Exhibit 20- The Hidden Dangers of Spinal Steroid Injections. National Pain Council. Publication # 016. 2023].

Facing rising uncompensated risk and as part of risk management compliance plans, physicians limit health care delivery, particularly to riskier patients. The limit interferes with the health care of the Monroe Community. A reasonable person would likely believe that damage to the health, safety, and rights to medical care under the Americans with Disabilities Act (ADA) is a substantially greater harm than interference with DEA's property rights in the FOIA data and FOIA documents.

C. Misrepresentations published by James Stewart aka James Howell

The DEA exists by Congressional Intent in a position of Trust. The defense of misrepresentation may be asserted by a party whose assent was induced by a misrepresentation, or untrue assertion, that was either fraudulent or material, as long as the party's reliance on the assertion was justified. Non-disclosure of a material fact may be a misrepresentation when the non-disclosing party knows that disclosure is necessary to correct the other party's mistake or has a relationship of trust and confidence with the other party. Restatement (Second) of Contracts § 161 (1981). The DEA, via HFPP and BCBSMMIC relies on misrepresentations [false medical records, false social security numbers, false driver's license, false medical referrals by Dr. J. Alan Robertson, use of unlicensed

investigator who obtained and ingested controlled substances under the scheme of investigating the Plaintiff]. The DEA's disclosure via the FOIA is necessary to correct the misrepresentations of MANTIS, James Stewart aka James Howell, BCBSMMIC, and other HFPP partners. The Defendant cannot remain a non-disclosing party.

XVII. Product Liability – Defective Design / Express Warranty-Proprietary Function Outside of FOIA Protection

A commercial supplier is a manufacturer, wholesaler, retailer, or anyone else selling or distributing the product on a more-than-casual basis in the regular course of business, so long as that supplier is in the chain of distribution from the initial manufacturer to the plaintiff. Blue Cross Blue Shield of Michigan Mutual Insurance Company BCBSMMIC manufactures, distributes to the stream of judicial commerce, including the DEA, the "Prescriber Block Analysis Software." In an advertisement using facts in the soliciting business from prosecuting attorneys, Ms. Gembarsky of Blue Cross Blue Shield of Michigan Mutual Insurance Company (BCBSMMIC) warrantied its software product to strengthen a finding that a physician committed fraud. The Court opined that : "statistical evidence, although valuable, cannot solely satisfy the FCA's scienter requirement. Stated differently, it cannot, without more, demonstrate that a defendant knowingly committed fraud." [United States v. Life Care Ctrs. of Am., 114 F. Supp. 3d 549, 560 (E.D. Tenn. 2014).]

Additionally, through Qlarant, a government contractor, the DEA introduced into the stream of judicial commerce, software-based data analytics, that expressly warranties the ability of the software in the prediction of criminal activity (mens rea, actus rea, causation, and concurrence), and strengthened the convictions against similarly situated persons as the Plaintiff, within the zone of interests to be protected.

[LP Exhibit 5- Federal agencies using generative AI, analytics to search for health care fraud Sep 12, 2023, Medical Economics, Dan Martin, JD]

[LP Exhibit 6- Forensic System And Method For Detecting Fraud, Abuse, And Diversion In The Prescriptive Use Of Controlled Substances by Dr. Timothy King]

LP Exhibit 7- Testimony of Dr. Timothy King and Use of Dr. King's Own Proprietary Data Analytics Algorithm For Expert Opinion Utilization In Criminal Trials Against Physicians]

The software product fails to perform its obvious intended function. [LP Exhibit 8- *Dr. David Stein v. Dr. Timothy King*; USDC IN/ND case 2:22-cv-00187-PPS-JPK]

No legally effective warning was given as presented as to the software product being unfit for its ordinary use. Such written documents constitute an intentional or a negligent misrepresentation. A misrepresentation is material when it is likely to induce a reasonable person's assent, or when it is known to be likely to induce the party's assent. [Restatement (Second) of Contracts § 162 (1981)]. BCBSMMIC knew that Qlarant, the DEA, State Attorney Generals were likely to rely on BCBSMMIC in seeking criminal convictions of the Plaintiff, or similarly placed doctors.

A. Software Product Defective Per Se

If a product at issue does not comply with a statute or regulation, and the risk that the statute was designed to avoid is the same risk that caused a plaintiff's injury, then the product is per se defective. HIPAA, 42 CFR Part 2, the ADA (American Disability Act) are either statutes or regulations that provide for the privacy protection and the rights to treatment of patients, and 2) for the privacy rights of physicians treating certain class of patients requiring a court order prior to the insertion of undercover agents, such as James Stewart, videotaping without consent or privilege,

patients entitled at law (HIPAA, CFR 42, the ADA) to an expectation of privacy interest. The software product is defective per se.

B. The Software Product Fails Reasonable Consumers

A reasonable consumer would expect the software to predict criminal intent accurately and truthfully, and the risks of medical treatments versus the risks of non-treatment. The software design provides prior authorization [LP Exhibit 4- Artificial Intelligence May Influence Whether You Can Get Pain Medication by Andy Miller and Sam Whitehead September 6, 2023, Kaiser Health News] without normalizing the prescription habit data of the plaintiff for the weight, disease state, tolerance level, tachyphylaxis level, and the availability of alternative effective treatments of similar risk profile, of the prescribed patients. For example, the Joint Enterprise has not shown that back surgery, or any other surgeries, provide greater quality of life for a greater lifespan, at less disability than either surgical treatments, or treatments using non-controlled pharmacologic treatments. Jacob Foster, Principal Assistant Chief of the DOJ's Health Care Fraud Unit, stated : "[…] data is not the truth." The software products behave in a manner below the expectation of the Department of Justice. The software product is defective as the product functions below the standard alleged by the express warranty. As an actual and proximate cause of the defective software, the defective software adversely affected the health, finances, and professional standing of the Plaintiff directly, and of the Plaintiff's patients indirectly.

C. Warning Defect

Pursuant to *Carruth v. Pittway Corp.*, 643 So.2d 1340, 1346 (Ala. 1994), legally effective warnings should be presented in a way calculated to gain the average user's attention. *The DEA, BCBSMMIC, and Qlarant failed to inform a particular reader, or prosecutor warning of potential*

defect in their software product. The DEA, IBC, and BCBSMMIC failed to warn of :Fundamental Causes of Illicit Drug Deaths and Mortality

> "There are now extensive data that solidly link illicit drug use to loss of community institutions, loss of jobs and persistent unemployment, physical disability, often with pain, breakup of families, poor mental health, hopelessness, and ultimately lives of desperation and despair. These factors have particularly affected people with less than a college education, and even more so, people with less than a high school education."

[LP- Exhibit 18-Understanding Contributors to US Drug-Related Mortality. Richard A Lawhern PhD and Stephen E Nadeau MD. November 2023. P4]

D. Joint and Several Liability

A defendant's liability for negligence is limited to the harms that result from the risks that make the actor's conduct tortious in the first place. Restatement (Third) of Torts § 29 (2010). A defendant will not be liable when his tortious conduct does not increase the risk of the type of harm actually suffered by the plaintiff. *Id.* at § 30. The data analytic software 1) does not promote the health, safety, and rights of the public, and 2) has not been shown that a particular physicians' prescribing habits, increase the risks of death, to more than 50%. Because the overdose harm some of the patients suffered is unrelated to the risk that makes prescribing habits of doctors negligent in the first place, the doctors will not be liable for these patients' injuries. Where doctors, and neither the DEA nor MANTIS, are not solely under the control of all the actions that an overdosing patient takes, Res Ipsa Loquitur style of liability does not apply to criminal

defendants. The data analytics attributes fault to the wrong party. The Court can redress the misattribution by allowing the release of the FOIA data and FOIA documents.

E. Proprietary Function of MANTIS, IBC, BCBSMMIC, and the Defendant.

Exemptions fall under discretionary functions and not proprietary functions. DEA prosecutions and convictions allow private actors, such as BCBSMMIC, IBC to obtain pecuniary gain, beyond restitution and pecuniary remedy from actual damages under contract law, to presumed damages under criminal law. By moving away from direct observation and toward a

analytical, inference-based data analytic approach of their defective proprietary software, unjust enrichment yields rich proprietary gain from criminal defendant's assets forfeiture MANTIS, BCBSMMIC, IBC, BCBSA, and the Defendants

XVIII. Alternative Remedy

In the alternatives that the above is denied, the Plaintiff would request that: 1) the DEA to disclose the record only to a federal judge for in camera inspection to determine whether it's exempt; or 2) the DEA to create an index, known as a *Vaughn* index of the supposedly exempt files. The *Vaughn* index describes and identifies which exemption applies to each record. The Plaintiff would receive a copy of the *Vaughn* index, so that the Plaintiff can rightfully challenge the DEA's exemption claims.

WHEREFORE, liberty and justice would be sacrificed without the FOIA disclosure. The DEA must use reasonable care to warn conditions, which the DEA knows about or has reason to know about, and which involve a risk of death or serious injury. The DEA is objectively unreasonable, given all the circumstances, in refusing to release FOIA information likely to save lives.

Dated: November 27, 2023

By: /s/ Lesly Pompy

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EXHIBITS LIST

LP Exhibit 1- *Micks-Harm v. Nichols* Consolidated Action Lead Case NO. 18-12634 United States District Court Eastern District Of Michigan Southern Division

LP Exhibit 2- *U.S. v. Levin* 973 F.2d 463 (6th Cir. 1992) Decided Aug 7, 1992

LP Exhibit 3- United States of America v. Patrick Titus, United States Court of Appeals for the Third Circuit No. 22-1516

LP Exhibit 4- Artificial Intelligence May Influence Whether You Can Get Pain Medication by Andy Miller and Sam Whitehead September 6, 2023, Kaiser Health News

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LP Exhibit 8- *Dr. David Stein v. Dr. Timothy King*; USDC IN/ND case 2:22-cv-00187-PPS-JPK

LP Exhibit 9- *United States of America v. Lonnie Joseph Parker* Case No. 4:19-CR-40018-001; UNITED STATES' RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM

LP Exhibit 10- *In Bad Faith: The Influence of PROP and CDC on Failed National Opioid Policy*, Chad D. Kollas, MD, FACP, FAAHPM Medical Director, Supportive & Palliative Care, Orlando Health Cancer Institute, Orlando, FL

LP Exhibit 11- Certified Public Record of *Neil Anand v. Pennsylvania Department of Insurance* No. 318 MD 2023

LP Exhibit 12- *United States of America v. Lonnie Joseph Parker* Case No. 4:19-CR-40018-001; THE UNITED STATES OF AMERICA'S SUPPLEMENTAL RESPONSE TO THE DEFENDANT'S MOTION FOR DISCLOSURE OF EVIDENCE UNDER 404(b)

LP Exhibit 13- DOJ official (DOJ's Jake Foster): Data Analytics Resulting in More Efficient Health Care Fraud Detection. FEDSCOOP. BY JOHN HEWIT • FEBRUARY 22, 2023

LP Exhibit 14, Advanced Data Analytics is Changing How Agencies Fight Fraud. – Wylie Wong. HealthTech. June 28, 2023.

[LP- Exhibit 15. Foundations of Mathematics]

LP- Exhibit 16. HEALTH CARE FRAUD UNIT. An official website of the United States government. Visited 9/29/23, 3:04 PM

[LP- Exhibit 17. Opioids Misuse Strategy. Centers for Medicare and Medicaid Services (CMS). January 5, 2017]

[LP- Exhibit 18-Understanding Contributors to US Drug-Related Mortality. Richard A Lawhern PhD and Stephen E Nadeau MD. November 2023. P4]

[LP- Exhibit 19- Resources for Clinicians in Pain Medicine: Correcting Medical Mythologies on Prescription of Opioid Analgesics. Richard A. Lawhern, PhD. P5]

[LP-Exhibit 20- The Hidden Dangers of Spinal Steroid Injections. National Pain Council. Publication # 016. 2023].

[LP-Exhibit 21. Federal Register / Vol. 88, No. 209 / Tuesday, October 31, 2023 / Notices. Page 74512]

[LP-Exhibit 22-Trends and Geographic Patterns in Drug and Synthetic Opioid Overdose Deaths MMWR / February 12, 2021 / Vol. 70 / No. 6. US Department of Health and Human Services/Centers for Disease Control and Prevention.]

CASES

United States v. Life Care Ctrs. of Am., 114 F. Supp. 3d 549, 560 (E.D. Tenn. 2014).

Certificate of Service

Lesly Pompy hereby certifies that on the date set forth below a copy of the foregoing was filed with the clerk of courts. Notice of this filing will be sent to all parties by email or by regular mail. I also hereby certify that I presented the foregoing Brief to the Clerk of the Court through email, submitted in PDF format, to DCD_ECFNotice@dcd.uscourts.gov, dcd_intake@dcd.uscourts.gov, for filing and uploading to the ECF system, which will send notification of such filing to the attorneys of record listed herein.

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