No._____

In The

Supreme Court of the United States

Janet Berry

Petitioner,

V.

William Paul Nichols et al

Respondents,

On Petition For Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit Court of Appeal 19-2209

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

In Forma Pauperis

Janet Berry

8 West 7th Street

Apt. 307

Monroe, MI 48161

APPENDIX

APPENDIX A

Decision of SIXTH CIRCUIT COURT OF APPEAL

Nos. 19-2173/2182/2207/2209/2226/2227/2228/1137

ORDER

Before: GUY, SILER, and GIBBONS, Circuit Judges.

The pro se Michigan plaintiffs in these consolidated cases appeal the district court's judgment dismissing their 42 U.S.C. § 1983 civil rights complaints, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state claims for relief. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a).

Plaintiffs Tracy Clare Micks-Harm, Debra A. Nichols, Jennifer L. Smith, Janet Berry, Patrick Andrew Smith, Jr., Angela Mills, Janet Zureki, and Michael Smallwood were patients of Dr. Lesly Pompy, who operated a pain-management clinic in Monroe, Michigan. In September 2016, agents of a narcotics task force raided Dr. Pompy's office and seized the plaintiffs' medical records. In June 2018, a federal grand jury in the Eastern District of Michigan returned a thirty-seven-count indictment charging Dr. Pompy with healthcare fraud and illegally distributing controlled substances. That case is still pending in the district court.

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During the investigation into Dr. Pompy's activities, agents subpoenaed medical records from I-Patient Care, Inc., a New Jersey corporation that provided cloud-based electronic records storage services for him. Agents also subpoenaed financial records from Dr. Pompy's bank, First Merchants Corporation (First Merchants). It appears that Blue Cross/Blue Shield of Michigan neither cooperated in the investigation or conducted its own investigation into Dr. Pompy's medical practice and sent an investigator or employee named James Stewart (aka James Howell) to

his office under the guise of a patient seeking treatment. Stewart allegedly obtained a prescription for controlled substances, and he allegedly surreptitiously filmed Dr. Pompy's office during his visit.

The plaintiffs did not claim, however, that they appeared in Stewart's film. The Michigan Department of Licensing and Regulation has suspended Dr. Pompy's medical license, and the Drug Enforcement Agency has revoked his authority to prescribe controlled substances. Near the end of 2018, the plaintiffs in these cases, as well as others who are not parties to these appeals, filed substantially identical civil rights complaints in state court against William Nichols, who was the prosecuting attorney for Monroe County, Michigan, at the time, and a host of federal, state, and local officials; state and federal judges; federal, state, and local law enforcement agents and officers; state agencies; state and local governmental entities; private insurance companies; and employees of the insurance companies. The plaintiffs brought claims for healthcare fraud and for violations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996); the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030; the Fourth Amendment; and the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs also asserted state law claims for breach of contract, malicious prosecution, and violations of the code of ethics for judges and lawyers promulgated by the American Bar Association. Micks-Harm, Nichols, Mills, and Zureki also sued a local newspaper reporter, Ray Kisonas, for defamation and false-light invasion of privacy because he wrote an article in which he allegedly referred generally to Dr. Pompy's patients—but not the individual plaintiffs themselves—as heroin addicts. Additionally, these same four plaintiffs sued

First Merchants and two bank officers for releasing Dr. Pompy's financial records pursuant to the subpoena. The plaintiffs sought billions of dollars in compensatory and punitive damages from the defendants.

The district court consolidated the various cases, sorted the defendants into various groups, and then granted motions to dismiss that the defendants had filed under Federal Rule of Civil Procedure 12(b)(6). Generally speaking, the district court concluded that the state and federal prosecutors and judicial officers were entitled to absolute immunity from suit; the plaintiffs' complaints did not comply with

Federal Rule of Civil Procedure 8 because they failed to make a "short and plain statement" of their claims, their claims were not supported by factual allegations, and their allegations failed to identify which defendants were responsible for which violations; the plaintiffs lacked standing to assert claims on behalf of Dr. Pompy and his absent third party patients; HIPAA does not provide a private cause of action to remedy violations; the state agencies were entitled to Eleventh Amendment sovereign immunity; the plaintiffs' CFAA claims failed because they did not allege that the defendants had illegally accessed their computers; the plaintiffs alleged only respondeat superior liability against the municipal defendants; the individual state police officers and investigators were entitled to qualified immunity; and I-Patient was entitled to dismissal because it was not a state actor. The district court did not specifically address the plaintiffs' claims against Kisonas or First Merchants and its officers. The court also denied the plaintiffs leave to amend their complaints to bring additional claims against the defendants. The plaintiffs individually appealed the district court's judgment, and the clerk of court consolidated the appeals for disposition. They have filed substantially similar appellate briefs, which, despite their length, fail to develop any argument demonstrating that the district court erred in dismissing their complaints. After careful de novo review, see Ohio ex rel. Boggs v. City of Cleveland, 655 F.3d 516, 519 (6th Cir. 2011), we conclude that the district court correctly dismissed the plaintiffs' complaints for failure to state plausible claims for relief, see Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), and that issuing our own separate opinion would be unnecessarily duplicative. Accordingly, we adopt the district court's opinion and reasoning as our own. See Adler v. Childers, 604 F. App'x 502, 503 (6th Cir. 2015).

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We do wish to emphasize several points, however. First, the plaintiffs lack standing to assert the rights of Dr. Pompy and his patients who were not parties in these cases—indeed, the plaintiffs' complaints were largely devoted to seeking

relief on behalf of Dr. Pompy. See Rakas v. Illinois, 439 U.S. 128, 134 (1978); Crawford v. U.S. Dep't of Treasury, 868 F.3d 438, 455 (6th Cir. 2017); Moody v. Mich. Gaming Control Bd., 847 F.3d 399, 402 (6th Cir. 2017). Among the claims

that the plaintiffs lack standing to pursue are those alleging an illegal search of Dr. Pompy's office and seizure of the plaintiffs' medical records from his office and computer system; the suspension of Dr. Pompy's medical license and license to dispense controlled substances; the insurance carriers' alleged breach of their contracts with Dr. Pompy; and the disclosure of Dr. Pompy's financial records pursuant to a subpoena. To the extent that the plaintiffs claimed that Dr. Pompy's arrest and the suspension of his medical privileges violated their right and/or ability to obtain appropriate pain medication for their conditions, they failed to state a constitutional violation. Cf. Whalen v. Roe, 429 U.S. 589, 603 (1977) ("[T]he State no doubt could prohibit entirely the use of particular Schedule II drugs."). Second, the plaintiffs do not have a private cause of action to remedy the alleged HIPAA violations. See Faber v. Ciox Health, LLC, 944 F.3d 593, 596–97 (6th Cir. 2019); Thomas v. Univ. of Tenn. Health Sci. Ctr. at Memphis, No. 17-5708, 2017 WL 9672523, at *2 (6th Cir. Dec. 6, 2017) (collecting cases). And the disclosure of the plaintiffs' medical records to law enforcement officers for the purpose of investigating Dr. Pompy's allegedly illegal activities did not violate their Fourth Amendment rights or their constitutional right to privacy. Cf. Whalen, 429 U.S. at 602; In re Zuniga, 714 F.2d 632, 642 (6th Cir. 1983).

Third, the plaintiffs' complaints failed to give each of the defendants fair notice of their claims, as required by Federal Rule of Civil Procedure 8. See Marcilis v. Twp. of Redford, 693 F.3d 589, 596 (6th Cir. 2012).

Fourth, the plaintiffs' defamation and false-light claims against newspaper reporter Ray Kisonas failed as a matter of law because the plaintiffs failed to identify any false or defamatory statement that Kisonas made about them personally, as opposed to statements about Dr. Pompy'spatients generally. See Mitan v. Campbell, 706 N.W.2d 420, 421 (Mich. 2005) (per curiam); Found. for Behav. Res. v. W.E. Upjohn Unemployment. Tr. Corp., ___N.W.2d___, No. 345145, 2020 WL 2781718, at *2 (Mich. Ct. App. May 28, 2020) (per curiam), perm. app. granted, 955 N.W.2d 898 (Mich. 2021) (mem.).

Fifth, the district court did not err in denying the plaintiffs leave to amend because their proposed claims would not have withstood a motion to dismiss. See Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 569 (6th Cir. 2003); Morse v. McWhorter, 290

F.3d 795, 799 (6th Cir. 2000). Their proposed amendments suffered from the same defects as their original complaints—they asserted claims under statutes and regulations that do not provide a private cause of action, cf. Ellison v. Cocke Cnty., 63 F.3d 467, 470–72 (6th Cir. 1995) (holding that 42 U.S.C. § 290dd-2, which mandates that the medical records of substance-abuse patients be kept confidential, does not provide a private cause of action for a violation), they asserted claims on behalf of third parties, and they failed to give the defendants fair notice of the claims.

We AFFIRM the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B. SIXTH CIRCUIT COURT OF APPEAL

Order Denying Reconsideration

Consolidated: 19-2173, 19-2182, 19-2207, 19-2209, 19-2226, 19-2227, 19-2228, and 19-2237). U.S. Court of Appeals, FOR THE SIXTH CIRCUIT. June 30, 2021 Order.

ORDER BEDORE : GUY, SILVER, and GIBBONS, Circuit Judges denying rehearing .

The pro se Michigan Plaintiffs in these consolidated Appeals individually petition the court to rehear our court order of May 24, 2021, affirming the district court's judgment dismissing their 42 U. S. C. § 1983 civil rights complaints for failure to state claims for relief.

Upon review, we conclude that the plaintiffs have not shown that we overlooked or misapprehended a point of law or fact in affirming the district court's judgment. See Fed. R. App. P. 40 9a) (2).

APPENDIX C

Consolidated cases 2.18-cv-12634, Filed in 2018

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN

TRA CY CLARE MICKS HARM et al v. WILLIAM PAUL NICHOLS et al

TRACY CLARE MICKS-HARM, Plaintiff,
v.
WILLIAM PAUL NICHOLS ET AL, Defendants.

CASE NO. 18-12634

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

February 20, 2019

HON. DENISE PAGE HOOD

ORDER GRANTING DEFENDANTS' MOTION TO CONSOLIDATE CASES[1] [#16] AND SETTING DATES

I. BACKGROUND

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On August 3, 2018, Plaintiff Tracy Clare Micks-Harm ("Micks-Harm") commenced this action in the State of Michigan's Monroe County Circuit Court alleging that the defendants she named in her Complaint violated her rights under the Fourth Amendment, the Health Insurance Portability and Accountability Act of

1996 ("HIPAA"), the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, 42 U.S.C. § 1985 (conspiracy to interfere with civil rights), and 18 U.S.C. § 1347 (health care fraud). (Doc # 1-2) These named defendants include: William Paul Nichols, Blue Cross Blue Shield of Michigan Foundation, Blue Cross Blue Shield of Michigan, Blue Care Network of Michigan, Bluecaid of Michigan, I-Patient Care, Inc., Marc Moore, Brian Bishop, Christine Hicks, John J. Mulroney, Shawn Kotch, James Stewart, Robert Blair, Brent Cathey, Jon Lasota, Sean Street, Mike McLaine, Monroe Police Department, Tina Todd, Jessica Chaffin, Jack Vitale, Daniel White, Carl Christensen, Alan J. Robertson, Diane Silas, Jim Gallagher, Scott Beard, Derek Lindsay, Aaron Oetjens, Mike Merkle, FNU Sproul, Brian Zazadny, William McMullen, Donald Brady, Chris Miller, William Chamulak, Tom Farrell, Mike Guzowski, Timothy Gates, Sarah Buciak, Allison Arnold, Jeffrey Yorkey, Michael G. Roehrig, Dale Malone, Leon Pedell, Vaughn Hafner, Dina Young, Bill Schuette, Jennifer Fritgerald, Timothy C. Erickson, Catherine Waskiewicz, Michael J. St. John, Michigan Administrative Hearing System, Michigan Automated Prescription System, Haley Winans, Matthew Schneider, Wayne F. Pratt, Brandy R. McMillion,

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and Blue Cross Complete of Michigan. (*Id.* at Pg ID 11-13.) Defendants Matthew Schneider, Wayne F. Pratt, and Brandy R. McMillion (collectively, "the Federal Defendants") removed this action to federal court on August 23, 2018. (Doc # 1)

On November 30, 2018, Federal Defendants filed a Motion to Consolidate Cases. (Doc # 16) Micks-Harm has not responded to Federal Defendants' Motion. There was a hearing held regarding this Motion on February 15, 2019.

The facts as alleged are as follows. On June 28, 2018, Micks-Harm was informed by Dr. Leslie Pompy that all of the named defendants reviewed her medical records. (Doc # 1-2, Pg ID 22) Two or more of the named defendants currently continue to possess and/or have access to her past medical history. (*Id.* at 20.) The named defendants were able to access Micks-Harm's medical information following the execution of a felony search warrant that resulted in her medical records being seized from Dr. Pompy's office. (*Id.* at 22.) It is alleged by Micks-Harm that the search warrant occurred without the existence of probable cause and absent any exigent circumstances. (*Id.*) The search warrant that Micks-Harm refers to in her Complaint is connected with an ongoing criminal case, *United States v. Pompy*, 18-cr-20454 (E.D. Mich.), in which Dr. Pompy is charged with distributing controlled substances (21 U.S.C. § 841(a)(1)) and health care fraud (18 U.S.C. § 1347). (Doc # 5, Pg ID 45)

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Micks-Harm claims that her HIPAA rights were violated because she was not notified that the named defendants were going to access her medical information.

(Doc # 1-2, Pg ID 22) Micks-Harm alludes to the fact that her Fourth Amendment rights were violated since the police unreasonably seized her medical records from Dr. Pompy's office. (*Id.* at 23.) It is additionally asserted by Micks-Harm that two or more of the named defendants violated her rights by committing computer fraud under 18 U.S.C. § 1030. (*Id.* at 21.) Micks-Harm also alludes to the fact that her rights were violated under 42 U.S.C. § 1985 (conspiracy to interfere with civil rights), and 18 U.S.C. § 1347 (health care fraud) as well. (*Id.* at 24-25.)

Micks-Harm requests that the Court award her and Dr. Pompy's other patients punitive damages in the amount of $800 million dollars, monetary damages in excess of $1 billion dollars, and an unspecified amount of compensatory damages. (*Id.* at 27-28.) Micks-Harm also seeks any other damages available, interest, fees, and medical expenses. (*Id.* at 28.)

II. ANALYSIS

Rule 42(a)(2) provides that a court may consolidate actions involving "a common question of law or fact." Fed. R. Civ. P. 42(a)(1); *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993). The objective of consolidation is to administer the court's business with expedition and economy while providing justice to the parties. *Advey v. Celotex Corp.*, 962 F.2d 1177, 1181 (6th Cir. 1992). Consolidation

of separate actions does not merge the independent actions into one suit. *Id.* at 1180. The party seeking consolidation bears the burden of demonstrating the commonality of law, facts or both in cases sought to be combined. *Young v. Hamrick*, 2008 WL 2338606 at *4 (E.D. Mich. 2008). Once the threshold requirement of establishing a common question of law or fact is met, the decision to consolidate rests in the sound discretion of the district court. *Stemler v. Burke*, 344 F.2d 393, 396 (6th Cir. 1965). The court weighs the interests of judicial economy against the potential for new delays, expense, confusion, or prejudice. *Banacki v. OneWest Bank, FSB*, 276 F.R.D. 567, 571 (E.D. Mich. 2011). Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial. *Id.* at 572. Consolidation is not justified or required simply because the actions *include* a common question of fact or law. *Id.* When cases involve *some* common issues but individual issues predominate, consolidation should be denied. *Id.*

The trial court must consider whether the specific risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on the parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives. *Cantrell*, 999 F.2d at 1011 (citations omitted). "Care must be taken that consolidation does not result in unavoidable

prejudice or unfair advantage." *Id.* Even though conservation of judicial resources is a laudable goal, if the savings to the judicial system are slight, the risk of prejudice to a party must be viewed with even greater scrutiny. *Id.*

Federal Defendants argue that the Court should consolidate the instant case with other cases that they assert contain identical allegations and claims pertaining to medical records that were allegedly obtained through a search warrant executed at Dr. Pompy's office. Federal Defendants further argue that these cases essentially involve the same parties. It is also the contention of Federal Defendants that if the cases survive the dismissal and summary judgment stages, the cases will require the same witnesses and evidence to be presented at their respective trials.

After considering the records of the nine cases, the Court finds that all of these cases should be consolidated. The complaints essentially contain the same: (1) questions of law and fact; (2) parties; and (3) relief sought. The cases will also require obtaining much of the same evidence. No party has objected to consolidating the cases, and it does not appear as if any party will be prejudiced by consolidation. Therefore, in the interest of promoting judicial economy and avoiding duplicative discovery, the Court concludes that consolidation is warranted pursuant to Rule 42(a).

III. CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Defendants Matthew Schneider, Wayne F. Pratt, and Brandy R. McMillion's Motion to Consolidate Cases (Doc # 16) is GRANTED. The Court will consolidate any new and related cases filed and reassigned to this Court.

IT IS FURTHER ORDERED that the following cases are consolidated: *Micks-Harm v. Nichols et al*, 18-cv-12634; *Nichols v. Nichols et al*, 18-cv-13206; *Helm v. Arnold et al*, 18-cv-13639; *Helm v. Nichols et al*, 18-cv-13647; *Cook v. William et al*, 19-cv-10125; *Cook v. Nichols et al*, 19-cv-10126; *Cook v. Nicols et al*, 19-cv-10132; *Cook v. Nichols et al*, 19-cv-10135; and *Blakesley v. Nichols et al*, 19-cv-10299.

IT IS FURTHER ORDERED that *Micks-Harm v. Nichols et al*, 18-cv-12634 will be the lead case. All motions to dismiss/dispositive motions and responses/replies must be filed on the *Micks-Harm v. Nichols et al*, 18-cv-12634 docket until further notice.

IT IS FURTHER ORDERED that the defendants will be categorized into the following groups: (1) Federal Defendants; (2) State Defendants; (3) Monroe County Defendants; (4) Monroe City Defendants; (5) Insurance Company Defendants; (6) Doctors and Providers Defendants; and (7) Miscellaneous Defendants.

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IT IS FURTHER ORDERED that the Court will initially address any motions to dismiss/dispositive motions. The following dates apply:

A. Any party that wishes to file a new motion to dismiss/dispositive motion or join any outstanding motions to dismiss/dispositive motions will have until February 22, 2019 to do so.
B. All parties will have until March 8, 2019 to file any responses to any outstanding motions to dismiss/dispositive motions that have not already been filed.
C. The parties will have until March 22, 2019 to file any replies.
D. There will be a hearing on April 12, 2019 at 2:00 pm regarding all motions to dismiss/dispositive motions that have been filed by February 22, 2019.

IT IS SO ORDERED.

s/Denise Page Hood
DENISE PAGE HOOD
Chief Judge, U. S. District Court

DATED: February 20, 2019

Footnotes:

[1] The Court will consider consolidating the instant case with the following cases:

1) *Nichols v. Nichols et al*, 18-cv-13206 (Hood, J.) (removed on October 15, 2018).
2) *Helm v. Arnold et al*, 18-cv-13639 (Hood, J.) (removed on November 21, 2018).
3) *Helm v. Nichols et al*, 18-cv-13647 (Hood, J.) (removed on November 21, 2018).
4) *Cook v. William et al*, 19-cv-10125 (Hood, J.) (removed on January 14, 2019).
5) *Cook v. Nichols et al*, 19-cv-10126 (Hood, J.) (removed on January 14, 2019).
6) *Cook v. Nicols et al*, 19-cv-10132 (Hood, J.) (removed on January 14, 2019).
7) *Cook v. Nichols et al*, 19-cv-10135 (Hood, J.) (removed on January 14, 2019).
8) *Blakesley v. Nichols et al*, 19-cv-10299 (Hood, J.) (removed on January 30, 2019).

Five of these cases were not yet removed from state court when Defendants filed the instant Motion, and consequently, Defendants did not mention them in their

Motion. The Court will consider consolidating all nine cases due to their apparent similarities.

APPENDIX D

TRACY CLARE MICKS-HARM, Plaintiff,
v.
WILLIAM PAUL NICHOLS ET AL, Defendants.

CONSOLIDATED ACTION LEAD CASE NO. 18-12634

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

September 30, 2019

HON. DENISE PAGE HOOD

OPINION AND ORDER REGARDING VARIOUS MOTIONS

I. BACKGROUND

A. Procedural Background

On August 3, 2018, Plaintiff Tracy Clare Micks-Harm ("Micks-Harm") commenced this action in the State of Michigan's Monroe County Circuit Court alleging that the defendants she named in her Complaint violated her rights under the Fourth Amendment, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, 42 U.S.C. § 1985 (conspiracy to interfere with civil rights), and 18 U.S.C. § 1347 (health care fraud). (Doc # 1-2) These named defendants include: William Paul Nichols, Blue Cross Blue Shield of Michigan Foundation, Blue Cross Blue Shield of Michigan, Blue Care Network of Michigan, Bluecaid of Michigan, I-Patient Care, Inc., Marc

Moore, Brian Bishop, Christine Hicks, John J. Mulroney, Shawn Kotch, James Stewart, Robert Blair, Brent Cathey, Jon Lasota, Sean Street, Mike McLaine,

Monroe Police Department, Tina Todd, Jessica Chaffin, Jack Vitale, Daniel White, Carl Christensen, Alan J. Robertson, Diane Silas, Jim Gallagher, Scott Beard, Derek Lindsay, Aaron Oetjens, Mike Merkle, FNU Sproul, Brian Zazadny, William McMullen, Donald Brady, Chris Miller, William Chamulak, Tom Farrell, Mike Guzowski, Timothy Gates, Sarah Buciak, Allison Arnold, Jeffrey Yorkey, Michael G. Roehrig, Dale Malone, Leon Pedell, Vaughn Hafner, Dina Young, Bill Schuette, Jennifer Fritgerald, Timothy C. Erickson, Catherine Waskiewicz, Michael J. St. John, Michigan Administrative Hearing System, Michigan Automated Prescription System, Haley Winans, Matthew Schneider, Wayne F. Pratt, Brandy R. McMillion, and Blue Cross Complete of Michigan. (*Id.*) Defendants Matthew Schneider ("Schneider"), Wayne F. Pratt ("Pratt"), and Brandy R. McMillion ("McMillion") removed this action to federal court on August 23, 2018. (Doc # 1)

On November 30, 2018, Defendants Schneider, Pratt, and McMillion filed a Motion to Consolidate Cases. (Doc # 16) The Court granted this Motion on February 20, 2019 as to the pending cases and any new and related cases filed and reassigned to the undersigned. (Doc # 27) Several defendants from the other cases were consolidated with this Action, and these defendants include: Donna Knierim, Adam Zimmerman, Administrative Hearing System, Assistant US Attorney's

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Office, Bureau of Licensing and Regulation, Christensen Recovery Services, City of Monroe, City of Monroe and Police Vice Unit, John Does, James Howell, Lt. Marc Moore, MANTIS, Michigan State Police, County of Monroe, Monroe County Sheriff Office, Nichols William, Mike Mclain, Drug Enforcement Administration, Michigan Department of Licensing and Regulatory Affairs, Dana Nessel, Monroe City Police Department, Monroe County Circuit Court, Charles F. McCormick, Attorney General of the United States, US Attorney's Office (DEA), Diane Young, Blue Cross Blue Shield Association, United States of America, Udayan Mandavia, and the State of Michigan.

The consolidated action effective as of the hearing date of April 12, 2019 includes the following Plaintiffs as of the date of the hearing: Tracy Clare Micks-Harm, Debra A. Nichols, Dennis Helm, Ines Helm, Eric Cook (2 cases), Eric Cook (for Jacob Cook) (2 cases), Raymond Blakesley, Renay Blakesley, Tammy Clark (for Richard Johnson), Janet Berry, Angela Mills, Donna Knierim, Janae Drummonds, Michael Smallwood, Janet Zureki, and Jennifer Smith.[1]

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Pursuant to the Court's Order (Doc # 27), all defendants were categorized into several groups.[2] Each of these groups of defendants were given until February 22, 2019 to file any dispositive motions. According to the dispositive motions that have been filed, these defendants are in the following groups:

Federal Defendants: Brandy R. McMillion, Wayne F. Pratt, Matthew Schneider, Brian Bishop, William Chamulak, Tom Farrell, and John J Mulroney.

Monroe County Defendants: Monroe County, William Paul Nichols, Robert Blair, Jon Lasota, Mike McClain, Tina Todd, Jessica Chaffin, Jack Vitale, Daniel White, Allison Arnold, Jeffrey Yorkey, Michael G. Roehrig, and Dale Malone.

Monroe City Defendants: City of Monroe, Donald Brady, Brent Cathey, Shawn Kotch, Derek Lindsay, Mike Merkle, Chris Miller, Monroe Police Department, and Aaron Oetjens.

State Defendants: Administrative Hearing System, Scott Beard, Bureau of Licensing and regulation, Timothy C. Erickson, Jennifer Fritgerald, Vaughn Hafner, MANTIS, William McMullen, Michigan Administrative Hearing System, Michigan Automated Prescription System, Michigan Department of Licensing and Regulatory Affairs, Michigan State Police, Marc Moore, Marc Moore, Dana Nessel, Bill Schuette, FNU Sproul, Michael J. St. John, Sean Street, Catherine Waskiewicz, Haley Winans, and Dina Young.

Insurance Company and Doctors and Providers Defendants: Blue Care Network of Michigan, Blue Cross Blue Shield of Michigan, Blue Cross Blue Shield of Michigan Foundation, Blue Cross Complete of Michigan, Bluecaid of Michigan, Carl Christensen, MD, Jim Gallagher, James Howell, Alan J Robertson, MD, Diane Silas, James Stewart, and Brian Zazadny.

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Miscellaneous Defendant: I-Patient Care, Inc.

Several dispositive motions have been filed and they are all before the Court. A hearing on these motions was held on April 12, 2019.

Federal Defendants filed a Motion to Dismiss on October 5, 2018. (Doc # 5) Micks-Harm filed a Response to Federal Defendants' Motion to Dismiss on October 31, 2018. (Doc # 7) Federal Defendants filed their Reply on November 2, 2018. (Doc # 10) Micks-Harm filed a Supplemental Response on March 20, 2019. (Doc # 67) Federal Defendants filed another Motion to Dismiss on February 22, 2019. (Doc # 33) Several Plaintiffs filed Responses to Federal Defendants' second Motion to Dismiss on various dates. (Docs # 59, 62, 74, 77, 81, 82, 100, 101, 104, 105, 109, 110, 144, 148, 168, 170) Federal Defendants filed their Reply to these Responses on March 22, 2019. (Doc # 114)

On November 29, 2018, Monroe County Defendants filed a Motion to Dismiss or in the Alternative, for Summary Judgment. (Doc # 15) No responses were filed. On February 22, 2019, Monroe County Defendants filed a Motion to Dismiss. (Doc # 36) Several Plaintiffs filed Responses to Monroe County Defendants' second

dispositive motion on various dates. (Docs # 52, 76, 83, 86, 87, 89, 91, 94, 96, 102, 107, 111, 135, 145, 150, 151, 152, 153, 154, 173) Monroe County Defendants filed their Reply on March 22, 2019. (Doc # 120)

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Monroe City Defendants filed a Motion to Dismiss on January 9, 2019. (Doc # 21) No responses have been filed. On February 27, 2019, Monroe City Defendants filed several identical Motions to Dismiss. (Docs # 44, 45, 46, 47, 48, 49, 50) Eric Cook (for Jacob Cook) filed a Response to one of the Motions to Dismiss (Doc # 48) on March 21, 2019. (Doc # 73) On March 11, 2019, Monroe City Defendants filed several additional identical Motions to Dismiss. (Docs # 54, 55, 56, 57, 58) No responses have been filed.

I-Patient Care, Inc. ("I-Patient Care") filed a Motion to Dismiss on February 22, 2019. (Doc # 32) Several Plaintiffs filed Responses on various dates. (Docs # 79, 84, 88, 92, 98, 103, 112, 121, 122, 127, 128, 132, 149, 172) I-Patient Care, Inc filed its Reply on March 22, 2019. (Doc # 118)

State Defendants filed a Motion to Dismiss on February 22, 2019. (Doc # 37) Several Plaintiffs filed Responses on various dates. (Docs # 72, 78, 80, 90, 93, 99, 108, 133, 134, 146, 169) No reply has been filed.

Insurance Company and Doctor and Providers Defendants filed a Motion to Dismiss on February 22, 2019. (Doc # 40) Several Plaintiffs filed Responses on various dates. (Docs # 52, 75, 85, 97, 106, 113, 124, 131, 147, 171) Insurance Company and Doctor and Providers Defendants filed a Reply on March 22, 2019. (Doc # 119)

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B. Factual Background

On June 28, 2018, Micks-Harm was informed by Dr. Leslie Pompy that all of the named defendants reviewed her medical records as well as the medical records of the other Plaintiffs. (Doc # 1-2, Pg ID 22) Plaintiffs all appear to be patients of Dr. Pompy. Two or more of the named defendants currently continue to possess and/or have access to Plaintiffs' past medical histories. Defendants were able to access Plaintiffs' medical information following the execution of a felony search warrant that resulted in her medical records being seized from Dr. Pompy's office. It is alleged by Plaintiffs that the search warrant occurred without the existence of probable cause and absent any exigent circumstances. The search warrant that Plaintiffs refer to in their Complaints is connected with an ongoing criminal case, *United States v. Pompy*, 18-cr-20454 (E.D. Mich.)(assigned to Judge Arthur J.

Tarnow), in which Dr. Pompy is charged with distributing controlled substances (21 U.S.C. § 841(a)(1)) and health care fraud (18 U.S.C. § 1347). (Doc # 5, Pg ID 45)

Plaintiffs claim that their HIPAA rights were violated because they were not notified that the Defendants were going to access their medical information. Plaintiffs allude to the fact that their Fourth Amendment rights were violated since the police unreasonably seized their medical records from Dr. Pompy's office. It is additionally asserted by Plaintiffs that two or more Defendants violated their rights by committing computer fraud under 18 U.S.C. § 1030. Plaintiffs also allude to the

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fact that their rights were violated under 42 U.S.C. § 1985 (conspiracy to interfere with civil rights), and 18 U.S.C. § 1347 (health care fraud).

Plaintiffs request that the Court award them punitive damages in the amount of $800 million dollars, monetary damages in excess of $1 billion dollars, and an unspecified amount of compensatory damages. Plaintiffs also seek any other damages available, interest, fees, and medical expenses that the Court deems appropriate.

II. Motions to Dismiss

A. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This type of motion tests the legal sufficiency of the plaintiff's complaint. *Davey v. Tomlinson*, 627 F. Supp. 1458, 1463 (E.D. Mich. 1986). When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). A court, however, need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting Gregory v. Shelby Cnty., 220 F.3d 443, 446 (6th Cir. 2000)). "[L]egal conclusions masquerading as

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factual allegations will not suffice." *Edison v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007).

As the Supreme Court has explained, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . .

.." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted); *see LULAC v. Bresdesen*, 500 F.3d 523, 527 (6th Cir. 2007). To survive dismissal, the plaintiff must offer sufficient factual allegations to make the asserted claim plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Federal courts hold the *pro se* complaint to a "less stringent standard" than those drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519 (1972). However, *pro se* litigants are not exempt from the requirements of the Federal Rules of Civil Procedure. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989).

B. Federal Defendants

1. Absolute Prosecutorial Immunity

The Federal Defendants in the various cases, namely the United States Attorneys and/or the Assistant United States Attorneys, seek dismissal based on

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absolute immunity in their role in prosecuting Dr. Pompy and obtaining documents relating to the criminal matter against Dr. Pompy.

A prosecutor is entitled to absolute immunity for a prosecutor's conduct in initiating a prosecution and in presenting the case before the courts. *Lanier v. Bryant*, 332 F.3d 999, 1005 (6th Cir. 2003); *Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 422 (1976). Liberally construing the allegations in the various complaints, the allegations against the Federal Defendants fail to state a claim upon which relief may be granted under Rules 8(a)(2) and 12(b)(6) of the Rules of Civil Procedure. The Federal Defendants are currently prosecuting a criminal matter against Dr. Pompy. The claims against the federal prosecutors are dismissed with prejudice.

2. No Private Cause of Action under HIPAA

The various Plaintiffs allege violations under HIPAA by the Federal Defendants because they obtained, possessed, and disclosed Plaintiffs' medical records in the possession of Dr. Pompy in connection with the criminal matter against Dr. Pompy. The Federal Defendants seek to dismiss the HIPAA claims against them because HIPAA does not provide a private cause of action to be brought by an individual plaintiff and HIPAA permits disclosure of a patient's health information for law enforcement purposes to law enforcement officials.

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HIPAA is designed to protect the privacy of personal medical information by limiting its disclosure, and provides for both civil and criminal penalties for violations of its requirements. 42 U.S.C. §§ 1320d-5, d-6. HIPAA expressly provides the authority to enforce its provisions only to the Secretary of Health and Human Services. *Id.* The Supreme Court has explained that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). Congress must expressly authorize a private cause of action for a private person to have the right to sue to enforce a federal statute. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). HIPAA provides no express language that allows a private person the right to sue in order to enforce HIPAA.

The Sixth Circuit Court of Appeals noted that if an individual plaintiff believes his or her HIPAA rights were violated, "the proper avenue for redress is to file a complaint with the DHHS [Department of Health and Human Services]."[3]

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Thomas v. Univ. of Tenn. Health Science Ctr at Memphis, Case No. 17-5708, 2017 WL 9672523 at *2 (6th Cir. Dec. 6, 2017) (finding that the district court did not err in dismissing claims under HIPAA where no private right of action existed, citing, *Bradley v. Pfizer, Inc.*, 440 F. App'x 805, 809 (11th Cir. 2011); *Carpenter v. Phillips*, 419 F. App'x 658, 659 (7th Cir. 2011); *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010); *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 n.4 (10th Cir. 2010); *Miller v. Nichols*, 586 F.3d 53, 59-60 (1st Cir. 2009); *Webb v. Smart Document Sols.*, LLC, 499 F.3d 1078, 1081 (9th Cir. 2007); *Acara v. Banks*, 470 F.3d 569, 571 (5th Cir. 2006)).

Because there is no private cause of action by private individuals before the courts for alleged violations of HIPAA, the claims alleging such violations against the Federal Defendants and other Defendants must be dismissed.

3. Proper Disclosures under HIPAA

The Federal Defendants also argue that HIPAA permits the disclosure of protected health information, without the authorization of the individuals. In this case, state investigators initially obtained Dr. Pompy's medical records pursuant to a search warrant. The Federal Defendants argue that they were covered under HIPAA to use the materials for law enforcement purposes, such as in a grand jury proceeding.

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The HIPAA regulations provide disclosure of protected health information, "for a law enforcement purpose to a law enforcement official." 45 C.F.R. § 164.512(f).

Such information must be disclosed to comply with a "court order or court-ordered warrant, or a subpoena issued by a judicial officer." 45 C.F.R. § 164.512(f)(ii)(A) & (B). Disclosure of medical records is also permitted "in the course of any judicial or administrative proceeding." 45 C.F.R. § 164.512(e)(1).

The various Complaints fail to state claims under HIPAA because the protected health information was obtained from Dr. Pompy's office by search warrants. The Federal Defendants used the information before a grand jury proceeding related to Dr. Pompy. The allegations under HIPAA alleged in the various complaints must be dismissed with prejudice for failure to state claims upon which relief may be granted.

C. State Defendants

1. Rule 8 Violation

The State Defendants move to dismiss the various complaints because the complaints violate the requirement under Rule 8 that the complaint must contain "short and plain statement of the claim[s]" supported by factual allegations, which give the defendants fair notice of the claims against them. The State Defendants argue that the complaints are neither a short nor a plain statement of the claims. They further argue that the allegations do not give the State Defendants fair notice of the

claims against them since the allegations allege "two or more defendants" or "one or more defendants" without specifying which defendant violated the law.

Even liberally construing the various complaints, the Court finds that the allegations violate Rule 8 of the Rules of Civil Procedure. The complaints are not "short and plain statement of the claims" and the claims are not supported by factual allegations, sufficient to give the State Defendants fair notice of the alleged violations. In many instances, the allegations in the complaints do not specifically identify which State Defendant violated which claim. The complaints must be dismissed for failure to follow Rule 8 of the Rules of Civil Procedure in setting forth the claims and factual allegations against the various State Defendants.

2. Lack of Standing

The State Defendants also move to dismiss the various complaints asserting that many of the claims alleged by Plaintiffs are claims on behalf of others, such as other patients of Dr. Pompy and Dr. Pompy himself. The State Defendants argue that the individual Plaintiffs cannot seek redress for injuries suffered by third parties.

Standing is a jurisdictional matter and is a threshold question to be resolved by the court before the court may address any substantive issues. *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987). Article III of the United States Constitution limits the federal courts' jurisdiction to "cases and controversies." In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the

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United States Supreme Court set forth three elements to establish standing: 1) that he or she suffered an injury in fact, which is both concrete and actual or imminent; 2) that the injury is caused by defendants' conduct; and 3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. "A plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999)(citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

In liberally construing the allegations in the various Complaints, the Court finds that the individual Plaintiffs do not have standing to address the alleged injuries suffered by others. Plaintiffs have failed to carry their burden that they have standing to assert claims on behalf of other individuals because standing requires that a plaintiff must have suffered an injury in fact. Plaintiffs may only allege claims which caused them injury. If Dr. Pompy seeks to challenge the actions against him and the warrants issued against him, he must do so himself and in the appropriate setting. Any claims alleged on behalf of others must be dismissed.

3. Eleventh Amendment Immunity

The State Defendants, including the State of Michigan, the MDOC and the Probation Department, move to dismiss the federal claims under 42 U.S.C. §§ 1983, 1985 and 1986 asserting they are entitled to immunity.

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The Eleventh Amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment prohibits private citizens from bringing suit against a state or state agency in federal court. *Alabama v. Pugh*, 438 U.S. 781 (1978). There are two exceptions to this rule. First, a state may waive its immunity and agree to be sued in federal court. *Pennhurst State School & Hospital v. Halderman*,

465 U.S. 89, 100 (1984). Second, a state may be sued in federal court where Congress specifically abrogates the state's immunity pursuant to a valid grant of Constitutional power. *See Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). The Eleventh Amendment immunity has been interpreted to act as a constitutional bar to suits against the state in federal court unless immunity is specifically overridden by an act of Congress or unless the state has consented to suit. *Thiokol Corp. v. Dep't of Treasury, State of Michigan*, 987 F.2d 376, 381 (6th Cir. 1983).

The Eleventh Amendment bars federal courts from hearing state law claims against the state and/or the state's officials. *Freeman v. Michigan Dep't of State*, 808 F.2d 1174, 1179-80 (6th Cir. 1987). Claims against the state and its officials sued in their official capacities under 42 U.S.C. § 1983 are also barred since neither the state nor the state official sued in their official capacities are "persons" under §

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1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 91 (1989). Suing a state official in an individual capacity is also barred because liability under § 1983 cannot be based on a theory of respondeat superior. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691 (1978).

Based on the above, State of Michigan, the State Attorney General, the Michigan Department of Police (MSP), the Michigan Automated Prescription System (MAPS), and the Monroe Area Narcotics Team Investigative Services (MANTIS) must be dismissed under the Eleventh Amendment. The State Attorney General in her official and/or her individual capacity must also be dismissed because there are no facts alleged in any of the Complaints that she was personally involved in any of the incidents alleged in the Complaints.

4. Absolute Judicial Immunity

State of Michigan Administrative Law Judge ("ALJ") Michael St. John, alleged to have presided over the regulatory action that resulted in the revocation of Dr. Pompy's medical license, is a named defendant. Other than so noting, there are no factual allegations as to any unlawful conduct by the ALJ. The claims against the ALJ must be dismissed for failure to comply with Rule 8 as noted above. If Plaintiffs are seeking a review of the revocation of Dr. Pompy's medical license, they lack standing to seek review on behalf of Dr. Pompy, again, as set forth above.

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In addition, the ALJ is entitled to absolute judicial immunity for his actions in adjudicating the medical license issue. As a general rule, judges are immune from suits for money damages. *Mireles v. Waco*, 502 U.S. 9, 10 (1991); *Pierson v. Ray*, 386

U.S. 547 (1967). Defendant State of Michigan ALJ is entitled to absolute judicial immunity and dismissed with prejudice from all the applicable claims.

5. Absolute Prosecutorial Immunity

In addition to the Michigan Attorney General, Plaintiffs also named several Michigan Assistant Attorneys General as defendants related to their actions in prosecuting the regulatory matter against Dr. Pompy which resulted in the loss of his medical license. There are no specific factual allegations of wrongful conduct against these Defendants, other than actions in their role as prosecutors. As set forth above, prosecutors are entitled to absolute prosecutorial immunity for their actions as prosecutors in judicial proceedings. *See Pachtman*, 424 U.S. at 422. Defendants Michigan Attorney General and Assistant Attorneys General Erickson, Fitzgerald and Waskiewitz are dismissed with prejudice.

6. Qualified Immunity

State of Michigan police and regulatory agency investigators are named as defendants in their role in investigating Dr. Pompy. Plaintiffs allege that these police and agency investigators violated Dr. Pompy's rights and the rights of Dr. Pompy's patients. The State Defendants seek dismissal of the police and agency investigators claiming they are entitled to qualified immunity.

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Government officials are entitled to qualified immunity where their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Green v. Reeves*, 80 F.3d 1101, 1104 (6th Cir. 1996) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity is an initial threshold question the court is required to rule on early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The privilege is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.*

The Supreme Court in *Saucier* instituted a two-step sequential inquiry to determine qualified immunity. In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Supreme Court abandoned the requirement that the inquiry must be performed sequentially. Although courts are free to consider the questions in whatever order is appropriate, the Supreme Court ruled that the two questions announced in *Saucier* remain good law and that it is often beneficial to engage in the two-step inquiry. *Pearson*, 555 U.S. at 236.

The first step of the two-step inquiry to determine qualified immunity is whether the plaintiff has established a *prima facie* case of a constitutional violation

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by the defendant official. *Saucier*, 533 U.S. at 201. If no constitutional right was violated, there is no necessity for further inquiries concerning qualified immunity. *Id.* If the alleged facts established a violation of the plaintiff's constitutional right, the next step is to determine whether the right was "clearly established" at the time of the violation. *Id.* The "clearly established" inquiry must take into consideration the specific context of the case, not as a broad general proposition, and whether a reasonable official understood that the action violated the plaintiff's constitutional right. *Id; Parson v. City of Pontiac*, 533 F.2d 492, 500 (6th Cir. 2008). "Qualified immunity 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009) (citations omitted). Once the defense of qualified immunity is raised, the plaintiff bears the burden of showing that a defendant is not entitled to qualified immunity. *Roth v. Guzman*, 650 F.3d 603, 609 (6th Cir. 2011).

Liberally construing the complaints, the Court finds that Plaintiffs failed to allege any constitutional violations against Plaintiffs themselves by the Michigan police and regulatory agency investigators. Plaintiffs generally allege that the Defendants improperly obtained search warrants and violated HIPAA, without specific factual allegations against specific defendants. Plaintiffs did not comply with Rule 8 of the Rules of Civil Procedure by failing to show how a specific

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Defendant violated a specific law or a constitutional right in a short and plain statement.

Plaintiffs' Fourth Amendment claims are generally based on the argument that the search and seizures of the patient records in Dr. Pompy's office were unconstitutional. The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The "rights assured by the Fourth Amendment are personal rights, [which] ... may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S. 377, 389 (1968). If a search warrant was not directed to the person alleging a Fourth Amendment violation, the documents seized were normal corporate records and not personally prepared by the person and not taken from the person's personal office, desk, or files, that person cannot challenge a search. Such a person has no reasonable expectation of privacy in materials he or she did not prepare and not located in the

person's personal space. *United States v. Mohney*, 949 F.2d 1397, 1403-04 (6th Cir. 1991).

The constitutional claims against the Michigan police officers and regulatory agency investigators are dismissed since Plaintiffs failed to show they have standing to challenge any such searches or seizures. Plaintiffs failed to state any

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constitutional violation claims against these state officials in their role in investigating Dr. Pompy. Even if Plaintiffs are able to identify any constitutional violation, these Defendants are entitled to qualified immunity since Plaintiffs' constitutional rights, if any, to be free from any search and seizure of documents in Dr. Pompy's office are not clearly established.

7. HIPAA

The State of Michigan Defendants argue that Plaintiffs do not have a private cause of action under HIPAA. For the reasons set forth above, the HIPAA claims against the State of Michigan Defendants must be dismissed with prejudice since Plaintiffs do not have such a private cause of action.

D. Monroe County Defendants

1. Lack of Standing, HIPAA, § 1983 Claims

The Monroe County Defendants move to dismiss the claims against them for lack of factual support and clarity of the allegations. They also claim that Plaintiffs lack standing to assert legal rights and interests of Dr. Pompy and/or his other patients. Further, they argue that Plaintiffs' HIPAA claims must be dismissed because HIPAA does not provide such private cause of action. As to any alleged § 1983 claims, the Monroe County Defendants argue that Monroe County is entitled to dismissal under *Monell* since a municipality cannot be held liable on a Respondeat superior theory. The Monroe County Defendants also seek dismissal based on

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absolute immunity against the Monroe County judges and prosecutors. They also seek dismissal of the claims under federal law against individual Monroe County Defendants based on qualified immunity since there are no specific factual allegations of constitutional rights violations. As to the state law claims, the Monroe County Defendants argue that these must be dismissed because they are entitled to governmental immunity under Michigan law.

For the same reasons set forth above, the Court finds that Plaintiffs lack standing to assert legal rights and interests of Dr. Pompy and/or his other patients and Plaintiffs and there is no private cause of action under HIPAA. The Court further finds that as to any § 1983 claim, Monroe County is entitled to dismissal under *Monell*, that the Monroe County judges and prosecutors are entitled to absolute immunity and the individual Monroe County Defendants are entitled to governmental immunity. The Complaints are devoid of any specific factual allegations that these Defendants violated any of the Plaintiffs' constitutional rights.

2. State Law Claims

As to the Michigan state law claims, M.C.L. § 691.1407(5) provides:

(5) A judge, a legislator, and the elective or highest appointive executive official or all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

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Ross v. Consumers Power Co., 363 N.W.2d 641, 647 (1985) held that the highest executive officials of all levels of government are absolutely immune from all tort liability whenever they are acting within their legislative or executive authority. In *Odom v. Wayne County*, 760 N.W.2d 217, 223 (2008), the Michigan Supreme Court held that courts need to determine whether the individual is the highest-ranking appointed executive official at any level of government and if so then the individual is entitled to absolute immunity under M.C.L. § 691.1407(5). Assistant prosecuting attorneys are entitled to "quasi-judicial immunity" when their alleged actions are related to their role as prosecutor, such as seeking warrants or the introduction of evidence at trial or hearings. *See Payton v. Wayne County*, 137 Mich. App. 361, 371 (1984); *Bischoff v. Calhoun Co. Prosecutor*, 173 Mich. App. 802, 806 (1988).

M.C.L. § 691.1407(2) provides that an employee of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee or member while in the course of employment if the employee is acting within the scope of his or her authority, that the agency is engaged in a governmental function, and the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damages. In *Robinson v. Detroit*, 462 Mich. 439, 462 (2000), the Michigan Supreme Court held that governmental employees are entitled to immunity because their conduct was not "the one most immediate, efficient, and direct cause of the injury or damage." "Gross

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negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. M.C.L. § 691.1407(8)(a).

Liberally construing the Complaints, the Court finds they lack specific allegations to avoid absolute and governmental immunity as to the state law claims alleged against the Monroe County Defendants. The Monroe County Sheriff and the Monroe County Judges are entitled to absolute governmental immunity under § 691.1407(5). The individual Monroe County Defendants are also entitled to governmental immunity under § 691.1407(2). Plaintiffs have failed to state any claims under Michigan law to avoid absolute and governmental immunity as to the Monroe County Defendants. The claims against the Monroe County Defendants must be dismissed.

E. Monroe City Defendants

1. No Factual Allegations, qualified and governmental immunities, HIPAA

The City of Monroe Defendants seek dismissal asserting that the complaints fail to allege any specific factual allegations against the Defendants in violation of the notice-pleading requirement under Rule 8 of the Rules of Civil Procedure. They further assert that the City of Monroe's Police Department is not a legal entity capable of being sued. *Boykin v. Van Buren Twp.*, 479 F3d. 444, 450 (6th Cir. 2007). The City of Monroe Defendants claim the federal claims under § 1983 must be dismissed since any claim against the City of Monroe is barred by *Monell* and the

individual City of Monroe Defendants are entitled to qualified immunity. As to the state law claims, the City of Monroe Defendants also assert dismissal based on governmental immunity. The City of Monroe Defendants further argue that the HIPAA claims must be dismissed since there is no private cause of action under HIPAA. The City of Monroe Defendants argue that they are entitled to dismissal of the CFAA claim since only vague references are alleged under this statute.

Again, in liberally construing the Complaints, the Court finds that Plaintiffs failed to allege any specific factual allegations against any of the City of Monroe Defendants. The Court further finds that the City of Monroe Police Department must be dismissed since it is not a legal entity capable of being used. As to the federal constitutional claims, the Court finds that the constitutional claims against individual officials of the City of Monroe Defendants must be dismissed for failure to state any constitutional violations. The Michigan state law claims must also be dismissed because the City of Monroe Defendants are entitled to governmental immunity. As noted above, the HIPAA claims against these Defendants must be dismissed since there is no private cause of action under HIPAA.

2. CFAA

The Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq.*, contains a provision for civil liability. 18 U.S.C. § 1030(g). Potential violations of the CFAA may be asserted against a person who: (i) "intentionally accesses a computer without

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authorization or exceeds authorized access" to obtain information; (ii) knowingly and with intent to defraud" obtains access to a "protected computer without authorization, or exceeds authorized access," and commits fraud; or (iii) "knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer...." 18 U.S.C. §§ 1030(a)(2)(C), 1030(a)(4), 1030(a)(5)(A). Civil actions for violations of these provisions may be brought if certain types of harm result, including the loss of $5,000 within a year period. 18 U.S.C. § 1030(g); 18 U.S.C. § 1030(c)(4)(A)(I). Violations of §§ 1030(a)(2)(c) and (a)(4) require accessing a protected computer without authorization, or access in excess of authorization. See 18 U.S.C. §§ 1030(a)(2)(c) & (a)(4). Under § 1030(a)(4), a defendant must have furthered a fraudulent scheme and obtained something of value (or obtained over $5,000 worth of use out of the protected computer).

Liberally construing the Complaints, the Court finds that Plaintiffs failed to state claims under the CFAA. There are no specific factual allegations that the defendants accessed any of the *Plaintiffs'* personal protected computers. Plaintiffs cannot bring any challenges as to those who accessed Dr. Pompy's computers. Plaintiffs also failed to allege any facts that the computer was intentionally accessed without authorization or exceeded any authorized access to obtain information. Plaintiffs further failed to allege specific facts that the result of any such conduct

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caused damage to a protected computer. There are no specific facts alleging that the Defendants furthered a fraudulent scheme and obtained something of value. The CFAA claims must also be dismissed.

F. Insurance Company and Doctors and Providers Defendants

The Insurance Company Doctors and Providers Defendants argue that that Plaintiffs' HIPAA claims must be dismissed since there is no private cause of action under HIPAA. As noted above, the HIPAA claims against these Defendants must also be dismissed since there is no private cause of action under HIPAA.

G. Miscellaneous Defendants

Defendant I-Patient Care seeks to dismiss the claims against it claiming that HIPAA provides no private cause of action, that HIPAA expressly authorizes the use of protected health information for law enforcement activities and fraud waste and abuse investigations, that the CFAA claim is insufficiently pled, that it is not a state actor so that the Fourth Amendment claim is inapplicable to it, that the conspiracy claims also fail and that the Complaints are deficient of facts under Rule 8 of the Rules of Civil Procedure.

Liberally construing the claims alleged by Plaintiffs, for the same reasons set forth above, the HIPAA claims are dismissed against Defendant IPC since there is no such private cause of action and HIPAA expressly authorizes the use of certain health information for law enforcement and fraud and abuse investigations. The

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CFAA claim is also dismissed as insufficiently pled. Defendant IPC is not a state actor and therefore any § 1983 claim against it must be dismissed. *See Gottfried v. Med. Planning Serv.*, 280 F.3d 684, 691-92 (6th Cir. 2002). As noted above, the Complaints fails to state sufficient facts for a defendant to have notice as to the claims against it as required under Rule 8 of the Rules of Civil Procedure.

III. AMENDMENT OF COMPLAINTS

Some of the Plaintiffs may seek to amend their Complaints.

Rule 15(a) provides that a party may amend its pleading once as a matter of course within 21 days after a responsive pleading is served. Fed. R. Civ. P. 15(a)(1). Rule 15(a)(2) further provides that a party may amend its pleading on leave of court. Leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). A district court may deny leave to amend in cases of undue delay, undue prejudice to the opposing party, repeated failure to cure deficiencies by amendment previously allowed or futility. *Foman v. Davis*, 371 U.S. 178, 184 (1962). If a complaint cannot withstand a motion to dismiss under Rule 12(b)(6), the motion to amend should be denied as futile. *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000).

Here, any amendment of the Complaints would be futile since any claim cannot withstand a Rule 12(b)(6) motion. There is no private cause of action under HIPAA, Plaintiffs cannot file any claims on behalf of Dr. Pompy or any of his

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patients, and the Defendants are entitled to absolute, qualified or governmental immunity.

IV. DISCOVERY

Some of the documents filed by Plaintiffs appear to seek discovery. Where a party files a Rule 12(b) motion, and where the district court accepts a plaintiff's allegations as true, but concludes that those allegations are insufficient as a matter of law, it is not an abuse of discretion to limit discovery *sua sponte*. *Flaim v. Medical College of Ohio*, 418 F.3d 629, 643 (6th Cir. 2005). Discovery is only appropriate where there are factual issues raised by a Rule 12(b) motion. *Id.* The district court does not abuse its discretion in limiting discovery pending its resolution of a 12(b)(6) motion. *Id.* at 644.

In these cases, discovery is not required since Plaintiffs failed to state any claim against any of the Defendants upon which relief may be granted.

V. SUBSEQUENT CASES FILED AND CONSOLIDATED

As noted by this Court's February 20, 2019 Order, any new and related cases filed and reassigned to the undersigned would be consolidated. The Court has reviewed motions to dismiss and removed cases subsequently filed by the Defendants since the hearing was held in this matter in April 2019. The same arguments are raised in the various motions to dismiss that are addressed in this

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Opinion. Accordingly, the Court finds that for the same reasons set forth in this Opinion, those motions are also granted.

Regarding the cases newly-removed and consolidated where no motions to dismiss have been filed, the claims in those cases are summarily dismissed for failure to state a claim upon which relief may be granted for the reasons set forth above.

VI. CONCLUSION

For the reasons set forth above, the Court finds Plaintiffs have failed to state any claim upon which relief may be granted in any of their Complaints.

Accordingly,

IT IS ORDERED that the various Defendants' Motions to Dismiss and/or Strike Amended Complaints (ECF Nos. 5, 15, 21, 32, 33, 36, 37, 40, 44, 45, 46, 47,

48, 49, 50, 54, 55, 56, 57, 58, 155, 156, 175, 233, 235, 241, 246, 247, 546, 549, 551, 553, 554, 557, 569, 578, 651, 660, 681, and 720) are **GRANTED.**

IT IS FURTHER ORDERED that all the Defendants in all the consolidated cases are **DISMISSED** with prejudice. All of the Consolidated Cases are **DISMISSED** with prejudice:

- 18-12634, Micks -Harms v. Nichols (LEAD CASE);
- 18-13206, Nichols v. Nichols;
- 18-13639, Helm v. Arnold;
- 18-13647, Helm v. Nichols;
- 19-10125, Cook v. William;
- 19-10126, Cook v. Nichols;
- 19-10132, Cook v. Nicols;

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- 19-10135, Cook v. Nicols;
- 19-10295, Blakesley v. Blue Cross;
- 19-10299, Blakesley v. Nichols;
- 19-10639, Clark v. Nichols;
- 19-10648, Berry v. Nichols;
- 19-10649, Mills v. Nichols;
- 19-10661, Knierim v. Nichols;
- 19-10663, Johnson v. Nichols;
- 19-10785, Drummonds v. Nichols;
- 19-10841, Smallwood v. Nichols;
- 19-10984, Zureki v. Nichols;
- 19-10990, Jennifer v. Nichols;
- 19-10995, Smith v. Nichols;
- 19-11980, Nichols v. Blue Cross;
- 19-11984, Micks-Harm v. Blue Cross;
- 19-12251, Billings v. Nichols;
- 19-12266, Jennings v. Nichols;
- 19-12369, Mills v. Blue Cross;
- 19-12385, Zureki v. Nichols.

IT IS FURTHER ORDERED that the Plaintiffs' various Motions to Amend/Correct, to find obstruction of justice, for directed verdict, for discovery and inspection, for entry of default or for default judgment, finding under the Criminal Justice Act, to enjoin the DEA de facto regulation of the practice of medicine, etc. (ECF Nos. 7, 25, 60, 63, 68, 159, 177, 187, 228, 256, 258, 260, 271, 288, 294, 296, 300, 304, 309, 324, 328, 330, 332, 336, 342, 348, 369, 375, 383, 391, 394, 402, 406, 414, 434, 450, 451, 452, 453, 454, 455, 461, 462, 463, 464, 465, 466, 467, 468, 485, 497, 498, 499, 500, 501, 503, 507, 510, 511, 528, 539, 540, 571, 588, 676, 677, 678,

679, 680, 687, 702, 703, 705, 710, and 739) are **DENIED as MOOT** in light of the dismissal of all the claims alleged in all of the Complaints.

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IT IS FURTHER ORDERED that Leon Pedell's Motion to Quash Service (ECF No. 398) is **GRANTED**, the Court finding Dr. Pedell has not been properly served. Even if Dr. Pedell was properly served, in light of the ruling that all Defendants are DISMISSED with prejudice because Plaintiffs have failed to state a claim upon which relief may be granted, Dr. Pedell is also DISMISSED with prejudice from any of the Complaints where he is named as a Defendant.

s/Denise Page Hood
DENISE PAGE HOOD
Chief United States District Judge

DATED: September 30, 2019

Footnotes:

1. All of the plaintiffs in the present Action are proceeding on a *pro se* basis. Several Defendants are represented by counsel.

2. The groups include: (1) Federal Defendants: (2) State Defendants; (3) Monroe County Defendants; (4) Monroe City Defendants; (5) Insurance Company Defendants; (6) Doctors and Providers Defendants; and (7) Miscellaneous Defendants. (Doc # 27, Pg ID 7)

3. Even if an individual plaintiff brought a HIPAA complaint before the DHHS and the DHHS declined to investigate the matter, there is no statutory or case law that provides review by a federal district court of the DHHS's discretionary decisions to investigate or not under 45 C.F.R. § 160.306(c). *See, Thomas v. Dep't of Health and Human Serv.*, Case No. 17-6308, 2018 WL 5819471 at *2 (6th Cir. Aug. 24, 2018). DHHS is entitled to sovereign immunity for a claim for monetary damages for its failure to investigate a claim under HIPAA. An individual plaintiff also does not have a due process claim against any individual defendant under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation*, 403 U.S. 388 (1971) because the discretionary decision to decline to investigate a HIPAA complaint does not implicate a protected property or liberty interest. *Thomas*, 2018 WL 5819471 at *2.

APPENDIX E

HARMS, et al., Plaintiffs,
v.
WILLIAM PAUL NICHOLS, et al., Defendants.
Lead Case No. 18-12634 CONSOLIDATED CASES

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

October 30, 2019

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Hon. Denise Page Hood

ORDER DENYING WITHOUT PREJUDICE DEFENDANTS' MOTION TO ENJOIN STATE AND FEDERAL COURT FILINGS BY PLAINTIFFS

Before the Court is the Blue Cross Defendants' Motion to Enjoin Future State and Federal Court Filings By Plaintiffs, joined by other Defendants in this matter. (ECF Nos. 556, 560, 561, 562, 565, 573) Responses (ECF Nos. 579, 580, 585, 586, 591, 592, 673, 674, 675, 692) and a reply (ECF No. 661) have been filed. Defendants seek to enjoin Plaintiffs from initiating new actions that utilize the state and federal court systems to harass and annoy Defendants, now at over 50 named Defendants.

The various actions filed by various Plaintiffs, consolidated in this action, stem from investigations initially by Blue Cross, the Michigan licensing authorities and then State and Federal criminal investigations against Lesly Pompy, M.D., which

resulted in an Indictment in *United States v. Pompy*, Case No. 18-20454 (E.D. Mich.) (Assigned to the Hon. Arthur J. Tarnow). Dr. Pompy was indicted on June 26, 2018 with 22 counts of Distribution of Controlled Substances, Aiding and Abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

In August 2018, Dr. Pompy's former patients began filing actions before the Monroe County Circuit Court, State of Michigan, alleging various claims, including

violations under the Fourth Amendment, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, 42 U.S.C. § 1985 (conspiracy to interfere with civil rights), and 18 U.S.C. § 1347 (health care fraud). To date, 26 cases have been consolidated in this action. See, Opinion and Order, ECF No. 743, PageID.9802-03.

The Defendants identified in the various cases filed and removed to this District include: Federal Defendants (the United States Attorney, Assistant United States Attorneys, District and Magistrate Judges, DEA Agents and Manager, DEA Administrative Law Judge); Monroe County Defendants (the Sheriff, Deputy Sheriffs, the Monroe Area Narcotics Team and Investigative Services, the Prosecutor and Assistant Prosecutors, Judges (Circuit, District and Magistrate)); the City of Monroe Defendants (the City of Monroe, the Monroe Police Department, police officers and detectives, MANTIS); the State Defendants (The Administrative Hearing System, the

Page 3

Bureau of Licensing and Regulation, the Michigan Automated Prescription System, the former and current Attorney Generals, Assistant Attorney Generals, the Michigan State Police and Troopers and Detectives, employees with the Michigan Department of Licensing and Regulatory Affairs); Various related insurance companies (Blue Cross Blue Shield of Michigan Mutual Insurance Company, its related entities, employees and contractors (including doctors reviewing claims)); Electronic Health Records Vendor (IPC and its Chief Executive Officer); a bank and its officers.

The instant action is the lead case in cases consolidated by this Court as of September 30, 2019[1] filed by various Plaintiffs, former patients of Dr. Pompy as

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noted above. The Court has now issued an Opinion and Order finding Plaintiffs' claims fail to state upon which relief may be granted and dismissing the all of the Defendants in all consolidated cases. This Court found that Plaintiffs are attacking the appropriateness of the searches and seizures of documents and records relating to Dr. Pompy's practice. The Court further found that Plaintiffs failed to state a claim upon which relief may be granted as to any Fourth Amendment constitutional claims, any HIPAA violation, any Computer Fraud Act claims.

The Sixth Circuit has held that district courts may properly enjoin vexatious litigants from filing further actions against a defendant without first obtaining leave of court. *Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 269 (6th Cir. 1998); see also, *Filipas v. Lemons*, 835 F.2d 1145, 1146 (6th Cir. 1987). "There is nothing unusual about imposing prefiling restrictions in matters with a history of repetitive

or vexatious litigation." *Feathers*, 141 F.3d at 269. In certain circumstances an order may be entered that restrains not only an individual litigant from repetitive complaints, but "that places limits on a reasonably defined category of litigation because of a recognized pattern of repetitive, frivolous, or vexatious cases within that category." *Id.* A district court need only impose "a conventional prefiling review requirement." *Id.* The traditional tests applicable to preliminary injunction motions need not be

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applied since the district court's prefiling review affects the district court's inherent power and does not deny a litigant access to courts of law. See *In re Martin-Trigona*, 737 F.2d 1254, 1262 (2d Cir. 1984). A prefiling review requirement is a judicially imposed remedy whereby a plaintiff must obtain leave of the district court to assure that the claims are not frivolous or harassing. *See e.g.*, *Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996). Often, a litigant is merely attempting to collaterally attack prior unsuccessful suits. *Filipas*, 835 F.2d at 1146.

The All Writs Act provides Article III courts generally "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The All Writs Act should be used "sparingly and only in the most critical and exigent circumstances." *Wisc. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1306 (2004). As to a federal court's authority to enjoin state court proceedings under the All Writs Act, the Anti-Injunction Act provides that federal courts "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Sixth Circuit has held that the "in aid of jurisdiction" exception applies only in "two scenarios: where the case is removed from state court, and where the federal court acquires *in rem* or *quasi in rem* jurisdiction over a case

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involving real property before the state court does." *Martingale LLC v. City of Louisville*, 361 F.3d 297, 302 (6th Cir. 2004). "[A] simultaneous *in personam* state action does not interfere with the jurisdiction of a federal court in a suit involving the same subject matter." *Roth v. Bank of the Commonwealth*, 585 F.3d 527, 535 (6th Cir. 1978). Where a case is "not an *in rem* action and was not removed from state court," it is merely "a parallel *in personam* action in state court." Sixth Circuit precedents "plainly prohibit injunctive relief" in such a situation. *In re Life Investors Ins. Co. of America*, 589 F.3d 319, 330 (6th Cir. 2009).

As noted above, twenty-six cases were consolidated based on similar complaints filed by various Plaintiffs who are former patients of Dr. Pompy. Although the Court found in its Opinion and Order that Plaintiffs' complaints failed

to state claims upon which relief may be granted, the Court will not currently impose pre-filing restrictions on any new Complaints involving Dr. Pompy's patients at this time. Prior to the Court's Opinion and Order, there was no ruling from the Court that the allegations related to the closing of Dr. Pompy's office and/or the arrest of Dr. Pompy failed to state any claim upon which relief may be granted. Since the Court's ruling, the Plaintiffs and potential Plaintiffs now have a ruling that those allegations are not viable claims.

At this time, the Court will not enter an order imposing a prefiling requirement

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on the current Plaintiffs or any potential Plaintiffs. Plaintiffs are subject to Rule 11(b) of the Rules of Civil Procedure which provides that an attorney or *unrepresented party* certifies that a pleading, written motion, or other paper filed "is not being presented for any improper purpose, such as to harass ..., are warranted by existing law or by a nonfrivolous argument ..., [and] the factual contentions have evidentiary support ..." Fed. R. Civ. P. 11(b). Plaintiffs and potential Plaintiffs are now on notice that any new complaints filed before this Federal District Court related to Dr. Pompy's arrest are subject to dismissal for failure to state a claim upon which relief may be granted.

As to any Complaints filed in State Court, the Court cannot enjoin or place any limits on a plaintiff filing a case in the State Courts if the case is not an *in rem* case involving real property. Only when a defendant removes the matter to federal court does the Court have any authority to review a new Complaint, which may then be subject to dismissal for failure to state a claim upon which relief may be granted.

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Accordingly,

IT IS ORDERED that Defendants' Motion to Enjoin Future State and Federal Court Filings By Plaintiffs (ECF No. 556) is DENIED without prejudice.

s/Denise Page Hood
Chief Judge, United States District Court

DATED: October 30, 2019

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Footnotes:

[1] The twenty-six (26) consolidated cases to date are:

- 18-12634, Micks -Harms v. Nichols (LEAD CASE);
- 18-13206, Nichols v. Nichols;
- 18-13639, Helm v. Arnold;
- 18-13647, Helm v. Nichols;
- 19-10125, Cook v. William;
- 19-10126, Cook v. Nichols;
- 19-10132, Cook v. Nicols;
- 19-10135, Cook v. Nicols;
- 19-10295, Blakesley v. Blue Cross;
- 19-10299, Blakesley v. Nichols;
- 19-10639, Clark v. Nichols;
- 19-10648, Berry v. Nichols;
- 19-10649, Mills v. Nichols;
- 19-10661, Knierim v. Nichols;
- 19-10663, Johnson v. Nichols;
- 19-10785, Drummonds v. Nichols;
- 19-10841, Smallwood v. Nichols;
- 19-10984, Zureki v. Nichols;
- 19-10990, Jennifer v. Nichols;
- 19-10995, Smith v. Nichols;
- 19-11980, Nichols v. Blue Cross;
- 19-11984, Micks;Harm v. Blue Cross;
- 19-12251, Billings v. Nichols;
- 19-12266, Jennings v. Nichols;

APPENDIX F

THE STUDENT JOURNAL OF INFORMATION PRIVACY LAW

Wpsites.maine.edu/mlipa/2021/11/15/predicting-drug-diversion-the-use-of-data-analytics-in-prescription-drug-monitoring/

HomePredicting Drug Diversion: The Use of Data Analytics in Prescription Drug Monitoring

Predicting Drug Diversion: The Use of Data Analytics in Prescription Drug Monitoring

November 15, 2021 editor Article

CATHLEEN LONDON, MD CIPP/US, Class of 2022

Equifax just completed the acquisition of Appriss Insights,[1] who is rebranding as Bamboo Health.[2] How much data sharing goes on between the entities? Just as Appriss' NarxCare score[3] is a black box[4], never subjected to peer review or outside scrutiny[5], this reorganization seems designed to hide data sharing. Monitoring of controlled substance prescribing is a recent phenomenon that owes its appearance to the opioid epidemic. Doctors are now put in a position to be law enforcement, counterintuitive to their training. As medical students, physicians learn to conduct a history and physical. The patient's story is a center piece of the history, and there is a truth bias. Physicians are being asked to doubt what patients tell them and approach each encounter as someone who is "drug-seeking." This harms the physician-patient relationship directly.

There is a historic conflict around what constitutes the practice of medicine, particularly in regard to physician prescribing of controlled substances.[6] With the passage of the Harrison Narcotics Act in 1914, Congress sought to address the non-medical use of narcotics.[7] Drafted as tax law, the Harrison Act required anyone authorized to manufacture or distribute narcotics to register with the Treasury Department, pay a fee and keep records.[8] For the first time, possession, use, and distribution of narcotics were criminalized. Physicians were easier than unlicensed distributers to target and bring to court.[9]

A series of Supreme Court decisions transformed narcotics control from tax revenue to a cabining of physician prescribing. Prescribers

could no longer treat patients with their drugs of choice to prevent withdrawal, as addiction was viewed as a vice.[10] The first argument to allow alleviation of pain and suffering was *Linder v. United States*, when prescribing for withdrawal symptoms was permitted.[11] In 1968, Congress established the Bureau of Narcotics, housed in the Justice Department for the enforcement of federal drug laws.[12] The Controlled Substance Act (CSA) was passed in 1970, beginning the accelerated 'War on Drugs'. The CSA created five schedules of controlled substances based upon medical use and abuse potential.[13] Prescribers were now required to register with the Attorney General, the law required that prescriptions "must be for a legitimate purpose acting in the usual course of professional practice."[14] The CSA created a closed chain for controlled substance distribution which was designed to monitor legal products as they were transferred among DEA registrants to prevent diversion to the illicit market.[15] The DEA manages diversion by maintaining strict control over availability of substances through quotas, registration, record keeping, and security requirements from manufacturer to patient.[16] The DEA has a way to track suspicious ordering without the need to resort to protected health information (PHI), and has since the initiation of the CSA. The DEA is responsible for the production numbers of opioid quotas.

Prescription Drug Monitoring Programs (PDMP) began on paper as a set of law enforcement tools. The first program, in New York in 1918, was rescinded after three years.[17] California started one through the Bureau of Narcotic enforcement in 1939 followed by Hawaii in 1943.[18] When Illinois chose to begin one in 1961, it was housed in the Department of Health.[19] As other states began their programs, all were used for Schedule II drugs and required duplicate or triplicate prescription forms that relied on tracking serial numbers. In 1977, the Supreme Court ruled in *Roe v. Whalen* that these PDMPs were not unconstitutional.[20] The Court felt that PDMPs did not violate confidentiality and were part of state police powers. This ruling was based on paper, static PDMPs with very limited information. In 1990, Oklahoma was the first state to mandate electronic transmission of PDMP data.[21] From 2000-2017, twenty-seven electronic PDMPs were established.[22] In 2010, five states had mandatory prescriber query

laws; by 2021, forty states had mandatory query laws.[23] Forty-seven states allow interstate sharing of data.[24] Unlike their paper predecessors, today's PDMPs have a wealth of personal information.[25] They track Schedule II-V drugs and some track unscheduled medications. Prescriptions reveal information from diagnosis to location.

Only Missouri does not currently have a PDMP.[26] Twenty are housed in the Board of Pharmacy, nineteen in the Department of Health, six in professional licensing agencies, five in law enforcement, three in substance abuse agencies, and one in a consumer protection agency.[27] In addition to scheduled drugs, they track "drugs of concern."[28] Many have alternate data from child welfare cases, drug court, drug arrests and convictions, medical marijuana dispensing, Narcan dispensing, disciplinary information of registrants, and lost or stolen drug reports.[29] Insurance companies and marijuana dispensaries are being given access to PDMPs. Thirty-eight PDMPs give prescribers an unsolicited report card comparing them to other prescribers.[30]

Forty-two of the fifty-two PDMPs have Appriss' algorithm embedded within them, which uses the "NarxCare" score, a three digit score, for narcotics, sedatives, and stimulants. It leverages a black box algorithm that has never been subject to outside or peer evaluation. The 'NarxCare' patent was originally from a 2011 filing by the National Boards of Pharmacy.[31] When the patent was renewed in 2015 it was transferred to Appriss. All of the validation of NarxCare was internal, retrospective, case control studies of Ohio data from 2009-2015.[32] Appriss claims to be a clinical support tool and on the website markets NarxCare as "Up Front, Every Patient, Every Time", but only reveals some of the data used to generate the score:

- Number of prescribers;
- Number of pharmacies;
- Amount of medication;
- Presence/amount of potentiating medication
- Number of overlapping prescriptions

Appriss is seeking access to CLUE (an auto database), SIRIS (a banking database), and MIDEX (a real estate database) which the recent purchase by Equifax makes likely.[33] Appriss asserts that their internal studies "validate the NarxCare scores. Such self-serving assertions hardly quell the concerns identified, the initial innovator of a black-box software platform faces strong financial incentives not to disprove its own algorithm."[34] Their model fails transparency. It is a retrospective cohort which means selection bias and often errors of conclusion (correlation is not causation). In a retrospective study, there are too many confounding variables. The study population was selected for having the targeted health outcome which confounds the contextual information and is not accounted for in the study population. In constructing the NarxScore, no alternative hypotheses were accounted for. They had a lack of independence and had an overarching assumption which puts great limits on the data integrity. NarxCare is also based solely on data from Ohio which then creates questions about its generalization to expand beyond that geographic region.[35] Appriss did not disclose any tests of reliability and validity.[36] Algorithms need post marketing surveillance audits.[37]

The Odds Ratio (OR) is a measure of association between an exposure and an outcome. The OR represents the odds that an outcome will occur given a particular exposure, compared to the odds of the outcome occurring in the absence of that exposure.[38] Risk is a probability, a proportion of those exposed with an outcome compared to the total population exposed. An OR of 10.1 means there is a 1010% increase in the odds of an outcome with a NarxCare (Overdose Risk) score of 200-290, and so forth. Looking at Table 2 From the Appriss White Paper pictured below, we see that in Ohio the Overdose Risk 0-190 represents an OR of 1.0; Overdose Risk 200-290 OR = 2; Overdose Risk 300-390 OR = 4; Overdose Risk 400-490 OR = 8; Overdose Risk 500-590 OR = 14; Overdose Risk 600-690 OR = 24; Overdose Risk 700-790 OR = 38; Overdose Risk 800-890 OR = 72; and Overdose Risk 900-990 OR = 417. Importantly, this is not the same as saying a multiplication of the likelihood of an outcome.

Rather this is a measure of a chance that a projected likelihood will occur.[39]

Table 2 - NarxScore - Unintentional Overdose Deaths

Overdose Risk	Odds Ratio Ohio 2013-2016 Decedents	Odds Ratio Arizona 2011-2016 Decedents	Odds Ratio Michigan 2013-2015 Decedents
0-190	1.0 (REF)	1.0 (REF)	1.0 (REF)
200-290	2	2	2
300-390	4	4	3
400-490	8	5	5
500-590	14	10	11
600-690	24	19	30
700-790	38	46	64
800-890	72	94	56
900-990	417	155	351

Overdose Risk Score and Unintentional Overdose Death in 100 decedents in each state sampled from three states, Ohio (Decedents=8,017), Arizona (Decedents=2,577), and Michigan (Decedents=5,261)

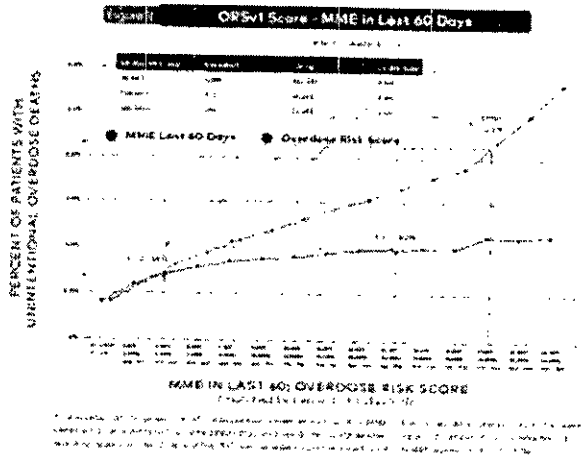
[40]

The confidence interval (CI) is the 95% probability that the true OR (chance) would be likely to lie between the upper and lower limits, assuming there is no bias or confounding in the data. Confidence intervals are a general guide to the amount of random error in the data. The width of the CI indicates the amount of random error in an estimate. Pictured below, for Overdose Risk of 200-290 with an OR of 2, the true OR is 10.1 with a 95% CI of (7.8, 13); for Overdose Risk of 300-390 with OR of 4 the true OR is 10.0 with CI (7.7, 12.9); for Overdose Risk of 400-490 with OR 8 the true OR is 16.3 with CI (12.7, 20.9); for Overdose Risk of 500-590 with OR 14 the true OR is 31.7 with CI (24.7, 40.6); for Overdose Risk 600-690 with OR 24 the true OR is 56.1 with CI (43.1, 73); for Overdose Risk 700-790 with OR 38 the true OR is 76 with CI (55.9, 103.3); for Overdose Risk 800-890 and OR 72 the true OR is 101.3 with CI (66.2, 155.2) and finally for Overdose Risk 900-990 with OR 417 the true OR is 168.1 with CI (48, 588). These are large errors.

Extremely Large Errors
Look At Confidence Intervals

Overdose Risk	Odds Ratio Ohio 2013-2016 Decedents	OR (95% CI)
0-190	1.0 (REF)	1.0 (REF)
200-290	2	7.9 (6.1, 10.1)
300-390	4	10.1 (7.8, 13.0)
400-490	8	10.0 (7.7, 12.9)
500-590	16	16.3 (12.7, 20.9)
600-690	24	31.7 (24.7, 40.6)
700-790	38	56.1 (43.1, 73.0)
800-890	72	76.0 (55.9, 103.3)
900-990	417	101.3 (66.2, 155.2)
		168.1 (48.0, 588.0)

[41]



The Appriss NarxCare model overpredicts overdose risk. Highlighted in the graph above are the errors at 56%, 60%, and 125%. A calculated 54 times means where 90 MME (morphine equivalents) it should really be reflected as 4500 MME. As a comparison, an estimated 200,000 dead from COVID-19 would be 10,000,000 dead.[42]

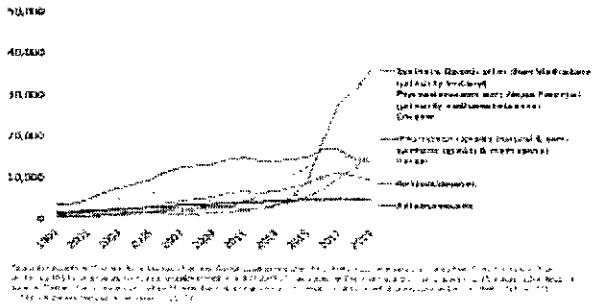
The Appriss model is a smart database that purports to use artificial intelligence to predict an individual's probability of developing opioid use disorder. The NarxCare predicted risk scores do not appear to correlate with the individual specific treatment effect of receiving opioids.[43] Professor Kilby, an economics professor, constructed an

algorithm similar to Appriss and used a more comprehensive database. There is inherently algorithmic unfairness in machine learning applications arising from the researcher's choice of the objective function.[44] The algorithm identifies high risk for opioid use disorder based on a few key demographic characteristics thereby flagging complex chronic pain patients with comorbidities as high risk. Models trained with the typical risk-prediction objective function do not produce a valid proxy for the object of interest: patient-level heterogeneous treatment effects.[45] The algorithm falsely discriminates against rural patients, those who have suffered trauma, having multiple prescribers due to no fault of their own (especially now that most doctors are employees) or relocation due to jobs, and cash payments due to indiscriminate need of prior authorizations.[46] The algorithm falsely sees these variables as doctor shopping and indicators of drug diversion or substance abuse.

Prescription drug monitoring has exacerbated, rather than mitigated the overdose crisis. Some patients may choose to forgo treatment due to unwanted surveillance and law enforcement involvement. Monitoring incentivizes physicians to avoid these substances, even when medically indicated, to avoid scrutiny as they fear the DEA. Prescription drug monitoring has led to a dramatic spike in illicit drug use and overdoses. The data analytics in PDMPs perpetuate biases and have a disproportionate impact on the underprivileged. Most concerning is that law enforcement can access and mine data without individualized suspicion, probable cause, or any judicial review. This has led to the inappropriate targeting of prescribers. The PDMPs are criminal and regulatory surveillance tools dressed up as public health.[47] They are used to help the DEA identify who they perceive might be suspicious patients, prescribers, and pharmacists who they feel might be diverting narcotics.[48] The DEA uses administrative subpoenas to search databases. When challenged by states (on Fourth Amendment and Due Process grounds) the DEA has successfully defended their actions invoking the third-party doctrine.[49] Professor Oliva contends that these warrantless searches violate the Fourth Amendment under *Carpenter*.[50] This is particularly relevant since PDMPs are no longer static, passive databases with limited information, but have become smart databases replete with personal

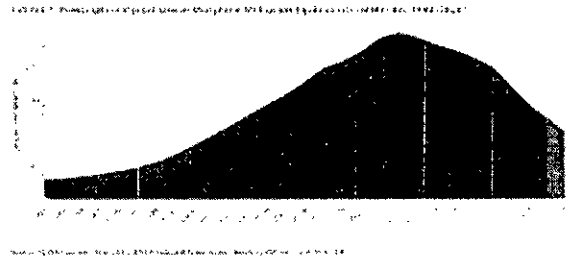
health information. They rely on robust data analytics with black box algorithms that have never been subjected to independent verification.[51]

Figure 2. National Drug-Involved Overdose Deaths*, Number Among All Ages, 1999-2019



Overdose deaths have spiked and in fact have been driven by illicitly manufactured fentanyl, an increase of over 540% from 2014-2016 as shown in figure 2 above. The trope that the opioid overdose crisis is due to physician overprescribing is erroneous.[52] Prescription painkiller deaths leveled off and had been overestimated to begin with.[53] Opioid prescribing started declining with the introduction of PDMPs consistent with the discriminatory and chilling effect on prescribing for chronic pain patients many have described:[54] As pictured below, Prescription opioid use declined to 60% of the peak volume in 2011 and continues to decline.

Prescription opioid use has declined to 60% of the peak volume in 2011 after another year of double-digit decline expected in 2020



For patients who purportedly became addicted after receiving a pain prescription, over 75% did not get those medications directly from physicians.[55] The implementation of PDMPs has not been associated

with a reduction in drug overdoses. In a subsample analysis of states with PDMPs in operation for 5 or more years, the programs were found to be associated with significantly higher mortality rates in legal narcotics, illicit drugs, and other and unspecified drugs.[56]

Despite the harm and disparate impacts on marginalized populations, expansion continues as evidenced most recently by Equifax's purchase of Appriss and Appriss's rebranding. In addition, the DEA submitted a Request for Proposal, ("RFP") for their own nationwide database to streamline the subpoena process.[57] An RFP is a description of the service they are seeking ad a call for bids. They are seeking prescription level data at the national, state, and local levels. The RFP includes the ability to rank the top prescribers both nationwide and statewide for Schedule II and Schedule III substances, including fentanyl, oxycodone, hydrocodone, tramadol and buprenorphine (a drug used to treat substance use disorder). They are also seeking to target pharmacies with the same ranking criteria. Given the amount of data that the Department of Justice would have direct access to on a regular basis, this is monitoring of the population on an unprecedented scale.

Algorithms such as Appriss's NarxCare are marketed as clinical decision support tools which makes them subject to FDA regulation. The FDA regulates medical devices, and software as a medical device is part of Clinical Decision Support tools.[58] Section 3060 of the twenty-first Century Cures Act exempts five categories of Clinical Decision Support tools.[59] For Software as a Medical Device, the FDA seeks a valid clinical association between the software's output and its targeted clinical condition.[60] The company must show that the software processes input data to generate accurate, reliable output that achieves the intended purpose in the context of clinical care for the target population.[61] Since PDMPs have not shown that they reduce overdose deaths nor improve patient outcomes, NarxCare scoring would fail these FDA safety and effectiveness criteria. In Section 3060, software is exempt from regulation if it is administrative support software, unrelated to diagnosis, cure, mitigation, prevention or treatment of a disease or condition, an electronic health record or used to store and transfer lab data – as long as it does not analyze the data.

There is a final exemption concerning software that aggregates patient data and provides recommendations to health care professionals about prevention, diagnosis, or treatment of a disease or condition. This exemption depends on the health care professional being able to "independently review and reject the recommendations that such software presents."[62] The key is that health care professional needs to not rely on the software for decision making for the vendor to avoid regulation.[63] NarxCare scores are presented to prescribers in an unavoidable fashion in the PDMP. Laws are in place to mandate checking the PDMP prior to prescribing and many are now integrated into electronic health records.

Professor Oliva contends that the FDA should be regulating this data analytic software, as the NarxScore is simply presented to prescribers as a risk score without any way to independently evaluate its veracity.[64] Given the harms from PDMP use, the increased overdoses, the difficulty for chronic pain patients to obtain needed medications, PDMPs are certainly ripe for regulation. Most importantly, the intrusion upon privacy by these entities, without any consent from patients is concerning. Receiving a prescription should not mean giving the government your medical history. It certainly should not mean giving it to Equifax.

[1] Equifax, *Equifax Completes Acquisition of Appriss Insights* (Oct. 01, 2021), https://www.prnewswire.com/news-releases/equifax-completes-acquisition-of-appriss-insights-301389738.html.

[2] Bamboo Health, https://bamboohealth.com/news/bamboo-health-unveiled/ (last visited Oct. 23, 2021) .

[3] NarxCare Score is their proprietary predictive algorithm used in prescription drug monitoring programs nationwide. Bamboo

Health, *NarxCare*, https://apprisshealth.com/solutions/narxcare/ (last visited Oct. 23, 2021).

[4] A blackbox algorithm is one whose inputs and operations are not visible to the interested party. It is an impenetrable system. https://whatis.techtarget.com/definition/black-box-AI (last visited Nov. 11, 2021).

[5] November 1, 2021 a study is being published purported to be a comprehensive external verification of NarxCare however it only looks at Ohio and Indiana via a one-time self-administered survey. Gerald Cochran, et al., Validation and Threshold Identification of a Prescription Drug Monitoring Program Clinical Opioid Risk Metric With the WHO Alcohol, Smoking, and Substance Involvement Screening Test (Nov. 1, 2021), https://doi.org/10.1016/j.drugalcdep.2021.109067.

[6] Diane E. Hoffman, *Treating Pain v. Reducing Drug Diversion and Abuse: Recalibrating the Balance in Our Drug Control Laws and Policies*, 1 St. Louis j. health L. & pol'y 231, 257 (2008).

[7] *Id.* at 259.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 261-62.

[11] *Id.*

[12] *Id* at 263

[13] 21 U.S.C. §§ 812, 822.

[14] *Id.*.

[15] Jennifer D. Oliva, *Prescription Drug Policing: The Right to Health-Information Privacy Pre and Post Carpenter* 69 Duke L. J. Duke L.J. 775, 782 (2020).

[16] *Id.* Databases of every sale, delivery, and disposal are kept in ARCOS (Automation of Reports and Consolidated Orders System).

[17] *See generally,* Prescription Drug Monitoring Program Training and Technical Assistance Center ("PDMP TTAC"), History of Prescription Drug Monitoring Programs (Brandeis Univ.) (2018).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] PDMP TTAC, PDMP Policies and Capabilities Results from 2020 State Assessment (2021), https://www.pdmpassist.org/pdf/PDMP%20Policies%20and%20Capabilities%202020%20Assessment%20Results_20210111.pdf.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Olivia, *supra* note 14 at 775.

[26] Appriss Health, *Up Front, Every Patient, Every Time,* https://info.apprisshealth.com/whitepaper-model-for-pdmp-effectiveness.

[27] *Id.*

[28] *Id.* These include gabapentin, butalbital and ephedrine.

[29] *Id.*

[30] *Id.*

[31] Application No, 13/234,777, September 16, 2011, James Huizenga for the Department of Justice.

[32] Huizenga J.E., et al., NarxCHECK Score as a Predictor of Unintentional Overdose Death , Appriss, Inc., (Oct. 2016), https://apprisshealth.com/wp-content/uploads/sites/2/2017/02/NARxCHECK-Score-as-a-Predictor.pdf.

[33] *Id. See also* Jennifer D. Oliva *Dosing Discrimination Regulating PDMP Risk* Scores 110 Ca. L. Rev. (*forthcoming* 2022).

[34] Huizenga J.E., et al. *supra* note 32.

[35] Kristine Whalen, Risk Scoring in the PDMP to Identify At-Risk Patients, (Appriss Health ed., 2020);

Chelsea Canan et al, *Automatable Algorithms to Identify Non-medical Opioid Use Using Electronic Data: a Systematic Review,* 24(6) J. Am. Med. Info. Assoc. 1204-10 (2017).

[36] Angela E. Kilby, *Algorithmic Fairness in Predicting Opioid Use Disorder using Machine Learning*, N.E. Univ. (Mar. 2020).

[37] *Id.*

[38] Terri Lewis, *Analysis of the Appriss Narx Model* 12 J. Advanced Rsch. Dynamic. Control Sys. (*forthcoming* 2022).

[39] *Id.*

[40]Whalen, *supra* note 35.

[41] Neil K. Anand, Institute of Advanced Medicine and Surgery. Dr. Anand reached out to Appriss in 2020 seeking the raw data used in their analysis for independent study as mentioned in their excerpt. The contact was no longer working for Appriss and the other parties were non-responsive.

[42] Kilby, *supra* note 36.

[43] *Id.* ; Chelsea Canan et al, *Automatable Algorithms to Identify Mon-medical Opioid Use Using Electronic Data: a Systematic Review,* 24(6) J. Am. Med. Info. Assoc. 1204-10 (2017).

[44] *Id.*

[45] *Id.*

[46] Jennifer D. Oliva *Dosing Discrimination Regulating PDMP Risk* Scores 110 Ca. L. Rev. (*forthcoming* 2022).

[47] Jennifer D. Oliva, *Prescription Drug Policing: The Right to Health-Information Privacy Pre and Post Carpenter*, 69 Duke L.J. 775 (Jan. 2020).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Maia Szalavitz, *Why Trump's Opioid Plan Will Harm More People Than It Will Save*, SELF (Mar. 28, 2018), https://www.self.com/story/trump-opioid-plan [https://perma.cc/CD94-XS9S].

[53] The CDC issued a correction from its original number of 32,445 lowering by 53% to 17,087. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7987740/; https://www.cato.org/blog/cdc-researchers-state-overdose-death-rates-prescription-opioids-are-inaccurately-high; https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304265.

[54] Anand, *supra* note 41

[55] Oliva, *supra* note 46.

[56] Young Hee Nam, et al., *State Prescription Drug Monitoring Programs and Fatal Drug Overdoses*, 23 Am. J. Mgmt. Care. 5 (May 2017).

[57] DEA RFP 15DDHQ20R00000021

[58] Oliva, *supra* note 46.

[59] *See generally* An Act to Accelerate the Discovery, Development, and Delivery of 21st Century Cures, Pub. L. No. 114-255 (West 2016), https://www.congress.gov/114/plaws/publ255/PLAW-114publ255.pdf

[60] Oliva, *supra* note 46.

[61] *Id.*

[62] Hee Nam, et al *supra* note 56.

[63] *Id.*

[64] Oliva, *supra* note 46.

Post navigation

PROFESSIONAL RESOURCES

OCI externship applications are due by October 28, 2021, at noon for:

– International Association of Privacy Professionals (IAPP)

– Match Group, LLC

CONSTITUTIONAL PROVISIONS, In Relevant Part

The Fourth Amendment provides for :

" the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Statutes

42 USC 1983 provides for:

"Section 1983 Litigation" refers to lawsuits brought under Section 1983 (Civil action for deprivation of rights) of Title 42 of the United States Code (42 U.S.C. ... Section 1983 provides an individual the right to sue state government employees and others acting "under color of state law" for civil rights violations.

Bivens Claim:

"Section 1983 Litigation" refers to lawsuits brought under Section 1983 (Civil action for deprivation of rights) of Title 42 of the United States Code (42 U.S.C. § 1983). Section 1983 provides an individual the right to sue *state* government employees and others acting "under color of state law" for civil rights violations. Section 1983 does not provide civil rights; it is a means to enforce civil rights that already exist.

Bivens action: Section 1983 only applies to local state governments. A "Bivens action" is the *federal* analog which comes from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Subject to certain exceptions, victims of a violation of the Federal Constitution by a federal officer have a right under *Bivens* to recover damages against the officer in federal court despite the absence of any statutory basis for such a right.

Under 42 U.S.C. § 1985(3) provides:

"If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do . . . any act in furtherance of the object of such conspiracy, whereby another is injured . . . or deprived of . . . any right or privilege of a citizen of the United States, the party so injured or deprived" may have a cause of action for damages against the conspirators.

Title 21 USC Codified CSA § 802 (56) (C) provides:

"(C) the practitioner, acting in the usual course of professional practice, determines there is a legitimate medical purpose for the issuance of the new prescription."

Title 21 USC Codified CSA §879 provides :

"A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate judge issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time."

Title 21 USC Codified CSA §880(Administrative inspections and warrants) provides:

> "(4) The judge or magistrate judge who has issued a warrant under this section shall attach to the warrant a copy of the return and all papers filed in connection therewith and shall file them with the clerk of the district court of the United States for the judicial district in which the inspection was made."

The Federal Advisory Committee Act (FACA)

"is a Federal law that governs the establishment and operation of advisory committees. It is implemented Government-wide by the General Services Administration (GSA), which has issued regulations and guidance. A overview of the FACA. The purpose of the FACA is to ensure that the public has knowledge of and an opportunity to participate in meetings between Federal agencies and groups that the agency either has established, or manages and controls for the purpose of obtaining

group advice and recommendations regarding the agency's operations or activities.The FACA requires that such groups be chartered, that their meetings be announced in advance and open to the public, and that their work product be made available to the public."

State Statutes

Federation of State Medical Boards- Model Policy on DATA 2000 and Treatment of Opioid Addiction in the Medical Office of April 2013.

The Federation of State Medical Board Requirements include: " The (state medical board) will determine the appropriateness of a particular physician's prescribing practices on the basis of that physician's overall treatment of patients and the available documentation of treatment plans and outcomes. The goal is to provide appropriate treatment of the patient's opioid addiction (either directly or through referral), while adequately addressing other aspects of the patient's functioning, including co-occurring medical and psychiatric conditions and pressing psychosocial issues."

Rules

Fed. Rule of Civ. Proc. Rule 4. Summons, provides:

"(c) SERVICE. (1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies

to the person who makes service. (2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint."

Rule 3:5-1 of the "RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY.

RULE 3:5-1 provides: "A search warrant may be issued by a judge of a court having in the municipality where the property sought is located." The Statute M.C.L §600.761, and the State of New-Jersey RULE 3:5-1,do not provide for the execution of search warrants issued from the State of Michigan, to be validly executed in the State of New Jersey. "