No._____

In The

Supreme Court of the United States

Michael Smallwood for Heidi Smallwood, Pro se

Petitioner

vs.

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 19-2237

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Michael Smallwood for Heidi Smallwood, Pro se

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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.

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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Nos. 19-2173/2182/2207/2209/2226/2227/2228/2237

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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. One West 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

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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

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

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

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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

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

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

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

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

The PDMP: Raising Issues in Data Design, Use and Implementation

Terri Lewis https://link.medium.com/Q8YRQMWUjlb

Aug 7·2021 10 min read

How machine learning, algorithms, and poorly designed data collection combines to create vicarious harm to health care users

1/ "The worst part of machine learning snake-oil isn't that it's useless or harmful–it's that ML-based statistical conclusions have the veneer of mathematics, the empirical facewash that makes otherwise suspect conclusions seem neutral, factual and scientific.

Think of "predictive policing," in which police arrest data is fed to a statistical model that tells the police where crime is to be found. Put in those terms, it's obvious that predictive policing doesn't predict what criminals will do; it predicts what *police* will do." — @CoryDoctorow, 2021, twitter

2/ Machine learning is an application of artificial intelligence (AI) that programs digital data systems with the ability to automatically learn from an existing dataset without being explicitly programmed. Machine learning focuses on the development of computer programs that can access data and use it to learn for themselves. https://www.ibm.com/cloud/learn/machine-learning

3/ Predictive modeling is the formulaic application of algorithms to project a behavior based on patterns

detected in retrospective data. https://light-it.net/blog/use-of-predictive-modeling-in-healthcare/

4/ Let's apply the idea of machine learning, 'predictive policing,' and 'predictive modeling' to prescription opioid surveillance data that relies on machine learning. Keep in mind that the CDC Guidelines (2016) provide the reference thresholds for dose (<90 MME), days (<90 days), units (dose X days), and inclusion (primary care, acute pain) and exclusion (chronic pain associated with cancer pain, palliative care or end of life hospice care). https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained and https://www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm

5/ From here it gets murky, primarily because within these algorithms, opioids are associated exclusively with 'risk of harms' for persons with conditions associated with noncancer chronic pain. This association was incorporated into the CDC Guidelines (2016) based on low quality evidence and under the undue influence of associates of Physicians for Responsible Opioid Prescribing or PROP. (pI, pp60–

68) https://www.cdc.gov/drugoverdose/pdf/prescribing/CDC-DUIP-QualityImprovementAndCareCoordination-508.pdf

6/ Here opioid prescribing data captured by a statewide PDMP is fed into a statistical model that tells the DEA that an aberrant pattern of behavior may reflect a 'crime in process' based on accumulated patient, prescriber, or pharmacy data in one or more of 17 elements detected across rolling windows of time. https://static1.squarespace.com/static/54d50ceee4b05797b34869cf/t/5fac5d0d16947a58fe85ba09/1605131535197/DEA+RFP+%282%29.pdf

7/ This crime may be fraudulent billing, wasteful diagnostic testing and treatment, or abuses of medications thought to be associated with system, community, or patient harms. https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/CombMedCandDFWAdownload.pdf

8/ 'Predictive policing' attempts to identify the potential for a crime to occur based on the presence of data believed to have a reliable association with a pattern of crime. https://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR233/RAND_RR233.pdf

9/ The DEA Strike Force can only find a crime when and where they can LOOK for it. Where the PDMP collects information about dose, days, and units, surveillance entities will always perform pretextual investigations upon patients who utilize opioids, the physicians who prescribe them, and the pharmacies that fill them. https://www.dea.gov/operations/ocdetf

10/ Given the very nature of the algorithm, predictive modeling doesn't predict what physicians, pharmacies, or patients will do; *it predicts what the DEA will do in response to indicators and patterns of aberrant behaviors associated with retrospective patterns of opioid prescribing*. https://twitter.com/doctorow/status/1422239691034664991?s=20

11/ The DEA will ONLY find 'harms' associated with prescribed opioids, prescription fills, and days of use among patients who receive these medications through their physician offices and pharmacies because the only indicators programmed into the PDMP focus on behaviors that have been associated in the algorithm with fraud, waste, and abuse of medications. https://www.ehra.org/sites/ehra.org/files/EHRA%20Recommended%20Ideal%20Dataset%20for%20PDMP%20Inquiry%20-%201.14.19.pdf

12/ Despite claims of patient-centeredness prescribing, there is no data collected about potential positive patient outcomes. The PDMP algorithms cannot predict appropriate use behavior from legal prescribing. 'Benefit' or 'No harm' has no assigned value in these algorithms. https://www.cdc.gov/drugoverdose/pdf/pubs/2019-cdc-drug-surveillance-report.pdf

13/ That's not because patients have more illicit medications or are engaged in more antisocial behavior, but because surveillance entities that rely on the PDMP are only checking for harmful behavior among people with prescribed, legal medications. This imposes a form of

confirmation bias. (If we build it, it will come) http://www.collegiatetimes.com/opinion/digital-algorithms-are-reinforcing-confirmation-bias/article_a23423fe-a457-11e6-9992-e7a835b30d18.html

14/ Opioid use is reflected as 'Suspect' (1) and becomes 'more suspect' (1+1) à 'public menace'(1+1+1) compared to other members of the ingroup data set as case characteristics increase in dose, distributed prescription units, or accumulating days. When that surveillance data is fed into an algorithm that relies on harms (1), the algorithm treats it like the truth and predicts harmful behavior accordingly. https://www.bmj.com/content/361/bmj.k1479

15/ Add to this, naïve 'experts' who designed algorithms that lack indicators about patient characteristics, and indicators of benefit or absence of harm, can only find 'cases associated with risk of harm.' The system will predict mathematical calculations that we perceive to be empirically neutral, but harmful based on scale of their distribution within the measured ingroup of patients,

physicians, and pharmacies tagged by dispensing and or use of
opiods. https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/

16/ By what method are these algorithms biased toward one outcome or another?

17/ The 'less-is-better bias' is the phenomenon of ascribing more value (better-ness) to something smaller in quantity (less-ness) in certain situations that we don't have a good baseline for needed comparisons (think MME, days, units dispensed). when a person judges an option in isolation, the judgment is influenced more by attributes that are easy to evaluate than by attributes that are hard to evaluate, even if the hard-to-evaluate attributes are more
important. https://steemit.com/cognitive-biases/@natator88/less-is-better-effect-cognitive-bias-1-of-
188 https://www.healthcareitnews.com/news/addressing-ai-bias-algorithmic-nutrition-label

18/ An attribute is said to be easy to evaluate if the decision maker knows how its information about impact is distributed and thereby knows whether a given value on the attribute is good or bad. By claiming there is no evidence of positive benefit for opioids, our understanding of distribution effect is foreclosed and we don't event ask the question. https://steemit.com/cognitive-biases/@natator88/less-is-better-effect-cognitive-bias-1-of-188

19/ The PDMP is programed to predict the 'less is better behavioral bias' that DEA is intent on tracking and prosecuting. The algorithms answer not WHO IS BAD, but HOW BAD ARE MEMBERS OF THE DATASET BY COMPARISON TO MEMBERS WHO ARE LESS BAD? https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Global-JusticeSystemUsePDMPs.pdf

20/ Because fewer opioids are 'risky,' they only tag behavior deemed 'risky,' and can't measure or look for positive patient outcomes — because data that is not associated with risk is nowhere to be found. p9 https://www.ojp.gov/ncjrs/virtual-

library/abstracts/technical-assistance-guide-pdmp-administrators-standardizing and https://www.wmpllc.org/ojs/index.php/jom/article/view/2675

21/ Where else do we see this AI design problem show up?

22/ Notably, Black Women in AI encountered significant resistance for asserting that facial recognition systems are inherently racist because they overly predict skin types of color as aberrant. https://arstechnica.com/tech-policy/2019/01/yes-algorithms-can-be-biased-heres-why/

23/ Similarly, Kilby (2020) found that that the PDMP algorithm applied to multiple years of CMS billing claims, over-detected chronically-ill patients as aberrant (over utilizers) based on the scale of the prescriptions dispensed, filled, and purchased within the measured group. http://www2.nber.org/conferences/2020/SI%20subs/main_draft23.pdf

24/ You don't have to have a degree in computer science or be an AI specialist to understand that algorithms primed with biased data can reasonably be expected to predict singularly harmful behavior. Coined in 1957, the phrase "Garbage In, Garbage Out" (GIGO) became an iron law of computing since the days of hand tabulation of data. Yet another inherent problem in data submitted from the states into the PDMP is a lack of standardization in collection and a concerning data error rate. https://towardsdatascience.com/problems-in-machine-learning-models-check-your-data-first-f6c2c88c5ec2 and https://www.ncpdp.org/NCPDP/media/pdf/WhitePaper/NCPDP_Standards-based_Facilitated_Model_for_PDMP_-_Phase_I_and_II.pdf

25/ Sometimes humans cut corners. "If all you have is a hammer, then everything is a nail" is a cautionary tale for scientific malpractice. If scientists don't address data integrity, the results can impose what has been referred to as 'vicarious harms' upon those whose data is targeted by digital surveillance. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850418

26/ This can be lethal. USDOJ-DEA relies on statistical modeling to figure out which physicians are over-prescribing based on the accumulation of positive data hits on harmful data. All data submitted to the system relies on positive hits (harms) to predict antisocial conduct around the use of controlled substances. https://towardsdatascience.com/problems-in-machine-learning-models-check-your-data-first-f6c2c88c5ec2

27/ The most egregious statistical sin in AI algorithm development is the recycling of what is known as training data to validate a model. Whenever you create a statistical model, you hold back some of the "training data" (data the algorithm analyzes to find commonalities) for later testing. https://towardsdatascience.com/train-validation-and-test-sets-72cb40cba9e7

28/ Machine-learning systems — "algorithms" — produce outputs that reflect the training data over time. If the inputs are biased (in he mathematical sense of the word), the outputs will be, too. Eliminating sociological bias is very hard because it depends on the design of data and questions asked, information

collected. https://arstechnica.com/tech-policy/2019/01/yes-algorithms-can-be-biased-heres-why/

29/ Retrospective cohort studies suffer from *selection bias* where participants are selected based on known outcomes that have already occurred. Short on data, the original developers of the PDMP in Ohio (2015) used a shortcut to train and test their algorithm for predicting aberrant use of opioids on a single set of data of 1687 users suspected of misusing opioids with subsequent mortality. https://academic.oup.com/biostatistics/article/10/1/17/269436

30/ The construction of the PDMP involved assessment of existing cases, and mirrored the same cases to create a control group for training. Then it asked the algorithm to confidently predict that the cases in the control group were also legitimate cases. https://apprisshealth.com/wp-content/uploads/sites/2/2017/02/NARxCHECK-Score-as-a-Predictor.pdf

31/ There's a major issue in predictive modeling based on data that it has already digested and modeled. It's the

equivalent of asking a witness in a police lineup 'have you seen this face before'? It becomes a test of recall rather than generalization to the detection of features of novel data characteristics. Have you seen this before (matching, recall) versus 'Is this LIKE something you have ever seen (categorization, generalization). https://academic.oup.com/biostatistics/article/10/1/17/269436

32/ A training set of data must be representative of the cases you want to generalize to. Machine learning is excellent at recall. The PDMP has repeatedly demonstrated that it can recognize users of opioids and aggregate their use based on dose, days, and units. https://academic.oup.com/biostatistics/article/10/1/17/269436

33/ What the PDMP is NOT designed to do, is detect patients who are using their opioids correctly from patients who are misusing their medications. It can detect physicians are prescribing and dispensing within specific parameters. It CANNOT predict whether prescribing and dispensing is associated with either appropriate use or misuse by patients. It can detect that pharmacies are

filling authorized prescriptions. It CANNOT predict which prescriptions will be used appropriately from those that are
diverted. https://academic.oup.com/biostatistics/article/10/1/17/269436

34/ Machine learning relies on the use of patterns associated with its own training data. The PDMP only recognizes the presence and quantity of doses, days, units dispensed for people who it is programmed to assume may be misusing the system. People with the same characteristics who are not prescribed opioids are not found in the dataset. What they may do for palliation remains unknown.

35/ Applied algorithms distribute the available data to predict who is engaged in aberrant behavior based on the scale of the data (smaller à larger). It cannot predict harms associated with data associated with unknown users of drugs purchased outside the physician, pharmacy, patient relationship.

36/ Machine learning in AI can impose vicarious harms upon patients, physicians and pharmacies whose

experience is captured in the data. These harms are imposed by the treatment of the data by the algorithms that encode specific assumptions or values. https://effectivehealthcare.ahrq.gov/products/algorithms-bias-healthcare-delivery/request-info

37/ Data algorithms can cause great harms if individual health behavior is filtered through a forensic model to compare it to desirable public health outcomes. https://www.practicalpainmanagement.com/resources/ethics/when-opioid-prescriptions-are-denied

https://www.belmonthealthlaw.com/2020/02/04/narxcare-pharmacies-way-of-tracking-opioid-usage-of-patients-what-you-need-to-know/

38/ This brings me to the models that emerge from combining PDMP data with other federal, state and private insurance datasets to create comparative analytics designed to detect 'aberrant patterns of prescribing, dispensing, patient use.' Twenty-one public datasets combine to create a Frankenstein data framework for evaluation by AI contractors and DOJ-

DEA. https://www.cms.gov/hfpp/become-a-partner/benefits-of-membership

39/ All of this is shrouded in secrecy by nondisclosure agreements among the data partners. The data and methods are covered by contracting agreements with "AI" contractors who don't have to disclose their source data, data treatment, algorithms used to treat the data submitted by multiple data sharing parties. https://www.cms.gov/hfpp/become-a-partner/benefits-of-membership

40/ Stakeholders most affected by outcomes are not invited to participate in the data design process. This forecloses on the necessary and independent scrutiny that might catch errors of assumptions in algorithm construction. https://wecount.inclusivedesign.ca/uploads/WeBuildAI_Participatory-Framework-for-Algorithmic-Governance-tagged.pdf

41/ It also pits research teams against one another, rather than setting them up for collaboration, a phenomenon exacerbated by scientific career advancement, which structurally gives preference to independent work. It pits

governments against physicians, pharmacy companies and patients whose inputs could actually improve the process and reduce the vicarious harms imposed upon them by forensic modeling. https://www.scientificamerican.com/article/what-skepticism-reveals/

42/ Making mistakes is human — the scientific method demands an accounting for disclosure, peer review, validation and reliability testing as a check against fallibility and harms to the public.

43/ The combination of untested assumptions, financial incentives, poor quality practices, and badly designed data make for poor design of clinical guidelines and implementation of public policy. https://www.ncbi.nlm.nih.gov/books/NBK22928/

44/ Without the discipline of good science, nontransparent implementation produces poor public outcomes. These outcomes are pressed into service in the field, offer no benefit, and harm physicians, pharmacies, patients, and public policy at large. https://www.worldbank.org/content/dam/Worldb

ank/Event/MNA/yemen_cso/english/Yemen_CSO_Conf_Social-Accountability-in-the-Public-Sector_ENG.pdf

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. "