

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

Brianna Boe, *et al.*,)
)
Plaintiffs,)
)
and)
)
United States of America,)
)
Plaintiff-Intervenor,)
)
v.) No. 2:22-cv-00184-LCB-CWB
)
Hon. Steve Marshall, in his official)
capacity as Attorney General of the)
State of Alabama, *et al.*,)
)
Defendants.)

**PLAINTIFF-INTERVENOR UNITED STATES OF AMERICA’S NOTICE
REGARDING THE STATUS OF DISCOVERY BY HHS**

Pursuant to the Court’s Fifth Amended Scheduling Order (ECF No. 292) (Scheduling Order), the United States submits this notice to apprise the Court of the progress the United States Department of Health and Human Services (HHS) has made in producing documents in this matter.

Over the last several months, HHS has continued to work diligently to collect, review, and produce documents in accordance with the Scheduling Order and the Court’s March 27, 2023 Order on Defendants’ Motion to Compel (ECF No. 261). So far, HHS has produced over 2.3 million pages of documents to

Defendants, in rolling productions that were delivered in March, June, and September 2023. HHS produced a substantial batch of 15,751 pages of documents earlier today.

HHS has collected documents from eight Divisions¹ and nine email custodians,² as agreed to by the parties. All email and document collections for the relevant HHS Operating Divisions and Staff Divisions are now complete. HHS's third-party vendor has finished processing these documents so that they can undergo attorney review. Attorney review of these documents is ongoing and includes review by a team of HHS attorneys and final review by the Department of Justice. HHS expects to complete this process and to produce all responsive, nonprivileged documents from seven Divisions—AHRQ, OASH, CMS, OCR, FDA, IHS, and SAMHSA—by October 20, 2023.

¹ The Divisions are: Agency for Healthcare Research and Quality (AHRQ), Office of the Assistant Secretary of Health (OASH), Centers for Medicare and Medicaid Services (CMS), Office of Civil Rights (OCR), Food and Drug Administration (FDA), Indian Health Services (IHS), National Institutes of Health (NIH), Substance Abuse and Mental Health Services Administration (SAMHSA).

² The custodians are: Janet Maynard, Director, Office of Rare Diseases, Pediatrics, Urologic and Reproductive Medicine, FDA; Christian Cao, Team Leader, Division of Pharmacovigilance I, FDA; Diana Bianchi, Director, National Institute of Child Health and Human Development, National Institutes of Health (NIH); Rohan Hazra, Director, National Institute of Child Health and Human Development – Division of Extramural Research, NIH; Karen Parker, Director, Sexual & Gender Minority Research Office, NIH; Joshua A. Gordon, Director, National Institute of Mental Health, NIH; Maura Calsyn, Deputy Assistant Secretary for Health Policy, Office of the Assistant Secretary for Health; Dylan Nicole de Kervor, Senior Advisor, Office for Civil Rights; and Arlin Hatch, Psychologist, Center for Mental Health Services, Substance Abuse and Mental Health Services Administration.

While HHS has made tremendous progress in fulfilling its discovery obligations in this matter, the full NIH document production cannot be completed by October 20, 2023 due to the unanticipated volume of the collection yielded by the search terms agreed to by the parties—seven times more documents than what was expected. Specifically, HHS reasonably expected the NIH search would yield 900 documents based on hit reports; instead, the search terms returned over 6,000 results. HHS is reviewing the NIH documents as quickly as possible and will produce those it has available by October 20, 2023, with the remaining documents to be produced on a rolling basis thereafter. HHS anticipates that it will complete production for the remaining NIH documents no later than December 15, 2023, and will make every effort to complete the production sooner if possible.³

The United States will provide a further status update regarding the remainder of the HHS production on or before October 20, 2023.

Dated: September 18, 2023

Respectfully submitted,

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³ HHS hopes to complete this production prior to December 15, 2023, but suggests this date out of an abundance of caution in order to avoid seeking an extension from the Court.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

Respectfully submitted,

/s/ Kaitlin Toyama

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