# IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS

**DALLAS DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff, v.**

**GAS PIPE, INC. (7),**

**AMY LYNN, INC. (8), GERALD SHULTS (9),**

**AMY HERRIG (10),**

**RAPIDS CAMP LODGE, INC. (31),**

**RIDGLEA COMPLEX MANAGEMENT, INC. (32),**

**Case No. 3:14-cr-00298-M**

**Defendants.**

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# MOTION TO COMPEL DISCOVERY PURSUANT TO

***BRADY V. MARYLAND* AND REQUEST FOR EVIDENTIARY HEARING**

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# Introduction

This case presents this Court with a chapter in an ongoing, nationwide, pervasive, and egregious *Brady* violation whereby a group of chemists with the Drug and Chemical Evaluation Section of DEA’s Office of Diversion Control (“Diversion Control” or “ODE”) seeks to imprison defendants for that which is not unlawful while concealing voluminous evidence that an entire division of the DEA – the Office of Forensic Science (“Forensic Science” or “SF”) – dissents both from the incorrect substance of Diversion Control’s analogue determinations and from Diversion Control’s exclusion of Forensic Science from participation in those determinations. In light of the volume of potentially exculpatory information, coupled with the pattern of concealing this information in similar cases throughout the nation, it is respectfully submitted that an evidentiary hearing on this motion is necessary and appropriate. In addition, subpoenas should be issued to compel the attendance of relevant witnesses at the requested evidentiary hearing.

Defendants’ companion Motion to Dismiss Counts Four through Nine for Vagueness (“Vagueness Motion”), as well as Defendants’ Motion for a Pretrial *Daubert* Hearing (“*Daubert* Motion”), set forth the scientific disagreement regarding whether the substances at issue meet prong one regarding structure under the Analogue Act, as well as the difficulties presented by the “substantially similar in chemical structure” standard. In summary, it appears undisputed that the term “substantially similar” is not one of science, and that no methodology exists to determine with objectivity whether two molecules are “substantially similar” in their chemical structure. The most any chemist – or potential defendant for that matter – can do is reach purely subjective “opinions” regarding how similar two molecules have to be in order to be “substantially similar,” or conversely how different from one another they have to be in order to be merely “similar” rather than

“substantially similar.” The other conclusion to be drawn from the current state of scientific disagreement is that, with a single exception1, the only chemists who assert that all of the substances at issue in this case qualify as analogues are those employed by Diversion Control, while at least fifteen professors of chemistry across an array of the nation’s universities and three highly qualified forensic chemists unanimously believe otherwise.2

Given that the Diversion Control chemists’ unpublished methodologies lack any generally accepted basis in science and that their subjective opinions drawn from these methodologies appear to be at odds with nearly everyone in the rest of the world, it is a fair question as to how this happened and whether anyone within the DEA dissented from Diversion Control’s unique opinions.

1Undersigned counsel are aware of only one chemist outside the DEA who agrees with the government: Dr. Andrew Coop, Professor and Associate Dean for Academic Affairs at the University of Maryland School of Pharmacy. *See United States v. Ritchie, et al*, No. 4:15-cr-00018 (E.D. Va.), doc. 658.

2Dr. Michael Croatt, Associate Professor at the University of North Carolina at Greensboro; Dr. Anthony P. DeCaprio, Associate Professor of Chemistry and Biochemistry at Florida International University; Dr. Paul Doering, Distinguished Service Professor Emeritus in the Department of Pharmacotherapy and Translational Research at the University of Florida, College of Pharmacy; Dr. Gregory Dudley, Distinguished Professor and Chair of the Department of Chemistry at West Virginia University; Dr. Mark Erickson, Professor of Chemistry at Hartwick College; Dr. Neil Garg, Professor and Vice Chair of the Department of Chemistry and Biochemistry at the University of California, Los Angeles; Heather Harris, Professor of Forensic Chemistry at Arcadia University; Dr. Michael Hilinski, Assistant Professor of Chemistry at the University of Virginia; Dr. James R. McCarthy (deceased), late Professor of Chemistry and Chemical Biology at Purdue University in Indianapolis; Dr. Joseph Ready, Professor of Biochemistry at the University of Texas Southwestern Medical Center; Dr. Adam R. Renslo, Professor of Pharmaceutical Chemistry at the University of California, San Francisco; Dr. Richmond Sarpong, Professor of Chemistry at the University of California, Berkeley; Dr. Uttam Tambar, Associate Professor of Biomedical Research at the University of Texas Southwestern Medical Center; Dr. Richard E. Taylor, Professor of Chemistry and Biochemistry at the University of Notre Dame; Dr. Guido Verbeck, Associate Professor of Chemistry at the University of North Texas; Joseph P. Bono, forensic chemist formerly employed by DEA’s Office of Forensic Science; Dr. Lindsay Reinhold, forensic chemist and former Chair of the Advisory Committee for the Evaluation of Controlled Substance Analogs; and Dr. Terry Stouch, forensic chemist with more than 35 years’ experience in the discovery of new pharmaceuticals.

It turns out that indeed an entire division of the DEA – the Office of Forensic Science – dissents from many of the positions advanced by Diversion Control, and subscribes to the view that at least two of the substances at issue here – XLR-11 and JWH-250 – are not unlawful as analogues. And there is reason to believe that additional information still within the sole possession of the government would cast considerable doubt on the credibility of Diversion Control’s position regarding most, if not all, of the remaining substances alleged to be analogues in this case.

The requested materials are both exculpatory and material to the defense. The government bears the burden of proving not only that the alleged substances qualify as analogues, but also that these defendants knew that during the relevant periods of time charged. The government should be compelled to produce all information in its possession regarding its process of determining that the substances at issue qualify as analogues, including information that the DEA is violating its own protocols and ignoring the opinions of its own scientists in reaching these determinations. Any inconsistencies with which the government has made its determinations and dissension even among the government’s own experts tends to suggests that the substances do not qualify as analogues. Moreover, if the government’s own experts are uncertain, the defendants are unlikely to have had superior knowledge.

A detailed and specific list of examples of exculpatory materials sought by this Motion is included in the appendix at Exhibit 13. In addition, the Court should convene an evidentiary hearing

3Exhibits in support of all motions filed by the Defendants this week, including this motion, are filed in the appendix, and will be cited in this motion as “Ex. .” In some instances only the pertinent portions of transcripts are included in the appendix. Complete transcripts of these hearings are available on PACER.

and order the issuance of subpoenas to compel the attendance at the hearing of the DEA personnel listed in Exhibit 2.4

1. **Facts Revealed by the *Fedida Brady* Disclosure and *Williams* Rule 17(c) Subpoena**

What is known to date regarding this internal dispute within the DEA and other reasons to doubt the credibility of Diversion Control’s analogue determinations comes primarily from two sources of information – first, a *Brady* production made in July 2013 by the United States Attorney for the Middle District of Florida in *United States v. Fedida*, Case No. 6:12-cr-00209-37DAB (M.D. Fla.), Exhibit 3 (“*Fedida Brady* disclosure”); and second, documents obtained in June or July of 2017 by the Office of the Federal Defender in the Western District of Missouri in response to a Rule 17(c) subpoena issued to the DEA in *United States v. Williams*, Case No. 4:13-cr-00236 (W.D. Mo.), Exhibit 4 (“Rule 17(c) documents”). These two collections of disclosures cover distinct periods of time – the *Fedida Brady* disclosure spans a period of less than a month, from March 23, 2012, to April 19, 2012. The Rule 17(c) documents are from time periods both before and after that of the *Fedida Brady* disclosure. The information is set forth below in rough chronological order:

4For the Court’s ease of reference Exhibit 2 is a “DEA Cast of Characters” containing the names and affiliations of the various personnel involved in the relevant communications disclosed to date. In some instances additional personnel who are copied on various communications have been omitted from reference in this motion for the sake of simplicity as it is unclear what their roles were and they did not initiate or respond to any of the communications.

# The Rule 17(c) Documents, Part One – 2002 to September 1, 2011: Forensic Science Disagrees with Diversion Control Regarding JWH-250 and Diversion Control’s “Indole Core” Methodology

* + 1. *The 2002 Memorandum From DEA Headquarters*

On July 11, 2002, “DEA HQS,” presumably DEA headquarters, issued a three-page Memorandum to an array of DEA entities, including Diversion Control, Forensic Science, the DEA’s Office of Chief Counsel, and all laboratory directors, setting forth “areas of responsibility” for determining whether a substance can be treated as an analogue in a criminal proceeding. Ex. 4 at R17-0002. The Memorandum designates Diversion Control as “the competent authority within DEA for determining whether a substance meets the definition of a controlled substance analogue.” *Id*. The Memorandum specifies that the responsibilities of Forensic Science “include identifying the substance in question and consulting with [Diversion Control] to determine the structural similarities prong of the analogue definition.” *Id*. In addition, the Memorandum explains that “in certain situations, SF may provide expert testimony regarding the [sic] structural similarity on a case by case basis.” *Id*. The Memorandum further documents that “DEA has established an Analogue Committee composed of representatives from [Diversion Control, Forensic Science, the Chief Counsel, and Domestic Operations].” *Id*. The Memorandum provides that the Analogue Committee “will monitor all analogue prosecutions, challenges, and outcomes,” and identifies the four initial members of the Analogue Committee “composed of representatives from” Diversion Control, Forensic Science, the Office of Chief Counsel, and Domestic Operations. *Id*. at R17-0002-3.

* + 1. *Diversion Control Seeks Input From Forensic Science Regarding Whether Various Cannabinoids Meet Prong One*

On March 1, 2011, the DEA temporarily scheduled the first five synthetic cannabinoids ever scheduled, including the substance JWH-018. Little is known regarding the DEA’s activities relating to the Analogue Act between 1986 when the Act was passed and 2002, or the workings of its Analogue Committee between the 2002 Memorandum from Headquarters and the temporary scheduling action in March 2011.5 The first glimpse into these workings is an email exchange dated May 19, 2011, reflecting that Diversion Control was seeking input from Forensic Science regarding whether four substances (JWH-122, JWH-081, JWH-210, and JWH-398) qualified as analogues under prong one. Ex. 4 at PR17-0017. The emails reflect that Diversion Control had prepared Monographs regarding each substance, sent them to Forensic Science for its input pursuant to the 2002 Memorandum, and that Forensic Science had tasked its Forensic Science Laboratory One (“SFL1”) to “perform a technical review of the monographs and provide comments to [Forensic Science]” by an established deadline. *Id*. The emails further reflect that SFL1 performed this review and concurred with the conclusions of Diversion Control as to all four substances. *Id*.

On July 18, 2011, Diversion Control emailed another five Monographs to Forensic Science for “review and comment” in accordance with the 2002 Memorandum. *Id*. at R17-0018. These

5All that is known of this time period is that Diversion Control drafted a Monograph regarding a non-cannabinoid substance – 4-Bromo-DragonFly – in June, 2010. Ex. 4 at R17-0004. It is not known why this Monograph was included in the Rule 17(c) documents, or whether Forensic Science was asked to review this Monograph. According to the Office of the United States Attorney for the Eastern District of California, “[a] determination concerning the analogue status of 4-bromo- dragonfly was never finalized.” *United States v. Way*, Case No. 1:14-cr-00101-DAD-BAM (E.D. Cal.), doc. 384 at 5. No documents have been disclosed reflecting this representation or the reason why an analogue determination could not be “finalized.”

Monographs related to the substances AM694, JWH-203, JWH-019, JWH-2506, and JWH-251. *Id*. The email was sent by Liqun Wong at Diversion Control to David Rees, Program Manager of the Lab Operations Section of Forensic Science, and was copied to Lance Kvetko, Chief of the Laboratory Operations Section of Forensic Science, and Terrence Boos at Diversion Control. *Id*. The email requests that Forensic Science expedite its review and provide a response to Diversion Control by July 25, 2011, if possible. *Id*. The five Monographs drafted by Diversion Control are attached to the email. *Id*. at R17-0019-55.

A review of the five Monographs prepared by Diversion Control reveals that they are substantially similar to one another. Each asserts that the chemical structures of the substance in question and JWH-018 are substantially similar. *Id*. at R17-0020, R17-0028, R17-0035, R17-0043, R17-0050. This assertion is supported in each instance with the statement that “[b]oth compounds share the same core indole structure as depicted in Figure 1 with substitutions at the 1 and 3 positions of this fused bi-cyclic ring system.” *Id*. Each Monograph then describes the various differences in the chemical structures of the two compounds. *Id*. at R17-0021-22, R17-0029-30, R17-0036-37, R17-0044-45, R17-0051-52. Each of the Monographs then states that other than the differences, “the remainder of the chemical structure of each substance is the same.” *Id*. at R17- 0022, R17-0030, R17-0037, R17-0045, R17-0052. Each Monograph then concludes: “Therefore, based on the above analysis, [the substance at issue] is substantially similar in chemical structure to JWH-018 and meets the first criterion of the definition of a controlled substance analogue.” *Id*. at R17-0022-23, R17-0030, R17-0037, R17-0045, R17-0052-53. Other than describing the similarities and differences in the chemical structures of the various substances, the only “analysis”

6JWH-250 is one of the substances alleged to be an analogue in this case.

regarding why they are “therefore” substantially similar in chemical structure appears to be that they all share “the same core indole structure as depicted in Figure 1 with substitutions at the 1 and 3 positions of this fused bi-cyclic ring system.” *Id*. at R17-0020, R17-0028, R17-0035, R17-0043, R17-0050.

* + 1. *Forensic Science Disagrees with Diversion Control and its “Indole Core” Methodology*

On July 21, 2011, Forensic Science again tasked its Laboratory One to perform the Technical Review of the five Monographs forwarded by Diversion Control on July 18, 2011, and to provide comments to Forensic Science by July 29, 2011. *Id*. at R17-0056. On July 29, 2011, SFL1’s Supervisory Chemist, Thomas Duncan, emailed Technical Reviews of the Diversion Control Monographs to Forensic Science. *Id*. The email reflects that these Technical Reviews were “prepared by SFL1 Senior Research Chemist Dr. Art Berrier,” and suggests that questions regarding the Reviews may be directed either to Duncan or to SFL1’s Director, Jeffrey Comparin. *Id*. As discussed in greater detail below, SFL1 rejected the “same core indole structure” argument advanced by Diversion Control, and further opined that four of the five substances at issue (including, for our purposes, JWH-250) were *not* substantially similar in their chemical structure to JWH-018 and therefore were *not* controlled substance analogues.

The Technical Review by SFL1 of Diversion Control’s Monograph regarding JWH-250 is the longest and sets forth the scientific disagreement with Diversion Control in the greatest detail. *Id*. at R17-0058-63. The Review’s comments on the Monograph begin:

In this Monograph, JWH 250 is compared to the Schedule I substance 1-pentyl-3-(1- naphthoyl)indole (JWH 018). Based upon the comparison of the structures of JWH 250 and JWH 018, the Monograph concludes that the structures of the two materials are substantially similar. The major argument for this conclusion is the observation that the chemical structure of JWH 018 contains the same core indole structure as

JWH 250 and that the only difference in structure is the group substituted at the 3- position of indole. While there are obvious similarities in the structures of JWH 018 and JWH 250, it is the opinion of SFL1 that JWH 018 and JWH 250 are not substantially similar in structure and therefore, JWH 250 is not a controlled substance analogue.

*Id*. at R17-0058 (emphasis in original). The SFL1 Technical Review then discusses the various similarities and differences in the chemical structures of the two compounds and rejects the assertion in the Diversion Control Monograph that the differences are not substantial. In particular, the SFL1 technical review rejected the assertion by Diversion Control that the “core structure” of JWH-018 is limited to the “indole” portion of the molecule that it shares with the other compounds at issue. Instead, according to SFL1, the “true core structure” of JWH-018 includes not only the “indole” portion, but also the 1-naphthoyl group that is attached to it. *Id*. at R17-0060. The SFL1 Technical Review then sets forth examples of compounds that are substantially similar to JWH-018 because they share this same “true” core structure. *Id*. at R17-0060-62.

The SFL1 Technical Review asserts that the “true core structure for JWH 250” is also not limited to the “indole” portion of the molecule, but includes the phenylacetyl group that is attached to it. *Id*. at R17-0062. The Review then gives examples of other compounds that “are substantially similar in structure to each other but are not substantially similar in structure to JWH 018.” *Id*. at R17-0063. These examples include JWH-203 and JWH-251 – two of the remaining five compounds addressed by the Diversion Control Monographs sent to Forensic Science for review at that time. *Id*. It appears that SFL1 and Forensic Science did not draft separate Technical Reviews regarding those two compounds.

A second Technical Review submitted by SFL1 on July 29, 2011, to Forensic Science addressed AM 694. *Id*. at R17-0064. This Review is briefer, and tracks the Review regarding JWH-

250. It begins by noting that the “major argument” for Diversion Control’s conclusion that AM 694 qualifies as an analogue of JWH-018 “is the observation that the chemical structure of AM 694 contains the same ‘core’ indole structure as JWH 018.” *Id*. The SFL1 Review rejects this argument, stating: “While there are obvious similarities in the structures of AM 694 and JWH 018, it is the opinion of SFL1 that AM 694 and JWH 018 are not substantially similar in structure and therefore, AM 694 is not a controlled substance analogue.” *Id.* The Review explains that AM 694 contains a phenyl ring in place of the naphthoyl ring in JWH-018, and that “a naphthalene group is not substantially similar to a phenyl ring.” *Id*. The SFL1 Review again explicitly rejects the “indole core” argument advanced by Diversion Control:

The Monograph makes the argument that AM 694 and JWH 018 share the same basic core structure (1-alkyl-1H-indol-3-yl system) and the only differences are minor structural changes of the 1- and 3- substituents. However, as was discussed in the review of the JWH 250 Analogue Monograph, the 1-alkyl-1H-indol-3-yl system is not the true core structure of these molecules. In the case of JWH 018, the true core structure is the 1-alkyl-3-(1-naphthoyl)indole system. In the case of AM 694, the true core structure is the 1-alkyl-3-benzoylindole system. AM 694 and JWH 018 belong to different classes or families of cannabimimetic compounds and are not substantially structurally similar.

*Id*.

A third Technical Review submitted by SFL1 to Forensic Science on July 29, 2011, regarding JWH-019 concurred in the opinion of Diversion Control that it was substantially similar in structure to JWH-018. *Id*. at R17-0065.

4. *Diversion Control Disregards the Dissent of Forensic Science*

The documents available to date do not reveal what happened after Forensic Science received these Technical Reviews from SFL1 dissenting from the analogue opinions of Diversion Control as to four of the five compounds at issue in the July 18, 2011, Monographs. Subsequent documents

discussed below suggest that Forensic Science likely notified Diversion Control of the disagreement orally rather than in writing, but this is not yet known. In any event, on September 1, 2011, Tom DiBerardino, Acting Chief of Diversion Control, sent an email to Kvetko at Forensic Science, with copies to Rees at Forensic Science, and Wong and Boos at Diversion Control, forwarding the July 18, 2011, email requesting review of the five Monographs, and stating:

Lance,

I am writing in regards to the below email sent on July 18 that requested a review of five analogue monographs with an anticipated completion date of July 25. As of today, September 1, we have not received any response.

Assuming other priorities on your part, and workloads that prevent completion of this task, it may be best that ODE assumes that the documents are correct and proceed with finalization. This is necessary as there are active investigations and prosecutors that are waiting for a response. ODE is confident that the documents are correct, and that ODE chemist [sic] and pharmacologist [sic] can testify with confidence to their findings. Thus, *unless we hear from you by September 6, we will proceed by publishing these documents in our table of analogue determinations* and provide support to the field.

As you know, the analogue statute is an important tool available to DEA to prevent diversion of these dangerous substances, and to help achieve our mission to protect the public health. CSA requirements for scheduling, even emergency scheduling, do not allow DEA to respond to immediate threats, which is the purpose of the analogue provision.

As stated, ODE is confident in its analysis of these substances and stands ready to support prosecutors who understand the situation and are willing to take on these threats.

*Id*. at R17-0066 (emphasis added). It is not yet known whether Kvetko or anyone else at Forensic Science responded to this email, but as reflected by the instant prosecution and many others, it would appear that Diversion Control did indeed proceed without formal input from Forensic Science

and published its five Monographs in its “table of analogue determinations.”7 The timing of this publication to the DEA’s analogue determination table, and the manner of dissemination of the table to agents in the field, are unclear however. According to a May 6, 2014, sworn affidavit of DEA Task Force Officer Tanisha Washington in support of fourteen warrants and orders for tracking devices in this matter filed before United States Magistrate Judge Paul Stickney, JWH-250 had been determined *not* to be an analogue because “[a]lthough JWH-250 has the same effect on the central nervous system as scheduled [sic] I controlled substances, the chemical structure is not substantially similar to that of other scheduled controlled substances.” Ex. 5 at GasPipeDTO\_00470141 n. 3.8

# The *Fedida Brady* Disclosure – March 23, 2012 to April 19, 2012: Forensic Science Disagrees with Diversion Control Regarding UR-144 and Maintains a “Running List” of Such Disagreements

No documents available to date reveal the actions of Diversion Control or Forensic Science regarding analogue determinations between September 1, 2011, and March 23, 2012. The *Fedida Brady* disclosure reveals, however, that Diversion Control continued to seek the input of Forensic

7As discussed below, this explicit reference to Diversion Control’s “table of analogue determinations” is significant because the government has represented in various proceedings, including its response to the Defendants’ *Brady* requests in this case, that such a table, or list, of analogue determinations either does not exist or cannot be produced in any form.

8*See also id*. at 00470146 and 00470157 (comparison of notes 12 and 13 regarding UR-144 and AM- 2201 and note 19 regarding XLR-11 with note 17 regarding JWH-250 reflects the former allegedly qualify as analogues whereas the latter does not). The DEA agent’s affidavit also states that AB- Fubinaca, prior to its scheduling on February 10, 2014, was “not similar enough to be classified as a controlled substance analogue.” *Id.* at 00470161 n. 24. *See also*, doc. 672 (Third Superceding Indictment) at ¶¶ 17, 19a, 19j, 19k, 19l, 19m, 19o, 19p, and 19r (describing AB-Fubinaca as a “synthetic cannabinoid” rather than an “analogue”), at ¶¶ 30 & 36d (omitting AB-Fubinaca from analogue allegations); *United States v. Rabineau*, Case No.: 4:13-cr-00044 (E.D. Va.), doc. 245 at 63 (Representation of Assistant United States Attorney during pretrial *Daubert* hearing that AB- Fubinaca was determined by DEA not to qualify as an analogue.).

Science regarding prong one analogue determinations in accordance with the 2002 Memorandum from Headquarters.

On March 23, 2012, Diversion Control sent Forensic Science Monographs regarding three substances, MAM-2201, UR-144,9 and 251-NBOMe, and requested Forensic Science’s “comments on the chemical structure evaluation” in the Monographs with a proposed response date of April 6, 2002. Ex. 3 at FBD003. The request was sent by Wong at Diversion Control to Rees, and was copied to Kvetko, as well as Sandy Ghozland at Diversion Control. *Id*.

On March 26, 2012, Kvetko forwarded the request to Comparin at SFL1, with a copy to Rees, stating: “Heads up. Let me know if this will present a problem for your staff and we will coordinate with ODE. Otherwise, expect outgoing from SF later today.” *Id*. at FBD004. Comparin forwarded this email from Kvetko to Duncan, asking “Can you squeeze these in?” *Id*. Duncan then forwarded the entire thread to Berrier, stating: “Looks like we will have -1 week on these. Good

Luck! Art, chat with me before you start writing, please.” *Id*. Later that day Forensic Science

forwarded the three Monographs from Diversion Control to Comparin with the request that SFL1 perform a Technical Review of the Monographs by the deadline requested by Diversion Control, April 6, 2012. *Id*. at FBD006. This email was copied to Scott Oulton, the Associate Deputy Assistant Administrator of Forensic Science, along with Kvetko, Rees, and Duncan. *Id*. Duncan then forwarded the thread to Berrier with the note: “tasking.” *Id*. at FBD007.

9As discussed in greater detail below, UR-144 is of particular relevance to this case because it is identical to XLR-11, one of the alleged analogues in the Indictment, except that XLR-11 differs from both UR-144 and JWH-018 by the substitution of a fluorine atom for a hydrogen atom. XLR- 11 is therefore even less similar to JWH-018 than UR-144 is, so evidence that Forensic Science disagreed with Diversion Control regarding UR-144 has even greater force as applied to XLR-11. Stated differently, it is a logical impossibility for XLR-11 to be substantially similar in its chemical structure to JWH-018 if UR-144 is not.

Review of the UR-144 Monograph drafted by Diversion Control reveals that it is substantially similar to its previous Monographs. Ex. 4 at R17-0068-78. It compares the chemical structures of the two compounds UR-144 and JWH-018, asserts that they share a common “indole core,” notes the differences in their structures, then declares that other than those differences they are the same, and “therefore” are substantially similar in their chemical structures. *Id*. at R17-0069- 73.

On April 5, 2012, Berrier emailed his three Technical Reviews to Duncan with the note: “Thomas, attached are the reviews for the ODE Monographs. Only in the case of UR-144 did I have an issue with the conclusion of ODE.” Ex. 3 at FBD008. The Technical Review of UR-144 rejected Diversion Control’s argument that it qualified as an analogue under prong one:

In this Monograph, UR-144 is compared to the Schedule I substance 1-pentyl-3-(1- naphthoyl)indole (JWH-018). Based on a comparison of the structures of UR-144 and JWH-018, the Monograph concludes that the two materials are substantially similar. The major argument for this conclusion is the observation that the chemical structures of UR-144 and JWH-018 only differ by the identity of the ring structure attached to the carbonyl group at the 3-position of indole - tetramethylcyclopropyl in the case of UR-144 and 1-naphthyl in the case of JWH-018. In the opinion of SFL1, UR-144 and JWH-018 are not substantially similar in structure *and are not Analogues.*10

While both JWH 018 and UR-144 contain a 1-pentyl-1H-indole-3-yl ring system as part of their structure, there [sic] no similarity in the remaining portion of the molecules. In the case of JWH 018, the substituent attached to the carbonyl carbon is the 1-naphthyl group, a bicyclic aromatic moiety, while with UR-144, the substituent is a tetramethylcyclopropyl group, a three-membered aliphatic ring

10Emphasis has been added to the words “and are not Analogues” to bring to the Court’s attention that by the time this document was produced in response to the Rule 17(c) subpoena in the *Williams* case, those words had been deleted from the document and a period inserted after the word “structure.” *Cf*. Ex. 3 at FBD011 *with* Ex. 4 at R17-0104. The government produced only the shortened version of the document to the defense in this matter. *See* Ex. 6 at NewDiscov- 20316\_00000536. A defendant engaged in such alterations of critical documents could reasonably be expected to meet with a prosecution for obstruction of justice.

system. These two substituents are not similar in structure in any manner. The resultant molecules, while having features common to both, also have significant portions that are not similar.

*Id*. at FBD011.11 The Technical Reviews of MAM2201 and 251-NBOMe concurred with the Diversion Control Monographs regarding those compounds. *Id*. at FBD009-10.

The following day, April 6, 2012, Comparin emailed Oulton at Forensic Science, with copies to Kvetko and Rees at Forensic Science and Duncan at SFL1, and advised them regarding Dr. Berrier’s conclusion that “UR-144 and JWH-018 are not substantially similar in structure.” *Id*. at FBD012. Two minutes later, Kvetko emailed Rees: “Let me know what ODE says before we write any outgoing to that office.” *Id*. at FBD013. Later that afternoon Rees responded to Kvetko: “I left Liqun [Wong at Diversion Control] a message, but she still hasn’t called back.” *Id*. at FBD013. Less than 30 minutes later Wong emailed Rees: “Got you[r] phone msg. call you on Monday.” *Id*. at FBD014. It is not yet known what further communications took place between Forensic Science and Diversion Control regarding their disagreement about UR-144.

On April 19, 2012, at 10:17 a.m., Forensic Science emailed Ghozland at Diversion Control, with copies to Wong, Boos, and DiBerardino at Diversion Control, Oulton, Kvetko, and Rees at Forensic Science, and Comparin at SFL1, advising that Forensic Science agreed with Diversion Control regarding MAM-2201 and 251-NBOMe. *Id*. at FBD015. The email omitted any reference

11At a conference on Emerging Trends in Synthetic Drugs hosted by the National Institute on Standards and Technology in April, 2013, Dr. Berrier described the chemical structures of UR-144 and XLR-11 but declined to answer the question of whether they are unlawful analogues because it was “not in my job description.” This presentation was previously available online at [http://www.nist.gov/oles/forensics/emerging-trends-in-synthetic-drugs-workshop-webcast.cfm.](http://www.nist.gov/oles/forensics/emerging-trends-in-synthetic-drugs-workshop-webcast.cfm) The video has since been removed from this link, and has been uploaded at https://vimeo.com/256588007. (Dr. Berrier’s remarks begin at 1:06, his discussion of UR-144 and XLR-11 (referred to as 5F-UR-144) is at 17:12 - 20:08, and his declination to answer the analogue question from the audience is at 36:24 - 36:41).

to Diversion Control’s request for Technical Review of the UR-144 Monograph or Forensic Science’s disagreement with that Monograph. At 10:25 a.m., Kvetko responded to Oulton, with copies to Comparin and Rees:

Scott, SF (actually SFL/SFL1) declined to officially opine on UR-144. However, it is now listed on OD E ’ s w e bsite: <http://webster/cgi-> bin/fr/manuals/operations/oc\_ode/analogue\_list.html

In case you’re curious, Dave [Rees] is keeping a running list.

*Id*. at FBD016. Comparin responded to Kvetko and Oulton at 10:43 a.m.: “Why didn’t *we* opine in accordance with the analogue committee protocol?” *Id*. at FBD017 (emphasis in original). Three minutes later Oulton replied to Comparin and Kvetko: “I had the same question.” *Id*. at 10:53 a.m., Kvetko responded to Oulton and Comparin: “Same recurring issue. Up to you and SF if we wish to pursue and discuss further. I’m hitting a brick wall at our level.” *Id*.

# The Rule 17(c) Documents, Part Two – April 24, 2014 to December 10, 2014: Breakdown In Relations Between Diversion Control and Forensic Science

Nothing is yet known about the next two years of interactions between Diversion Control and Forensic Science regarding analogue determinations as no documents have been produced for the period of April 20, 2012, to April 24, 2014.

On April 24, 2014, Boos at Diversion Control sent an email to what appears to be the members of the Analogue Committee at that time proposing a meeting of the Committee on May 8, 2014. Ex. 4 at R17-0114-115. Those receiving the email included Jane Erisman, Associate Chief Counsel in the DEA’s legal office, Kvetko from Forensic Science, and Comparin from SFL1. *Id*. The email included as attachments an agenda for the meeting and sixteen Monographs drafted by Diversion Control for consideration by the Committee. *Id*.

The Indictment in this case alleges that on April 30, 2014, DEA agents made controlled purchases of products containing the substance THJ-2201 from the Defendants’ stores in Austin, Texas. Doc. 672 at 16-17. On a date unknown between April 24, 2014, and May 2, 2014,12 Diversion Control emailed the Analogue Committee notifying them that two additional Monographs were being added to the agenda for the May 8, 2014, meeting. Ex. 4 at R17-0114. One of the two additional Monographs addressed THJ-2201. *Id*.

In response to the two emails requesting the May 8, 2014, Analogue Committee meeting, Comparin emailed Oulton: “Scott, Did you want us to stand down on this? I had proposed sending Duncan but I don’t think we finalized a plan. What say you? ...” *Id*. Oulton responded to Comparin: “Go ahead and send Tom [Duncan]. We are just attending a meeting, let them document all opinions and discussions. Please ask him not to send anything to them in writing until he has checked with us.” *Id*.

On July 16, 2014, Boos sent an email to the Analogue Committee proposing another meeting on July 29, 2014, and attached five draft opinions for consideration by the Committee. *Id*. at R17- 0116. Shortly before the meeting Comparin forwarded this email to Duncan and Berrier at SFL1 with the note: “FYI only. I’ll be on the call.” *Id*.

Boos sent another email to the Analogue Committee on September 23, 2014, proposing a Committee meeting on October 7, 2014. *Id*. at R17-0120. Later that day, Comparin at SFL1 forwarded the email to Oulton at Forensic Science, with a copy to Kvetko at Forensic Science, with the following note:

12The email thread produced by the DEA does not reveal the date of this email, but it follows the email sent on April 24, 2014, and is responded to in an email dated May 2, 2014. Ex. 4 at R17-0114.

How to proceed. You’ll recall that last time ODE sent draft monographs ahead of

the meeting without any request for [Forensic Science] to conduct a review. We did not review the material for substantial chemical similarity or otherwise. Therefore there was no opinion from [Forensic Science] on the matter. I made that point during the conference call which caught Terry and John off guard. I spoke with Terry after the conference call and conveyed that if they wanted an opinion they should formally request one from [Forensic Science]. Please advise.

*Id*. The following morning Kvetko emailed Comparin to ask whether Oulton had responded to his email from the previous day. *Id*. at R17-0117. Comparin responded: “Negativo.” *Id*. Kvetko responded: “Ok. Call me please at your convenience.” *Id*. Several hours later Oulton responded to Comparin’s email from the day before:

My thoughts have not changed. If they are asking for your opinion, we need to evaluate it and provide one. The question in my mind is how do they want us to relay our opinion. I’m assuming we will relay it verbally at the meeting and that is fine with me. If they want something in writing, we need to discuss this further. Ideally, I see it happening like this – they provide you the monographs ahead of time to review, you attend the meeting and provide your input verbally, they make a decision based upon the factors and they ultimately take their own meeting notes. We have nothing in writing between our office and theirs, aside from maybe an email sending you the monographs for review ahead of time.

*Id*. at R17-0119.

On October 1, 2014, Boos sent a second email to the Analogue Committee, again proposing a Committee meeting on October 7, 2014, and attached seven Monographs to be considered by the Committee. *Id*. at R17-0121. Comparin forwarded the email to Berrier at SFL1 with the request: “Please have a look at these and we’ll discuss any points of consideration on Monday.” *Id*. The following day Comparin emailed Oulton, with a copy to Kvetko:

Here’s how we’re handling this one. Arthur [Berrier] and I will have brief discussions on the monographs that they’ve provided without rendering an opinion one way or the other. We’ll simply look for any pitfalls or special things to consider and I can bring those up at the meeting. We won’t be on the record as having rendered an opinion one way or the other. Sound like a plan?

*Id*. at R17-0119. Oulton responded:

Sounds good to me. Please just make sure they know the type of information we will be conveying as well. I just want to make sure they don’t turn around writing something that says “SF concurs with x substance being an analogue,” when we in fact did not make a determination.

*Id*.

On December 10, 2014, Wong emailed the Analogue Committee announcing a meeting of the Committee on December 16, 2014, and attached eight Monographs to be considered by the Committee. *Id*. at R17-0122. Two days later Comparin forwarded this email to Oulton with the note:

Did you all get a request to review these? We didn’t and it’s short notice. I still haven’t seen Terry [Boos’] meeting minutes from the last meeting. I’m still curious about the record with respect to SF’s guidance on these issues. I’m inclined to not review them.

*Id*. Oulton responded to Comparin a few minutes later:

Nothing went through me for us to review. Why don’t you call Terry [Boos] and ask your questions. Then we can decide if we are going to play in the sand box or not.

*Id*. Whether Forensic Science decided to “play in the sand box” any further is not known as no further documents have yet been produced.

# The Government’s Previous Efforts to Conceal the Information Set Forth Above and its Ongoing Efforts to Avoid Disclosure of Further Exculpatory Information

As set forth in rough chronological order below, the government has not been forthcoming regarding the communications reflected above. Instead, it appears that personnel at Diversion Control, with the possible cooperation of DEA’s Office of Chief Counsel and various Assistant United States Attorneys, have engaged in efforts to avoid disclosure of these communications. These efforts are described in some detail because this motion posits that these past efforts at

concealment, together with the evident gaps in the information known to date, suggest that such efforts are ongoing.

## *United States v. Fedida*

As described in greater detail in Defendants’ *Daubert* Motion, the first evidentiary hearing regarding the DEA’s efforts to prosecute cannabinoids under the Analogue Act was the consolidated *Hummel/Fedida* hearing in December 2012. In advance of the hearing, counsel for Fedida sent the government a *Brady* request for any documents that “reflect[ ] any concern, doubt, contrary or conflicting opinions, or questions by anyone” in the DEA regarding whether UR-144 and XLR-11 are controlled substance analogues. *Fedida*, Case No. 6:12-cr-00209-RBD-DAB, doc. 90-1. In response to this specific request, the government produced nothing prior to or at the evidentiary hearing.

At the hearing, Boos from Diversion Control testified regarding his opinion that XLR-11 and UR-144 are substantially similar in chemical structure to JWH-018. Ex. 41 at 214-278. His opinion relied heavily on argument that all three molecules shared the same “indole core.” *Id*. at 227-29. When cross-examined on whether his methodology for making substantial similarity determinations has general acceptance in the scientific community, Boos answered: “I believe I’ve arrived at a sound decision based on the science, and those individuals or scientists *in my shop* have also arrived at the same conclusion. *Id.* at 250 (emphasis added). When asked specifically who at the DEA had decided that UR-144 was an analogue of JWH-018, Boos answered: “That was a decision made by the chemists *in our department*.” *Id*. at 254 (emphasis added). Boos further assured the court that “as we’re doing this, there are other scientists *in our section* that are also weighing in on this through the process.” *Id.* at 254 (emphasis added). Thus, while Boos repeatedly represented his views as a

product of unanimous consensus within Diversion Control, he studiously avoided disclosure of either the involvement or the dissenting opinion of Forensic Science.13

On May 15, 2013, Fedida filed a Motion for Production of *Brady* Material seeking the materials specifically requested prior to the December, 2012, hearing. *Fedida*, doc. 60. At a status conference the following day the District Court granted the motion, reasoning: “If there’s been any kind of give and take at the Department of Justice where people have expressed a view to the contrary” “to the view that’s now being posited by the government that these substances constitute analog drugs” “it seems to me that’s appropriately disclosed as *Brady* material.” *Fedida*, doc. 61, doc. 147 at 6. The prosecutor agreed that any such material “will certainly be discoverable under *Brady*,” and that “it may just be a matter of whether it exists or not.” *Fedida*, doc. 147 at 7.

The government then filed a Motion for “Clarification” of the Order granting the *Brady* Motion, and for an extension of time to file a “Response” to the Order. *Fedida*, doc. 68. The government’s motion is included in the appendix as Exhibit 7 because of the volume and

13The next known evidentiary hearing on these issues took place two months later, in February, 2013. *In Re Smoke Shop*, Case No. 12-cv-1186 (E.D. Wis.). Again the government called Boos from Diversion Control to testify regarding his opinion that XLR-11 and UR-144 are unlawful as analogues. Ex. 43 at 196-244. On cross-examination, Boos not only failed to reveal the dissent of Forensic Science – he affirmatively swore he was not aware of any dissent by anyone within the DEA:

Q: Did anybody within the D.E.A. disagree with you? A: Not that I’m aware of.

Q: Did anybody express any doubt or concern about it? A: Not that I’m aware of.

Ex. 43 at 226-27.

significance of the representations made by the government in this document. In summary, the Motion asserted that (1) no information responsive to the *Brady* request existed; (2) the *Brady* request was overly broad and compliance with it would be unduly burdensome; (3) defense counsel had not given the prosecutor sufficient information about the basis for her belief that *Brady* material existed and why she believed the evidence sought would be exculpatory if it existed; and (4) the defense had received sufficient information on the topic in light of their opportunity to cross examine Boos at the December, 2012, hearing. Ex. 7 at 2-4.

On May 30, 2013, the District Court convened a hearing on the government’s Motion for Clarification. *Fedida*, doc. 119, included in the appendix at Ex. 42. The government repeatedly attempted to limit the scope of any required disclosures to Diversion Control. The prosecutor opened his remarks by asserting that decisions by the DEA regarding Analogues are made by Diversion Control. *Id.* at 8. The prosecutor assured the Court that he had made inquiry “with ODE” and Boos “back in December,” that the defense had also had its opportunity to question Boos directly, and that the prosecutor was “not aware of any disagreement over whether the substances were analogs.” *Id*. at 10. The prosecutor agreed that he would have an obligation to disclose “a serious disagreement and an official position taken by someone *in ODE*, a serious disagreement of an official paper they wrote.” *Id.* at 10-11 (emphasis added). After the Court expressed uncertainty regarding the prosecutor’s term “serious,” *id*. at 11, the prosecutor responded:

I have asked whether there are – were any serious disagreement, any official positions taken at any time within DEA, *within ODE* that these substances were not analogs and the answer has come back no. However, in order to reply to the order as stated, to – I have not undertaken and it would be incredibly burdensome – overburdensome.

*Id*. at 11-12 (emphasis added). After the Court asked the prosecutor how he knew it would be “overburdensome” to comply with the Order if he had not yet asked, the prosecutor responded:

I have spoken with legal counsel at DEA. I have spoken with ODE. I don’t believe I have an obligation to do an e-mail search of the archives of e-mails at ODE or in DEA or in the entire Department of Justice over the last several years. That – that is what would be called for by this order. I don’t believe I have a legal obligation to do that. I don’t think any of this – I think there’s a serious question as to materiality and I’d like some direction from the defendant. What’s the disagreement over, whether substances were analogged [sic]. I haven’t heard of one. My colleague apparently has heard of one. Where? Where did she hear of this agreement? Give me some direction. My – I don’t believe my job is as a prosecutor is to undertake a search through all of the files of the Department of Justice to find this disagreement which doesn’t sound to me like it would be material in any respect on behalf of the defense. I think I’m entitled to some direction before I instruct or ask DEA and the

Department of Justice to do a search through their entire database of e-mails.

*Id*. at 12-13. Describing the prosecutor’s “asking for direction from the defendant” as “incongruous” in light of the “asymmetry of information” between the parties, *id*. at 13, the District Court ordered the government to produce any evidence of any disagreement about whether the substances at issue “constitute analog drugs.” *Id*. at 14-15. The prosecutor responded: “Well, I – let me see if I’ve got it straight. If I inquire again more pointedly *with ODE* –.” *Id.* at 15 (emphasis added). The Court interrupted to emphasize that he did not want the prosecutor’s request for information “to be nuanced,” and that he should ask for information “within the Department or an agency used by the Department” regarding “any disagreement as to whether or not these compounds constitute analogs.” *Id*. at 15-16. The prosecutor responded with another effort to limit the scope of the inquiry to Diversion Control:

I just want to be clear that I have done a version of that already and I will revisit it because I – the question I asked back in December and have asked again since then is, you know, other than the normal types of questions that come up when scientists are discussing something, has there been any serious disagreement over whether or not these – these substances are analogs. And the answer I have gotten back is, no, there has not been. But I will go back and ask whether there was any disagreement,

and, as you stated, if there was, how it was recorded, communicated, what form it is in, any internal disagreement.

*And if it’s all right, I would like to confine myself to ODE* because I think that all could possibly be relevant or material in this case.

*Id.* at 16-17 (emphasis added). The Court observed that if there existed responsive information somewhere other than Diversion Control, such a limitation “wouldn’t meet our Constitutional Obligation to Mr. Fedida.” *Id*. at 17-18. The hearing proceeded with the following exchange – during which the prosecutor continued to deny the existence of the materials and attempted to limit his inquiry to Diversion Control and to learn the scope of the information already known to defense counsel – after which the Court clarified the scope of its ruling:

MR. BOGGS: And I asked that question under the assumption, which is my understanding that this decision is only made in ODE. Of course I would make sure that my experts understand that if they did any – if they did any outside consulting, I mean, I’ll consider –

THE COURT: And I’m confident you know how to explain this to them, but your consultants need to understand this is not in the context of some civil proceeding. This is in the context of a criminal prosecution. And if this information exists and they are aware that it exists, then they need to tell you about it and you need to tell me about it.

MR. BOGGS: Absolutely.

THE COURT: Okay.

MR. BOGGS: The other thing, again, I don’t want to beat a dead horse, but I’m hearing from my colleague that there was a disagreement and it might – it would be very helpful to me to know if that is in fact true, if that information – where that information comes from. That would be an avenue I would certainly pursue in trying to fulfill my obligations if I knew where this

– I don’t believe there was a disagreement, and –

THE COURT: Well, I know you appreciate that I can’t order the defense to disclose to you their defense strategy or their – it’s not the way it works. I mean if Ms. Hawkins [Fedida’s counsel] is in a position to help you out, you know, that’s up to her. She can help you out. I mean if she knows something about it. But seems to me that you – the issue is well defined enough for you to be able to go your experts and put the question to them, make sure they understand the importance of the question and get them to tell you yes or no whether the information exists.

So I appreciate your dilemma. Maybe she knows something out there. Maybe she’ll be willing to share it with you. I don’t know. But I can’t order her.

MR. BOGGS: Well, I think the case law says the defense has an obligation if they’re alleging a Brady violation, if they’re alleging that there’s something out there that I haven’t gotten, they have an obligation to give me some guidance. It’s in the case law.

THE COURT: Well, and I’ll be happy to look at it. I don’t think – I guess my quarrel with you is that we’re not at the stage of a Brady violation now. We’re at the stage of a request for Brady information. So if Ms. Hawkins has – Ms. Hawkins wants to tell you – I don’t know how Ms. Hawkins came about that information or if in fact she has it. So I’m leery about putting an onus on Ms. Hawkins to do anything more than what she’s done, which I think is – I think the Court – forgot about Ms. Hawkins – I think the Court has given you a pretty direct instruction about what I think is encompassed by the defense request for Brady information and that is whether or not the Department of Justice, the DEA or any agency employed by or retained by the Department of Justice or the DEA is aware of any disagreement within the scientific community as to whether or not these compounds qualify as analog drugs so as to be contraband in violation of the Controlled Substances Act. And they either are or aren’t. If they are, as I said, then they can tell you – they can tell you in – for instance, if you talk to them, they come back and say, well, there was, you know – there was a – there was an early opinion that maybe they didn’t, which after some research, you know, we concluded that in fact they did. They can tell you that. They can say, you know, John Jones did this in this location, you know, reached a conclusion they weren’t, but after we did

further studies we felt that he was wrong. And that’s fine. That’s fair game for cross-examination if in fact that comes out. But they can’t even effectively cross-examine as to any disagreements if all the disagreement took place within the sealed container and then out of the sealed container comes the final opinion but nothing about how the final opinion was ultimately arrived at in terms of the resolution of disagreements. Maybe there were no disagreements. But what you’re hearing from me is I think if there was a weighing process, an evaluative process employed by the chemists within the Department or utilized by the Department as to whether or not these drugs constitute analogs, that the defendant’s entitled to that information.

MR. BOGGS: There certainly was a weighing process. I mean that’s – that

– that would be done with any analog controlled substance.

THE COURT: But don’t misunderstand my question. It’s not a question of whether or not – it’s certainly not – it’s not – it’s not exculpatory to the defendant if the government is wrestling with a question whether to institute a prosecution for these offenses. That’s the government’s business. But it is within the province, in my judgment, of the defendant’s Brady requests if the government decision to prosecute was based on evaluating, you know, nine out of 10 dentists agree, nine out of 10 doctors agree, nine out of 10 chemists agree that these are analog drugs, I think they have a right to know who was the tenth that didn’t agree.

MR. BOGGS: Yeah. My understanding is that it’s all done at ODE. And I certainly will ask that.

*Id*. at 18-21.

On July 8, 2013, Associate Chief Counsel Erisman of the Office of Chief Counsel at the DEA sent a letter to the Fedida prosecutor in response to his “request that DEA provide a summary of its process for determining whether a substance is a controlled substance analogue.” Ex. 8. After declaring Diversion Control the authority within DEA for making analogue determinations and describing the role of Forensic Science in limiting terms, the letter relates that Diversion Control

consulted with Forensic Science regarding UR-144 and that “One SF chemist opined that UR-144 and JWH-018 were not substantially similar in structure because JWH-018 has a naphthyl structural group while UR-144 has a tetramethylcyclopropyl group.” Ex. 8 at 1. The letter stated that Diversion Control had decided XLR-11 was an analogue without consulting Forensic Science.14 *Id.* at 2. The letter made no further disclosures and did not include any documents. On July 10, 2013, the prosecutor sent the letter to Fedida’s counsel that is included in the first two pages of Exhibit 3. The letter incorporates the July 8 letter from Erisman to the prosecutor verbatim, and also had no attached documents.

On July 11, 2013, Fedida filed a Motion to Compel the production of *Brady* Material. *Fedida*, doc. 90. The Motion noted that upon request the government had identified the dissenting “chemist” as Berrier, but had declined to provide any further information or any documents. The government filed a written opposition to the Motion to Compel refusing to produce any documents while asserting that the disclosure in the July 10, 2013, letter “far exceeds that which is required under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, that the defendant does not have a right to rummage through the files of the Department of Justice, and that the emails and other written communications defendant seeks are not material to his defense, would not be admissible at trial, and should be protected from disclosure owing to recognized privileges.” *Fedida*, doc. 94 at 2. The government argued that any responsive documents were protected by the deliberative process privilege, but did not attach any privilege log or offer to prepare one. *Id*. at 2-5.

14There would have been no point to such an inquiry, because, as noted above, XLR-11 differs from JWH-018 not only by the substitution of the tetramethylcyclopropyl group for the naphthyl group, but also by the addition of a Flourine atom not present in JWH-018.

The District Court set the Motion to Compel for a hearing on July 19, 2013. *Fedida*, doc.

104. The prosecution disclosed the *Fedida Brady* disclosure, Exhibit 3, to Fedida on the day before the hearing, and the motion was declared moot at the hearing. *Fedida*, doc. 108. No further disclosures were made, and a few weeks later the government entered into a plea agreement with Fedida pursuant to Rule 11(c)(1)(C) whereby the parties agreed to a one-year term of probation. *Fedida*, doc. 128.

# The Communications from DEA’s Office of Chief Counsel Regarding the

***Fedida Brady* Disclosure.**

In August, 2013, just after the *Fedida Brady* disclosure, DEA Associate Chief Counsel Erisman issued a “guidance” memo to DEA personnel advising of the disclosure. The memo is directed to “All Agents and Investigators with Investigations and/or Prosecutions of UR-144.” Ex. 4 at R17-0113. After describing the disclosure in terms of “a dissenting opinion regarding the similarity in the chemical structures of UR-144 and JWH-018,” the memo advises that this “may be considered *Brady* material.” *Id*. The memo reminds the DEA personnel that “the prosecutor has the ultimate responsibility for determining whether information constitutes *Brady* material and, if so, how it should be disclosed.” *Id*. The memo then sets forth the DEA Counsel’s official version of what should be disclosed to prosecutors regarding cases “involving UR-144” that largely tracks the July 8, 2013, letter from Erisman to the Fedida prosecutor. *Id*. The memo stresses that analogue determinations are the responsibility of Diversion Control, while “in contrast” Forensic Science identifies unknown substances. The memo states that Diversion Control “often requests that [Forensic Science] provide input regarding the chemical structure of substances during [Diversion Control]’s deliberative process of determining structural similarity.” *Id*. The memo then describes in general terms that “[o]ne [Forensic Science] chemist opined that UR-144 and JWH-018 were not

substantially similar in chemical structure.” *Id*. The memo goes on to explain that Diversion Control considered those differences in chemical structure and disagreed with the chemist from Forensic Science. *Id.* The final paragraph of the memo addresses XLR-11 and suggests that the disclosure regarding UR-144 would be inapplicable to cases involving XLR-11 because Diversion Control did not consult with Forensic Science regarding XLR-11 before determining it was an analogue. *Id*.

The memo from Erisman did not attach or include the *Fedida Brady* disclosure. The memo did not include any explanation of why the “one [Forensic Science] chemist” believed UR-144 was not substantially similar in structure to JWH-018. Erisman’s memo does not reveal that senior officials at Forensic Science believed Diversion Control’s treatment of substances as analogues over their dissent was a violation of the Analogue Committee’s protocol and that they were “keeping a running list” of such violations. The memo was similarly silent regarding the substances other than UR-144 on which Forensic Science had previously dissented, including JWH-250, AM 694, JWH- 203, and JWH-251. And the memo omitted the reason for Forensic Science’s repeated dissents regarding these substances – its rejection of Diversion Control’s “indole core” argument.

At an unknown date after August 2013, an unknown person in an unknown governmental entity revised Erisman’s memo and it was attached to a two-page “Alert Regarding Discovery Issue in Prosecutions of UR-144 and XLR11 as Controlled Substance Analogues” that appears to have been issued by some entity within the Justice Department15 to all United States Attorneys’ Offices. Ex. 9. Some of the revisions to Erisman’s memo are noteworthy.16 According to the revised version, the “information may *or may not be* considered *Brady* material in any particular case.” *Id*.

15Both the “Alert” and the revised memo attached to it are undated and unsigned.

16A line-by-line comparison of the two documents is included in the appendix at Exhibit 10.

at 3 (emphasis added). Rather than say Diversion Control “often requests that [Forensic Science] provide input regarding the chemical structure” of potential analogues, Ex. 4 at R17-0113, the new memo states that Diversion Control “may, but is not required, to request input from [Forensic Science] as part of its analogue determination process.” Ex. 9 at 3. The new memo adds that the dissenting chemist’s “duties do not include analogue determinations on behalf of DEA.” *Id*. at 4. The revised memo reflects all of the omissions from the Erisman memo noted above. Neither version of the memo disclosed Forensic Science’s equal representation on the Analogue Committee, or that Forensic Science “may provide expert testimony regarding the [sic] structural similarity on a case by case basis.” Ex. 4 at R17-0002.

The two-page “Alert” to which the revised memo is attached contains much of the same information as the memo itself and reflects the same critical omissions as the Erisman memo. It does add the following, however, regarding XLR-11: “[Diversion Control] did not consult the other component during deliberations regarding XLR11, but prosecutors have learned that the same dissenting chemist may have a similar opinion regarding the structural similarity of XLR11 and JWH-018. DEA advises, however, that the chemist has not conducted a formal review or offered a written opinion regarding the structural similarity of those two substances.” Ex. 9 at 2. Neither the “Alert” nor either version of the DEA Counsel’s Office Memo reveals the nature of the difference between XLR-11 and UR-144 or the logical necessity that flows from that difference that XLR-11 cannot be substantially similar in its chemical structure to JWH-018 if UR-144 is not.

# The Government Successfully Avoids Further Disclosures in Other Cases for More Than Three Years.

Following the *Fedida Brady* disclosure, the government was successful in avoiding any further disclosures for more than three years. In case after case, the government either failed to

disclose even those documents already disclosed in *Fedida*, or successfully convinced various courts not to order any further disclosures. Examples of this pattern include the following cases*: United States v. Rihani*, No. 12-cr-01766 (D. N.M.) (defendants charged with conspiring to distribute MDPV, AM-2201, 4-MEC, and UR-144 received *Fedida Brady* disclosure from the prosecution but not the Rule 17(c) documents. *See* affidavit of Donald Kochersberger, Esquire, included in the appendix at Exhibit 11c); *United States v. Le*, No. 1:13-cr-00295 (D. Colo.) (defendants charged with violating the Analogue Act for distributing XLR-11 and PB-22 received *Fedida Brady* disclosure from the prosecution but not the Rule 17(c) documents); *United States v. Libbert*, No. 8:14-cr-00083-CJC (C.D. Cal.) (defendants charged with violating the Analogue Act for distributing AM-2201, AM-694, JWH-250, JWH-210, and JWH-081 did not receive *Fedida Brady* disclosure or Rule 17(c) documents from the government); and *United States v. Ritchie, et al*, No. 4:15-cr-00018 (E.D. Va.) (defendants charged with violating the Analogue Act for distributing UR-144 and XLR-11 received *Fedida Brady* disclosure from the prosecution but not the Rule 17(c) documents. *See* affidavit of Christian Connell, Esquire, included in the appendix at Exhibit 11b). A particularly egregious example of the manner in which the government avoided further disclosures during this time period is *United States v. Stockton*, Case No. 1:13-cr-00571 (D. N.M.), a prosecution for AM-2201, UR-144, XLR-11, JWH-250, and AM-694 under the Analogue Act. In its successful campaign to keep the Forensic Science dissents regarding JWH-250, AM-694, and Diversion Control’s “indole core” methodology, as well as the remainder of the Rule 17(c) documents under wraps, the government in *Stockton* first misled the defense, then repeatedly misled

the Court, and then violated an order of the Court.

Armed with the *Fedida Brady* disclosure, in December 2015, Stockton made a specific request for additional *Brady* material, including (1) the Analogue Committee protocol; (2) documents reflecting any opinions within DEA that particular substances should not be treated as an analogue or dissenting from any prong one determinations by Diversion Control; (3) the complete list of compounds on which Forensic Science had been asked to opine; and (4) the complete list of compounds the DEA considers to be analogues. *Stockton*, doc. 280, Ex. C; *see also* Ex. 11c. The government responded by producing the *Fedida Brady* diclosure already in Stockton’s possession along with the 2013 version of the Erisman memo, which the prosecutor described as “a summary of DEA’s process for determining whether a substance is a controlled substance analogue.” *Stockton*, doc. 280, Ex. D. The government stated that the Analogue Committee protocol did not exist: “there was no protocol in effect in January 2012 for how DEA Drug Science Specialists were to analyze a substance to determine whether it was a controlled substance analogue.” *Id*. The government objected to producing any Forensic Science dissents regarding substances not in the indictment, and represented that there were no such dissents regarding any of the substances in the indictment other than the UR-144 dissent reflected in the *Fedida Brady* disclosure. *Id*. The government stated that DEA has not compiled any lists of substances determined to be analogues and that Forensic Science has no lists of any of the substances it had considered. *Id*.

To eliminate any ambiguity about the matter, Stockton replied to the government’s letter, stating in part:

The existence of the DEA Office of Forensic Sciences Senior Research Chemist, Dr. Arthur Berrier’s, April 6, 2012, determination that UR-144 and JWH-018 are not substantially similar, leads us to make a very pointed inquiry. The Defendants in this case assert that any material evidencing such internal DEA (or other federal governmental entity, for that matter) [dissension] regarding the similarity of the subject chemicals must be disclosed. There appear to be no such other instances of

[dissension] in the materials provided in discovery to date. And, the inclusion of the Berrier material leads us to conclude that no such other materials exist within the government’s control. To the extent we are mistaken, please inform us of the error in our understanding.

*Stockton*, doc. 280, Ex. E. Stockton reiterated his requests for the Analogue Committee protocol, Diversion Control’s list of analogues, and Forensic Science’s list of dissents. *Id*. The government did not respond to this correspondence.

Stockton filed a Motion to Compel Discovery based on the *Fedida Brady* disclosure seeking compelled production of the materials informally requested of the government. *Stockton*, doc. 280. The government opposed Stockton’s Motion on an array of grounds. *Stockton*, doc. 295. The government stated that “there is no list of controlled substance analogues.” *Id.* at 4. Regarding the request for internal dissension regarding similarity, the government labeled this “nothing more than an inappropriate fishing expedition,”and then represented to the Court that the government had already “produced information relating to UR-144” and that “[t]he United States is not in possession of any additional responsive material.” *Id*. at 5. The government argued that Stockton’s request for the Analogue Committee protocol “should be denied as moot” because “[u]ndersigned counsel have inquired of DEA and have been advised that no such protocols exist.” *Id.* at 8. The prosecutor added that “[t]he United States is fully aware of, and will comply with, its obligations under *Brady*.” *Id*. at 6.

The Motion was referred to the Magistrate Judge, who convened a hearing on Stockton’s Motion to Compel. *Stockton*, doc. 357, included in the appendix at Exhibit 44. The Court asked the prosecutor “to address the issues raised thus far, particularly with regard to ODE and OFS and the committee.” *Id*. at 20. The prosecutor responded:

It’s not about willingness to disclose or not disclose. Judge, the bottom line is we can’t disclose what doesn’t exist. I believe in this case we’ve gone, you know, much farther on any disclosure of any drug case that I’ve ever prosecuted, I think that we’ve ever prosecuted in district as far as what we’ve turned over, what we continue to turn over.

We can’t disclose something we don’t have. We can’t disclose something the DEA doesn’t have. We’ve had multiple conversation. I’ve personally had multiple conversation at counsel’s office at DEA. There is no list. There is no protocol. They do have an e-mail that references perhaps an informal list that might be kept that might have been mentioned. I think this is all stuff that’s been right for cross- examination. ....

*Id*. at. 21-22. The Court asked the government: “[i]s this an analogue committee and was there documentation or discovery provided about this analogue committee?” The prosecutor responded:

The only documentation I think that deals with kind of (inaudible) between there is referenced to your 144 (inaudible), and those items have been turned over. There’s no committee, you know, per se. Forensic science has actually asked to opine about things, but ultimately the determination is (inaudible). There’s no necessarily committee. They look at things differently. (Inaudible) makes the determination of whether or not something is an analog or not.

*Id*. at 29-30. Shortly thereafter the following colloquy occurred between the Court and the prosecutor:

THE COURT: Well, are there other internal analog discussions concerning the analogs at issue in this case between ODE and OFS in which there’s disagreement?

MR. MEYERS: No.

THE COURT: So you’ve turned over everything in which there’s disagreement in relation to any of the analogs alleged in this case.

MR. MEYERS: Yes. And I will point out that that disclosure has, you know, pretty much swept through the nation at one point.

THE COURT: Right. I think it’s –

MR. MEYERS: In fact, I think it’s Dr. Berriere who was somewhat, I guess, you know, coloring outside of the lines as far as what he’s supposed to do. He’s a very good scientist at forensic science, but not dealing with OD. (Inaudible) those things have been turned over.

I think with any scientific community there might be some, you know, disagreement as we will have in this case obviously. And then (inaudible) DEA experts will testify and the defense experts will testify and they’re almost certainly going to disagree.

THE COURT: Well, all of this – the disagreements internally within DEA, has any of the analogs at issue in this case have been disclosed?

MR. MEYERS: Yes.

*Id*. at 33-34. After further discussion, the Court ordered the prosecutor to speak with Kvetko and Oulton and ask them directly whether they have a list of analogues or an Analogue Committee protocol and report the results of these communications to the Court. *Id*. at 45. The prosecutor thereafter filed a letter with the Court indicating that he had made the requested inquiry of Comparin, Rees, Kvetko, and Boos. *Stockton*, doc. 346, Ex. A. The Court convened a second hearing on the Motion to Compel, at which the Court asked the prosecutor:

THE COURT: Okay. And so I think – well, the Court’s question which I’m going to ask you as to this category was really just the question that was raised by that Exhibit F, which was the email between Mr. [Kvetko] and [Oulton], [Comparin] and Reese (phonetic). I think they were all in the string where they reference an analogue committee protocol. The Government reported that the Government had spoken to them and that no such committee protocol exists. But I guess the question is, what were they talking about there?

MR. BRAUN: It was just their choice of word for how we normally deal with these things, the protocol meaning lower case “p,” just how we deal with it when we get a chemical, who tests it, who’s going to give their opinion, what weight some

(indiscernible) of the DEA is going to be given in their opinion.

*Stockton*, doc. 362 at 43-44, included in the appendix at Exhibit 45. The prosecutor assured the Court that the only document relevant to this process was the Erisman memo. *Id*. at 44. Stockton reiterated his request for any documents regarding any internal dissents within DEA regarding analogue determinations. *Id*. at 55. This discussion followed:

THE COURT: Well, basically as I read the status report, the Government has already confirmed that there are no other DEA internal analogue discussions in existence as to the analogues at issue in this case; is that correct?

MR. BRAUN: That is right. We have spoken with the DEA, someone from their chief counsel’s office. And that’s what we’re talking about, the analogues that are at issue in this case.

THE COURT: Right. Although, the Defendant is asking for – the Defendants are asking for more and we’re going to talk about that in a second because I don’t understand at all why you think that information is at all material to the defense in this case. But as to the discussions regarding the analogues in this case, there is no other information.

MR. BRAUN: Correct, there’s none that we’re aware of. Now, within the scientific community, there are often going to be disagreements I would imagine between experts, various experts, like we have with this UR-144. That doesn’t necessarily make it *Brady*, but we produced this in an abundance of caution and we’re aware of no other disagreements with regard to the charged analogue.

*Id*. at 55-56. Stockton reiterated his request for a list of substances determined to be analogues by Diversion Control, which led to the following exchange:

THE COURT: Well, let me ask the Government to clarify. Is there a list? MR. BRAUN: No, your honor.

THE COURT: Okay.

MR. BRAUN: Apparently there was a share point site I think is what it’s referring to where the memos giving the opinion of what was an analogue was posted to, and people could go to that share point site and see those memos and see what was determined to be an analogue. That’s what it was. It wasn’t a list, 1 through 50 here in the analogues the DEA determined exists.

And then furthermore, our understanding is that share point site doesn’t even exist anymore. The DEA counsel who had access to its internal DEA intranet, she wasn’t going to be able to go to it, it’s just not there.

THE COURT: And so at the time that that share point site existed and any of the analogues in this case somebody with access to that website could go to that, would they click on that and then they would pull up a memo?

MR. BRAUN: I would assume so. I don’t know for sure because I don’t have access to it. That’s my understanding though. Yes, it would have that – would have those various memos on there that you could look at.

THE COURT: And the memos would be what?

MR. BRAUN: They’re supposed to be opinion of the substances in the analogue.

THE COURT: Okay. So are there written DEA memos and opinions about the substances in the analogues that are charged in this case that haven’t been produced?

MR. BRAUN: That I’m not – I can’t say for certain.

\* \* \*

THE COURT: Well, to the extent that there are memos that were available where there was discussion about scientific testing that was done by DEA on the analogues charged in this case, such memos could arguably contain dissenting opinions. And so the question is if there are other memos out there, has somebody looked at those to make sure that they don’t contain any dissenting opinions?

MR. BRAUN: Well, I’ve asked DEA counsel, who we have spoken with on numerous occasions who would be aware –

THE COURT: Okay. Well, would you ask – (Voices overlapping)

MR. BRAUN: We can ask that specific question.

*Id*. at 66-67, 68. The Court ordered the prosecutor to report the findings of his inquiries to Stockton within one week. *Id*. at 69.

The Magistrate Judge entered a Report and Recommendation granting Stockton’s motion in part. *Stockton*, doc. 388. Relying on the government’s representations that the Erisman memo was the sole information responsive to the request for the Analogue Committee Protocol, the Court recommended denial of the motion “because the government has already produced all such items in its possession, custody, or control.” *Id*. at 18. As for dissenting opinions regarding Diversion Control’s analogue determinations, the Court recommended distinguishing between those substances charged in the indictment versus substances not at issue. As to the first category, “items evidencing internal DEA discussions in which anyone expressed any doubt or dissent regarding, or questioned or challenged the reasoning of, a determination that a charged substance meets the criteria of a controlled substance analogue,” the Court recommended that the government be ordered to “make a pointed inquiry of the DEA and to ensure that it has disclosed each and every such item.” *Id*. at

19. The Court recommended denial of the motion as to internal DEA discussions regarding uncharged substances. *Id*. at 19-20. The Court ordered production of any memoranda regarding the substances charged that had been placed on the “‘share point site’ that no longer exists” to the extent the government still had access to them. *Id.* at 20. Finally, the Magistrate Judge recommended

denial of the Motion “with respect to DEA lists of analogues and non-analogues based on the government’s representations that the DEA does not maintain such lists.” *Id*. at 22.

The government objected to an unrelated aspect of the Report and Recommendation, but as to the above rulings it expressly did not object. *Stockton*, doc. 396. Stockton objected to the aspects of the Report and Recommendation that recommended denial of the Motion. *Stockton*, doc. 400. The government produced nothing further to Stockton in response to the portion of the Report and Recommendation to which it had no objection. Before the District Court ruled on Stockton’s objections to the Report and Recommendation the dispute was mooted by the government’s agreement to dismiss all analogue counts from the indictment in connection with the defendants’ guilty pleas to FDA misbranding offenses. *Stockton*, doc. 471, 472, 482, 486, 493, 503, and 509.

## *United States v. Broombaugh*

*Broombaugh* involved a prosecution for 17 different substances alleged to be analogues, including JWH-250, UR-144, and XLR-11. *United States v. Broombaugh*, Case No. 5:14-40005- DDC (D. Kan.). By February 2017, Broombaugh had obtained the *Fedida Brady* disclosure from filings in other analogue cases, and based on the disclosure filed a motion to compel the production of additional *Brady* material, including “(1) An analogue committee protocol, requiring [Diversion Control] to consult with [Forensic Science] before determining that a substance was an analogue;

(2) An internal list of substances that the DEA had concluded were analogues; and (3) A running list of substances that the DEA had added to its internal list of analogues in violation of the analogue-committee protocol.” *Broombaugh*, doc. 983 at 1-2; *see also* affidavit of Branden Bell at Ex. 11a. The Motion recites that the government had declined to produce any further information and had represented to Broombaugh that no list of analogue determinations exists. *Broombaugh*,

doc. 983 at 4, 6. Broombaugh followed his *Brady* Motion with a Motion to issue subpoenas to compel testimony from Kvetko, Oulton, Comparin, Rees, Berrier, and a DEA Custodian of Records, as well as a subpoena to compel the DEA to produce the three items sought in the *Brady* Motion. *Broombaugh*, doc. 984.

The government opposed the *Brady* Motion, largely based on the argument that it was “an effort to conduct a speculative and baseless fishing expedition into DEA procedures and protocols, which, in this case, do not exist.” *Broombaugh*, doc. 993 at 2. The government’s opposition contains a near-verbatim recitation of the Erisman memo. *Id*. at 3-4. As for the request for the Analogue Committee protocol, the government stated:

The government submits that it has no discoverable material that would satisfy the defendant’s request in this circumstance. There are no written protocols with respect to any methodology or procedure employed by the DEA chemists at the point a substance is under consideration for being a suspected analogue. Plainly stated, there is no “analogue-committee protocol” at the DEA describing the process for determining whether a substance me[e]ts the scientific criteria of the Analogue Act, and the defendant has simply reached a conclusion upon which there is no foundation to draw from.

*Id*. at 4. Turning to the internal list of analogue determinations and Rees’ “running list” of Forensic Science dissents, the government declared Broombaugh “overconfident in his pronouncement” that the DEA keeps a list of analogues, then explained:

Notwithstanding the remarks by Lance Kvetko referencing a web address and that “Dave is keeping a running list,” (Doc. 983-1, p. 14), the reference is to a share-point site that no longer exists. The comment “running list” was a figure of speech and no “running list” exists. The web address reference is to an internal share-point site which contains a collection of internal DEA memoranda and scientific opinions on various substances for consideration as analogues. These materials are “living documents” and may be updated as additional scientific information is obtained. While [Diversion Control] continues to maintain an internal site for these materials, the composition of the site changes as new substances are considered and as materials are removed in connection with substances that have been formally

controlled. Accordingly, the internal website as referenced in the 2012 Kvetko email no longer exists.

*Id*. at 5. The government also opposed the motion on the ground that Broombaugh already had sufficient information regarding the UR-144 dissent, and that any further disclosure would be both immaterial to the defense and protected by the deliberative process privilege. *Id*. at 5-10.

The government opposed Broombaugh’s Motion for Subpoenas on the grounds that he had failed to comply with the *Touhy* regulations, and that the information sought was protected by the deliberative process privilege. *Broombaugh*, doc. 994 at 1-6, 10-16. The government specifically objected as to Berrier, claiming he had no expertise in comparing chemical structures to determine substantial similarity and that he had “never been accepted by any Court as an expert in *anything* during the course of his employment with DEA.” *Id*. at 8 (emphasis in original). The government opposed the subpoena to Oulton because he is too important, and also argued that his testimony would be immaterial because his reference to the Analogue Committee protocol “has been taken out of context,” that “[i]n fact, there is no such protocol,” and that his “email is a loosely worded reference to a communication practice, not a formal protocol.” *Id*. at 16-20. Finally the government argued Broombaugh was merely engaged in a “fishing expedition” for speculative, inadmissible material in an attempt to “unjustifiably rummage through the DEA and [Diversion Control]’s files.” *Id*. at 20-28.

The District Court granted the *Brady* Motion, reasoning that “what defendants knew or did not know about UR-144’s chemical structure is a central issue in this case” and that “[i]f sophisticated chemists at the DEA disagreed over UR-144’s chemical structure and whether it was substantially similar to that of a controlled substance, their disagreement – if indeed they disagreed

– may make it less probable that defendants knew the answer to this central question.” *Broombaugh*,

doc. 1003 at 4. Regarding the claim of deliberative process privilege, the Court expressed “significant reservations about the government’s argument” because it had “chosen to designate as its trial experts chemists who routinely participate in the deliberative process purportedly protected by this privilege,” but did not reach that question because any such privilege was waived by the *Fedida Brady* disclosure. *Id*. As for the government’s assertion “that none of this matters because the documents sought by defendant’s motion do not exist,” the Court ruled: “If they exist, the government must produce them.” *Id*. at 4-5.

Broombaugh’s Motion for Subpoenas was granted in part and denied in part. The District Court ordered issuance of a subpoena to Berrier, reasoning that because the government planned to call DEA experts to testify that UR-144 qualifies as an analogue, “Defendant is entitled to question a member of that same agency who, it appears, may have dissented from that opinion ” *Id*. at 6.

Regarding the government’s assertion that Berrier was unqualified and that only Diversion Control gets to decide similarity of chemical structure, the District Court observed that “[t]his apparently escaped [Diversion Control]’s understanding, for it was [Diversion Control], as part of its evaluation, who solicited the opinion of the [Forensic Science] office where Dr. Berrier worked.” *Id*. The District Court also ordered the issuance of a subpoena to Comparin because he had “sent the email referencing the DEA protocol.” *Id*. at 7. The District Court denied Broombaugh’s Motion as to Kvetko, Oulton, and Rees, ruling that they were “collateral to the issues justifying Dr. Berrier and Mr. Comparin’s appearances” and “at most, cumulative.” *Id*. at 7-8.

The government did not produce any documents to Broombaugh in response to the Order granting the *Brady* Motion prior to the commencement of his jury trial. During trial the District Court entered an Order that is reflected as a text docket entry. *Broombaugh*, doc. 1014. The Order

notes that although the government asserted that none of the documents at issue in the Order exist, “the DEA provided one document to the government’s counsel because, as she explained, the DEA desired to cooperate and wanted to proceed cautiously.” *Id*. The document produced to the Court was the July 11, 2002, Memorandum issued by DEA Headquarters. After *in camera* review, the Court concluded that it “cannot discern whether the document provided by the government is the ‘protocol’ addressed in its earlier Order”, but that “[u]nquestionably, a portion of the contested document outlines a procedure which one reasonably could call a protocol.” *Id*. Ruling that any deliberative process privilege had been waived by the testimony of earlier DEA witnesses, the Court ordered disclosure of a redacted version of the Memorandum. *Id*.

Daniel Willenbring testified as the government’s prong one expert that each of the substances at issue was substantially similar in chemical structure to JWH-018, based largely on the “indole core” argument. *Broombaugh*, doc. 1157, 1158, included in the appendix at Exhibits 48 and 49. While, as noted, the government did not disclose any lists of analogues pursuant to the District Court’s order, Willenbring did offer a “guess” that the reason their “group of internal documents” “regarding our opinions when the chemists have met and documented” analogue determinations, organized “by file name,” did not qualify as lists of analogues may have been a matter of formatting:

Q: And I may not have written down your answer correctly, but was it that the DEA doesn’t have a list of what it considers to be analogues, or was it that the DEA has it but doesn’t publish it?

A: There’s no list of analogues because to be an analogue, some of the criteria are based on evidence in a case an agent would collect; not necessarily our scientific opinions.17 So we do have some documents regarding our opinions

17This is presumably a reference to prosecutions based on evidence of prong three (proscribing representations regarding pharmacological effect by defendants) rather than prong two (proscribing substantially similar or greater actual effects). The government may proceed on either theory. *United States v. Vickery*, 199 F. Supp. 2d 1363, 1371 (N.D. Ga. 2002). It is legally sufficient to

when the chemists have met and documented and the pharmacologists have evaluated the substance. So there’s some documents like that, but there’s no list of something that would be considered an analogue.

\* \* \*

Q: So these documents that you talk about are these documents that have past findings from your group about substantial similarity and substantially similar pharmacological effect?

A: Yes.

Q: All right. And so is there a list of substances that your division has found have a substantial structural similarity and substantially similar pharmacological effect to controlled substances?

A: There’s a group of internal documents, but it’s not in a list format, I guess. Q: Okay. So it’s just sort of like by file name or –

A: Yeah.

Ex. 48 at 151-52. Willenbring further acknowledged that Diversion Control does maintain an “internal shared directory” of “write-ups” of the “results” of prior analogue determinations. Ex. 49 at 14-15.

Broombaugh called Berrier in his defense, who confirmed that he had been asked to review Diversion Control’s Monograph regarding UR-144, a type of evaluation he had previously performed “commonly.” *Broombaugh*, doc. 1161, included in the appendix at Exhibit 50 at 6. Over the government’s continued objection based on its asserted deliberative process privilege, the *Fedida Brady* disclosure was admitted into evidence. *Id*. at 9. Berrier explained the differences in structure between UR-144 and JWH-018, and his judgment that “[t]hey don’t have to be identical for two

establish prong two without evidence regarding prong three. That some substances could only be prosecuted as analogues on a prong three theory does not explain why it would not have been worthwhile to list those substances that appeared to meet both prongs one and two.

molecules to be structurally similar, but they need to be – they need to be more common than what you see here.” *Id.* at 11. Broombaugh attempted to elicit an opinion from Berrier regarding XLR-11, but the Court sustained the government’s objection on the ground that he had not been specifically tasked by DEA to review that substance. *Id*. at 12. Berrier stated that after his opinion regarding UR-144 he was never asked to do any further reviews, and that Forensic Science no longer consults with Diversion Control regarding structural similarity comparisons, although he did not know why. *Id.* at 14.

Comparin also testified in Broombaugh’s defense case, and confirmed that the dissenting opinion regarding UR-144 was not that of Berrier or even the SFL1 lab alone, but the opinion of the Operations Section of Forensic Science as well. *Broombaugh*, doc. 1162, included in the appendix at Exhibit 51 at 13. Asked whether Diversion Control maintained a list of analogue determinations, Comparin answered:

A: I don’t know if it was an analogue list, per se. It was a record of chemicals considered with respect to the prongs of the Controlled Substances Analogue Act for consideration and determination by them as the authoritative body as to how DEA was going to proceed.

Q: Okay. So there was a list of substances and a determination about what – if [Diversion Control] considered it to be an analogue?

A: Elements of analogue consideration. In particular, prongs 1 and 2.

*Id*. at 15. Comparin was asked whether Forensic Science had disagreed with Diversion Control regarding any substances other than UR-144. He answered: “I don’t recall another issue other than this one, but it may have happened.” *Id.* at 30. Comparin stated that “shortly after” the “incident” involving UR-144, Diversion Control stopped asking Forensic Science for its opinions about structural similarity. *Id*. at 31.

Other than a redacted version of the 2002 Memorandum from DEA Headquarters, the remainder of the Rule 17(c) documents were not disclosed by the government. Thus, notwithstanding a direct Court Order to produce them, entered in the face of the government’s express denial of their existence, Broombaugh did not have the benefit of the documents showing the Forensic Science rejection of the “indole core” argument, its dissent regarding JWH-250, and the ongoing nature of the dispute between Forensic Science and Diversion Control that continued at least through the end of 2014, in his examinations of Willenbring, Berrier, Comparin, and others. Even so, the jury acquitted Broombaugh on all charges.18

## *United States v. Williams*

Although Berrier and Comparin were required to testify in *Broombaugh* regarding a limited set of issues,19 and a portion of the 2002 Memorandum from DEA Headquarters was disclosed, the remainder of what is known comes from the Rule 17(c) documents obtained by the defense in *United States v. Williams*, Case No. 4:13-cr-00236 (W.D. Mo.). *Williams* involved a prosecution for not only JWH-250, UR-144, and XLR-11, but also AM 694, JWH-019, JWH-081, JWH-122, JWH-203,

18Several weeks ago – nearly a year after Broombaugh’s acquittal – the government sent a letter to counsel for Broombaugh’s co-defendants who, unlike Broombaugh, had pled guilty to analogue offenses involving JWH-250. Ex. 12. The letter, entitled “newly discovered evidence,” encloses the July 29, 2011, Technical Review by SFL1 regarding JWH-250, with the explanation that the prosecutor received it that morning from the DEA and that it had been found “during a recent audit by DEA.” *Id*. The letter asserts that the newly disclosed information had “no impact” on the defendant’s guilty pleas and sentences, but that “the government sincerely regrets the recent discovery of this memorandum by Dr. Berrier.” *Id*.

19The government sought to maintain the public testimony of Berrier and Comparin at Broombaugh’s trial under seal, noting presciently that “should the transcript of the two witnesses’ testimony be unsealed, the United States will be faced with the inevitable arguments of waiver in every forum in which analogue drug cases are prosecuted.” *Broombaugh*, doc. 1075 at 6. The Court rejected these efforts because any applicable privileges regarding their testimony had indeed been waived. *Broombaugh*, doc. 1120.

JWH-210, and AM-2201.20 At a pretrial *Daubert* hearing, Willenbring testified as the government’s prong one expert that each of these substances was substantially similar in chemical structure to JWH-018, based largely on the “indole core” argument. *See Williams*, doc.164 at 26-34, included in the appendix at Exhibit 52. Willenbring also emphasized that the chemists within Diversion Control reach unanimous consensus before asserting that a substance meets prong one. *Id*. at 31-33, 84-85, 110, 112. Willenbring omitted any mention of Forensic Science or its involvement in the analogue determination process on direct examination. When asked on cross-examination whether he had any knowledge of any DEA chemists reaching a different opinion regarding prong one as to any of the substances at issue, Willenbring responded: “I can speak for the group that I’m in, my section, and I don’t believe there is any inconsistencies within my section.” *Id*. at 102. Pressed regarding dissenting opinions outside of Diversion Control, Willenbring acknowledged that he had “heard some inconsistencies from someone in the laboratory system on one of the substances” which he identified as UR-144, but claimed to know nothing more about this. *Id*. at 102-03, 113-14, 117-

19. Although the *Fedida Brady* disclosure occurred nearly three years earlier, at the time of the *Daubert* hearing the defense had not yet come into possession of these materials; no further examination regarding the Forensic Science dissent was conducted.

Williams thereafter obtained the *Fedida Brady* disclosure and moved for Rule 17(c) subpoenas and discovery of additional documents, including (1) any dissenting opinions by Forensic Science regarding substances other than UR-144 alleged in the indictment to be analogues;

(2) documents related to Diversion Control’s termination of its consultation with Forensic Science

20As explained in Part II above, Forensic Science was of the view that in addition to UR-144 (and by logical implication XLR-11), JWH-250, AM 694, JWH-203 also did not qualify as controlled substance analogues.

regarding prong one determinations; (3) the “running list” of substances Forensic Science had dissented on; and (4) Diversion Control’s list of analogue determinations. *Williams*, doc. 200. The Motion also sought the issuance of subpoenas to Berrier, Comparin, Kvetko, Rees, and a records custodian for DEA. *Id*.

The government opposed Williams’ discovery Motion as “a ‘fishing expedition’ that is unreasonable, onerous, and lacks specificity.” *Williams*, doc. 206. The government argued no further discovery was necessary, largely tracking the assertions made in the Erisman memorandum regarding Diversion Control’s exclusive expertise and responsibility to make analogue determinations, and Dr. Berrier’s lack thereof. *Id.* The government also presented deliberative process privilege and *Touhy* Regulation arguments in opposition to further disclosure to Williams. *Id.*

The District Court convened a hearing on Williams’ discovery Motion. At the hearing the government argued that no further discovery should be ordered because the *Fedida Brady* disclosure related only to UR-144, the government intended to supercede its indictment to remove UR-144, and therefore the need for any further inquiry would be moot. *Williams*, doc. 226. The court requested additional briefing and took the motion under advisement. The government thereafter moved to “narrow” the indictment by removing UR-144, *William*s, doc. 214, and then filed a supplemental opposition to Williams’ discovery motion. It asserted that “the materiality of [Williams’] requests cannot be apparent now that UR-144 has been removed from the case.” *Williams*, doc. 229 at 4-7. The government specifically argued that the continued presence of XLR-11 in the indictment was of no moment, stressing its differences with UR-144. *Id.* at 2-4.21

21The government’s efforts to argue the importance of the one-flourine-atom difference between UR- 144 and XLR-11, in the context of a prosecution premised on the notion that XLR-11 is substantially

The Court rejected the government’s effort to moot the dispute by withdrawing UR-144 from the indictment,22 and granted Williams’ motion for the issuance of a subpoena to DEA for the requested documents. *Williams*, doc. 250. Agreeing with the Court’s logic in *Broombaugh*, the *Williams* Court reasoned: “If sophisticated chemists at the DEA disagreed over whether the chemical structures of the charged analogues were similar to that of a controlled substance, their disagreement may make it less probable that defendant Williams knew the answer to this central question.” *Id*. at

7. Turning to Williams’ request for witness subpoenas to DEA personnel, the *Williams* Court parted company with *Broombaugh*, and ordered the issuance of subpoenas to not only Berrier and Comparin, but also to Kvetko, Rees, and a DEA records custodian. *Id.* at 8-9. The Court held that Kvetko and Rees were neither collateral nor cumulative, and that because “Kvetko is the author of the emails that mention the ‘running list’ and the ‘recurring issue’” and “Rees is allegedly the one keeping the ‘running list,’” both Kvetko and Rees “appear to have testimony necessary for an adequate defense.” *Id*. at 8 n. 2. The government produced the documents included in the appendix at Exhibit 4 to Williams in response to the Rule 17(c) subpoena ordered by the Court. Shortly thereafter the case was resolved by plea agreements whereby the government agreed to dismiss all of the Analogue Act allegations. *Williams*, doc. 288, 289, 292.

similar in chemical structure to JWH-018, were so jarring that Williams sought (unsucessfully) to have the statements in the government’s brief introduced into evidence. *Williams*, doc. 241.

22A similar effort by the government to prevent further inquiry into the DEA’s analogue determination process by shifting its allegations from UR-144 to XLR-11 was also unsuccessful in the context of a civil forfeiture action. *See United States v. $177,844.86 in United States Currency*, 2015 WL 4227948, at \*5 (D. Nev. July 10, 2015) (“If the differences in the chemical structures of UR-144 and XLR-11 from that of JWH-018 are substantially the same, then Dr. Berrier’s opinion regarding the differences between UR-144 and JWH-018 may also be relevant to the comparison between XLR-11 and JWH-018”).

## *United States v. Way*

While no additional disclosures have yet taken place, it appears that additional information regarding the DEA’s analogue determination processes may be obtained soon in *United States v. Way*, Case No.: 1:14-cr-00101-DAD-BAM (E.D. Cal.). *Way* involves a prosecution for XLR-11 as an analogue. *Way*, doc. 196. Armed with the materials in the *Fedida Brady* disclosure, Way moved for additional discovery, including the “running list” of Forensic Science dissents from Diversion Control’s analogue determinations, any information regarding Berrier or Forensic Science’s opinions regarding XLR-11 or the process by which Diversion Control determined that XLR-11 qualified as an analogue, and any Analogue Committee protocols. *Way*, doc. 352. The government opposed the motion on the grounds that the requested materials do not exist. *Id*., doc. 347 at 3 (“There is no listing of controlled substance analogues”). The government also argued that if such documents do exist, their production would not be required because they exceed the scope of Rule 16, *id*. at 5, that Way already had sufficient information, *id*. at 6, and that “any internal lists or memoranda that David Rees may have maintained are subject to the deliberative process privilege.” *Id.* The government also argued that additional information regarding Berrier need not be disclosed because he was not requested to provide an opinion on XLR-11 and therefore “[i]t appears that no one but Dr. Berrier knows what Dr. Berrier’s opinion is regarding XLR-11.” *Id*. at 9. The government further asserted that Way’s discovery requests were irrelevant “since UR-144 is not involved in this case.” *Id*. at 10.

Following a hearing, the Court entered a text order on Way’s *Brady* motion. *Way*, doc. 357.

The Court observed that some of the materials sought “are alternatively represented by the government as non-existent and also subject to the deliberative process privilege,” and that the

documents “already produced indicates that these documents do in fact exist.” *Id*. Finding that the documents sought appear to be exculpatory, the Court overruled the government’s deliberative process objection and ordered production of any Monographs for UR-144 and XLR-11, Berrier’s opinion on those substances, the Analogue Committee protocol, and the “running list.” *Id*. The Court further observed that “the government was uncertain of the ‘criteria’ under which [Diversion Control] determines that the analogue was structurally similar,” and that this process remained “ambiguous from the briefs and from the argument at the hearing.” *Id*. Accordingly, the Court set an evidentiary hearing for February 13, 2018, regarding “the process and/or procedures ... an analogue goes through for structural similarity.” *Id.* The Court ordered the government to produce at the hearing “the person most knowledgeable” regarding this subject. *Id*.23

Way subsequently obtained the Rule 17(c) documents and filed a Supplemental Motion for Discovery based on the information revealed by these documents. *Way*, doc. 380. The government declined to produce any additional information to Way and opposed his Supplemental Motion. *Way*, doc. 384. The government identified Boos of Diversion Control as the person most knowledgeable regarding analogue determination procedures to provide testimony at the February 13, 2018, hearing. *Id.* The Defendants have ordered the transcript of this hearing and will supplement this motion as necessary based on additional developments in *Way*.

23The government moved for reconsideration of this order on the ground that there was no evidence that Berrier had dissented regarding XLR-11, *Way*, doc. 358, but the Court denied the motion citing the need for an evidentiary hearing to determine whether additional discovery should be ordered. *Way*, doc. 361. The government also sought, unsuccessfully, to produce only a redacted version of the 2002 DEA Headquarters Memorandum to Way. *See Way*, doc. 359, 361, 365, 383.

# The Defendants’ *Brady* Requests and the Government’s Responses to Them

Notwithstanding the Erisman Memorandum, and its subsequently revised version distributed to all United States Attorney’s Offices, the government did not produce the *Fedida Brady* disclosure or any of the Rule 17(c) documents to the Defendants prior to a specific request by the Defendants. On January 19, 2016, Herrig’s counsel sent a letter to counsel for the government identifying categories of materials that appeared material to their defense, and requesting that the government provide any responsive information. Ex. 13. Among other matters, the letter requested (1) documents reflecting how Diversion Control and Forensic Science evaluate substances under prongs one and two of the Analogue Act; (2) all information in Diversion Control’s analogue list internal website; (3) all documents related to the DEA’s analogue determinations regarding the substances at issue in this case, including, *inter alia*, the date of analogue determination, the controlled substance(s) used in the prong one and two comparison(s), and the methodology used to make the determinations; and (4) any dissenting opinions within DEA as to whether any of the substances at issue qualify as analogues. *Id*.

The government responded to the Defendants’ requests by refusing to provide any further documents other than the *Fedida Brady* disclosure and some lab reports because the requests were overly broad, burdensome, and sought materials that are irrelevant and beyond the scope of Rule 16. Ex. 14.24 The government thereafter produced the *Fedida Brady* disclosure (as modified by the deletion of the words “and are not analogues” from the SFL1 Technical Review regarding UR-144) to the Defendants. *See* Ex. 6 at NewDiscov-20316\_00000536.

24The government did state that it would comply in the future with the Court’s order requiring disclosure of Rule 16 expert witness summaries.

The Defendants obtained the Rule 17(c) documents from defense counsel in *Williams*, and on November 17, 2017, sent a second request for production of additional *Brady* materials to the government requesting many of the materials sought in this Motion. Ex. 15. The request was accompanied by examples of documents that would be responsive to the requests drawn from the *Fedida Brady* disclosure and the Rule 17(c) documents. *Id*. Counsel for the government and the Defendants met and conferred regarding the second *Brady* request in December 2017. The Defendants provided the government with a complete set of the Rule 17(c) documents at the meeting in an effort to further illustrate the nature of the additional information sought as well as the manner in which these documents demonstrate the existence of the additional information sought.

By letter dated January 16, 2018, the government declined to produce any additional documents. Ex. 16.25 With regard to the request for official or unofficial lists of analogue determinations, the government stated that Diversion Control:

maintains an internal library of scientific opinions, which is dynamic and is not comprehensive. The materials in the library are “living documents” and may be updated as additional scientific information is obtained. The composition of the library site changes as new substances are considered and as materials are removed, for example, upon formal control.

*Id.* at 2. Although Berrier and Comparin testified in *Broombaugh* that Forensic Science never provided any input to Diversion Control regarding analogue determinations after its dissent regarding UR-144, the government represented in its January 16, 2018, letter that “[b]ased on information and belief,” Diversion Control invited Forensic Science to participate in the final analogue determinations of each of the substances alleged to be analogues in the indictment with

25The government did produce some of the Rule 17(c) documents provided by the Defendants to the government the previous month, although many of the documents sent back by the government contained various redactions. In short, the Defendants produced more to the government regarding the matters at issue than the government has produced to the Defendants.

the exception of XLR11. *Id*. at 3.26 The views of Forensic Science regarding PB-22, 5F-PB-22, FUB-PB-22, and THJ-2201 thus evidently exist. But the substance of those opinions – whether Forensic Science agreed with Diversion Control or, instead, the array of independent experts whose views are reflected in the Defendants’ Motion to Dismiss for Vagueness – remains unknown.

# The Government Should be Compelled to Disclose All Exculpatory and Impeachment Evidence.

The applicable law is well settled. Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *Giglio v. United States*, 405 U.S. 150, 154 (1972), upon the defendant’s request, counsel for the government is obligated to disclose any exculpatory evidence that is material to guilt or punishment. This obligation extends both to evidence that is directly exculpatory and to impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676-77 (1985). That the requested material may be in the possession of the DEA rather than the prosecutor does not affect the prosecutor’s obligation to produce the information. *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (government violated its disclosure obligation by failing to turn over relevant material possessed by the Food and Drug Administration; “the government cannot with its right hand say it has nothing while its left hand holds what is of value”), *appeal after remand*, 112 F.3d 518, 1997 WL 207973 (9th Cir. 1997) (unpublished).

While the law here is not novel, the context certainly is. There is no list available to the public of substances the government considers unlawful as analogues. Even though the government could choose to make it public when the DEA determines that the government will henceforth consider a substance to be unlawful as an analogue, the government has elected not to provide such

26The continued involvement of Forensic Science in the DEA’s prong one determinations, at least as of the Summer of 2014, was also described by ODE chemist DiBerardino in *United States v. Le*, Case No. 13-cr-00295 (D. Colo.), doc. 412 at 63.

notice to the public for reasons that it, alone, knows. This would be less consequential if there existed an objective methodology that a citizen could reasonably deploy to determine whether a substance qualifies as an unlawful analogue. But it is beyond dispute that no such objective methodology exists, and that determinations of “substantial similarity” are, by their nature, unscientific and subjective. Even still, a set of secret laws based on subjective criteria might nevertheless be conceivably tolerable so long as a very conservative approach, erring well on the side of protecting potentially innocent conduct, were to be adopted. But here the DEA has taken the subjective, unscientific, and inherently elastic concept of “substantial similarity” and stretched it beyond the breaking point such that the DEA stands virtually alone in the scientific field. A citizen, trying to ascertain whether his conduct might violate the secret subjective criminal analogue code, may consult with the leading experts at their local institutions of higher learning, but alas it would be to no avail. And the stakes could not be higher, given the 167:1 sentencing ratio set forth in the United States Sentencing Guidelines for cannabinoid analogues.

Given this unusual context, the need to be vigilant in requiring the production of exculpatory information is especially compelling. Each of the requested items listed in Exhibit 1 all tie directly to the elements the government is required to prove in an Analogue Act case. A critical question, in addition to *mens rea*, will be whether the substances at issue qualify as analogues. The government may be expected to present testimony from Diversion Control chemists that each of the alleged analogues meets prongs one and two. They will likely assert that their opinions should be accepted because all of the chemists within Diversion Control agree with them. And the basis of their prong one opinions will almost certainly be largely based on the argument that the substances share a common “indole core.”

The Defendants must be permitted to fully cross-examine this testimony, armed with any and all information suggesting the DEA failed to follow its own protocols in determining these substances qualified as analogues. The government has repeatedly claimed that no written Analogue Committee protocols exist. But surely Comparin, Kvetko, and Oulton had *something* in mind when they collectively lamented Diversion Control’s recent and ongoing violations of “the analogue committee protocol.” Ex. 3 at FBD017. If the protocol exists in writing the government should be ordered to disclose it. If the protocol exists only in the minds of Comparin, Kvetko, and Oulton, or is merely a “loosely worded reference to a communication practice,” they should nevertheless be compelled to come to court and share it with the Defendants.

The Defendants should similarly be armed for cross-examination of the government’s experts with any and all information suggesting Forensic Science or others within the DEA disagree with them. Such evidence would also bear directly and be admissible substantively on the merits of the prong one question of whether two substances are substantially similar in their structure, as well as informing the critical element of the Defendants’ *mens rea*. *United States v. Nashash*, 2014 WL 169743, at \*1 (S.D.N.Y. Jan. 15, 2014) (defendant’s request for disclosure of reports, studies, and other information pertaining to the classification of UR-144 and XLR-11 was granted, because that information bears directly on the defendant’s guilt). As reasoned by the courts in *Broombaugh* and *Williams*, “If sophisticated chemists at the DEA disagreed over whether the chemical structures of the charged analogues were similar to that of a controlled substance, their disagreement may make it less probable that [the] defendant knew the answer to this central question.” *Broombaugh*, doc. 1003 at 4; *Williams*, doc. 250 at 7.

Documents regarding multiple Forensic Science dissents are known to exist. We know from the *Fedida Brady* disclosure that Forensic Science dissented regarding UR-144 and, by force of logic, XLR-11. We now know from the Rule 17(c) subpoena documents what Forensic Science thought about JWH-250 – not that this was disclosed to the Defendants by the prosecution, despite a specific request for such information. According to the prosecutor in *Way*, there were also disagreements regarding 4-Bromo-Dragonfly and MDPV, but these materials have not been disclosed. It stands to reason that Forensic Science continued to disagree with Diversion Control on the merits of its prong one determinations well into 2014. Otherwise, those at Forensic Science would have had no reason to be so concerned about making “sure” that Diversion Control chemists “don’t turn around writing something that says ‘SF concurs with x substance being an analogue,’ when in fact we did not make a determination.” Ex. 4 at R17-0119. It appears that Forensic Science may well understand the significance of what is happening – Diversion Control is seeking to imprison people for decades for that which is not unlawful – and wants no part of this “sand box.” We know that Rees was keeping a “running list” of Forensic Science dissents. Ex. 3 at FBD016. This list should be produced if it exists in writing, and if it exists only in Rees’ head he should be compelled to appear at an evidentiary hearing and recite it. Most likely Rees’ list would correspond to SFL1 Technical Reviews of Diversion Control Monographs or other Forensic Science documents and internal communications. The only SFL1 Technical Reviews produced in response to the Rule 17(c) subpoena in *Williams* were those related to the substances alleged to be analogues in that case. As explained by Professor Dudley, the implications of Forensic Science’s dissents regarding JWH-250 and XLR-11 and its rejection of Diversion Control’s “indole core” argument are such that it is reasonable to infer that Forensic Science also disagreed with Diversion Control

regarding PB-22, 5F-PB-22, THJ-2201, and FUB-PB-22. Ex. 18 at 2. If there exist Forensic Science Technical Reviews or other materials reflecting dissents by Forensic Science regarding other alleged analogues in this case, it can be reasoned from the government’s track record in this and other cases that this information will only be disclosed after the issuance of at least one Court Order.

In addition to dissenting opinions of others, a complete evaluation of the merits and credibility of a Diversion Control chemist’s subjective prong one determination regarding a cannabinoid requires access to and review of the prong one determinations made by Diversion Control regarding other cannabinoids. As explained by Dr. Dudley, Diversion Control’s “evaluation criteria may or may not be written down, but the key criteria can be inferred by reviewing the full complement of substances for which determinations have been made. Critical

review, examination, and cross-examination of the full quantity of DEA ODE assessment opinions is necessary to assess the quality and consistency of their evaluation criteria and to ascertain how the current assessment opinions fit in the broader context of DEA ODE analogue assessment opinions.” Ex. 19. Thus, the Defendants are entitled to production of Diversion Control’s complete lists – or “tables” – of analogue determinations and all materials related to these determinations. This information exists in a shared internal website accessible to Diversion Control. Indeed,

at least as of April, 2012, the website bore the title “analogue\_list.” Ex. 3 at FBD017. The information on this website – past and present – can readily be produced in just the same manner that website information is produced in civil litigation on a routine basis. Indeed, one would have to imagine that without a list of what has already been determined, every day would be “groundhog day” at the DEA. This seems unlikely over a prolonged period of time. The government’s various

excuses for not producing this information in the past – that “some of the criteria are based on evidence in a case an agent would collect,” that it is “not in a list format,” that it is “dynamic and is not comprehensive,” and a “living document” – are just that – excuses. This information clearly exists, and every version of it from the beginning of its “life” to the present time, maintained in any format by the DEA, should be ordered produced. This information will allow the Defendants’ experts to evaluate whether the conclusions of Diversion Control chemists have been made consistently for various substances and to identify discrepancies in those conclusions. Because it is undisputed that no objective methodology exists for determining substantial similarity, Defendants are entitled to review all of DEA’s opinions in order to discern the credibility and reliability of the conclusions the government’s experts reach in this case. At a minimum, any Diversion Control Monographs, Forensic Science Technical Reviews, and other communications regarding the process of determining that each of the substances at issue here should be treated as analogues should be ordered disclosed.

Moreover, evidence regarding the date on which the DEA reached its determination that a substance should be asserted to be an analogue is directly relevant to the Defendants’ state of mind and how likely it is that they knew the substantial similarity of a substance’s structure with that of a controlled substance before the DEA did. In particular, the timing of DEA’s determination that THJ-2201 was an analogue should be disclosed in light of the possibility that the determination was made only because it had just been seized from a Gas Pipe store a few days earlier. Similarly, according to the sworn affidavit of DEA Officer Washington, as of May 6, 2014, the DEA believed JWH-250 did not meet prong one and was not unlawful as an analogue. Ex. 5. When did the DEA change its mind? And why?

The Defendants also have a need for information regarding any and all cannabinoids Diversion Control determined did *not* meet prong one, and why. We know the DEA determined that AB-Fubinaca did not meet prong one, but we do not know why. DEA chemist Trecki testified in *Broombaugh* that the DEA had determined that the substance Fubimina did not meet prong one under the Analogue Act, but did not explain why. *Broombaugh*, doc. 1051 at 6-165. Fubimina is an isomer of THJ-2201, one of the substances alleged to be an analogue here. Isomers have the same chemical formula, and often have closely related chemical structures. It is therefore highly relevant in evaluating the government’s claim that THJ-2201 meets prong one to know why the government determined that Fubimina does not meet prong one. DEA chemist Boos testified in *Fedida* that the DEA had determined that the substance CB-13 did not meet prong one under the Analogue Act. Ex. 41 at 220-221. As explained in the Defendants’ companion motion to dismiss for vagueness, the structural disparity between PB-22 and JWH-018 is greater than the structural disparity between CB-13 and JWH-018. This example again illustrates how the disclosure of a non- analogue determination regarding one substance reveals inconsistency in the DEA’s analogue determination regarding another. The Defendants are entitled to not only the materials documenting the AB-Fubinaca, Fubimina, and CB-13 determinations, but also all other determinations by Diversion Control that various cannabinoids did not meet prong one of the Analogue Act.

The above are only examples of categories of information that have not been disclosed, are

highly exculpatory, and actually exist. As in *Way*, however, the overall picture of how Diversion Control makes its analogue determinations and the full scope of potentially exculpatory materials remains ambiguous. What did Forensic Science tell Diversion Control regarding its dissenting opinions? Was Boos truthful when he claimed he had no knowledge of any such dissents regarding

UR-144 as late as February of 2013? Who altered the SFL1 Technical Review regarding UR-144 to remove the words “and are not analogues,” and why? What happened during the two years between April 2012 and April 2014? Who made the revisions to the Erisman memo, and why? Did Forensic Science get out of Diversion Control’s “sand box,” and if so, why? These questions and others like them can only be answered through a complete evidentiary hearing at which those with relevant knowledge are compelled to attend. A list of these proposed witnesses is included in the appendix at Exhibit 2, and affidavits under the *Touhy* Regulations regarding these witnesses are included in the appendix at Exhibit 17.

# CONCLUSION

For the above reasons, the Court should order the government to disclose to the Defendants all exculpatory and impeachment information, including the materials listed in Exhibit 1. In light of the government’s efforts to avoid disclosure in past cases, coupled with the existence of additional materials that is evident from the materials disclosed to date, the Court should also conduct an evidentiary hearing to establish the existence and materiality of the information sought and to ensure disclosure of the full scope of potentially responsive documents. It is further requested that the Court authorize the issuance of the requested subpoenas to compel testimony at the requested evidentiary hearing.

Dated: February 21, 2018

Respectfully Submitted,

/s/ *James E. Felman*

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# CERTIFICATE OF CONFERENCE

On February 20, 2018, I conferred with Chad Meacham, counsel for the government assigned to this case, who indicated that the government is opposed to this motion.

/s/ *James E. Felman*

James E. Felman

# CERTIFICATE OF SERVICE

This is to certify that on February 21, 2018, a true and correct copy of the above and foregoing motion was filed with the Court’s electronic filing system which will send a notice of filing to all counsel of record and every party.

/s/ *James E. Felman*

James E. Felman