IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

vs.

PURDUE PHARMA L.P., *et al.*

Defendants.

Case No. CJ-2017-816

Honorable Thad Balkman

JURY TRIAL DEMANDED

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF SCHEDULING ORDER AND CROSS-MOTION FOR ENTRY OF SCHEDULING ORDER

INTRODUCTION

The State has brought numerous statutory and common-law claims against thirteen defendants, seeking to litigate broad public health issues and events spanning more than two decades. Its claims put at issue thousands upon thousands of prescriptions for numerous opioid medications that hundreds of health care providers have written and an even greater number of patients have filled across Oklahoma. The State seeks to recover a broad array of damages and other relief, ranging from the costs of tens of thousands of individual opioid prescriptions to a variety of social costs. Its claims are based on novel liability theories and questionable causal connections that it intends to support using complex expert evidence that it has yet to specify.

In the face of these facts, the State's proposal to try this case a mere 16 months from now—and to prepare the case for trial without the assistance of a discovery master—is not realistic. It disregards, among other things, the breadth and novelty of the State's claims, the number of party and nonparty witnesses whose testimony and other evidence will prove crucial, the volume of data and documents at issue, the review and analyses of those materials the parties and their experts must undertake, and the amount and complexity of proof the parties will rely on at trial. It also ignores entirely the question of coordination with the newly created federal multidistrict litigation, *In re National Prescription Opiate Litigation*, MDL No. 2804 (N.D. Ohio), where over a hundred similar actions brought by other governmental entities are now or soon will be pending.

The Court should therefore reject the State's impractical proposed schedule and instead adopt Defendants' schedule, including setting this case for trial no earlier than April 2020. *See* Exhibit A (Defendants' Proposed Scheduling Order). Defendants' proposed schedule is concededly aggressive, but Defendants believe that with the assistance of a discovery master to help the parties proceed more efficiently and expeditiously through discovery, it is realistic. This

trial date is less than a year after the State's proposed trial date, and thus fulfills its desire for prompt adjudication—a desire Defendants share. Unlike the State's proposed schedule, however, Defendants' schedule pays heed to the challenges and complexities posed by the State's inventive liability theories and the wide-ranging relief the State seeks. It also respects Defendants' due-process right to mount a robust defense.

ARGUMENT

The State has brought a massive and complicated case against thirteen defendants that will require an extraordinary amount of complex data and other evidence to resolve. The State's demand for a May 2019 trial does not grapple with the scope of this litigation or the other challenges it poses. Put simply, even aided by a discovery master, a trial before April 2020 is not workable.

To begin with, the scope of this case is vast by any reckoning:

- The State, through its public-nuisance claim, puts at issue the entirety of "the opioid epidemic." Pl.'s Opp. 1. *Cf. Evans v. Asarco*, 2011 WL 1842775, at *2 (N.D. Okla. May 16, 2011) (refusing to allow addition of public-nuisance claim because "a new round of costly discovery would need to be conducted"). The State's own reliance on the Presidential opioid commission (*see* Pl.'s Opp. 1, 4) reveals the breadth of issues involved. The commission's report details fully 56 recommendations and identifies and no fewer than 13 factors influencing the epidemic. *See* President's Commission on Combating Drug Addiction and the Opioid Crisis, Final Report 12-23 (Nov. 1, 2017).

- The State has brought this case against 13 defendants that, cumulatively, manufactured, marketed, or sold several different prescription opioid medications, many of which have different mechanisms of action, dosages, contraindications, forms of administration, and anti-abuse characteristics.

- The State bases its claims on events that occurred more than two decades ago, and has sought discovery dating to 1996.

- The State's allegations that it paid for improper opioid prescriptions over this long period put at issue a substantial number of reimbursement claims. Though the total number of at-issue claims is not yet known—as the State has failed to provide the required disclosure of a "computation of any category of damages claimed" and related materials, "including materials bearing on the nature and

extent of injuries suffered," *see* 12 O.S. § 3226(A)(2)—the State's allegations make it safe to say that Plaintiff calls into question 100,000 or more claims. *See* Pet. ¶¶ 5, 34 (alleging Oklahoma "rank[ed] number one in the nation in milligrams of opioids distributed per adult resident" and that Defendants caused the State "to pay millions of dollars for unnecessary or excessive opioid prescriptions"); *id.* ¶¶ 35-39 (asserting that over 99,000 claims for reimbursement were submitted in connection with Oklahoma Medicaid program since 2007, excluding generic medications).

- These disputed claims, it is also safe to say, involve prescriptions written by hundreds of health care providers and filled by thousands of patients for a range of medical conditions based on individual medical diagnoses.

- There are numerous third parties whose documents and testimony will be necessary. Aside from the health care providers and patients just mentioned, the State puts third-party organizations at issue by alleging Defendants engaged in misconduct by controlling "seemingly unaffiliated and impartial organizations," Pet. ¶ 63, and working with "key opinion leaders" to promote opioid use, *id.* ¶ 59. The State's discovery requests identify 10 so-called "Front Groups" and 8 "KOLs."

- At least 16 of the State's agencies, departments, and other entities possess crucial information bearing directly on the State's claims and Defendants' defenses. These entities include the Oklahoma Office of the Governor, Oklahoma Office of the Attorney General, Oklahoma Department of Corrections, Oklahoma Department of Public Safety, Oklahoma State Department of Health, Oklahoma State Bureau of Investigation, Oklahoma Bureau of Narcotics and Dangerous Drugs Control, Oklahoma Department of Mental Health and Substance Abuse Services, Oklahoma Health Care Authority, Oklahoma State Board of Dentistry, Oklahoma State Board of Medical Licensure and Supervision, Oklahoma State Board of Nursing, Oklahoma State Board of Pharmacy, Oklahoma State Board of Veterinary Medical Examiners, Oklahoma Workers' Compensation Commission, and Office of the Medical Examiner of the State of Oklahoma.

Moreover, the data and evidence at issue are wide ranging and complex. For its part, the State seeks twenty years' worth of information and demands that Defendants undertake extensive searches of current and former documents and email databases of current and past companies. Its discovery requests broadly call for "all" opioid marketing, educational, and training materials, as well as "all" documents, discovery materials, testimony, expert materials, and other materials from numerous other opioid cases and investigations. At the same time, the State's sweeping liability theories require Defendants to gather a broad range of materials to contest the State's

assertions and support their defenses. Among other things, Defendants will need to probe state claims data and obtain evidence from the health care providers and patients described in the claims data. Billing and collection data will also prove essential. And the State's public-nuisance claim implicates discovery of an immense amount of public health, law enforcement, regulatory, and other data. Furthermore, unlike a typical product-liability or mass-tort proceeding, the State is a large and sophisticated entity with troves of relevant information, has numerous departments and agencies, and employs hundreds of individuals that possess crucial knowledge. Several experts for the State and 13 Defendants will then have to analyze the voluminous materials collected in fact discovery, after which extensive motions practice will be required to assess their qualifications and the reliability of their opinions.

The State does not contest any of this. Nor does the State meaningfully defend its proposed schedule, citing only one facially inapposite case[1] and devoting only four sentences to its conclusory assurance that its schedule "provides sufficient time for discovery and pretrial matters." Pl.'s Opp. 5. The State's assurance is unconvincing. Rather than explaining why its proposed schedule is feasible, the State offers more overheated rhetoric, charging that Defendants "are actively fighting against solving this crisis and against resolving this case," and are engaging in "intentional delay tactic[s] to avoid liability for the crisis Defendants[] created." Pl.'s Opp. 1, 4. This is untrue and unnecessarily inflammatory. Defendants recognize the serious public health challenges posed by opioids—both illicit drugs and misused or abused prescription medications. But it does not follow that Defendants—who include manufacturers of

[1] The State cites a 1998 ***patent infringement*** case to argue that thirteen months of discovery is "reasonable." Pl.'s Opp. 5. Put succinctly, this action—involving thirteen defendants, several state-related agencies and entities, thousands of nonparties, numerous and different prescription medications, and a twenty-year-plus time period—bears scant resemblance to a simple patent infringement action.

FDA-approved opioid medications that bear extensive warnings about the risks of addiction, are subject to strict DEA regulation, and can be lawfully obtained only after a patient receives a prescription from a health care professional licensed to prescribe controlled substances and fills the prescription at a pharmacy licensed to dispense them—are legally liable for "the opioid crisis." Nor does acknowledging the complexities posed by this case constitute a delay tactic.

A candid assessment of this case leaves no doubt that, even with the efficiencies gained by a discovery master, April 2020 is the earliest date that this case will be ready for trial. As it stands, this case is near the outset of discovery and remains fraught with uncertainty. The State has yet to make even the most basic of its required disclosures. *See* 12 O.S. § 3226(A)(2). Its allegations are as broad as they are vague. The Court also lacks the benefit of formulating a schedule based on similar cases: despite the hundreds of opioid cases pending across the country, only a handful of cases involving certain defendants have made it to the early stages of written discovery and none has entered a scheduling order. The parties will almost certainly encounter unexpected hurdles in the course of fact discovery, given the number of parties and nonparties involved as well as the nature of the materials sought from current and previous databases. The State also has yet to offer any details about how it intends to support its claims, despite manifest challenges it will encounter in showing several elements, including causation. Though the State has said vaguely that it expects to rely on "statistical evidence" and "statistical sampling methods," Hr'g Tr. (Dec. 5, 2017) at 136-37, it has not elaborated. And the length and structure of trial is unknown at this time, but given the number of parties, numerous witnesses, and the volume of evidence, could easily stretch two months or longer.

Though much remains unknown, the exceptional nature of this case is already apparent and confirms that a trial date before April 2020 is not feasible. Litigating the State's claims will

require numerous steps. In addition to the points described above, these steps include the following:

- The public-nuisance claim implicates the actions of countless individuals and entities whose activities are traceable to the opioid crisis. Beyond the State itself, these individuals and entities range from federal government agencies and officials (such as the DEA, CDC, and FDA), to others in the medication supply chain (like distributors, who are charged with monitoring for and reporting suspicious orders of opioids), to numerous health care industry actors (including health insurers, pharmacy benefit program managers, pharmacies, hospitals, pain clinics, and individual providers). It also sweeps in criminal conduct, including diversion of prescription medications and production, distribution, sale, and use of illegal drugs like heroin and illicitly manufactured fentanyl.

- Because the State now challenges some 100,000 opioid prescriptions, it will need to, among other things identify: "(1) the prescription claims submitted to and paid for by [the State] that it asserts were medically unnecessary and to whom they were written; (2) the physicians or health care providers who wrote the prescriptions [the State] alleges to have been medically unnecessary; and (3) [the State's] basis for identifying the prescription claims to be 'medically unnecessary.'" *City of Chicago v. Purdue Pharma L.P.*, No. 1:14-cv-4361, Dkt. No. 604 (N.D. Ill. Aug. 21, 2017).

- The State's after-the-fact questioning of these opioid prescriptions also requires that Defendants have the chance to show that the prescriptions were in fact appropriate, which demands discovery into why the health care providers wrote the prescriptions at issue and the providers' interaction with their patients. "Sampling" is no solution to this issue; even if the Court were to go along with allowing Plaintiff to extrapolate from a small sample of 500 claims, the number used in the case Plaintiff has relied on (*see* Hr'g Tr. (Dec. 5, 2017) at 136-37 (citing *Burgess v. Farmers*, 2006 OK 66 (2006)), a representative sample would yield hundreds of health care providers and hundreds of patients.

- Coordination with the newly formed MDL will be necessary throughout fact discovery. As one court has explained, "[c]oordination, cooperation, discussion and interaction between and among the federal courts and the state courts is . . . advised, encouraged and welcomed by both the federal and state courts." *Dunlavey v. Takeda Pharm. Am., Inc.*, 2012 WL 3715456, at *2 (W.D. La. Aug. 23, 2012). The need for coordination is particularly great here given that multiple plaintiffs in these cases will otherwise seek to depose the same party witnesses multiple times over. For this reason and others, treatises implore that "[a]t a minimum, judges should exchange case-management orders, master pleadings, questionnaires, and discovery protocols." Manual for Complex Litigation (Fourth) § 20.313 (2017).

- Expert discovery will be much more complex here than in an ordinary case. Multiple experts are expected for multiple parties, and their reports will be unique and cover novel issues. Even for the statistical proof that the State intends to present, there will likely be "interlocking testimony" from multiple experts so that statistical experts draw on the correct data in preparing their opinions. *Reference Guide on Statistics*, *in* Reference Manual on Scientific Evidence (Third), at 215 (2011).

- There will be extensive expert-related motions practice, at least some of which may require hearings to decide. Among other things, Defendants expect to challenge the State's attempt to rely on statistical proof. And even assuming the Court allows some use of statistical proof, "statistics . . . come in infinite variety and, like any other kind of evidence, they may be rebutted." *Farmers Ins. Co. v. Peterson*, 2003 OK 99, ¶ 5.

- Defendants expect to pursue dispositive motions. Given each Defendant's unique circumstances, there will likely be fact-specific motions for each one.

- In addition to all the experts involved, numerous fact witnesses from 13 separate companies and the State's numerous departments and agencies will testify at trial. The process of designating deposition testimony, scheduling live witnesses, resolving evidentiary disputes, and the actual hearing of testimony will consume a significant amount of time.

In short, and for all these reasons, April 2020 is the very earliest that this case can realistically be trial ready.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion for Entry of Scheduling Order.

Dated: January 9, 2018

Respectfully submitted,

By: _____

Benjamin H. Odom, OBA No. 10917
John H. Sparks, OBA No. 15661
ODOM, SPARKS & JONES PLLC
HiPoint Office Building
2500 McGee Drive Ste. 140
Oklahoma City, OK 73072
Telephone: (405) 701-1863
Facsimile: (405) 310-5394
Email: odomb@odomsparks.com
Email: sparksj@odomsparks.com

Charles C. Lifland
Jennifer D. Cardelús
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
Email: clifland@omm.com
Email: jcardelus@omm.com

Stephen D. Brody
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
Email: sbrody@omm.com

Counsel for Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson, Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a/ Janssen Pharmaceuticals, Inc.

Sanford C. Coats, OBA No. 18268
Cullen D. Sweeney, OBA No. 30269
CROWE & DUNLEVY, P.C.
Braniff Building
324 N. Robinson Ave., Ste. 100
Oklahoma City, OK 73102
Tel: (405) 235-7700
Fax: (405) 272-5269
sandy.coats@crowedunlevy.com
cullen.sweeney@crowedunlevy.com

Counsel for Defendants Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc.

Of Counsel:

Sheila Birnbaum
Mark S. Cheffo
Hayden A. Coleman
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Tel: (212) 849-7000
Fax: (212) 849-7100
sheilabirnbaum@quinnemanuel.com
markcheffo@quinnemanuel.com
haydencoleman@quinnemanuel.com

Patrick J. Fitzgerald
R. Ryan Stoll
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive, Suite 2700
Chicago, Illinois 60606
Tel: (312) 407-0700
Fax: (312) 407-0411
patrick.fitzgerald@skadden.com
ryan.stoll@skadden.com

Robert G. McCampbell, OBA No. 10390
Travis J. Jett, OBA No. 30601
GABLEGOTWALS
One Leadership Square, 15th Fl.
211 North Robinson
Oklahoma City, OK 73102-7255
T: + 1.405.235.5567
RMcCampbell@Gablelaw.com
TJett@Gablelaw.com

Attorneys for Defendants Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.

Of Counsel:

Steven A. Reed
Harvey Bartle IV
Jeremy A. Menkowitz
MORGAN, LEWIS & BOCK.IDS LLP
1701 Market Street
Philadelphia, PA 19103-2921
T: +1.215.963.5000
Email: steven.reed@morganlewis.com
Email: harvey. bartle@morganlewis.com
Email: jeremy.menkowitz@morganlewis.com
Brian M. Ercole
MORGAN, LEWIS & BOCK.IUS LLP
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131
T: +1.305.415.3416
Email: brian.ercole@morganlewis.com

CERTIFICATE OF SERVICE

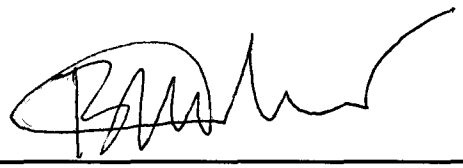
Pursuant to Okla. Stat. tit. 12, § 2005(D), this is to certify on January 9, 2018, a true and correct copy of the above and foregoing has been served via the United State Postal Service, First Class postage prepaid, to the following:

Mike Hunter
Abby Dillsaver
Ethan A. Shaner
Attorney General's Office
313 N.E. 21st Street
Oklahoma City, OK 73105
Attorneys for Plaintiff

Michael Burrage
Reggie Whitten
Whitten Burrage
512 North Broadway Avenue, Suite 300
Oklahoma City, OK 73102
Attorneys for Plaintiff

Bradley E. Beckworth
Jeffrey J. Angelovich
Nix, Patterson & Roach, LLP
512 North Broadway Avenue, Suite 200
Oklahoma City, OK 73102
Attorneys for Plaintiff

Glenn Coffee
Glenn Coffee & Associates, PLLC
915 North Robinson Avenue
Oklahoma City, OK 73102
Attorneys for Plaintiff



Benjamin H. Odom, OBA No. 10917
John H. Sparks, OBA No. 15661
Tava S. Jones, OBA No. 16854
ODOM, SPARKS & JONES, PLLC
Suite 140
HiPoint Office Building
2500 McGee Drive
Norman, Oklahoma 73072
(405) 701-1863
(405) 310-5394 FACSIMILE

Counsel for Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson, Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a/ Janssen Pharmaceuticals, Inc.