

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,)

v.)

PURDUE PHARMA L.P.; PURDUE PHARMA)
INC.; THE PURDUE FREDERICK COMPANY,)
INC.; TEVA PHARMACEUTICALS USA, INC.;)
CEPHALON, INC.; JOHNSON & JOHNSON;)
JANSSEN PHARMACEUTICALS, INC.;)
ORTHO-McNEIL-JANSSEN)
PHARMACEUTICALS, INC., n/k/a JANSSEN)
PHARMACEUTICALS, INC.; JANSSEN)
PHARMACEUTICA, INC., n/k/a JANSSEN)
PHARMACEUTICALS, INC.;)
ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a)
ACTAVIS, INC., f/k/a WATSON)
PHARMACEUTICALS, INC.; WATSON)
LABORATORIES, INC.; ACTAVIS LLC; and)
ACTAVIS PHARMA, INC., f/k/a WATSON)
PHARMA, INC.,)

Defendants.)

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk

FEB 20 2018

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816

Honorable Thad Balkman

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION
FOR APPOINTMENT OF SETTLEMENT MASTER**

Defendants¹ respectfully submit this Opposition to the State of Oklahoma's (the "State") Motion to Appoint a Settlement Master. Much of what is argued in the State's Motion is not in dispute, to wit:

- The opioid-abuse crisis is a national problem that has spawned over 400 lawsuits against some or all of the Defendants in state and federal courts around the country. Mot. at 3.
- The majority of these cases have been centralized in the federal Multidistrict Litigation ("MDL") pending before Judge Polster in the Northern District of Ohio.
- Judge Polster has "stayed all discovery and motion practice in the MDL to focus endeavored to focus 'everyone's present efforts on abatement and remediation of the opioid crisis rather than pointing fingers and litigating legal issues.'" Mot. at 4 (quoting *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, Dkt. 70 at 1 (N.D. Ohio Jan. 11, 2018)) (attached as Ex. 1).
- Judge Polster seeks to foster a nationwide settlement, which includes cases like this one brought by State Attorneys General, and has appointed *three* special masters to focus on reaching a global settlement. These special masters, in turn, have reached out to state officials across the country—including those who have not brought lawsuits against the Defendants and those who, like the State here,

¹ Defendants are Purdue Pharma L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen, Pharmaceuticals, Inc., N/K/A Janssen Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc., N/K/A Janssen Pharmaceuticals, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. F/K/A Watson Pharma, Inc.

have lawsuits pending in state courts—to hear their concerns and garner their participation in the global settlement process.

Notwithstanding the State’s general endorsement of Judge Polster’s efforts, it now seeks to undercut them by asking this Court to appoint a separate special settlement master solely for this case (“Settlement Master”). While Defendants applaud the State’s willingness to explore avenues for a potential resolution of this dispute, the State’s motion should be denied.

First, while the State may be able to unilaterally *litigate* this case, it cannot unilaterally *settle* the case. The State’s insistence on the appointment of a Settlement Master over the Defendants’ objections undermines productive settlement discussions.

Second, and most fundamentally, the appointment of a Special Master in this case would be futile as any meaningful resolution of this case can only be reached in conjunction with the participation of stakeholders from around the country. The pathway to resolving this mass litigation is not through piecemeal settlement of individual cases on an ad hoc basis, but instead through a global resolution.

The settlement process in the MDL is already well underway. As noted, Judge Polster has appointed *three* special masters to help negotiate a settlement framework. There has already been one full-day settlement conference and several more are scheduled. With Judge Polster’s encouragement, State Attorneys General and other stakeholders not subject to federal jurisdiction have participated in the process.² See *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, Dkt. 70 at 2 (N.D. Ohio Jan. 11, 2018) (Ex. 1); *id.*, Dkt. 94 at 1 (N.D. Ohio Jan. 24, 2018) (attached as Ex. 2). In fact, the Special Masters are meeting separately with State Attorneys

² The State notes that the MDL court lacks jurisdiction over this case (Mot. at 4), but that does not preclude the State from participating in and coordinating with the MDL process.

General to obtain their views and exploring ways a global resolution can be achieved in conjunction with the MDL proceedings.

The State has a binary choice: It can participate in the ongoing nationwide settlement proceeding or not. It cannot, however, seek to circumvent this process by having a Special Master appointed in this case over Defendants' objections.

Third, the State has not cited any, nor are Defendants aware of any, specific authority under Oklahoma law providing for the appointment of a "settlement master" under the circumstances of this case. Instead, the State urges this Court to appoint a settlement master based on its supposed "inherent authority" to "efficiently manage its docket and appropriately administer justice." Mot. at 5. The State also invokes "the Court's analogous authority to appoint a discovery master under 12 Okla. Stat. § 3225.1." Pl's Proposed Order at 1. The authority to appoint a discovery master does not authorize a court to appoint a settlement master. Rather, a court's authority to appoint a settlement master without the parties' consent is limited to circumstances not present here.

Research has not revealed any case in which the Oklahoma Supreme Court has recognized the inherent authority of a court to appoint a master for *settlement* over parties' objections. Instead, it has explained: "In the absence of a contrary command in our fundamental or statutory law, courts have the power to avail themselves of devices necessary to the efficient performance of their constitutionally-mandated duties." *Lee v. Hester*, 1982 OK 30, ¶ 4, 642 P.2d 243, 245 (citing *Rand v. Nash*, 1935 OK 1086, ¶ 6, 51 P.2d 296, 297 (per curiam), and addressing the routine use of references in matrimonial cases). As the concurrence in *Lee* observed, "[t]he power of compulsory reference is purely statutory. Title 12 O.S.1971, s 613 governs compulsory reference. It governs all actions whether at law or in equity, which are not

otherwise controlled by specific statute. Compulsory reference statutes are exclusive. *There are no powers of reference independent of statutes.*” *Id.* ¶¶ 3-4, 642 P.2d at 247 (Simms, J., concurring in result) (emphasis added).

The Oklahoma Legislature has specified the narrow circumstances in which compulsory reference, without the parties’ consent, is permitted. For example, “the court may . . . direct a reference” without the parties’ consent “in either of the following cases: Where the trial of an issue of fact shall require the examination of mutual accounts, or when the account is on one side only, and it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account . . . ; or where the taking of an account shall be necessary for the information of the court before judgment, in cases which may be determined by the court, or for carrying a judgment into effect, or where a question of fact other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of an action.” 12 O.S. § 613. None of these circumstances is present here.

Further, none of the three cases the State cites supports its position. In fact, none dealt with the appointment of a settlement master at all. *Hambright v. City of Cleveland*, 1960 OK 184, 360 P.2d 493, 496, dealt with the court’s authority to extend time. *Winters v. City of Okla. City*, 1987 OK 63, 740 P.2d 724, 726, dealt with the court’s equitable power to assess attorney’s fees. And *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), dealt with the court’s power to stay proceedings.

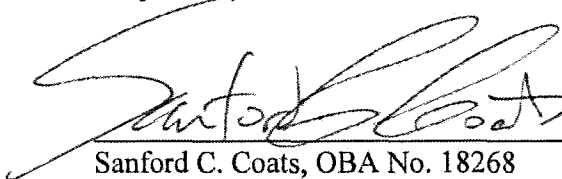
The State’s assertion that “the Court undoubtedly has the authority to appoint a Settlement Master” based on the discovery master provisions in 12 O.S. § 3225.1, Mot. at 6, fares no better. The State recognizes that “unlike its federal counterpart, [12 O.S. § 3225.1] does not explicitly contemplate a ‘settlement master.’” Mot. at 6. But the State fails to mention that

the statute *does* contemplate *other statutes* allowing a court to appoint a referee or master, and *denies* having any effect on them: “Nothing in this section shall be construed to replace or supersede any other statute or provision authorizing the appointment of a referee or master.” 12 O.S. § 3225.1(H). The State’s invocation of “the Court’s analogous authority to appoint a discovery master under 12 Okla. Stat. § 3225.1,” Pl’s Proposed Order at 1, is therefore nonsensical: the very statute the State cites *expressly disclaims* the power the State claims it has. The fact that 12 O.S. § 3225.1(A)(1) authorizes Oklahoma courts to appoint a *discovery* master over a party’s objection is not exportable by analogy to other appointments or references.

For these reasons, Defendants respectfully request the State’s motion for Appointment of Settlement Master be denied.

Dated February 19, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 20th day of February, 2018 to:

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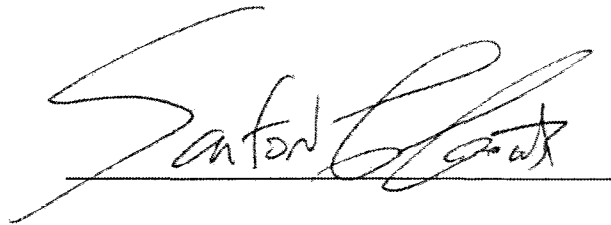
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A handwritten signature in black ink, appearing to read "Charles C. Lifland", written over a horizontal line.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION) MDL No. 2804
OPIATE LITIGATION)
) Case No. 17-md-2804
THIS DOCUMENT RELATES TO:)
) Judge Dan Aaron Polster
ALL CASES)
) MINUTES OF INITIAL PRETRIAL
) CONFERENCE - 1/9/2018

The Court held an Initial Pretrial Conference with Counsel on January 9, 2018, at which time the Court solicited and obtained the consensus of Counsel to focus everyone's present efforts on abatement and remediation of the opioid crisis rather than pointing fingers and litigating legal issues. Counsel thought it would be beneficial to select a day for an information session to educate the Court and each other on supply-chain dynamics and other issues relevant to resolving this MDL, and to further pursue settlement discussions. The Court has scheduled that conference for **9:00 a.m. Eastern Time on Wednesday, January 31, 2018**. The morning will be devoted solely to an exchange of information, and the afternoon will be devoted to preliminary settlement discussions.

To that end, Plaintiffs' Counsel agreed to bring to the conference a representative group of approximately 6-7 Government Entity Plaintiffs, and a representative for the Hospitals and Third-Party Payors. Defense Counsel agreed to bring a small number of senior executives from both the Manufacturer Defendants and from the Distributor Defendants. The Court also directed Defense Counsel to bring a representative group of Insurers to the conference. Finally, the Court directed Attorney Tyler Tarney to bring Dr. Russell Portenoy to the conference.

Exhibit 1

Because this MDL addresses a nationwide crisis and resolution of the crisis involves more than the parties and attorneys who are in this MDL, the Court volunteered to try to get an experienced person with relevant knowledge from the FDA and from the DEA to attend the conference in person. This effort is underway. The Court also said that it would invite representation from both State Attorney General groups, i.e., those who have filed cases in state court and those who have not. These invitations have been extended.

The Court expects Counsel to confer prior to the January 31 conference, agree on a program for the morning session, and file a single proposed agenda **no later than 12:00 p.m. Eastern Time on January 26, 2018**. Counsel shall also confer and be prepared to offer suggestions on a schedule for regular meetings and a deadline for submitting proposed agenda items. The Court also invited Counsel to exchange and submit to the Court any suggestions for abating the opioid crisis.

Due to the number of persons the Court expects to attend the January 31 conference, only Leadership Counsel may attend.¹ A transcript will be made of the information session and will subsequently be made available to all Counsel.

As Counsel are to focus their efforts on resolution, the Court hereby **continues the moratorium on all substantive filings**.

IT IS SO ORDERED.

/s/ Dan A. Polster January 11, 2018
Dan Aaron Polster
United States District Judge

¹Plaintiffs' Leadership Counsel includes Plaintiffs' Liaison and Lead Counsel and the Executive Committee. Defendants' Leadership Counsel includes Manufacturer Defendants' Liaison Counsel and Steering Committee, Distributor Defendants' Liaison Counsel and Steering Committee, and Physician Defendants' Liaison Counsel and Steering Committee.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION) CASE NO. 1:17-MD-2804
OPIATE LITIGATION)
) JUDGE POLSTER
)
) ORDER

In its Minute Order dated January 11, 2018, the Court scheduled a conference for Wednesday, January 31, 2018, and stated “it would invite representation from both State Attorney General groups, i.e., those who have filed cases in state court and those who have not. These invitations have been extended.” (Doc #: 70 at 2.)

The Court enters this additional Order to make clear as follows: (1) any State Attorney General (“AG”) who wishes to attend the conference, or representatives whom the AG chooses, are welcome; (2) the Court asks all such AGs or representatives to notify the Court that they intend to appear; and (3) the Court recognizes it has no jurisdiction over (i) the AGs or their representatives, (ii) the State cases they have filed, or (iii) any civil investigations, but invites their participation because it is essential if there is to be any resolution. State AGs should not feel compelled to attend the January 31 Conference because it is the first of numerous opportunities they will have to provide input in the Court’s effort to resolve this matter.

IT IS SO ORDERED.

/s/ Dan Aaron Polster
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

Dated: January 24, 2018

Exhibit 2