IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	
Plaintiff,	**Case No. CJ-2017-816**
vs.	**Judge Thad Balkman**
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC; (8) ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,	**Special Master: William Hetherington**
Defendants.	

PLAINTIFF'S OPPOSITION TO JANSSEN'S MOTION FOR PROTECTIVE ORDER AND TO QUASH DEPOSITIONS

I. INTRODUCTION

Janssen's Motion for Protective Order and to Quash ("Motion to Quash") is yet another attempt to delay this case. As set forth in its Second Motion to Compel Discovery ("Motion to Compel") (incorporated herein by reference), the State timely served proper corporate deposition notices on Defendants on April 2, 2018 (the "Notices"). *See* Exhibits 1–6 to Motion to Compel.[1] Defendants made clear on the meet and confer that they had no intention of working with the State in good faith to identify agreeable dates and locations. Thus, the State filed its Motion to Compel on April 5 so that these issues could resolved at the April 19 discovery hearing. Rather than respond to the State's motion, Janssen waited until after the April 5 deadline and filed a separate motion for protection in an attempt to delay full resolution of this dispute until the following hearing in May.

Janssen's intent to delay resolution of this discovery dispute was clear during the meet and confer. Janssen's counsel refused an offer by the State to provide Janssen additional time to consider the Notices in exchange for a tolling of the deadline for filing a motion to compel:

> **MR. DUCK**: Steve, this is Trey. One thing. We have -- we have said we're willing to give you time in exchange for you agreeing that you will toll our deadline for filing a motion to compel such that that motion can be heard on the 19th. I don't think we got a response on that. But we'll give you the exact time you've asked for. Just talk to your client and get us answers on this about dates, about any objection to scope, et cetera. That's fine. Use the time you've asked for.
>
> We just ask that you agree that we can file a motion late so that that motion can be heard on the 19th. That doesn't seem that controversial to me, and it seems like something that we could answer here on the phone today.
>
> **MR. BRODY**: No, I don't -- I mean, first of all, the timelines don't play out. Based on when the deposition was noticed, it did not provide the time required under the Special Master's order for a meet and confer and briefing even on a motion to compel under the order, you know.

[1] The Notices specific to Janssen are attached as Exhibits 3 and 5 to the State's Motion to Compel.

> So should we agree to short-circuit that? No. We should -- each side should plan ahead. If there's a discovery issue, I don't think it's in anybody's interest to -- to expedite things when the expedition is not going to be justified. And I see nothing that suggests that expediting things here, you know, in this situation would make sense.
>
> As to, you know, whether it's a motion to compel or a motion for protective order, we don't even know the scope of what we're talking about, and we won't until I'm given the opportunity to confer with my client. I've told you how much time I need. ***You know, if there is a motion for protective order and it doesn't get heard on the 19th and it gets heard three weeks later on May 11th, you know, I don't – if you're telling me that that's going to derail the case, well, maybe, you know – I mean, I just – I don't – I don't buy that.***

Exhibit 8 to Motion to Compel at 66:16-68:4 (emphasis added). Janssen then carried out its plan to wait until after the briefing period for the April 19 hearing passed to file its Motion to Quash. Defendants' repeated and mounting delays—including Janssen's attempt to push off the present dispute for an additional three weeks—can and will derail this case. Indeed, that is Defendants' goal.

This intentional delay should not be condoned. In a case of this magnitude, with this trial date, it cannot be. Accordingly, the State now files its response to Janssen's motion such that this dispute can be fully addressed and resolved at the April 19 hearing. For the reasons set forth below and in the State's Motion to Compel, the State's deposition Notices to Janssen are proper under Oklahoma law. Therefore, the State respectfully requests that the Court deny Janssen's motion and compel the depositions to occur in Oklahoma City on or before April 26 and 27, 2018.

II. ARGUMENT

a. The States' Deposition Notices Are Substantively Proper

The State's Notices satisfy the standards set forth in the Oklahoma Discovery Code. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." 12 O.S. §3226(B)(1). Courts liberally

construe the Discovery Code to provide the just, speedy, and inexpensive determination of every action. *Id.* at §3225. In regard to corporate deposition topics, the noticing party must simply "describe with reasonable particularity the matters on which examination is requested." *Id.* at §3230(C)(5) (governing depositions of corporate designees).

The topics directed to Janssen are plainly relevant to the subject matter involved in the pending action. At a minimum, the topics the Notices to Janssen related to (1) Janssen's understanding of what is required to abate the very nuisance that Janssen in part created, and (2) Janssen's motive and financial interests, through its former affiliate Tasmanian Alkaloids, in the deceptive marketing scheme to sell more opioids generally and its defense that Janssen itself did not sell a significant number of opioids in Oklahoma. Likewise, the Notices clearly describe the matters on which examination is requested. While Janssen provides myriad excuses for why it should not have to produce a witness on these topics, it does not appear to express any confusion as to the subject matter requested. Janssen's remaining arguments are, as set forth below, objections to be raised during depositions or at trial—not reasons to quash them.

i. Topic 1: Actions Necessary to Address the Opioid Epidemic

The State's first notice to Janssen requests examination on: "All actions available or necessary to address, fight, abate, and/or reverse the opioid epidemic." Exhibit 5 to Motion to Compel. Janssen argues that because this topic relates to the abatement element of the State's claims and remedies, it therefore necessarily seeks legal conclusions and expert opinions. Motion at 5–9. That is not true. As an initial matter, proper discovery requests *must* "relate[] to the claim[s] or defense[s]" at issue. *See* 12 O.S. §3226(B)(1). The fact that the State's request properly relates to its claims does not mean it seeks legal conclusions and expert opinions. As the manufacturer of addictive opioid drugs squarely at the center of the opioid epidemic, Janssen has undoubtedly

evaluated, discussed, and considered ways to address the epidemic—if for no other reasons than the public relations implications. Janssen has already acknowledged this publicly in response to being sued across the country for its role in creating the opioid epidemic. For example, Janssen has publicly stated: "Addressing opioid abuse will require collaboration among many stakeholders and ***we will continue to work with federal, state and local officials to support solutions.***"[2] Further, following the meet and confer, Janssen contacted counsel for the State with a self-serving attempt to change this topic to Janssen's "efforts to reduce the risks associated with its opioid medications." Motion at 4–5. This too demonstrates that Janssen *has* considered available and necessary actions and, in some instances, *acted* on those considerations. Of course, Janssen should not be entitled to limit the deposition to only those actions that it wishes to discuss but should be required to discuss all of them. The State is entitled to this testimony.

Further, Janssen's assertion that this first topic is beyond the province of a jury and therefore entirely the subject of expert testimony does not hold water. Mot. at 7–8. Janssen is the ***manufacturer*** of opioids. Is Janssen contending that it does not have knowledge regarding its own drugs, their risks and the damage they cause? As the manufacturer of these drugs, Janssen should already know the harm these drugs have caused and should have considered the solutions necessary to fix them. If they have not given these issues any consideration, they should be required to state that on the record. Either way, this topic is not directed toward legal opinions and conclusions or expert testimony. And, if Janssen believes that a specific question does call for such testimony, it can lodge and preserve that objection on the record in the deposition.

[2] http://www.nbc4i.com/local-news/city-of-columbus-files-suit-against-25-drug-companies-claiming-damages-for-opioid-epidemic/1096326084

This topic is also not directed toward privileged information. Again, if the State poses a question that Janssen believes implicates privilege, Janssen can object on the record and instruct the witness not answer. That is routine procedure. However, Janssen cannot completely shield itself from this topic by claiming it has discussed these issues in settlement discussions or with its attorneys.

This topic is also not premature. The Notices were issued more than nine months after the case was filed, during active discovery, and within the time periods provided by the rules. The State offered to negotiate the dates—offering Janssen up to 30 additional days—but Janssen refused. This refusal was unreasonable and indicates gamesmanship and delay tactics. The deadline to file motions to amend pleadings is less than three months away. Discovery closes in less than ten months. The Oklahoma rules confirm the propriety of this notice, and Janssen's actions and the status of this case confirm the need to proceed with this deposition now.

Finally, this topic is not overbroad or unduly burdensome. As set forth above, this topic complies with § 3230(c)(5)'s requirement that the topics be stated with "reasonable particularity." Janssen argues that preparing a witness will be overly burdensome because the State's Petition "broad[ly]" alleges deceptive marketing practices going back to the 1990s and "[t]here are, of course, many intervening links between Janssen's conduct and the harms flowing from the opioid epidemic." Mot. at 12–13. This argument is a statement of Janssen's defense to the lawsuit, not a reason to quash the deposition. It also has nothing to do with the actual topic in the deposition notice: "All actions available or necessary to address, fight, abate, and/or reverse the opioid epidemic." And, again, the State offered Janssen up to 30 additional days to reschedule the deposition, but Janssen refused.

Janssen should already be prepared to answer these questions. If Janssen does not have an answer to a particular question, Janssen's witness can say "I don't know." If Janssen has an objection on privilege or expert grounds, it can object on the record. The State's topics—and the manner in which they are phrased—are relevant to the subject matter in this case and "describe with reasonable particularity the matters on which examination is requested." For these reasons, the Court should deny Janssen's motion as to this topic and compel Janssen to provide a designee on or before April 26 and 27, 2018.

ii. Topic 2: Janssen's Relationship With Tasmanian Alkaloids

The State's second topic to Janssen requests examination on:

> The J&J Defendants' past and present relationship with Tasmanian Alkaloids, the corporate structure and management of Tasmanian Alkaloids during its affiliation with any J&J Defendant, and the terms of any asset purchase agreement, acquisition agreement, and/or purchase and sale agreement by and between any J&J Defendant and Tasmanian Alkaloids, including terms related to the assumption of liability.

Exhibit 3 to Motion to Compel. Janssen argues that because Tasmanian Alkaloids is not a defendant in this case or specifically mentioned in the Petition Janssen should not be required to provide testimony regarding its relationship with Tasmanian Alkaloids. Motion at 13–14. But this is not the scope of discovery standard in Oklahoma. "Tasmanian Alkaloids" need not be specifically mentioned in the State's Petition to be fair game for discovery—it need only be a "matter . . . relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." 12 O.S. §3226(B)(1).

Janssen's relationship with Tasmanian Alkaloids is clearly relevant to both the State's claims and Janssen's defenses. A former subsidiary of Johnson & Johnson (a named Defendant and Janssen's parent company), Tasmanian Alkaloids manufactures the poppy-based opiate used

in the majority of U.S. opioids. Thus, during much of the relevant time period, the Janssen Defendants had a direct financial interest in the sale of opioids *generally*, not just their own branded opioids. This incentivized their complicity in Defendants' deceptive marketing conspiracy. This is a critical issue because the Janssen Defendants have repeatedly claimed they did not sell a lot of opioids in Oklahoma and did not have great success in the market. Indeed, they raise this issue once again on the first page of their motion. Motion at 1, n.1 ("The State reimbursed only 2,100 prescriptions for those medications—or an average of 210 per year—between 2007 and 2017."). Accordingly, Janssen's past or current relationship with Tasmanian Alkaloids, the corporate structure of Tasmanian Alkaloids, and the terms of Johnson & Johnson's sale of Tasmanian Alkaloids are issues squarely related to Janssen's alleged defenses.[3] This topic is therefore a proper subject for discovery.

Similarly, Janssen's financial interest in Tasmanian Alkaloids goes to its motive for engaging in the deceptive marketing conspiracy set forth in the State's claims. Janssen contends that motive is irrelevant because it is not a specific element of the State's remaining claims. Motion at 14. However, even if this were true, it does not reflect the scope of discovery standard in Oklahoma or the test for relevant evidence. 12 O.S. § 2401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Janssen's motive (*e.g.*, financial incentive) for engaging in the deceptive marketing scheme set forth in the State's claims is highly relevant evidence tending to make it more probable that Janssen did indeed

[3] The fact that the State considers this alleged defense meritless is irrelevant. The State considers all of Janssen's defenses meritless, as Janssen presumably considers the State's claims. If parties were not allowed to conduct discovery on claims and defenses with which they disagreed, there would be no discovery.

engage in the deceptive marketing scheme aimed at changing the healthcare community's perspective on opioids generally. Through a deceptive scheme perpetrated by all Defendants and aimed at convincing prescribing professionals that opioids were non-addictive, highly effective painkillers, Janssen stood to gain enormous sums of money from increased opioid prescribing, regardless of the brands of opioids that were ultimately prescribed. This is because Tasmanian Alkaloids sold opiate feedstock to other Defendants and, thereby, benefited from increased demand for opioids in general and the success of other Defendants' in selling more opioids to meet that demand. Further, Janssen's motive is relevant to every claim brought by the State, as the jury has a right to know why Janssen perpetrated this nuisance on Oklahoma. Janssen's relationship with Tasmanian Alkaloids is evidence of, among other things, Janssen's intent and motive, which are relevant and discoverable in this case.

Finally, the State's prayer for punitive damages directly implicates the facts surrounding Janssen's relationship with Tasmanian Alkaloids. As set forth in the Oklahoma Uniform Jury Instructions, the jury may consider "the profitability of the misconduct to the Defendant" in determining a punitive damages award. OUJI No. 5.9. The details surrounding Janssen's financial interest in Tasmanian Alkaloids directly bear on that factor.

The Tasmanian Alkaloid topic is specific and highly relevant. The Court should deny Janssen's motion as to this topic and compel Janssen to provide a designee on or before April 26 and 27, 2018.

b. The States' Deposition Notices Comply With Oklahoma Statutory Procedure

In addition to being substantively proper, the States' deposition notices are procedurally proper under Oklahoma law. Oklahoma law requires that notices "be served in order to allow the adverse party sufficient time, by the usual route of travel, to attend, and three (3) days for

preparation, exclusive of the day of service of the notice" and that a party "may be deposed in the county where the action is pending"—*i.e.*, Cleveland County, Oklahoma. 12 O.S. § 3230(B)(2), (C)(1). The State's notices comply with these requirements.[4] *See* Motion to Compel at 5, 7.

Janssen does not appear to dispute that the State's notices comply with the letter of Oklahoma law. Rather, Janssen argues that the State's "unilateral" notices "frustrate orderly discovery" and "contravene[] standard Oklahoma practice." Motion at 16–17. These sweeping statements ignore the fact that "unilateral" notices are exactly what the Oklahoma rules contemplate. They also disregard the State's repeated efforts to work with defendants on agreeable dates and locations. Efforts in which Janssen and the other Defendants entirely refused to engage. Mot. to Compel at 6. Janssen simply wants to implement an alternative process, not required under Oklahoma law, through which it can further delay this case.

The process Janssen wants to implement would require the State to give notice of its notices to Defendants. Motion at 16 ("Expeditious discovery will be best served . . . if the parties confer with each other and their clients *before* depositions are noticed, so they can meaningfully negotiate the timing of depositions and their scope." (emphasis in original)). This unnecessary double-notice procedure is not required by the Oklahoma Code of Civil Procedure and is simply unnecessary. It certainly will not streamline discovery as Janssen suggests. The ***first*** meet and confer on the Notices demonstrates just how counterproductive an additional round of notice would be. No Defendant provided alternative dates, locations, potential date ranges, or any estimate of the time within which a witness would be available. Motion. to Compel at 6. For Janssen's part, its counsel

[4] For convenience, the Notices listed Oklahoma City as the location for the depositions. The parties have agreed that Oklahoma City (where most of the lawyers' offices are located), rather than Cleveland County, should be the location for any depositions that are to occur in Oklahoma. *See* Exhibit 1 to Motion to Compel at 19:24–20:9, 68:12–70:22.

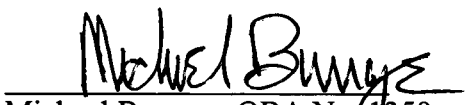
suggested that additional time to consult with the client after hearing the State elaborate on the deposition topics would provide "a chance to fully vet it internally, and I can give [the State] an answer." Exhibit 8 to Motion to Compel at 41:8–9. Janssen came back with an entirely different deposition topic and then filed its motion to quash the deposition notices in their entirety five days later. So far, Defendants are all refusing to voluntarily put up witnesses in response to the State's deposition notices. Requiring an additional round of notice and meeting and conferring before these issues are brought to the Court will irretrievably delay this case.

Janssen's claim that it objects to the deposition notices "not in order to delay, but *to the contrary*, because the State's conduct frustrates the orderly administration of discovery that is crucial to the just and speedy preparation of this case for trial before May 2019", Motion at 15 (emphasis added), is plainly contradicted by its actions. Janssen strategically delayed filing its Motion so that its objections would not be fully considered until over five weeks after issuance of the deposition notices. And there is no doubt that it will ask for many more weeks to actually put up a deponent once the Court resolves these issues. The State complied with the Oklahoma rules and will continue to do so to efficiently take discovery. And while the State is always willing to work with Defendants on reasonable adjustments to the time and location of noticed depositions, and to entertain discussions about the scope of any deposition, Defendants should not be afforded additional time to sandbag the State while it waits to bring those issues to the Court.

III. CONCLUSION

For the reasons herein, the State respectfully requests that the Court deny Janssen's Motion for Protective Order and to Quash and compel Defendants to produce prepared corporate designees for the topics contained in the Notices on or before April 26 and 27, 2018.

Dated: April 12, 2018



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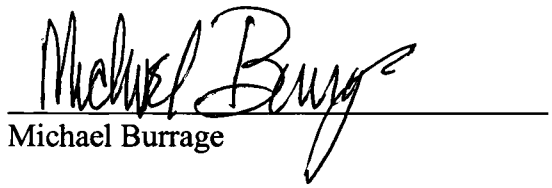

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