IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

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

Plaintiff,

v.

(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, INC.;
(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.,

Defendants.

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

DEFENDANTS TEVA PHARMACEUTICALS USA, INC., CEPHALON, INC., WATSON LABORATORIES, INC., ACTAVIS LLC, AND ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC. RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY

Plaintiff the State of Oklahoma's motion to compel Defendants Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc., f/k/a Watson Pharma, Inc. (collectively, the "Teva Defendants") to produce voluminous documents, data, and information covering not just Oklahoma but the entire nation, including separate litigations, dating back nearly 22 years (well beyond any statute of limitations) should be denied because the discovery sought is both irrelevant and grossly disproportionate given the claims and defenses at issue in this case. Plaintiff has admitted in its Petition that it reimbursed only ***245 prescriptions*** over a ***10-year span*** for the Teva Defendants' branded pharmaceuticals at issue here – Actiq and Fentora. Petition ¶ 37. That is about 25 prescriptions ***per year*** for ***the entire State of Oklahoma***. Further, according to Plaintiff, the last time it reimbursed a prescription for Actiq was ***2008*** when it reimbursed ***one*** prescription. *Id.* Ex. 3. Similarly, for all of Oklahoma for the first half of 2017, it reimbursed ***one*** prescription of Fentora (for $143.98). *Id.*[1] Yet, Plaintiff moves to compel the Teva Defendants to "boil the ocean" and search for, obtain, and produce all documents from May 1996 to the present related to marketing for Actiq and Fentora, and all documents produced in other opioid-related litigations nationwide, including "[a]ll discovery responses, investigative demand responses, deposition transcripts, witness statements, hearing transcripts, expert reports, trial exhibits and trial transcripts from litigations," among other things. *See* Pl. RFPs 1 and 2. Given the number of Actiq and Fentora prescriptions at issue, Plaintiff's discovery requests are both irrelevant and grossly disproportionate to the Oklahoma-specific claims against the Teva Defendants.

[1] That dearth of prescriptions for Actiq and Fentora is not surprising, given that they are narrowly indicated to provide short-term relief for breakthrough cancer pain for opioid-tolerant patients.

The Oklahoma Rules of Civil Procedure mandate that discovery be "just, speedy, and inexpensive." 12 O.S. § 3225. The Teva Defendants have sought – to no avail so far – to agree with Plaintiff on reasonable limitations to ensure that discovery in this case meets that standard. To that end, the Teva Defendants have agreed to collect, review, and produce Oklahoma-specific documents from 2006 through the filing of the Petition that are responsive to Plaintiff's Requests. The Teva Defendants' temporal limitation is consistent with the 2007 cut-off date that Plaintiff imposed on its responses to their discovery requests and the relevant statutes of limitations. The Teva Defendants also have already produced over 130,000 pages – Plaintiff has produced ***none*** – and are in the process of providing significantly more. And, although irrelevant to Oklahoma, the Teva Defendants also have agreed to produce documents regarding practices, policies, procedures which on their face do not specifically relate solely to states other than Oklahoma and are responsive to Plaintiff's requests. Under this proposal, Plaintiff would receive documents illustrating the Teva Defendants' purported nationwide marketing of its opioid pharmaceuticals. In addition, the Teva Defendants have proactively offered ways to ensure that Plaintiff obtains the relevant documents sought, efficiently and inexpensively, including providing a list of 10 employee custodians for e-mail collection, all of whom had supervisory roles in sales and marketing, or were involved in the creation or dissemination of medical information regarding the Teva Defendants' opioid pharmaceuticals, among other relevant topics. But, Plaintiff refused the Teva Defendants' reasonable proposals and filed this motion.

In sum, the Teva Defendants have already produced extensive discovery, will be producing more soon (as already discussed with Plaintiff), and have offered specific proposals to Plaintiff that are reasonable and proportional, in light of the miniscule number of Actiq and Fentora prescriptions at issue in this case. Plaintiff, on the other hand, asks this Court to compel production

to its shotgun-style, wide-ranging, admittedly irrelevant, and grossly non-proportional discovery. Plaintiff's Motion to Compel is needless and premature motion practice, is a waste of the parties' and the Court's resources, and creates unnecessary obstacles to ensure discovery is efficient, thorough, and appropriate. Accordingly, as demonstrated herein, the Motion to Compel against the Teva Defendants should be denied.

I. PROCEDURAL BACKGROUND

Plaintiff served its First Request for Production of Documents (the "Requests") on the Teva Defendants in August 2017. Motion to Compel at 1. In September 2017, Defendants, including the Teva Defendants, filed their Motion for Protective Order Staying Discovery. *Id.* Upon deciding Defendants' Motions to Dismiss, which included dismissing Plaintiff's cause of action under the Oklahoma Consumer Protection Act, on November 14, 2017, the Court directed Defendants to respond to Plaintiff's Requests by December 13, 2017 pursuant to a protective order. *Id.*

On December 13, 2017, the Teva Defendants responded to each of Plaintiff's Requests, pursuant to 12 O.S. § 3234. *Id.* Ex. C. Then, on December 22, 2017, the Teva Defendants produced to Plaintiff 4,862 documents which amounted to 70,915 pages; on January 10, 2018, the Teva Defendants produced 1,537 documents which amounted to 28,850 pages; and on February 14, 2018, the Teva Defendants produced 2,369 documents which amounted to 30,171 pages. Thus, in total, the Teva Defendants have already produced almost 9,000 documents, which have amounted to nearly 130,000 pages. Because the Teva Defendants are committed to working cooperatively with Plaintiff, the Teva Defendants produced these documents without an executed protective order with the understanding that Plaintiff would afford the protections provided by any final such order.

The Teva Defendants, as did the other Defendants, served their First Set Requests for Production of Documents on Plaintiff on January 12, 2018. Although over two months have elapsed since, ***Plaintiff has not produced a single document.*** Plaintiff instead has allocated resources to engage in unnecessary motion practice.

On March 14, 2018, the Teva Defendants conducted a meet and confer with Plaintiff to discuss Plaintiff's failure to produce any documents in the matter and the Teva Defendants' objections and responses to Plaintiff's Requests. During the meet and confer, Plaintiff refused to obligate itself to a date by which it would produce its first document or explain to the Teva Defendants the content of Plaintiff's first production. Plaintiff also refused to agree (1) to a 2006 cut-off date for the Teva Defendants' production (consistent with the statutes of limitations), even though it imposed its own 2007 cutoff for its responses; (2) to a geographic limitation on the Teva Defendants' discovery responses, even though it admits that Actiq and Fentora constitute a fraction of opioids prescribed in Oklahoma; and (3) to limit the Teva Defendants' production of payment data to certain doctors, key opinion leaders, or organizations for amounts less than $1,000, even though, since the passage of the Physician Payment Sunshine Act, 42 C.F.R. § 403.904, all such information (including for amounts less than $1,000) is publicly available to Plaintiff. During the meet and confer, the Teva Defendants also, without prompting from Plaintiff, offered to produce e-mail from 10 custodians, and have provided Plaintiff the names and titles of those custodians. The Teva Defendants offered to collect, review, and produce relevant e-mails from these individuals as a supplement to the extensive targeted collections the Teva Defendants have already produced and will continue to produce. These custodians represent the Teva Defendants' employees who had supervision roles over the sales and marketing, were involved in the compliance function regarding the sales and marketing, or were involved in the creation or

dissemination of medical information regarding the Teva Defendants' relevant opioid medicines. Plaintiff has not responded to this proposal.

Plaintiff nonetheless tells the Court: "To the extent the parties can continue to narrow any issues prior to the next scheduled hearing, the State is certainly willing to do so and will always have such discussions." Motion to Compel at 3. Plaintiff's actions speak louder. Instead of working with the Teva Defendants in fostering "just, speedy and inexpensive" discovery, 12 O.S. § 3225, Plaintiff has demanded that the Teva Defendants capitulate and agree to an outlandish scope of discovery – not remotely grounded in the concepts of relevance or proportionality.

II. ARGUMENT

As noted above, Oklahoma's Discovery Code is designed "to provide the just, speedy and inexpensive determination of every action." 12 O.S. § 3225. Discovery can be sought if it "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 and defense of any other party." 12 O.S. § 3226(B)(1). Limitations on discovery sought can occur when the burden or expense of the proposed discovery outweighs its likely benefit, "considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." 12 O.S. § 3226(B)(2)(c)(3). "Fishing expeditions are not allowed upon the suggestion that something may or might be discovered." *Nitzel v. Jackson*, 879 P.2d 1222, 1223 (Okla. 1994) (internal quotations omitted).

To this end, the Oklahoma Supreme Court has admonished that "[t]he requirement of [12 O.S. §3226] that the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Quinn v. City of Tulsa*, 777 P.2d 1331, 1342 (Okla. 1989). Because discovery is limited

by statute to matters "involved in the pending action," the court "should confine itself to matters involved in the pleadings." *Hesselbine v. Von Wedel*, 44 F.R.D. 431, 434 (W.D. Okla. 1968).

A. Plaintiff's Proposed Scope Of Discovery Seeks Information Irrelevant To The Claims Against the Teva Defendants

1. Plaintiff's Request For Discovery Dating Back To May 1996 Seeks Irrelevant Information And Ignores The Statutes of Limitations

Plaintiff asserts that the Court should essentially ignore the pleadings formulating the matter's claims and defenses and the pertinent statutes of limitations in assessing the scope of discovery. Instead, Plaintiff contends that extensive temporal discovery is warranted because "***Purdue Defendants*** started the sweeping false marketing campaign in May of 1996 when it released OxyContin." Motion to Compel at 8 (emphasis added). Plaintiff then alleges, without any detail, that the Teva Defendants "followed suit," and, thus, Plaintiff has defined the Relevant Time Period for its Requests as May 1, 1996 to the present for all Defendants. *Id.* Plaintiff lumps all of the Defendants together without any recognition that each engaged in different marketing activities for different opioid medicines indicated for different uses by the FDA in a broad class of pain medications. Plaintiff flatly refuses to acknowledge that Defendants' respective opioid medicines are not the same, nor is Defendants' respective conduct. As a result, Plaintiff's one-size-fits-all discovery requests seek wholly irrelevant material from the Teva Defendants.

As Plaintiff admits, an important issue for consideration as to the time period requested for discovery is "whether the defined time period relates to the claims and defenses at issue." *Id.*; *see* 12 O.S. § 3226(B)(1). And, "the requirement that material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .'" *Quinn*, 777 P.2d at 1342 (citations omitted). Plaintiff has failed

to explain how discovery from the Teva Defendants dating back decades is relevant to the matter's claims and defenses arising from the pleadings.

To start, the longest statute of limitations potentially applicable to Plaintiff's claims is the ten years limitations period for the Oklahoma Medicaid False Claims Act Count – which, in any event, only potentially applies to the 245 prescriptions Oklahoma reimbursed between 2007 and 2017.[2] The other counts remaining[3] in the Petition are subject to either a five or two years statute of limitations.

- Oklahoma Medicaid Program Integrity Act, 56 O.S. §§1001-1008 – "Prosecutions for . . . Medicaid fraud pursuant to Section 1005 of Title 56 of the Oklahoma Statutes, shall be commenced within five (5) years after the discovery of the crime." 22 O.S. § 152(A).
- Public Nuisance, 50 O.S. § 2 – The statute of limitations applicable to nuisance claims in Oklahoma is two (2) years. *N.C. Corff P'ship, Ltd. v. OXY USA, Inc.*, 929 P.2d 288, 293 (Okla. Ct. App. 1996).
- Fraud – The statute of limitations applicable to Fraud claims in Oklahoma is two (2) years. 12 O.S. §95.
- Unjust Enrichment – The statute of limitations applicable to Unjust Enrichment claims in Oklahoma is two (2) years. *Id.*

The Petition spans 32 pages and 134 paragraphs, only five of which (including two paragraphs in the "Parties" section) mention either Teva USA or Cephalon by name. And, the only allegedly false or misleading statements that Plaintiff attempts to even remotely attribute to

---

[2] A civil action brought under the Oklahoma Medicaid False Claims Act by the Attorney General under Section 5053.2 may not be commenced:

1. More than **six (6) years** after the date on which the violation of the Oklahoma Medicaid False Claims Act is committed; or

2. More than **three (3) years** after the date when facts material to the right of action are known or reasonably should have been known by the official of the State of Oklahoma charged with responsibility to act in the circumstances, but in no event more than **ten (10) years** after the date on which the violation is committed, whichever occurs last.
63 O.S. § 5053.6(B) (emphasis added).

[3] The Court previously dismissed Plaintiff's cause of action under the Oklahoma Consumer Protection Act, 15 O.S. § 751-65.

the Teva Defendants occurred in a third-party publication from 2007 – ***eleven years after*** the start of Plaintiff's requested Relevant Time Period for the Teva Defendants. *See* Petition ¶ 64. Along with not providing any allegations about the Teva Defendant's conduct before 2007, Plaintiff has only provided data related to the 245 prescriptions Oklahoma Medicaid reimbursed for dating back to 2007. *Id.* ¶ 37 & Ex. 3. Furthermore, supposedly in alignment with the matter's claims and defenses, Plaintiff has objected and refused to provide documents, data, or information from prior to 2007. Since the earliest date Plaintiff has attributed to any Teva Defendant action is 2007, the Teva Defendants have proposed that the Relevant Time Period for discovery in the matter be 2006 to the filing of the Petition – ***a full year earlier than the time period for which Plaintiff itself is willing to collect, review, and produce documents***.

Plaintiff illogically contends that "[c]ertain Defendants may not have joined the conspiracy and started false marketing themselves until after Purdue. Thus, such Defendants are not prejudiced by the definition of the Relevant Time Period, as they should have no responsive information for those dates that precede their involvement." Motion to Compel at 8. Such statements underscore the breadth of Plaintiff's Requests, which are not confined to "involvement" in a conspiracy and false marketing with Purdue. For example, Plaintiff has requested that the Teva Defendants provide "[a]ll branded advertisement and/or marketing materials published by [the Teva Defendants] concerning opioids, including, without limitation all videos, pamphlets, brochures, presentations, treatment guidelines, and any drafts of such materials" going back to May 1996, irrespective as to whether or when an affiliation existed between them and Purdue. *Id.* Ex. C at 17.

Plaintiff has not and cannot demonstrate that the broad temporal discovery it seeks is relevant to the issues in this case. Plaintiff has provided no valid showing as to how decades old

material, falling more than 10 years outside of any alleged conduct or claim at issue, has meaningful relevance to the Teva Defendant's actual conduct 2007 and forward. Thus, Plaintiff's Motion to Compel any material from the Teva Defendants from before 2006 should be denied.

2. Plaintiff Seeks Irrelevant Information Through Its Request For Discovery Specific To States Other Than Oklahoma

With regard to geographic scope, Plaintiff asserts that it has carte blanche to obtain nationwide discovery from the Teva Defendants. In doing so, Plaintiff contends it is justified since "Defendants have not articulated how their fraudulent marketing campaigns, sales strategies, and use of purportedly unbiased KOLs and Front Groups differed between Oklahoma and any other geographic region. . . ." *Id.* at 6. Plaintiff has even gone so far as to request that the Teva Defendants produce: "All discovery responses, investigative demand responses, deposition transcripts, witness statements, hearing transcripts, expert reports, trial exhibits and trial transcripts from prior litigation related to the promotion, marketing, distributions, and/or prescription of opioids . . . without limitation" from the entire United States. *Id.* Ex. C at 13. Yet, the scope of discovery is necessarily limited to the subject matter, claims, and defenses of the matter. 12 O.S. § 3226(B)(1). These expansive requests with no boundaries – other than the 50 States and territories – seek admittedly irrelevant material and constitute improper fishing expeditions. *Nitzel*, 879 P.2d at 1223 ("Fishing expeditions are not allowed upon the suggestion that something may or might be discovered.") (internal quotations omitted).

Plaintiff has not pled a single fact regarding any conduct outside of Oklahoma that had any effect in Oklahoma. Plaintiff has not identified a single false statement or omission that the Teva Defendants either made, either in or out of Oklahoma, to Plaintiff or, specifically, to any Oklahoma physician who wrote one of the 245 Actiq or Fentora prescriptions for which Plaintiff paid from 2007 to June 2017. Nor has Plaintiff has identified a single payment by the Teva Defendants to

any doctor, key opinion leader, or organization which resulted in an identified false statement or omission be disseminated – outside or inside of Oklahoma. Moreover, Plaintiff has not identified a single person in Oklahoma affected by any conduct committed by the Teva Defendants outside of Oklahoma. Plaintiff's conclusory allegations that at unidentified times and unidentified places, unidentified statements or omissions by the Teva Defendants about opioids ***may have*** reached unidentified Oklahoma prescribing doctors (or unidentified doctors in other states who ***may have*** moved to Oklahoma) does not warrant requiring the Teva Defendants to collect, review, and produce documents regarding other states. Plaintiff's fishing expedition, which extends well-beyond that which is pled in the Petition, should not be allowed. *Nitzel*, 879 P.2d at 1223; (internal quotations omitted); *U.S. ex rel. Regan v. Medtronic, Inc.*, 2000 WL 1478476 (D. Kan. July 13, 2000) (denying nationwide discovery because "when determining the scope of discovery, the natural focus is on the geographical boundaries referenced within the complaint").

The Teva Defendants propose to limit their productions to information pertaining to the subject matter, claims, and defenses of the matter, which geographically is limited to Oklahoma. The Teva Defendants have also agreed to produce documents regarding practices, policies, procedures that which on their face do not solely relate to state other than Oklahoma. Under this reasonable proposal, Plaintiff would receive documents that illustrated the purported "multi-faced, nationwide strategy" or the Teva Defendant's conduct that purportedly "blanketed the nation." Motion to Compel at 6.

In fact, in its haste to file the unwarranted Motion to Compel, Plaintiff failed to take the time to fully grasp the irrelevant and unnecessary geographic scope of the documents it seeks to compel the Teva Defendants to produce. For example, during the March 14, 2018 meet and confer, when the Teva Defendants objected to producing documents solely about other states, they used

call notes regarding only other states as an example of the type of information that it should not be compelled to produce. Then, Plaintiff informed the Teva Defendants – through its Motion to Compel – that it recognized that this information regarding other states is unnecessary. *Id.* at 7 fn.3 ("Through the State's meet and confer efforts, the State learned of a category of documents which Defendants intend to withhold based on this [geographic scope] objection referred to as "call notes." The State currently does not currently object to Defendants limiting their production of call notes in this case to Oklahoma."). Similarly, Plaintiff explained, again for the first time in the Motion to Compel, that "the State is amenable to Defendants carving out obviously irrelevant batches of documents [regarding other state-specific information]. . . ." *Id.* at 10. Notwithstanding that this is precisely the content that should be discussed in fruitful meet and confers, these production exclusions are exactly what the Teva Defendants informed Plaintiff would lead to proper discovery. Plaintiff's tactic of disagreeing just to disagree does not foster just, speedy and inexpensive discovery.

3. Plaintiff Seeks Irrelevant Information Through Its Request For Information Related To Other Litigation

Plaintiff admits that it seeks irrelevant material through its request that the Teva Defendants produce: "All discovery responses, investigative demand responses, deposition transcripts, witness statements, hearing transcripts, expert reports, trial exhibits and trial transcripts from prior litigation related to the promotion, marketing, distributions, and/or prescription of opioids . . . without limitation." *Id.* Ex. C at 13. In addition to the irrelevant temporal and geographic scope, the Court should deny Plaintiff's improper request that the Teva Defendants produce documents solely because they derive from other litigation, for four additional reasons.

First, Plaintiff admits that much, if not all, of the documents, data, and information, relevant produced in other litigation is irrelevant to this case. *Id.* at 10 ("Defendants should be ordered to

produce all of the documents and information already produced in other litigation, and the State will not complain that ***those productions include obviously irrelevant material***.") (emphasis added). But Plaintiff wants this Court to compel its production anyway. Requiring the production of such "obviously irrelevant material," however, is neither just, speedy, nor inexpensive.

Second, documents from other litigations are presumptively irrelevant because there is no genuine method for determining which documents from a numberless amount of litigations are actually relevant to this matter. *See Wollam v. Wright Medical Group, Inc.*, 2011 WL 1899774, at *2 (D.Colo.) (2011) ("Direct requests allow a court to consider the relevance of the information sought to the specific claims and defenses in the pending case.").

Third, courts routinely deny broad, nonspecific requests for documents from other litigations where parties lazily attempt to "clone discovery" which would result in the mass production of irrelevant information. *See Midwest Gas Servs., Inc. v. Indiana Gas Co.*, No. IP 99-690-C-D/F, 2000 WL 760700, at *1 (S.D. Ind. Mar. 7, 2000) (denying motion to compel where discovery sought was for all documents from other litigation and investigations because "counsel must do their own work and request the information they seek directly"); *King Cty. v. Merrill Lynch & Co.*, No. C10-1156-RSM, 2011 WL 3438491, at *3 (W.D. Wash. Aug. 5, 2011) ("Although some portion of documents encompassed by Plaintiffs' request may be relevant, the Court has no method of determining which of those documents are relevant, and which are not. It may very well be that each and every document produced in the government investigations is relevant to Plaintiff's claims. However, Plaintiff must make proper discovery requests, identifying the specific categories of documents sought, in order to obtain them – and each category must be relevant to its claims and defenses.").

Fourth and finally, many, if not all, litigations from which Plaintiff seeks production contain confidential and sensitive documents and information that are shielded by protective orders issued by the respective courts. Requiring the Teva Defendants to consult with each respective court and party involved in unnamed litigations, including third-parties, would be unduly burdensome. As an initial matter, this would require the parties here to become engulfed in additional nationwide motion practice regarding the modification or revocation of protective orders in an innumerate number of litigations. *See Public Citizen v. Liggett Group*, 858 F.2d 775, 780–82 (1st Cir. 1988) (holding that the issuing court necessarily has the power to enforce a protective order it issued at any point it is in effect, even after entry of a final judgment, and courts enjoy the inherent power to modify any discovery related orders post-judgment); *see also United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (noting that as long as a protective order remains in effect, the court that entered it retains jurisdiction to modify it, even if the underlying suit has been dismissed).[4]

Additionally, as a matter of comity, this Court should respect the protective orders issued in other courts around the nation and not undertake the onerous task of attempting to modify or revoke other courts' orders. *See, e.g., Inventio AG v. ThyssenKrupp Elevator Americas Corp.*, 662 F. Supp. 2d 375, 383 (D. Del. 2009) ("this Court is without authority to alter the Protective Order entered by another court by ordering production of any documents within the scope of the Protective Order"); *Dushkin Pub. Grp. v. Kinko's Serv. Corp.*, 136 F.R.D. 334, 335 (D.D.C. 1991) (declining, as a matter of comity and respect for another court, to modify a protective order issued

[4] Plaintiff can unilaterally request courts modify or revoke protective orders from the Teva Defendant's other litigations. *See Puerto Rico Aqueduct and Sewer Auth. v. Clow Corp.*, 111 F.R.D. 65, 67–68 (D.P.R. 1986) (concluding that the proper way for a third-party to challenge a protective order is to move to intervene in the action in which it was issued, and principles of comity require a subsequent court to await a ruling by the court that issued the order).

by the other court and instead required the party seeking the modification to first go to the issuing court).). Moreover, Plaintiff's requests necessarily include information disclosed by other parties under the terms and obligations of protective orders, which deserves the protections promised and expected during production. *See, e.g., Barrella v. Vill. of Freeport*, No. 12-CV-0348 ADS WDW, 2012 WL 6103222, at *3 (E.D.N.Y. Dec. 8, 2012) (quashing subpoena where party "is attempting to gain information and materials not from the source of the information" from another litigation). In fact, these third-parties may take measures, for example, filing motions to quash, which, too, could create overwhelming burdens for the parties here.

Thus, Plaintiff's plea to the Court that the Teva Defendants should be compelled to produce documents from other litigations because Plaintiff believes that potentially some "documents produced in other litigation have at least some relevance to this case," Motion to Compel at 10, is improper and should be denied.

B. Plaintiff's Proposed Scope of Discovery Is Not Proportionate To The Needs Of The Case

Even if Plaintiff could show that decades old, dated materials plucked from around the country could have some marginal relevance to its Oklahoma-specific claims against the Teva Defendants (which it cannot), the Court should not adopt Plaintiff's expansive discovery because Plaintiff cannot demonstrate that compelling the Teva Defendants to expend the considerable resources to collect, review, and produce such materials is proportionate to the needs of the case. *See* 12 O.S. § 3226(B)(2)(c)(3). Proportionality weighs whether the burden or expense of the proposed discovery outweighs its likely benefit, "considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *Id.* Courts are given the power to balance the needs for discovery with the burden or expense of production "to encourage judges to be more

aggressive in identifying and discouraging discovery overuse" and "to enable the court to keep tighter rein on the extent of discovery." *Koch v. Koch Ind., Inc.*, 203 F.3d 1202, 1238 (10th Cir. 2000) (internal citations and quotations omitted).

Here, as noted above, Plaintiff has acknowledged that, for the entire State of Oklahoma, it has reimbursed ***only 245 Actiq or Fentora prescriptions*** over the nine-and-one-half years prior to filing the Petition, including only a ***single*** Actiq prescription in 2008 and a ***single*** Fentora prescription (for $143.98) in the first half of 2017. Petition ¶ 37 & Ex. 3. Yet, despite this miniscule amount, the Teva Defendants have agreed to produce to Plaintiff all Oklahoma-specific and nationwide discovery that are otherwise responsive to Plaintiff's claims. This includes, among other things:

- payment data for Oklahoma doctors, key opinion leaders, and organizations receiving a payment of $1,000 or more;
- e-mail data from 10 Teva employees who had supervisory roles over sales and marketing, were involved in a compliance function, or were involved in the creation or dissemination of medical information;
- data concerning which Oklahoma doctors attended which speaker programs and when;
- who presented at speaker programs in Oklahoma and when;
- marketing materials disseminated across the country; and
- documents reflected sales strategies that were implemented across the country.

Yet, this discovery, even going back 10 years, is not enough for Plaintiff. Without justification or credible explanation, Plaintiff seeks even more. And Plaintiff could not have any justification or credible explanation for more discovery, given the very small number of prescriptions at issue in the relevant time period in Oklahoma. Plaintiff needs only Oklahoma-

specific and nationwide discovery, dating back to 10 years, which the Teva Defendants have agreed to produce. Anything more is obvious "discovery overuse," and this Court should be "aggressive" in "keep[ing a] tighter rein" to preclude that, particularly where the Teva Defendants are willing to produce the core of what Plaintiff seeks. *Koch Ind., Inc.*, 203 F.3d at 1238; *Yu Cheng Chen v. Cincinnati Inc.*, No. CV-06-3057 FB VVP, 2007 WL 1191342, at *2 (E.D.N.Y. Apr. 20, 2007) (denying motion to compel other litigation deposition transcripts because the burden of "retrieval, copying, and production" more than outweighed what could be accomplished through more targeted requests and productions).

The Teva Defendants have reasonably endeavored to strike a balance of proportional discovery. Just as the Oklahoma Rules of Civil Procedure intend, the Teva Defendants desire a "just, speedy and inexpensive determination" of this action. 12 O.S. §3225. Plaintiff, instead, insists on unduly burdensome and expensive discovery from the Teva Defendants. Plaintiff's requests for decades' worth of information irrespective of geographic origin or court ordered protections is not proportional, overly broad and unduly burdensome.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Compel should be denied in its entirety.

Dated: March 22, 2018.

Robert G. McCampbell, OBA No. 10390
Nicholas V. Merkley, OBA No. 20284
GABLEGOTWALS
One Leadership Square, 15th Fl.
211 North Robinson
Oklahoma City, OK 73102-7255
T: +1.405.235.5500
E-mail: RMcCampbell@Gablelaw.com

OF COUNSEL:

Steven A. Reed
Harvey Bartle IV
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
T: +1.215.963.5000
E-mail: steven.reed@morganlewis.com
E-mail: harvey.bartle@morganlewis.com

Brian M. Ercole
MORGAN, LEWIS & BOCKIUS LLP
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131
T: +1.305.415.3416
E-mail: brian.ercole@morganlewis.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.*