**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. AND CEPHALON INC.'S AND NON-PARTY TIM MULLEN'S OBJECTION AND MOTION TO QUASH DEPOSITION SUBPOENA DUCES TECUM**

Pursuant to Okla. Stat. tit. 12, § 2004.1(C), Defendants Teva Pharmaceuticals USA, Inc. and Cephalon, Inc. (collectively "the Teva Defendants"), and non-party Tim Mullen, by and through his undersigned counsel, object to and move this Court for an Order quashing the Deposition Subpoena Duces Tecum ("Subpoena," attached hereto as Exhibit A) issued to Tim

Mullen by counsel for the Plaintiff the State of Oklahoma ("Plaintiff" or "the State"). In support of this Objection and Motion, the Teva Defendants and Mr. Mullen state as follows:

## I. INTRODUCTION

Plaintiff filed suit against 13 opioid manufacturers for allegedly causing a "devastating opioid epidemic in Oklahoma." Plaintiff's Petition centers around the Defendants' alleged false and deceptive marketing and promotion of opioid medicines. As it specifically relates to the Teva Defendants, the Petition claims that "Defendant Cephalon, through its sales force and other marketing, misrepresented Actiq and Fentora as being appropriate for non-cancer pain and non-opioid-tolerant individuals, despite their labels' contrary warnings." Petition ¶ 53.

Tim Mullen is a non-party former employee of Defendant Cephalon, Inc. ("Cephalon"). On May 23, 2018, Mr. Mullen was served at his home in Tulsa, Oklahoma with a deposition subpoena and document request by the Plaintiff.[1] The Subpoena is addressed to Mr. Mullen personally and lists his home address. The Subpoena commands him to appear in Tulsa, Oklahoma, on July 18, 2018, to testify as a witness in a deposition in the above-captioned case. In addition, the Subpoena specifically instructs Mr. Mullen to "produce true and correct copies of the documents, electronically stored information, or objects in ***your possession, custody or control*** that are identified in Exhibit 'A.'" Exhibit A lists the following category of documents, which Mr. Mullen is instructed to produce on or before June 25, 2018:

> All documents and communications in ***your possession, custody, or control*** related to your employment at Teva/Cephalon, including but not limited to all training materials, sales call notes, marketing materials, and communications to or from Teva/Cephalon during and since your employment.

[1] On May 23, 2018, the State notified Defendants that it was serving deposition subpoenas on 41 individual witnesses, nine of whom are current or former Cephalon or Teva employees.

The Subpoena's document request is objectionable on three separate grounds. First, the Subpoena improperly seeks to collect documents from Mr. Mullen that, to the extent he has any such documents, may be the property of the Teva Defendants. Second, the Subpoena places an unfair and unworkable burden and expense on a non-party when the documents requested can be collected by a party to the action. Third, the document request as drafted is wildly overbroad. For these reasons, the Court should quash the Subpoena and order that Mr. Mullen need not produce any documents.[2]

## II. ARGUMENTS AND AUTHORITIES[3]

Pursuant to Okla. Stat. tit. 12, § 2004.1(C)(3)(1), on timely motion, this Court has the authority to quash a subpoena if it "subjects a person to undue burden," or it "requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title." Information that is not relevant to the claims or defenses of any party is not permissible discovery. *See id.*, § 3226.

The Subpoena should be quashed for three reasons. First, the Subpoena issued to Mr. Mullen improperly seeks documents belonging to the Teva Defendants. Mr. Mullen is a former Cephalon sales representative and a non-party to this case. The subpoena was served on Mr. Mullen in his personal capacity, at his home, and it seeks documents in his "possession, custody or control." Yet the Subpoena seeks all documents related to Mr. Mullen's employment with Teva/Cephalon – which may include documents, to the extent Mr. Mullen has any, that belong to the Teva Defendants and not Mr. Mullen. A non-party employee cannot be ordered to produce documents that belong to his or her employer, a party in the action. *See Bostian v. Suhor*

[2] The Teva Defendants and Mr. Mullen are not challenging the Subpoena for Mr. Mullen's oral deposition.

[3] Courts in Oklahoma look to federal case law when construing similar language in the Oklahoma discovery rules. *See Crest Infiniti, II, LP v. Swinton*, 174 P.3d 996, 999 (Okla. 2007).

*Industries, Inc.*, No. 07-151-GFK-FHM, 2007 WL 3005177, at *2 (N.D. Okla. Oct. 12, 2007) (rejecting plaintiff's argument that a non-party employee "should be required to produce requested documents because under Rule 45, regardless of ownership, he has 'control' of the documents"). The same rationale would extend to former non-party employees. Indeed, on this basis alone, the Court should quash the Subpoena's request for documents. *See id.*

Second, the Subpoena is objectionable for the additional and related reason that it would place an unreasonable burden on Mr. Mullen to identify, locate and produce documents that can be (and should be) requested from a party. *See Quinn v. City of Tulsa*, 777 P.2d 1331, 1342 (Okla. 1989) (affirming denial of discovery from a non-party that could have been obtained from a party). Mr. Mullen should not be tasked with having to search for and produce documents that would be redundant of materials requested from (or could be requested from) and produced by the Teva Defendants.

Finally, Mr. Mullen was served with a document request that, as written, is drastically overbroad and burdensome in scope. The Subpoena's document request seeks ***all*** documents and communications related to Mr. Mullen's employment at Teva/Cephalon, "including but not limited to all training materials, sales call notes, and communications to or from Teva/Cephalon during and since your employment." As written, the request encompasses literally everything related to Mr. Mullen's employment with Cephalon, even information that has nothing to do with opioid medicines or any other issues relevant to the action. The request contains no reasonable limitation based on time or subject-matter. The request would likely sweep in, for example, Mr.

Mullen's personnel file, his employee tax documents, and any training materials and communications related to non-opioid products. Such information is clearly not relevant and therefore beyond the scope of permissible discovery.

## III. CONCLUSION

The Subpoena for documents issued to Mr. Mullen should be quashed because it was served on a non-party seeking the Teva Defendants' documents, it places an undue burden on a non-party, and it is impermissibly overbroad as drafted.

Dated: June 6, 2018

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*Attorneys for Non-party Ashley Rice Feliciano*

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

## CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing was emailed this 6th day of June 2018, to:

| | | |
|---|---|---|
| ***Attorneys for Plaintiff*** | Mike Hunter, Attorney General<br>Abby Dillsaver, General Counsel<br>Ethan Shaner, Dep. Gen. Counsel<br>**ATTORNEY GENERAL'S OFFICE**<br>313 N.E. 21st Street<br>Oklahoma City, OK 73105 | Bradley E. Beckworth<br>Jeffrey J. Angelovich<br>Lloyd N. Duck<br>Lisa Baldwin<br>**NIX, PATTERSON & ROACH**<br>512 N. Broadway Ave., Suite 200<br>Oklahoma City, OK 73102 |
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| | Glenn Coffee<br>**GLENN COFFEE & ASSOCIATES**<br>915 N. Robinson Ave.<br>Oklahoma City, OK 73102 | |
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| | | |
|---|---|---|
| ***Attorneys for Johnson & Johnson, Janssen Pharmaceutica, Inc., N/K/A Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc. N/K/A Janssen Pharmaceuticals, Inc.*** | John Sparks<br>Ben Odom<br>**ODOM SPARKS & JONES**<br>2500 McGee Drive, Suite 140<br>Norman, OK 73072 | Charles C. Lifland<br>Jennifer D. Cardelus<br>**O'MELVENY & MEYERS**<br>400 S. Hope Street, 18th Floor<br>Los Angeles, CA 90071 |
| | Stephen D. Brody<br>**O'MELVENY & MEYERS**<br>1625 Eye Street NW<br>Washington, DC 20006 | |

Nicholas ("Nick") V. Merkley

**IN THE DISTRICT COURT OF CLEVELAND COUNTY**
**STATE OF OKLAHOMA**

| | | |
|---|---|---|
| STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, | § | |
| Plaintiff, | § | |
| vs. | § | |
| (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., | § | Case No. CJ-2017-816<br>JURY TRIAL DEMANDED |
| Defendants. | § | |

**DEPOSITION SUBPOENA DUCES TECUM**

STATE OF OKLAHOMA )
) ss.
COUNTY OF CLEVELAND )

TO: **TIM MULLEN**
7303 E 65th St
Tulsa, OK 74133-7524

EXHIBIT
A

GREETINGS:

YOU ARE HEREBY COMMANDED on behalf of Plaintiff in the above-captioned case, to produce true and correct copies of the documents, electronically stored information, or objects in your possession, custody or control that are identified in Exhibit "A" attached hereto. You may comply by delivering the requested materials to Whitten Burrage, 512 N Broadway Ave Suite 300, Oklahoma City, OK 73102, at 1:00 p.m. on or before June 25, 2018. In the alternative, you may comply by delivering the requested materials to Professional Reporters – Tulsa, c/o Whitten Burrage, 20 E. 5th St. Suite 720, Tulsa, OK 74103 at 1:00 p.m. on June 25, 2018.

In order to allow objections to the production of documents and things to be filed, you should not produce them until the date specified in this subpoena, and if an objection is filed, until the court rules on the objection.

YOU ARE ALSO HEREBY COMMANDED to appear at Regus - Memorial Place, 7633 E. 63rd Place Suite 300, Tulsa, Oklahoma, 74133, on July 18, 2018, at 1 p.m., to testify as a witness in a deposition noticed by the State of Oklahoma in the above-captioned case. The deposition shall be recorded by audio/visual means.

This subpoena is authorized pursuant to 12 O.S. § 2004.1 and all parties to this case are being given notice of the issuance of this subpoena. The provisions of 12 O.S. § 2004.1(C), relating to your protection as a person subject to a subpoena, and 12 O.S. § 2004.1(D) & (E), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Please direct inquiries regarding this subpoena to Brooke Hamilton: tel: (405) 516-7800; email: bhamilton@whittenburragelaw.com.

HEREOF FAIL NOT, UNDER PENALTY OF LAW.

Issued this 21st day of May, 2018.

Michael Burrage

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**ATTORNEYS FOR PLAINTIFF**

Oklahoma Session Law, 2010 O.S.L. 50, 2004.1 (c), (d), (e)

SECTION 2. AMENDATORY 12 O.S. 2001, Section 2004.1, as last amended by Section 5, Chapter 12, O.S.L. 2007 (12 O.S. Supp. 2009, Section 2004.1), is amended to read as follows:

Section 2004.1.

C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney, or both, in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

2. a. A person commanded to produce and permit inspection, copying, testing or sampling of designated books, papers, documents, electronically stored information or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

b. Subject to paragraph 2 of subsection D of this section, a person commanded to produce and permit inspection, copying, testing or sampling or any party may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve written objection to inspection, copying, testing or sampling of any or all of the designated materials or of the premises, or to producing electronically stored information in the form or forms requested. An objection that all or a portion of the requested material will or should be withheld on a claim that it is privileged or subject to protection as trial preparation materials shall be made within this time period and in accordance with subsection D of this section. If the objection is made by the witness, the witness shall serve the objection on all parties; if objection is made by a party, the party shall serve the objection on the witness and all other parties. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. For failure to object in a timely fashion, the court may assess reasonable costs and attorney fees or take any other action it deems proper; however, a privilege or the protection for trial preparation materials shall not be waived solely for a failure to timely object under this section. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

3. a. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(1) fails to allow reasonable time for compliance,

(2) requires a person to travel to a place beyond the limits allowed under paragraph 3 of subsection A of this section,

(3) requires disclosure of privileged or other protected matter and no exception or waiver applies,

(4) subjects a person to undue burden, or

(5) requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title.

b. If a subpoena:

(1) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(2) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena. However, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. DUTIES IN RESPONDING TO SUBPOENA.

1. a. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

b. If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena shall produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

c. A person responding to a subpoena is not required to produce the same electronically stored information in more than one form.

d. A person responding to a subpoena is not required to provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. If such showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subparagraph c of

paragraph 2 of subsection B of Section 3226 of this title. The court may specify conditions for the discovery.

2. a. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

b. If information is produced in response to a subpoena that is subject to a claim or privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for such claim. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies the party has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, such shall take reasonable steps to retrieve the information. The person who produced the information shall preserve the information until the claim is resolved. This mechanism is procedural only and does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived.

E. CONTEMPT.

Failure by any person without adequate excuse to obey a subpoena served upon him or her may be deemed a contempt of the court from which the subpoena issued.

## EXHIBIT "A"

## DEFINITIONS

1. "Teva/Cephalon" means Teva Pharmaceuticals USA, Inc. and Cephalon, Inc. and any and all predecessors, merged entities, subsidiaries and affiliates, whether individuals, corporations, LLC's or partnerships. The term "affiliate" shall include any entity owned in whole or in part by Teva/Cephalon or any entity which owns Teva/Cephalon in whole or in part. The term "Teva/Cephalon," where appropriate, shall also include entities and individuals, such as officers, directors, sales representatives, medical liaisons, etc., who are employed by Teva/Cephalon or who provide services on behalf of Teva/Cephalon.

2. "Communication" means the transmission, exchange, or transfer of information in any form between two or more persons, including by telephone, facsimile, telegraph, telex, text message, letter, email, mobile messaging application, or other medium.

3. "Document" includes, but is not limited to, any electronic, written, printed, handwritten, graphic matter of any kind, or other medium upon which intelligence or information can be recorded or retrieved.

## DOCUMENTS TO BE PRODUCED

1. All documents and communications in your possession, custody, or control related to your employment at Teva/Cephalon, including but not limited to all training materials, sales call notes, marketing materials, and communications to or from Teva/Cephalon during and since your employment.