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; (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 Judge Thad Balkman

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY
FILED
MAY 23 2018
In the office of the
Court Clerk MARILYN WILLIAMS

ORDERS OF SPECIAL DISCOVERY MASTER ON MAY 17, 2018 MOTION REQUESTS

On May 17, 2018, the above and entitled matter was heard before the undersigned on the parties' various motions, objections and requests for relief. The undersigned Special Discovery Master having reviewed the pleadings, heard oral arguments and being fully advised in the premises finds as follows:

1. **Non-Party, Stephen A. Ives' Objection and Motion to Quash Plaintiff's Subpoena And State's Response**

State seeks to compel by deposition notice the testimony of Stephen A. Ives to which Mr. Ives has moved to quash. The Purdue entities are all privately owned by the Sackler family. State contends Mr. Ives has worked for the Sackler family for years primarily as an accountant and investment advisor. They allege Mr. Ives to be an ... "individual the Sackler family uses to move, store, and invest its money....". State alleges Mr. Ives holds various executive positions at numerous Oklahoma-based entities owned by the Sackler family and manages the Sackler family financial investments. In his capacity, State argues Mr. Ives' testimony relevant to whether or not the Sackler family has financed or arranged to funnel money to various "front groups" in the Purdue pharmaceutical marketing program.

Mr. Ives in response claims accountant/client privilege stating that Mr. Ives is President of one company, Cheyenne Petroleum Co. and does "oversee" and review financial information of other entities on behalf of the Sackler family. Ives argues designated Purdue witnesses can testify to the Sackler financial structure with Purdue to include testimony this Court has now herein ordered discoverable relevant to the financing of "front groups" and designing the structue and putting in place the Purdue marketing campaign for marketed Purdue pharmaceutical products.

In 2009, the accountant/client privilege was created by Oklahoma statute (12 O.S. sec.2502.1). Prior to 2009, there was no accountant/client privilege under Oklahoma law. This privilege did not exist at common law, nor does it exist under Federal law. Because the statute is so new, there does not appear to be any case law construing it.

The statute allows a client (such as the Sacklers) to refuse disclosure and allows such client to prevent others from disclosing the contents of confidential communications with an accountant "because the communications were made in the rendition of accounting services to the client." 12 O.S. sec. 2502.1(B). "The privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice." Id. State's opposition asserts this accountant had a long-term professional and personal relationship with the Sacklers and it is suggested that certain information is sought (such as communications about opioids), which would arguably be outside the scope of rendition of accounting services or advice and thus, outside the scope of protection of the accountant/client privilege.

In a footnote to State's Opposition, it is noted Ives admitted the privilege belongs to the Sacklers (as his client) and not to him. This insinuates Ives' claim of privilege here is improper. However, the statute allows the accountant to claim the privilege on behalf of the client at 12 O.S. § 2502.1(C) ("The person who was the accountant at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.").

There is no accountant/client privilege "[w]hen the services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or should have known was a crime including, but not limited to, fraud." 12 O.S. sec. 2502.1(D)(1). At this point in the litigation, there is no prima facie showing that this accountant's accounting services were sought for the purposes of committing a crime or designing and/or funding a fraudulent marketing program. When, and if there is, the communications will lose their confidential character and discovery through Mr. Ives will become possible (Just as in *Keller v. State*, 651 P.2d 1339 (1982)).

The *Unit Rig* case cited in State's Opposition provides generally "[o]ur discovery procedures are broad and, with certain limitations it is not necessary that questions be limited to those which would be admissible in court. Evidence which might lead to the disclosure of admissible evidence is discoverable." *Unit Rig & Equipment Co. v. East*, 1973 OK 100, ¶4, 514 P.2d 396 (citations omitted). That case arose from a trial court's denial of a motion to quash a subpoena and notice to take the deposition of a medical expert/examining witness. The privilege at issue there was attorney work product privilege. The defendants there also questioned the plaintiff's right to discover information about the expert's other patients examined on behalf of defendants' counsel. The Court determined such questions of the expert were permissible as long as they do not violate the doctor-patient relationship with other patients. "For example, as long as the questions are limited to numbers of patients examined for defendants' attorneys and fees received therefore, they are permissible." Id. At ¶5. The *Unit Rig* case demonstrates that while the scope of discovery by deposition is broad in permitting the discovery of evidence which might lead to the disclosure of admissible evidence, it is not without limitation, particularly as to matters protected by privilege. State asserts it does not seek discovery of privileged information and objections may be raised contemporaneously during questioning at the deposition (just as was authorized in *Unit Rig*). While this may be true, I **find** this deposition notice to be premature. Ives' Motion To Quash is **sustained**.

2. **State's Fourth Motion to Compel and Purdues' Response (Interrogatory No. 2)**(State's Motion To Compel **Sustained** Per Transcript From The Bench);

3. **Purdue's Motion to Quash and Motion for Protective Order In Response to State's §3230(C)(5) Deposition Notice and State's Response;**

State served notice for deposition of a designated corporate witness to testify concerning the past and present ownership structure, Purdues' finances and the distribution of revenue and/or profits to Purdue owners. Purdue Pharma L.P., Purdue Pharma Inc. and The Purdue Frederick Co. filed requests to quash this notice and for a protective order in response to State's notice. Purdue agreed to produce a witness and/or information in response to the rest of the topics requested in the notice seeking a protective order to allow for adequate time to collect information and identify a designated corporate witness and to limit the scope.

The burden is upon Purdue to quash or limit by protective order the scope of this notice. In its motion to quash and request for protective order, Purdue offers to provide pro forma financial information for the past five years and limit production of ownership structure to the past five years. Then, if necessary, designate a corporate witness to testify regarding this information.

State's notice focuses on specific claims that defendant created, funded and promoted fraudulent marketing schemes. This Court has seen evidence and heard argument resulting in a previous finding that discovery in this context is relevant or potentially relevant directed at State allegations of violations of Oklahoma's Medicaid False Claims Act, Medicaid Program Integrity Act, common-law fraud, unjust enrichment and public nuisance, back to and including 1996.

State argues, 1. It is entitled to discover motive and incentive to market and sell pharmaceuticals the way they were promoted and sold; 2. It makes claims for relief asking for civil penalties; and 3. The financial information requested is necessary to promote potential settlement considerations in the future.

Purdue argues inquiry into ownership structure and shareholder distribution is not relevant to any claim or relief made by State. They further argue that financial health and financial status is a topic for expert testimony.

State is entitled to discovery relevant to marketing practices, company structure and who created the marketing programs, when and how they were funded, financial distributions to shareholders, shareholder and entity identities, profitability of any alleged misconduct, and methods designed to promote and market pharmaceutical products at issue. This discovery is not limited to preparation for a possible punitive damage stage. While financial health and financial status is a topic for expert testimony, this is not the focus of this discovery.

Purdue's motion to quash is **overruled** and a **protective order** is entered only to the extent that allows Purdue to first provide to State the financial information requested from and including 1996 forward and the ownership structure for Purdue entities from and including 1996 forward. It is **ordered** that this document production be provided to State no later than 4 pm on June 8, 2018.

Following that, Purdue shall designate a witness or witnesses to testify thereto with depositions to be completed no later than June 29th, 2018.

4. <u>Teva Defendants' Motion to Compel and State's Response</u>

Teva Defendants move to compel information related to, 1. Disclosure of State's damage computations, measures and types of damages for each count to include non-monetary relief; and, 2. Identification information for each employee who has factual knowledge and upon whom State will rely to testify to each State agency damage calculation for each claim for relief.

State has provided "initial disclosure" of each State agency and a number of named individuals for some State agencies designated to testify as fact witnesses. (Ex. B to Teva's Motion) This disclosure was provided pursuant to 12 O.S. Supp. 2017 §3226. This motion to compel asks this Court to compel complete disclosure of identification information for each fact witness State may use to support its claims and damage computation. State characterizes the disclosure made and shown in the relevant exhibits to be "initial disclosures". Section 3226(2) proscribes "Initial Disclosures" and discovery to be required: "...without awaiting a discovery request, shall provide to the other parties a computation of any category of damages claimed by the disclosing party, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." Pursuant to §3226 (2)(c), discovery under this paragraph is required within 60 days of the service "...unless a different time is set by stipulation or Court order, or unless a party objects that initial disclosures are not appropriate in the circumstances of the action and states the objection in a motion filed with the Court." It further states "A party shall make its initial disclosures based on the information then readily available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures." Therefore, discretion allows the Court to determine, based upon circumstances of the action, a different time to complete final disclosure of fact witnesses. I **find** this case to be unique and that while State has provided partial initial disclosures in compliance with the statutory requirement, it is in the best interest of fairness and compliance with the Scheduling Order entered, to set a final deadline for State and all Defendants to provide complete identification information for the remaining fact witnesses State and all Defendants may or will use to support each of their claims for relief, supporting damage information and defenses. State is currently required to disclose expert witnesses by August 17, 2018, with Defendants' expert

witness disclosure by September 14, 2018. Under the unique circumstances of this case, the undersigned extends the final fact witness disclosure deadline for both State and all Defendants, and **orders** disclosure of complete identification information for all fact witnesses that may or will be used to support any claim or defense not required to be an expert witness, on or before **4pm on July 6, 2018**. In doing so, this Court does not intend to delay current and ongoing fact witness disclosure and depositions. Therefore, Teva's motion to compel is **sustained** in part and **overruled** in part.

5. <u>State's Third Motion To Compel Discovery and Teva's Response</u>

This motion and response was announced resolved by meet and confer and was stricken.

Entered this 23rd day of May, 2018.

William C. Hetherington, Jr.
Special Discovery Master