IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	§	
Plaintiff,	§	
v.	§	CJ-2017-816
(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.	§	

THE STATE OF OKLAHOMA'S REPLY IN SUPPORT OF MOTION FOR SEPARATE TRIALS AND TO STAY DISCOVERY AND PROCEEDINGS AS TO PHASE 2

The most important thing to the State in this litigation is ending the opioid epidemic.

Consistent with that goal, the State filed a motion for separate trials so that discovery and all other litigation efforts would be channeled into what the State believes will bring a just, speedy, and efficient end to this crisis. Namely, this means trying the State's nuisance claim—along with its ability to obtain a judicially crafted abatement remedy—first. As such, should the Court so choose, the State would embrace a Phase 1 trial consisting solely of the State's nuisance claim and related remedies, with all other claims and remedies reserved for Phase 2. Indeed, this nuisance-only approach is likely the easiest bifurcation option. Anything else the Court includes or excludes in Phase 1 of this litigation is up to the Court's discretion. This scope decision is important because it will weigh heavily on the discovery decisions Judge Hetherington will make on August 31st.

Of fundamental importance, Defendants do not deny this Court's has discretion to divide this case into separate trials. Indeed, Defendants even suggest that bifurcation would be appropriate in this case. *See* Resp. at n.3 (hinting at Defendants' improper desire to divide this case into separate trials for each Defendant).

Put simply, there's nothing wrong with grouping the claims for trial in the manner the State has suggested. This Court is empowered—by its inherent powers and by an express rule—to divide a case along claim lines generally. Further, the specific claim lines the State has proposed are legally and factually distinct.

But to achieve the State's preeminent goal of bringing a swift end to this epidemic, the State reiterates that the crux of its request is simple: try the State's nuisance claim and its attendant abatement remedy first. If the Court would like to include other claims in Phase 1, the State has and will continue to propose ways for the Court to arrange this case

in the most efficient way possible. But if the Court decides that the most prudent way to bifurcate this case is to try nuisance, and nuisance only, in Phase 1, the State will agree to a Phase 1 trial of only the nuisance claim and related remedies, with all other claims and remedies reserved for Phase 2. The State's first priority is to save lives and bifurcation with nuisance first allows it to do just that.

ARGUMENT AND AUTHORITIES

All parties agree this Court has the power and discretion to bifurcate this case along lines that it believes will promote "convenience[,] . . . expedition and economy." 12 O.S. § 2018(D). Moreover, all parties seem to concede that bifurcation in some form is a good idea for managing the breadth and complexity of this case. *See* Resp. at n.3. The dispute on the motion is over where to draw the dividing line. As a general matter, this Court has broad discretion in deciding how to bifurcate a case for trial. *See Faulkenberry v. Kan. City S. Ry. Co.*, 1983 OK 26, ¶12, 661 P.2d 510, 513.

Indeed, this fact is best demonstrated by the fact that one of largest, most imported cases in U.S. history—the Texas Tobacco Litigation—was not simply bifurcated but *trifurcated*, and Big Tobacco lost its attempts in the Fifth Circuit to mandamus the trial judge on its trifurcation decision. Memorandum Opinion and Order Regarding the Issue of Bifurcation, *Texas v. Am. Tobacco Co.*, Case No. 5:96-cv-91, at 2-3 (Sept. 29, 1997) (attached hereto as Exhibit 1) (trifurcating the case into one phase for liability on Texas's RICO claim; a second phase for just whether duties existed, had been breached, and whether any misrepresentations had been made as part of the State's other claims, as well as elements of conspiracy and the defenses relevant to those issues; and a third phase to determine causation, materiality and damages for all claims).

And, as demonstrated below, bifurcating along claim lines, bifurcating along the specific line the State provides, or bifurcating to try only Nuisance first, are all appropriate options which will save the Court and parties time and resources and move Oklahoma closer to ending this epidemic.

I. Bifurcation along Claim Lines is Explicitly Authorized under 12 O.S. § 2018(D)

Section 2018(D) provides in full:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any ***claim***, cross-***claim***, counter***claim***, or third-party ***claim***, or of any separate issue or of any number of ***claims***, cross-***claims***, counter***claims***, third-party ***claims*** or issues, always preserving inviolate the right of trial by jury.

The word "claim" is mentioned, in one form or the other, ***eight*** times in just that one sentence. Meanwhile, the word "issue" is only mentioned twice. Thus, as a matter of simple statutory interpretation, bifurcation along claim lines is anything but "unusual"—it is the predominant method of bifurcation contemplated under the statute. *See contra.* Resp. at n.4. The State need not marshal further authority than the explicit, unambiguous word of the Oklahoma Legislature. This Court undoubtedly has the authority and discretion to bifurcate along claim lines.

Other Oklahoma Courts agree. In *Graham v. Keuchel*, 1993 OK 6, ¶¶35-36, 847 P.2d 342, 357-58, the Oklahoma Supreme Court ordered that, under some circumstances, courts "***must*** bifurcate" claims in order to "avoid jury confusion." And, in *Brannon v. Munn*, 2003 OK CIV APP 33, ¶ 9, 68 P.3d 224, 227-28, the court said of the trial court's

decision to bifurcate along claim lines: "This is the type of case contemplated by 12 O.S.1991 § 2018(D) for which bifurcation is allowed."

The State requests that the Court utilize its undeniable power to bifurcate this case along claim lines as the Court sees fit.

II. Bifurcation along the Line the State Proposes Is Appropriate Because the Claims in each Phase are Legally and Factually Distinct

The propriety of any line drawn in a court's decision to bifurcate, in terms of both the legal standard and the right to a jury, comes down to how natural or logical the separation is between the legal and factual *issues* presented on either side of the line. *See Buzzard v. McDanel*, 1987 OK 28, ¶¶8-10, 736 P.2d 157, 159; *U.S. v. J-M Mfg. Co.*, 2018 U.S. Dist LEXIS 100239, *17 (C.D. Cal. 2018) (*citing Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1128 (7th Cir. 1999). The principle concern is *not* whether the evidence or underlying "nucleus of operative facts" is the same. If that were true, then courts would never be able to bifurcate claims from compulsory counterclaims (claims that "arise[] out of the [same] transaction or occurrence"), which cannot be the case given that both Section 2018 and 12 O.S. § 2013—the statute that governs joinder of such counterclaims—explicitly provide that "[a] court may order separate trials of a counterclaim." Instead, the relevant question is whether the claims require a decision on the same precise factual and legal issues.

Here, the State intentionally proposed dividing its claims into distinct phases to avoid any such overlap. The Phase 1 trial proposed in the State's Motion would consist of its claims for public nuisance, common law fraud, and unjust enrichment. Chiefly among these suggested Phase 1 claims is the State's claim for public nuisance. As such, the State would embrace the Court ordering a Phase 1 trial consisting solely of the State's nuisance claim and related remedies.

Indeed, such Phase 1 nuisance trial would likely be the easiest and clearest solution. A public nuisance is defined as a nuisance "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." 50 O.S. §2. "A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either . . . annoys, injures or endangers the comfort, repose, health, or safety of others; or offends decency; or . . . in any way renders other persons insecure in life, or in the use of property . . . ." 50 O.S. §1.

With respect to the Phase 1 nuisance claim, the State will show that Defendants engaged in improper conduct, including intentionally marketed their products for purposes they knew were unsafe; that they did so intending to seduce an entire generation of Oklahoma doctors and patients into believing and trusting their misrepresentations about the risks, benefits and costs of opioid use; and that their actions caused to the largest public health crisis in the history of Oklahoma.

Should the Court wish to include additional claims in the Phase 1 trial, the State proposed in its Motion that those additional claims be the State's common-law fraud claim and unjust enrichment claim. Common law fraud requires the following: (1) that the defendant made a material representation; (2) that it was false; (3) that the defendant made it when it knew it was false or made it as a positive assertion without any knowledge of its truth; (4) that the defendant made it with the intention that it should be acted upon by the plaintiff; (5) that the plaintiff acted in reliance upon it; and (6) that the plaintiff thereby suffered injury. OUJI No. 18.1. The elements for fraud by concealment are similar: the defendant must have concealed or failed to disclose a fact it had a duty to disclose, that fact has to be material, the failure to disclose had to have been done with the intent of creating a false impression in the plaintiff's mind and with the intent that

the plaintiff act upon the false impression, which the plaintiff did to its detriment. OUJI No. 18.2. Finally, unjust enrichment requires the plaintiff to prove, simply, that the defendant "has money in its hands that, in equity and good conscience, it should not be allowed to retain." *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶ 18, 164 P.3d 1028, 1035.

As originally proposed in the State's Motion, Phase 2 would then consist solely of the State's statutory fraud claims under the Oklahoma Medicaid False Claims Act, 63 O.S. §§5053 *et seq.* (FCA), and the Oklahoma Medicaid Program Integrity Act, 56 O.S. §§1001 *et seq.* However, it makes sense to include the State's common-law fraud claims and unjust enrichment claim in Phase 2 as well, should the Court so desire. As for the State's first FCA claim, the State must show: (1) the defendant presented, or caused to be presented, a Medicaid claim for reimbursement to the State of Oklahoma; (2) that the claim was false or fraudulent; and (3) that the false claim was made knowingly. 63 O.S. § 5053.1(B)(1). Those elements are virtually identical to the elements of the State's claim under the Medicaid Program Integrity Act.[1] And, to make the State's second claim under the FCA, the State need only prove that the Defendants knowingly used, or caused to be made or used, a false material record or statement as part of their fraudulent Medicaid claim. *See* 63 O.S. § 5053.1(B)(2).

The State's statutory fraud claims are aimed specifically at Defendant's fraud on the State's Medicaid program, generating false Medicaid reimbursement claims. This supports bifurcation for two reasons. First, it shows that—whatever factual overlap there may be between the State's general fraud theory under common law and its fraud claims under the

[1] *See* 56 O.S. § 1005(A)(1) ("It shall be unlawful for any person to willfully and knowingly: Make or cause to be made a claim, knowing the claim to be false, in whole or in part, by omission or commission . . .").

statutes—the actual questions posed to the jury will be sufficiently different. Second, it also shows that Plaintiff's proposal to include common law fraud (the claim with the higher burden) in Phase 1 promotes efficiency and judicial economy.

Finally, the distinctions underlying the State's proposed bifurcation line also demonstrate why bifurcation in no way threatens the parties' right to trial by jury. The right to a jury is "concerned about factual conclusions, not evidence: The prohibition is not against having two juries review the same evidence, but rather against having two juries decide the same essential issues." *J-M Mfg. Co.*, 2018 U.S. Dist LEXIS 100239, *17 (C.D. Cal. 2018) (*citing Houseman v. U.S. Aviation Underwriters*, 171 F.3d 1117, 1128 (7th Cir. 1999). Accordingly, whether the trial is bifurcated with Phase 1 including nuisance, fraud and unjust enrichment, or whether Phase 1 includes only nuisance, neither option precludes a second jury from determining the statutory fraud claims (or all fraud claims), because none of these causes of action pose the same issues or questions for the jury to resolve.

Importantly, however, how to organize the jury for this case is not an issue currently before this Court. While the State does not believe its claims overlap enough to require the same jury to be empaneled in each phase, the Court does not have to make that decision until the pretrial proceedings. Moreover, there is nothing that says the Court cannot, if it thinks it prudent, call the same jury back several months later for Phase 2 and include a sufficient number of alternate jurors to ensure that such a solution remains viable. And, likewise, there is support for a court to empanel a new jury to hear separate parts of a case, including, for instance, when a case is remanded for the determination of damages. But that decision is not one that needs to be made now and, to the contrary, can be made after

summary judgment when both sides know what claims and defenses will actually proceed to trial.

III. In the Alternative, Bifurcating to Try Only the Nuisance Claim in Phase 1 Is Eminently Justifiable

As demonstrated above, the State's public nuisance claim is unique, a point which is wholly lost on Defendants. Contrary to Defendant's contentions, both the way one goes about demonstrating a nuisance claim *and* the remedies available upon successfully doing so, are unlike any other claim presented in this litigation. As such, if the Court prefers, bifurcation to try only the nuisance claim and related remedies in Phase 1 is entirely appropriate. Indeed, it may even be easier, and the State would embrace such a decision.

First, as demonstrated above, what the State has to show as part of its nuisance claim is unlike any other claim here. The State need only show that Defendant's action or inaction "injures or endangers the comfort, repose, health, or safety of others" and that it does so on a scale that affects an entire community. 50 O.S. §§ 1-2. In terms of this case, that means the State need only prove by a preponderance of the evidence that (a) there is an opioid epidemic across the State of Oklahoma and (b) Defendants' conduct caused it. It is really that simple. Accordingly, unlike the State's common law fraud claim, this also means the State doesn't have to prove that Defendant's intended for these consequences to occur. It is enough that they did occur.

It is also important to note that the State's nuisance claim is unlike any claim Defendant's describe. Specifically, the State's nuisance claim is not a negligence claim. Thus, to the extent Defendants suggest contributory negligence is at issue here, [cite to Resp.], it isn't. It does not matter what the State did or didn't do, or whether the reasonable person would have thought its response prudent under the circumstances. Indeed, given the State's right to seek joint and

severable liability (23 O.S. § 15), comparative fault will not be an issue in this case until after a judgement and the Defendants are left to fight amongst themselves for contribution. Moreover, not all Defendants have sufficiently pled a defense for contributory negligence or comparative fault.

The second reason the State's nuisance claim is unique is due to one of the remedies it offers: abatement. Defendants fundamentally misunderstand this point too. Along with damages to compensate the citizens of Oklahoma and punitive damages to deter Defendants' conduct (both of which the State seeks as part of this claim), the public nuisance claim also provides this Court and the State with the opportunity to craft a plan to end the opioid crisis. And by "end the opioid crisis" the State is referring to much more than just ceasing the Defendants' promotion of these products or obtaining an injunction against any such promotion. *See* Resp. at 9. Defendants demonstrate their misunderstanding of the abatement remedy when they argue "there is nothing for the Court to enjoin because the 'conduct' the State challenges—*i.e.*, Defendants' alleged promotion of their opioid medications—has *already* ceased." *Id.* To start, improper "promotion" is not the only unlawful conduct alleged by the State in this case. Even so, to suggest that this epidemic can be suddenly switched off by pulling sales reps out of the field or ad out of circulation is just wrong. Defendants know this. Indeed, at least one Defendant admitted in a deposition this week that there is still more to be done to abate the national opioid crisis:

> Q: You would agree that although Janssen ceased pro[mo]ting Duragesic in 2007 and Nucynta in 2015, there is still a public health emergency related to opioids in [this] nation.
>
> MR. LIFLAND: Object to the form of the question.

A: There is a public health emergency with respect to opioids in the United States. It doesn't necessarily relate to Janssen's promoting or not promoting our products.

Q: Janssen's ceasing promoting its opioid products did not abate the opioid crisis in the United States, did it?

MR. LIFLAND: Object to the form of the question.

A: The issues surrounding abuse, misuse, diversion of opioids continued before and after Janssen was promoting its products, but it's a much broader question than just Duragesic and Nucynta. We have activities under way that continue to work towards the abatement of the problem, and activities that are even beyond what a regulatory framework requires of us. So there is more, but I can't say should we be doing more than that.

Exhibit 2, Janssen Rough Depo. Tr. at 48:12–49:13 (Aug. 28, 2018). Moreover, Janssen admitted in the same deposition that it chose to cease promotion of its opioids due to "business reasons," not in effort to help abate the opioid epidemic it caused. *Id.* at 50:14–52:15.

To end this epidemic will require much more than enjoining Defendants from engaging in their fraudulent marketing; it will take treatment for those addicted to Defendants products, re-education of an entire generation of medical professionals that were taught the opioid as a one-stop cure-all for pain management, and education for the public on the real risks associated with these drugs, just to name a few.

As an example, lead paint was removed from store shelves decades ago, yet in *People v. ConAgra Grocery Prods. Co.*, a court recently found a lead-paint public nuisance stills exists today and ordered abatement measures to ensure that the hazardous paint is removed from houses and businesses. *See generally* 17 Cal. App. 5th (2017). Further,

education continued long after sales stopped, and medical bills continue to accumulate even absent the further sale of lead paint. As that court noted: "[T]he lead will not disappear on its own. So long as interior residential paint continues to exist in the 10 jurisdictions, this nuisance will continue to be an ongoing and imminent risk to the health of the children." *Id.* at *51, *110 (internal quotations omitted).

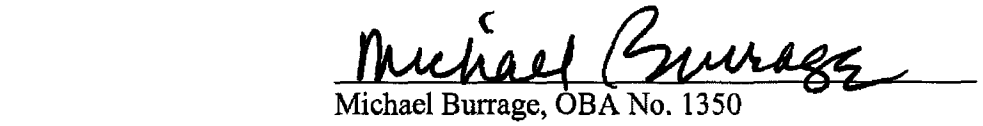
Similarly, if Defendants polluted a local river by dumping millions of gallons of chemicals into the water, surely they would not contend that the nuisance was abated immediately after its last chemical dump. Rather, Defendants would obviously acknowledge that while discontinuation of the hazardous chemical dumps was necessary, so too would be a clean-up effort of the contaminated waters they caused. Because the harmful chemicals are still in the water.

This case is no different. Just like the lead paint case, the opioid crisis will not disappear on its own. This is why nuisance's remedy of abatement makes this claim so vital to the State's efforts in ending the opioid crisis and, thus, why the State stresses so vehemently that it be tried first.

CONCLUSION

The purpose of bifurcation is to avoid prejudice and promote efficiency. The prejudice the State seeks to avoid with bifurcation is the further, needless loss of life. And the way the state proposes that occur in the most efficient way possible is by preparing and trying its nuisance claim—damages, punitive damages and most importantly abatement—first. So long as that happens, we are all one step closer to bringing this crisis to an end.

Respectfully submitted,



Michael Burrage, OBA No. 1350
Reggie Whitten, OBA No. 9576
WHITTEN BURRAGE
512 N. Broadway Avenue, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: mburrage@whittenburragelaw.com
rwhitten@whittenburragelaw.com

Mike Hunter, OBA No. 4503
ATTORNEY GENERAL FOR
THE STATE OF OKLAHOMA
Abby Dillsaver, OBA No. 20675
GENERAL COUNSEL TO
THE ATTORNEY GENERAL
Ethan A. Shaner, OBA No. 30916
DEPUTY GENERAL COUNSEL
313 N.E. 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-6246
Emails: abby.dillsaver@oag.ok.gov
ethan.shaner@oag.ok.gov

Bradley E. Beckworth, OBA No. 19982
Jeffrey J. Angelovich, OBA No. 19981
Trey Duck, OBA No. 33347
Drew Pate, *pro hac vice*
NIX, PATTERSON & ROACH, LLP
512 N. Broadway Avenue, Suite 200
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: bbeckworth@nixlaw.com
jangelovich@npraustin.com

Glenn Coffee, OBA No. 14563
GLENN COFFEE & ASSOCIATES, PLLC
915 N. Robinson Ave.
Oklahoma City, OK 73102
Telephone: (405) 601-1616
Email: gcoffee@glenncoffee.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was emailed on 29th day of August, 2018 to:

Sanford C. Coats
Joshua D. Burns
CROWE & DUNLEVY, P.C.
Braniff Building
324 N. Robinson Ave., Ste. 100
Oklahoma City, OK 73102

Sheila Birnbaum
Mark S. Cheffo
Hayden A. Coleman
Paul A. LaFata
Marina L. Schwartz
Dechert LLP
Three Bryant Park
New York, New York 10036

Benjamin H. Odom, OBA No. 10917
John H. Sparks, OBA No. 15661
ODOM, SPARKS & JONES PLLC
HiPoint Office Building
2500 McGee Drive Ste. 140
Oklahoma City, OK 73072

Robert G. McCampbell
Nicholas Merkley
Ashley E. Quinn
GABLEGOTWALS
One Leadership Square, 15th Floor
211 North Robinson
Oklahoma City, OK 73102-7255

Steven A. Reed
Harvey Bartle IV
Jeremy A. Menkowitz
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921

Charles C. Lifland
Jennifer D. Cardelus
David K. Roberts
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071

Brian M. Ercole
MORGAN, LEWIS & BOCKIUS LLP
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131

Jonathan S. Tam
QUINN EMANUEL URGUHART & SULLIVAN, LLP
50 California Street
San Francisco, CA 94111

Charles C. Lifland
Jennifer D. Cardelus O'MELVENY & MEYERS 400 S. Hope Street, 18th Floor Los Angeles, CA 90071

Stephen D. Brody
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

Michael Burrage

Michael Burrage

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TEXARKANA DIVISION

THE STATE OF TEXAS,
Plaintiffs,

v.

THE AMERICAN TOBACCO COMPANY, ET AL.,
Defendants.

Case No. 5:96cv91

September 29, 1997

MEMORANDUM OPINION AND ORDER REGARDING THE ISSUE OF BIFURCATION

Before the Court is the Plaintiff's Motion to Birfurcate Trial (docket # 888) pursuant to Federal Rule of Civil Procedure 42(b). After considering the Motion, the extensive arguments and briefing, the complexity of this case, and the underlying principles of Rule 42(b), the Court finds that this case should be tried in various phases.

I. BACKGROUND

This issue was first raised by the plaintiff in an informal status conference on July 17, 1997. Since that time, the parties have debated the propriety of trying this suit in separate phases. It was discussed on August 15, 1997 at a subsequent status conference. The issue was extensively briefed and discussed at an August 25, 1997, meeting with representatives from both sides that dealt with the related issue of the plaintiff's damage model. Both sides have been ordered by the Court to submit plans regarding their views on the type of evidence to be presented should the case be bifurcated on the issues of "wrongful conduct," causation, and damages and time estimates for each phase. See Court's Order, dated September 3, 1997. The parties have complied with these requests and extensively addressed the various issues presented by the September 3 Order. The defendants requested oral argument directed specifically at the bifurcation issue, and the hearing was held on September 23, 1997. The issue is ripe for decision and must be addressed so that the parties are able to adequately prepare for the impending trial.

II. RULE 42(b) AND ITS POLICY

Rule 42(b) provides in relevant part:

> Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any separate issue or any number of claims . . . always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

FED.R.CIV.P. 42(b). This rule provides the trial court with a tool that is greatly needed in the modern age of complex litigation. As the Fifth Circuit has recognized, "in appropriate cases . . . issues impacting upon general liability or causation may be tried standing alone." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997). In addition, the Fifth Circuit has recognized that Rule 42(b) is sufficiently broad to allow a trial court to exercise its discretion to separate issues for trial in appropriate circumstances. *See Rosales v. Honda Motor Co., Ltd.*, 726 F.2d 259, 260 (5th Cir. 1984)(discussing the propriety of bifurcating liability and damages questions in personal injury suit); *see also Sanford v. John-Manville Sales Corp.*, 923 F.2d 1142 (5th Cir. 1991). Finally, the Fifth Circuit has recognized that cases involving complex civil RICO allegation may many times merit separate trials. *See Conkling v. Turner*, 18 F.3d 1285 (5th Cir. 1994). The Court believes that this case fits perfectly within the confines of Rule 42(b) and its underlying policies. *See Manual for Complex Litigation*, at 119 (3d. ed. 1995).

First and foremost, the Court is concerned with the potential length of this trial should all issues be tried together. The parties have honestly estimated, and the Court agrees with these estimations, that this matter could take from four to six months to try to conclusion. Based on these estimations these estimations, the Court has allotted 225 hours for each side to present its case.[1] In addition, the parties have designated a combined list of over 1,500 witnesses. Also, the parties have submitted proposed exhibit lists that include in excess of 50,000 documents to be submitted at trial from approximately 23 million that have been disclosed by both sides.

As the parties are aware, this Court has over

[1] The Court will leave it to the discretion of the parties to divide their time in relation to the various phases of the trial. The only obligation they have is to remain within the confines of the limit.

350 cases currently pending on its docket. An inordinate number of these cases are of a complex nature. Cases are pending that range from complex antitrust class actions and individual smoker cases to securities fraud class actions and complicated patent infringement actions. These cases are currently languishing substantially untouched on the Court's docket due, in large part, to the present litigation. In addition, this Court's obligation to try criminal matters and comply with the terms of the Speedy Trial Act cannot be ignored and will certainly affect the ebb and flow of the present action. Any mechanisms the Court can utilize to expedite this case are certainly in the interest of judicial economy and convenience.

In addition, the economy and convenience to the parties must be considered. Both sides to this action have expended a great amount of resources, financially and by way of time. The Court believes that trying this matter in phases will conserve these resources. If a finding in favor of the defendants occurs after the first and second phases of trial, the Court believes approximately half of the trial time will be conserved.

Finally, the Court is convinced that the plan delineated below will allow jurors to better understand the nature of this case. The issues will be considered in a more pedestrian manner which will allow the jurors to reach more informed and considered verdicts. Furthermore, the arguments outlined above dealing with convenience and economy apply equally to the citizens of East Texas that may be selected to judge the facts of this case. This plan will allow them to fulfill their duty as citizens in a less confusing and potentially less time consuming manner at no expense to the search for justice.

In addition to these concerns, the Court is convinced that this plan will not prejudice either party. To the contrary, the Court finds that this plan will ensure that the issues are not confused and sound verdicts will be reached. Also, the Court finds that the mandates of the Seventh Amendment will not be disturbed nor due process violated by this decision. Based on these findings and concerns, the Court is of the opinion that the issues in this case must be tried separately.

III. FORMAT OF TRIAL

The Court believes that potentially three phases of trial are appropriate, and all phases shall be considered by the same jury. The first phase of this trial shall involve the issues of alleged liability under the civil RICO count of the complaint.[2] Regardless of a favorable finding for the plaintiff on the RICO claims, the case will then proceed to the second phase which will decide the issues relating to alleged "wrongful conduct" on the remaining common law claims.[3] If there is a favorable finding for the plaintiff during either Phase I or Phase II, then the case will proceed to Phase III which will consider the issues of causation and damages.

The phases shall encompass the following issues:

> Phase I: A separate trial will be conducted and the jury will consider the issue of whether the defendants have engaged in conduct prohibited by the RICO statute, and any defenses that may be applicable to the initial liability elements of civil RICO.[4]
>
> Phase II: A second separate trial will be conducted and the jury will consider issues that relate to any duties imposed upon the parties, any breach of those duties, whether any misrepresentations have been made, whether elements of conspiracy have been satisfied, and any defenses that may be applicable to the initial elements of these various claims.[5]

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[2] The plaintiff has suggested that it be allowed to amend its complaint to drop Counts 2 and 3 which are RICO counts. It will further amend to add defendants Council for Tobacco Research and the Tobacco Institute in Count 1. Furthermore, the plaintiff will amend to proceed only with its allegation of a "public relations enterprise" dropping from the complaint its allegations of regulatory and marketing enterprises. The Court through this Order will allow such amendments.

[3] It should be noted that the Plaintiff has requested that should it receive a favorable finding under RICO in Phase I, the Court should then take up issues relating to equitable relief before addressing the common law claims. The Court believes that it is premature to decide this specific issues and will reserve ruling until the completion of Phase I.

[4] The Court is persuaded that trying the liability issues associated with the civil RICO claim will greatly simplify issues for the jury and will decrease the likelihood of confusion. The Court also finds similarities and support in the *Conkling* opinion cited above. In that case, the time period over which the alleged violations occurred was in excess of 20 years. *See Conkling*, 18 F.3d at 1289. The allegations in this case span almost 50 years. In addition, as the *Conkling* court recognized, cases brought under civil RICO can be "specially suited for trial limitation" such as severance and trial and phases. *Id.* at 1293.

[5] The parties should be perfectly clear on this point. Certain claims presented and the defenses thereto raise issues regarding the conduct of the plaintiff as well as the defendants. The conduct of both parties must be decided in the second phase.

Phase III: If the plaintiff is successful in either Phase I or Phase II, a third separate trial will be conducted, and the jury will consider the issues that relate to cause in fact and proximate/producing cause, whether misrepresentations were material, if any are found to have occurred, reliance, and the amount of damages, if any, resulting from the events or occurrences in question.

IV. CONCLUSION

The Court will address any concerns on the types of evidence to be presented during Phases I and II, and if necessary the causation/damages phase, via motions in limine and rulings during the course of trial. In addition, the parties can rest assured that the Court will give the jury detailed instructions prior to trial, during the course of the necessary phases, and before submission of the various issues to the jury regarding the use of certain evidence when considering the various claims and defenses presented. The Court is confident that these actions coupled with the manner in which the jury charge can be structured will help to educate the jurors, protect the rights of the parties, and insure consistent verdicts on all issues.

Finally, the issue of overlapping witness testimony should be addressed. The defendants have expressed concern regarding this question. Although it is inevitable that some witnesses will required to testify in more than the two initial phases of trial, if more than two phases are necessary, the Court finds that under the trial structure outlined above it will be minimal. Furthermore, the Court is confident that the parties will engage in a good faith effort to analyze their respective evidence to determine in what phase it should be used. In those instances in which they are unable to make that determination, the Court will be here to assist.

This case is filled with difficult issues, both legal and factual in nature. The volume of work created by this case is exasperating. Given these realities, the Court has been confronted with the question of how to move this case in a fair, just, and convenient manner that recognizes the importance of conserving judicial economy. The Court does not purport to have all the answers to this perplexing query. However, it is convinced that the trial plan outlined above embodies a sense of fairness, guards against prejudice, protects the parties' Seventh Amendment rights, and provides a vehicle to potentially bring this matter to a conclusion on a more expedient basis. Therefore, this matter shall proceed to trial in a manner consistent with the trial plan outlined above, and the Plaintiff's Motion to Bifurcate is GRANTED IN PART. It is further

ORDERED that the Plaintiff shall be given until 5:00 p.m. on October 3, 1997, to amend its Complaint in a manner consistent with its "Proposed Trial Plan," the representations made at the hearing on this issue, and with this Court's Order. It is further

ORDERED that the parties file with the Court their Motions In Limine by 5:00 p.m. on October 6, 1997.

IT IS SO ORDERED.

Signed this 29th day of September, 1997.

X (signed)
DAVID FOLSOM
UNITED STATES DISTRICT JUDGE

09:01:13 1 THE VIDEOGRAPHER: This is the
2 videotaped deposition of Bruce Moskovitz in the
3 matter of the State of Oklahoma, et al., versus
4 Purdue Pharma, et al. This deposition is being
5 held at 511 Couch Drive in Oklahoma City,
6 Oklahoma, on August 28, 2018. We are on the
7 record at 9:01 a.m. Will counsel please state
8 your appearances for the record?
09:01:36 9 MR. DUCK: Trey Duck on behalf of the
09:01:3610 State of Oklahoma.
09:01:5211 MR. BECKWORTH: Brad Beckworth for the
12 state.
09:01:5213 MR. PATE: Drew Pate for the state.
09:01:5214 MR. LIFLAND: Charles Lifland on behalf
15 of Johnson & Johnson and Janssen
16 Pharmaceuticals.
09:01:5217 MS. WADDLE: Jessica Waddle on behalf of
18 Johnson & Johnson and Janssen.
09:01:5219 MR. SPARKS: John Sparks on behalf of
09:01:5220 Johnson & Johnson & Janssen.
09:01:5221 MR. TAM: Jonathan Tam for Purdue.
09:02:0222 THE VIDEOGRAPHER: The court reporter

2

for Janssen.

Q (BY MR. DUCK) Should Janssen do more than its currently doing to help abate the opioid public health emergency.

MR. LIFLAND: Object to the form of the question.

THE WITNESS: I can't answer that. More is -- more is a very hazy term. So that assumes that there's an inadequate amount that's being done and there's some finite more than can be done. I can't answer the question.

Q (BY MR. DUCK) You would agree that although Janssen ceased projting Duragesic in 2007 and Nucynta in 2015, there is still a public health emergency related to opioids in in nation.

MR. LIFLAND: Object to the form of the question.

THE WITNESS: There is a public health emergency with respect to opioids in the United States. It doesn't necessarily relate to Janssen's promoting or not promoting our products.

10:00:3524 Q. Janssen's ceasing promoting its opioid
25 products did not abate the opioid crisis in the

1 United States, did it?
10:00:44 2 MR. LIFLAND: Object to the form of the
3 question.
10:00:50 4 THE WITNESS: The issues surrounding
5 abuse, misuse, diversion of opioids continued
6 before and after Janssen was promoting its
7 products, but it's a much broader question than
8 just Duragesic and Nucynta. We have activities
9 under way that continue to work towards the
10 abatement of the problem, and activities that
11 are even beyond what a regulatory framework
12 requires of us. So there is more, but I can't
13 say should we be doing more than that.
10:01:3614 Q. Why did Janssen stop promoting Duragesic
15 in 2007?
10:01:4016 MR. LIFLAND: Object to the form of the
17 question. Beyond the scope. You can answer if
18 you know in your personal capacity.
10:01:4519 THE WITNESS: It's my understanding it

was because at that time, in 2005, there were generic transdermal fentanyl patches that came to the market, and over the course of time, the sales of Duragesic, the branded Duragesic product, fell significantly.

10:02:1025 Q (BY MR. DUCK) Your attorney objected