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

PURDUE'S RESPONSE TO THE STATE'S EMERGENCY MOTION TO SHOW CAUSE FILED ON AUGUST 20, 2018

Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc. (collectively, "Purdue") respectfully submit this response to the State's so-called "emergency" motion to show cause, filed on August 20, 2018.

The State's entire "emergency" motion is predicated on the State's belief that "Purdue is in blatant violation of multiple Court Orders, including Judge Balkman's August 10, 2018

order," which, the State contends, mandated that Purdue provide a corporate designee for depositions by August 30, 2018. The State is wrong. On August 10, 2018, the Court ordered that depositions that had been noticed prior to Purdue's removal, had been addressed by Judge Hetherington, and had been re-noticed for August 30, 2018, are not void and should go forward. That order did not, however, require depositions "***to occur by*** August 30th," as the State erroneously contends. State's Br. at 6 (emphasis added).

Consistent with the Court's ruling, Purdue has made clear to the State that it will provide a witness to testify on the two deposition topics at issue in the State's motion and that the depositions ***will go forward***. However, there is a scheduling issue because Purdue's corporate representative – a busy, full-time, high-level employee – is not available on the date that the State ***unilaterally*** noticed the depositions for, *i.e.*, August 30, 2018. The witness has a previously scheduled week-long vacation beginning on Friday, August 31, 2018, with travel from Connecticut that morning. Due to the travel demands and schedule involved in traveling from Connecticut to Oklahoma and back, a full-day deposition on August 30 would require the witness to modify her vacation plans. In order to provide the State a date during the week after her return from vacation, the witness is willing to clear her work schedule and other commitments to appear for deposition in Oklahoma on September 13, 2018. The witness is also available on September 19, 25, or 26, 2018.

Though the State has stated on record that it "will work with the defendants to move dates around to accommodate schedules, which we've always maintained that we would do" (8/10/18 Tr. at 29:8-10 (Mr. Beckworth)), it has refused to consider the timeframe provided by Purdue. Instead the State has filed this "emergency" motion seeking the extreme sanction of

striking Purdue's defenses based on a run-of-the-mill scheduling issue that could have been easily addressed if the State was true to its position to work things out.

The State attempts to muddy the waters further by arguing that Purdue "demand[ed]" that the State coordinate with the federal MDL. (State's Br. at 6.) This too is false. Purdue ***proposed*** that, in the interest of efficiency and to avoid duplicative depositions on the similar issues, the parties work together in good faith to coordinate the depositions with the MDL, where there are overlapping deposition topics. This ***proposal*** was manifestly not a demand.

The State's contentions that Purdue is seeking to delay discovery or the trial date is likewise belied by the record. Two depositions of former Purdue employees are taking place this week and another is scheduled to go forward next week. Meanwhile, Purdue has not been able to take a single deposition of the State in large part due to the State's failure to produce documents that go to the heart of the State's case, in violation of Judge Hetherington's orders compelling production. *See generally* Purdue's Motion to Compel Production of Documents (Aug. 17, 2018). The State is also refusing to answer written discovery requests from Purdue and the other Defendants, which is the subject of a pending motion. And while the State has complained about the amount of discovery motion practice in this case, and cited it as a reason for jeopardizing the trial date (*see, e.g.*, 8/10/18 Tr. at 29:19-24 (Mr. Beckworth)), the State has filed one or more discovery motions for nearly every hearing that has occurred and has now filed its own motion to quash a deposition noticed by Purdue.

Under these circumstances, no sanctions are warranted, let alone the severe sanction of striking Purdue's defenses. There is no violation of a court order. To the contrary, Purdue has repeatedly told the State's counsel that it will provide a corporate witness. The only

consideration is accommodating the witness's schedule, which the State previously indicated that it would do. For these and the following reasons, the Court should deny the State's motion.

BACKGROUND

On August 6, 2018, after this case was remanded, the State unilaterally re-noticed two deposition topics for August 30, 2018, which are the subject of the State's motion.[1] The State made no attempt to confer with Purdue regarding dates or the availability of witnesses.

On August 10, 2018, the Court held a status conference. The Court determined that deposition notices issued prior to the removal to federal court and upon which Judge Hetherington had already issued a ruling did not have to be reissued if the depositions were set to occur before August 30, 2018:

> THE COURT: All right. Here's what I think we will do. Those depositions that were noticed before the removal that went through the process where you all presented arguments and that Judge Hetherington ruled on, I'm going to decide that those ***are not void, that they should proceed***; that all those before August 30th ***should go ahead.*** I'm going to instruct the parties to move forward with those. All others that were pending will be void and will have to be taken up again as if new.

8/10/18 Tr. at 55:12-20 (emphasis added).

Purdue advised that the deposition topics at issue in the motion were noticed for the same day as the next scheduled hearing before the Court (August 30, 2018) and that "***we***

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[1] The first topic is: "The open letter published by or on behalf of the Purdue Defendants in the New York Times on Thursday, December 14, 2017, entitled, 'We manufacture prescription opioids. How could we not help fight the prescription and illicit opioid abuse crisis?' ('Open Letter'), including but not limited to all actions taken by the Purdue Defendants in support of the recommendations and initiatives identified in the Open Letter, and the reasons the Open Letter was written and published." (State's Dep. Notice (Aug. 6, 2018) (Ex. 1).)

The second topic is: "All actions and efforts previously taken, currently under way, and actions planned and expected to take place in the future which seek to address, fight or abate the opioid crisis." State's Dep. Notice (Aug. 6, 2018) (Ex. 2).

don't know if our witnesses are available," but that "we'll work in good faith with plaintiff's counsel to ***try*** to set those dates prior to August the 30th." 8/10/18 Tr. at 62:20-24 (emphasis added) (Mr. Coats). The Court responded, "Okay." *Id.* at 62:25 (Balkman, J.).

The Court memorialized this exchange in an Order, stating: "Previously noticed and approved depositions prior to removal and set to occur before 8/30/18 ***are not void***. All others to be taken up at the 8/31/18 hearing." 8/10/18 Order at 1 (emphasis added).

On August 18, 2018, Purdue's counsel wrote to the State's counsel stating that Purdue is "committed to offering a witness to testify" on the two deposition topics noticed for August 30, 2018, but that Purdue's corporate witness "is not available for a deposition until around the third week of September" and that "exact dates" would be offered as soon as possible.[2]

> Purdue remains committed to offering a witness to testify on the New York Times letter and actions taken to address opioid abuse, misuse, and diversion. We have checked with the witness's schedule and the witness is not available for a deposition until around the third week of September. I will provide exact dates as soon as I can.[3]

Purdue's counsel also proposed that the parties work together in good faith to coordinate the depositions with the MDL and invited the State's input on the process for coordination:

> Also, because there is overlap among those topics and deposition topics requested by Plaintiffs in the federal MDL, to avoid duplicative depositions, we propose producing the witness to cover the topics in one deposition that will be properly cross-noticed in this case, consistent with Defendants' proposed deposition protocol that is pending before Judge Hetherington and will be addressed at the August 31 conference. As you may know, Purdue, along with other defendants and the plaintiffs in the MDL, are currently working out a protocol for efficient state-federal coordination, including with respect to cross-noticing of depositions, subject to guidance from Special Master Cathy Yanni. We welcome your input on that process.

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[2] Email from S. Coats to B. Beckworth (Aug. 18, 2018) (Ex. 3).

[3] *Id.*

As always, we are available to discuss. I hope you're having a good weekend.[4]

Purdue has since confirmed that its witness can be available for a deposition on September 13, 19,[5] 25, or 26, 2018.

ARGUMENT

I. THE COURT'S RULING WAS THAT THE DEPOSITIONS AT ISSUE SHOULD GO FORWARD, NOT THAT THEY MUST OCCUR BY AUGUST 30, 2018

The Court ordered that deposition topics at issue – which were originally noticed prior to the removal, subject to earlier rulings by Judge Hetherington, and re-noticed for August 30, 2018 – "are not void" and "should go ahead." 8/10/18 Tr. at 55:12-20; 8/10/18 Order at 1. The State's gloss that the Court ordered the depositions "***to occur by*** August 30th" finds no support in the transcript or the written order. State's Br. at 6 (emphasis added). The order merely provides that those depositions should proceed.

Purdue has agreed to produce a witness on the two deposition topics at issue in the State's motion. At no time has Purdue taken the position that the deposition notices are void, suggested that it will challenge those deposition notices with further motion practice, or suggested that a deposition protocol must be put into place before the depositions can move forward. To be abundantly clear, the depositions that the State has asked for ***will go forward.***

The only issue is ***when*** the depositions can occur in light of Purdue's witness's schedule. Without consulting Purdue first on scheduling, the State unilaterally noticed the depositions for August 30, 2018. Purdue's witness is not available for a deposition until September 25 or 26, 2018. Contrary to the State's representation before both the Court and Judge Hetherington that it would "work with the defendants to move dates around to accommodate schedules, which

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[4] *Id.*

[5] On this date, Purdue respectfully requests an early start time of 8:00 AM to accommodate counsel's travel schedule.

we've always maintained that we would do" (8/10/18 Tr. at 29:8-10 (Mr. Beckworth)), the State has refused to accommodate schedules and filed the instant "emergency" motion.[6]

To be sure, during the August 10, 2018, status conference, Purdue's counsel alerted the Court (and the State) that there may well be issues with the State's notices of depositions for August 30, 2018 because the schedule of Purdue's witnesses was not yet known. 8/10/18 Tr. at 62:20-24 (Mr. Coats). The Court responded, "Okay." 8/10/18 Tr. at 62:25 (Balkman, J.).

II. PURDUE PROPOSED COORDINATION WITH THE MDL

The State erroneously asserts that Purdue "claimed" that "the State ***must*** coordinate with the MDL." State's Br. at 5 (emphasis added). This is not true. Purdue ***proposed*** to the State that the parties work cooperatively to avoid duplicative depositions since some of the deposition topics requested by plaintiffs in the MDL overlap with the deposition topics in this case.[7] For example, in the MDL, one of the deposition topics is:

> 34. After the CDC declared an opioid epidemic in 2011 and introduced guidelines to help reduce Opioid prescribing any steps You took to reduce the amount of Opioid prescribing, reduce supply of Opioids to the market or reeducate prescribing physicians and the public about the dangers of Opioids and the Opioid epidemic declared by the CDC and the budgets for any such efforts, by year, from 2011 to the present.[8]

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[6] While the State asserts that Purdue should have moved to quash the deposition notices (State's Br. at 6), there was no reason to do so because Purdue agreed to provide a witness for the depositions, and insofar as there was a scheduling issue, the State has repeatedly represented that it would accommodate schedules of witnesses and counsel.

[7] Email from S. Coats to B. Beckworth (Aug. 18, 2018) (Ex. 3).

[8] Amended Deposition Notice Pursuant to Rule 30(b)(6) at 15-16, *In re National Prescription Opiate Litigation*, MDL No. 2804 (June 29, 2018). Other overlapping topics include:

> 29. The December 2003 GAO Report entitled "Oxycontin Abuse and Diversion and Efforts to Address the Problem," Your response to the GAO Report, all subsequent actions you took in response to that Report and all budgets for any such actions, by year.
>
> 30. Warning letters sent to You by the FDA and the DEA regarding Your marketing of Your Opioid Products, Your response to these letters, all subsequent

That topic overlaps with the State's deposition topic: "All actions and efforts previously taken, currently under way, and actions planned and expected to take place in the future which seek to address, fight or abate the opioid crisis."[9] Efficiencies can be achieved if the depositions are coordinated.[10] In any event, Purdue has not conditioned the depositions in this case on coordination.

III. THE EXTREME SANCTION TO STRIKE DEFENSES IS NOT APPROPRIATE OR WARRANTED

As explained above, Purdue has not violated any court order, so the issue of sanctions is moot. In any event, the severe sanctions that the State is seeking—striking all of Purdue's defenses—is unwarranted. An analysis of the five-factor test set forth in the principal case cited by the State in support of their sanctions request—*Payne v. Dewitt*, 1999 OK 93, 995 P.2d 1088— confirms this conclusion because the requisite evidence of fault, willfulness, or bad faith are wholly absent here.[11]

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actions you took in response to those communications and all budgets for any such actions, by year.

Id. at 14.

[9] State's Dep. Notice (Aug. 6, 2018) (Ex. 2).

[10] While the issue of coordination is not an issue that needs to be decided in connection with the instant motion, and will be decided by the Special Discovery Master in due course, Purdue respectfully submits that coordination is warranted given the realities of the opioid litigation. There is no secret that this is one of more than a thousand cases filed across the country in state and federal courts. Given the related nature of the claims in these cases, there is significant overlap in the discovery sought by various plaintiffs, including with respect to deposition requests. Under these circumstances, coordinating discovery in actions pending in state courts and federal courts is widely encouraged "to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation." *Manual for Complex Litig. (Fourth)*, § 20.313 (2017). One form of discovery coordination is "scheduling and cross-noticing joint federal-state depositions." *Id.*

[11] The factors are: "(1) the quantum of prejudice noncompliance has caused the adversary (or moving) party, (2) the extent of interference with the judicial process, (3) culpability of the

First, contrary to the State's assertion (State's Br. at 8), the State will not be prejudiced by taking these depositions a couple weeks after the date it unilaterally selected. Discovery of Purdue has been proceeding apace on multiple fronts, with voluminous documents already produced and other depositions taking place this week and next. The State does not and cannot show that it will be harmed in any way by deposing a company witness next month when the witness is available.

Second, Purdue is participating, not interfering, with the judicial process. The State claims that Purdue "fraudulently removed" this case to federal court (State's Br. at 8), but the federal court rejected that view by the State. To be sure, the federal court ultimately held that a federal question did not exist, but in doing so, it rejected most of the State's arguments in support of remand, including the State's arguments that Purdue waived its right to remove, that the issues raised in Purdue's removal had already been decided by the Court, that Purdue's removal was untimely, and that Purdue's removal violated Oklahoma's settlement privilege.[12] The federal court's carefully considered opinion shows that Purdue's removal was both colorable and done in good faith.

Moreover, Purdue's proposal that the parties cooperate to coordinate depositions with the MDL is efficient and effective participation in the judicial process, rather than interference. Defendants' proposed deposition protocol is currently pending before Judge Hetherington. Purdue suggested a process consistent with that protocol, but did not condition providing the witness upon coordination.

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litigant, (4) whether the court warned the party in advance that noncompliance could lead to dismissal or default judgment, and (5) the efficacy of lesser sanctions." *Payne*, 1993 OK 93, ¶ 8.

[12] *See* Order, *State of Oklahoma v. Purdue Pharma L.P.*, No. 5:18-cv-00574, slip op. at 4-8 (W.D. Okla. Aug. 3, 2018) (Ex. 4).

Third, the culpability factor is not applicable in this case and does not weigh in favor of sanctions. Purdue has acted in good faith to schedule the depositions noticed by the State. In contrast, the State unilaterally noticed the depositions without checking with Purdue regarding the witness's availability.

Fourth, there is no requirement that Purdue provide a witness for depositions on the State's unilaterally noticed date and no warning that failure to provide a witness on August 30, 2018, could lead to any sanction, much less the extreme sanction of striking Purdue's defenses.

Fifth, while Purdue maintains that no sanctions of any kind are appropriate here, the severe sanction of striking Purdue's defenses over a scheduling issue is certainly unwarranted. The scheduling of depositions is something that can and should be worked out between the parties without need for a sanctions motion or judicial intervention.

Finally, the State does not cite any authority that supports imposing the sanctions it requests for a scheduling issue with a deposition. For example, *Payne* is an automobile hit-and-run case, where the defendant rear-ended the plaintiff and then fled the scene. A deposition of the defendant was scheduled, and the defendant's counsel appeared, but, apparently without any notice, the defendant-deponent did not appear. *Id.* ¶ 4. The plaintiff moved for sanctions because the defendant failed to appear and the court awarded fees and costs. *Id.* ¶ 5. The court also ordered that the deposition take place on a date certain and warned the defendant's counsel that further sanctions would be imposed if the defendant did not appear for the court-ordered deposition. *Id.* ¶ 10. The defendant failed to appear for that court-ordered deposition. *Id.* The defendant's counsel "offered no explanation or justification for his client's absence" and the trial court inferred that the defendant "sought to protect himself from revealing the circumstances of the ownership of the vehicle, his presence at the wheel when the accident happened as well as his

motives for the hit-and-run behavior." *Id.* Under those and other circumstances not present here, default judgment against the defendant was entered as a sanction. *Id.*

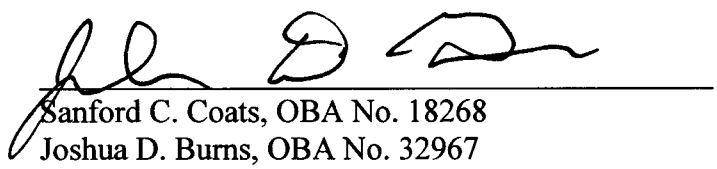
In sharp contrast to *Payne*, Purdue is not seeking to avoid or refusing to appear for the depositions noticed by the State. Purdue is moving forward with them. Purdue informed the State in advance of the date the State unilaterally selected that the date would not work for Purdue's witness, confirmed that it will provide a witness for the depositions, and offered dates on which its witness is available for depositions.

CONCLUSION

For the foregoing reasons, the Court should deny the State's motion.

Dated: August 22, 2018

Respectfully submitted,



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CERTIFICATE OF MAILING

This is to certify on August 22, 2018, a true and correct copy of the above and foregoing has been served via e-mail to the following:

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Joshua D. Burns

EXHIBIT 1

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

NOTICE FOR 3230(C)(5) VIDEOTAPED DEPOSITION OF CORPORATE REPRESENTATIVE(S) OF PURDUE PHARMA, L.P.; PURDUE PHARMA, INC.; AND THE PURDUE FREDERICK COMPANY

TO:

VIA *email*

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COUNSEL FOR THE PURDUE DEFENDANTS

Please take notice that, on the date and at the time indicated below, Plaintiff will take the deposition(s) upon oral examination of the corporate representative(s) of Defendants, Purdue Pharma, L.P., Purdue Pharma, Inc., and the Purdue Frederick Company (collectively, the "Purdue Defendants") in accordance with 12 O.S. §3230(C)(5). The Purdue Defendants shall designate one or more officers, directors, managing agents, or other persons who consent to testify on the Purdue Defendants' behalf regarding the subject matters identified in Appendix A.

The oral and video deposition(s) will occur as follows:

DATE	TIME	LOCATION
August 30, 2018	**9:00 a.m.**	**511 Couch Drive Suite 100 Oklahoma City, Oklahoma 73102**

Said depositions are to be used as evidence in the trial of the above cause, the same to be taken before a qualified reporter and shall be recorded by videotape. Said depositions when so taken and returned according to law may be used as evidence in the trial of this cause and the taking of the same will be adjourned and continue from day-to-day until completed, at the same place until it is completed.

PLEASE TAKE FURTHER NOTICE that each such officer, agent or other person produced by the Purdue Defendants to so testify under 12 O.S. §3230(C)(5) has an affirmative duty to have first reviewed all documents, reports, and other matters known or reasonably available to the Purdue Defendants, along with all potential witnesses known or reasonable available to the Purdue Defendant in order to provide informed binding answers at the deposition(s).

Dated: August 6, 2018

/s/ Michael Burrage

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I certify that a true and correct copy of the above and foregoing was emailed on August 6, 2018 to:

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/s/ Michael Burrage
Michael Burrage

Appendix A

The matters on which examination is requested are itemized below. The Purdue Defendants must designate persons to testify as to each subject of testimony. This designation must be delivered to Plaintiff prior to or at the commencement of the taking of the deposition. *See* 12 O.S. §3230(C)(5).

1. The open letter published by or on behalf of the Purdue Defendants in the New York Times on Thursday, December 14, 2017, entitled, "*We manufacture prescription opioids. How could we not help fight the prescription and illicit opioid abuse crisis?*" ("Open Letter"), including but not limited to all actions taken by the Purdue Defendants in support of the recommendations and initiatives identified in the Open Letter, and the reasons the Open Letter was written and published.

EXHIBIT 2

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

NOTICE FOR 3230(C)(5) VIDEOTAPED DEPOSITION OF CORPORATE REPRESENTATIVE(S) OF PURDUE PHARMA, L.P.; PURDUE PHARMA, INC.; AND THE PURDUE FREDERICK COMPANY

TO:

VIA *email*

Sanford C. Coats, OBA No. 18268
Cullen D. Sweeney, OBA No. 30269
CROWE & DUNLEVY, P.C.
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VIA *email*

Sheila Birnbaum
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Dechert LLP
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New York, New York 10036

COUNSEL FOR THE PURDUE DEFENDANTS

Please take notice that, on the date and at the time indicated below, Plaintiff will take the deposition(s) upon oral examination of the corporate representative(s) of Defendants, Purdue Pharma, L.P., Purdue Pharma, Inc., and the Purdue Frederick Company (collectively, the "Purdue Defendants") in accordance with 12 O.S. §3230(C)(5). The Purdue Defendants shall designate one or more officers, directors, managing agents, or other persons who consent to testify on the Purdue Defendants' behalf regarding the subject matters identified in Appendix A.

The oral and video deposition(s) will occur as follows:

DATE	**TIME**	**LOCATION**
August 30, 2018	**9:00 a.m.**	**511 Couch Drive** **Suite 100** **Oklahoma City, Oklahoma 73102**

Said depositions are to be used as evidence in the trial of the above cause, the same to be taken before a qualified reporter and shall be recorded by videotape. Said depositions when so taken and returned according to law may be used as evidence in the trial of this cause and the taking of the same will be adjourned and continue from day-to-day until completed, at the same place until it is completed.

PLEASE TAKE FURTHER NOTICE that each such officer, agent or other person produced by the Purdue Defendants to so testify under 12 O.S. §3230(C)(5) has an affirmative duty to have first reviewed all documents, reports, and other matters known or reasonably available to the Purdue Defendants, along with all potential witnesses known or reasonable available to the Purdue Defendant in order to provide informed binding answers at the deposition(s).

Dated: August 6, 2018

/s/ Michael Burrage

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CERTIFICATE OF SERVICE

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Washington, DC 20006

/s/ Michael Burrage
Michael Burrage

Appendix A

The matters on which examination is requested are itemized below. The Purdue Defendants must designate persons to testify as to each subject of testimony. This designation must be delivered to Plaintiff prior to or at the commencement of the taking of the deposition. *See* 12 O.S. §3230(C)(5).

1. All actions and efforts previously taken, currently under way, and actions planned and expected to take place in the future which seek to address, fight or abate the opioid crisis.

EXHIBIT 3

From: Sanford C. Coats
Sent: Saturday, August 18, 2018 12:38 PM
To: 'Brad Beckworth'
Cc: mburrage@whittenburragelaw.com; Trey Duck; Drew Pate; rwhitten@whittenburragelaw.com
Subject: RE: Depos

Brad,

I apologize for not getting back to you late last week. I was tied up on an emergency TRO matter for another client. Purdue remains committed to offering a witness to testify on the New York Times letter and actions taken to address opioid abuse, misuse, and diversion. We have checked with the witness's schedule and the witness is not available for a deposition until around the third week of September. I will provide exact dates as soon as I can.

Also, because there is overlap among those topics and deposition topics requested by Plaintiffs in the federal MDL, to avoid duplicative depositions, we propose producing the witness to cover the topics in one deposition that will be properly cross-noticed in this case, consistent with Defendants' proposed deposition protocol that is pending before Judge Hetherington and will be addressed at the August 31 conference. As you may know, Purdue, along with other defendants and the plaintiffs in the MDL, are currently working out a protocol for efficient state-federal coordination, including with respect to cross-noticing of depositions, subject to guidance from Special Master Cathy Yanni. We welcome your input on that process.

As always, we are available to discuss. I hope you're having a good weekend.

Best,

Sandy

CROWE DUNLEVY
ATTORNEYS AND COUNSELORS AT LAW
A LexMundi Member

Sanford C. Coats
Attorney at Law
405.235.7790

From: Brad Beckworth [mailto:bbeckworth@nixlaw.com]
Sent: Saturday, August 18, 2018 9:58 AM
To: Sanford C. Coats
Cc: mburrage@whittenburragelaw.com; Trey Duck; Drew Pate; rwhitten@whittenburragelaw.com
Subject: Depos

Sandy, since you did not respond, we will conduct the New York Times deposition on the 30th in Norman. We will most likely use the court house or a building near by and start at 8 am. We will advise on that Monday. Either way, doing it in Norman will give the witness and whoever takes / defends this one the ability to take a quick break for lunch and then allow the lawyers to go deal with the hearing then resume the deposition after that. We can take the abatement deposition the next day or y'all can bring he witness back another time. Have a good weekend.

Bradley E. Beckworth
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EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	Case No. CIV-18-574-M
PURDUE PHARMA L.P., et al.,	)	
Defendants.	)	

ORDER

Before the Court is plaintiff's Motion to Remand, filed June 14, 2018. On July 5, 2018, defendants Purdue Pharma L.P., Purdue Pharma Inc., and the Purdue Frederick Company Inc. ("Purdue Defendants") filed their response, and on July 6, 2018, plaintiff filed its reply. Based upon the parties' submissions, the Court makes its determination.

I. Introduction

On June 30, 2017, plaintiff filed the instant action in the District Court of Cleveland County, State of Oklahoma. Plaintiff alleges that defendants fraudulently promoted their opioid medications and asserts the following causes of action: (1) violation of the Oklahoma Medicaid False Claims Act, (2) violation of the Oklahoma Medicaid Program Integrity Act, (3) violation of the Oklahoma Consumer Protection Act, (4) public nuisance, (5) actual and constructive fraud and deceit, and (6) unjust enrichment. Defendants sought additional time to respond to plaintiffs' Original Petition, and the parties entered into a stipulation extending defendants' answer date for sixty days and limiting defendants' ability to remove the case ("Stipulation"). Regarding defendants' ability to remove, the Stipulation provides:

> The claims presently set forth in Plaintiff's Original Petition are properly brought in the District Court of Cleveland County, State of Oklahoma. The Served Pharmaceutical Defendants will not remove the above-captioned case, based upon Plaintiff's Original Petition, to Federal Court nor will they agree to, join in, or consent to the removal of this case, based upon Plaintiff's Original Petition, to Federal Court if any other Defendant(s) remove the case to Federal Court.

Stipulation at ¶ 2.

On April 18, 2018, defendant Purdue Pharma Inc. propounded its First Set of Interrogatories. Interrogatory No. 1 stated: "Describe the complete public nuisance abatement and the complete injunctive relief that You seek, if any, including in Your description the nature, terms, and scope of the relief sought, any conduct that You seek to prohibit, and any affirmative conduct You seek to compel." Defendant Purdue Pharma Inc.'s First Set of Interrogatories to Plaintiff at 5. On May 21, 2018, plaintiff responded to the interrogatories. Plaintiff provided a very extensive and detailed response to Interrogatory No. 1, which included the following response regarding necessary injunctive relief:

> The State seeks all necessary injunctive relief to abate the nuisance Defendants created including all costs associated with implementing such abatement procedures. Injunctive relief items beyond the items listed above include, but are not limited to:
> - Reducing production of Defendants' prescription opioids and implementing effective controlled substances monitoring programs.
> - Increased transparency into Defendants' opioid sales data.
> - Packaging prescription opioids in blister packs or other package to limit accelerated use.
> - Abiding by CDC or other government guidelines related to opioids in all communications (written or oral) with health care providers.
> - Cease stymieing or impeding efforts to disseminate information regarding the risks of opioids.

Plaintiff's Responses and Objections to Defendant Purdue Pharma, Inc.'s First Set of Interrogatories at 46.

Based on plaintiff's response to Interrogatory No. 1, the Purdue Defendants, pursuant to 28 U.S.C. §§ 1331, 1441, and 1446, removed this action to this Court on June 13, 2018. Plaintiff now moves this Court to remand this action to the District Court of Cleveland County, State of Oklahoma.

II. Discussion

In their Notice of Removal, the Purdue Defendants assert that federal question jurisdiction exists in this case because plaintiff's interrogatory responses revealed, for the first time, that plaintiff's lawsuit involves state law claims that are inextricably tied to substantial disputed federal questions. Specifically, the Purdue Defendants contend that through its requested relief, plaintiff is attempting to supplant the United States Food & Drug Administration's ("FDA") complex regulatory determinations and federal administrative prerogatives with plaintiff's contrary assessment regarding how defendants' opioids should be regulated, labeled, and marketed and, thus, is seeking to use Oklahoma state law to require that defendants convey different information about the safety and efficacy of their opioid medications and different packaging for those medications in Oklahoma than what the FDA has required in Oklahoma and every other state in the country. The Purdue Defendants conclude that these requested remedies give rise to federal question jurisdiction pursuant to 28 U.S.C. § 1331 because they require the Court to second guess the FDA by reassessing, reevaluating, and revamping the FDA's prior federal regulatory determinations.

Plaintiff contends that this action should be remanded to state court. Specifically, plaintiff asserts that the Stipulation bars removal of this action because the Original Petition has not been amended and the Purdue Defendants are bound by the Stipulation. Additionally, plaintiff asserts that the Purdue Defendants made the same arguments they are relying on in their Notice of

Removal in their prior motion to dismiss and, thus, have waived any right to removal. Plaintiff further asserts that because these arguments were raised in the motion to dismiss, the Purdue Defendants' Notice of Removal is untimely. Plaintiff also asserts that the state court has already ruled that plaintiff's claims do not implicate federal issues and that this ruling is the law of the case and applies to the question of removal. Plaintiff further asserts that by filing the Notice of Removal, the Purdue Defendants are in violation of the settlement privilege under Okla. Stat. tit. 12, § 2408. Finally, plaintiff asserts that the Purdue Defendants do not satisfy the *Grable*[1] test for removability.

A. Stipulation

The parties agree that the right to remove a case may be waived by agreement. The parties, however, do not agree as to whether the Stipulation waived the Purdue Defendants' right to remove based upon the specific circumstances at issue. Based upon the Stipulation, plaintiff contends that the Purdue Defendants contracted away their right to remove this case absent a new petition. On the other hand, the Purdue Defendants contend that the Stipulation does not preclude removal which is based upon a subsequent "other paper."

The Stipulation provides, in pertinent part, that "[t]he Served Pharmaceutical Defendants will not remove the above-captioned case, based upon Plaintiff's Original Petition, to Federal Court . . . ." Stipulation at ¶ 2. The Court finds this language is clear, explicit, and limited. Under the Stipulation, a served pharmaceutical defendant would not be able to remove this case based upon plaintiff's Original Petition but would be able to remove this case on some other basis. The Stipulation does not state that a served pharmaceutical defendant cannot remove this case for any reason, does not state that a served pharmaceutical defendant waives its right to remove as long as

[1] *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

the Original Petition is the live complaint, and does not state that a served pharmaceutical defendant cannot remove this case if the claims in the Original Petition remain unchanged. Therefore, this Court must determine whether the Purdue Defendants removed this case based upon plaintiff's Original Petition or removed this case on some other basis.

In the Original Petition, plaintiff's requested relief in relation to its public nuisance claim is stated in very broad terms. Specifically, plaintiff "seeks to abate the public nuisance Defendants created and all necessary relief to abate such public nuisance." Original Petition at ¶ 120. The Court finds this very broad language contained in plaintiff's Original Petition does not give the Purdue Defendants any real notice of what specific relief plaintiff is seeking in relation to its public nuisance claim. The Court further finds that it was not until the Purdue Defendants received plaintiff's response to Interrogatory No. 1 that the Purdue Defendants were aware of the specific relief that plaintiff was seeking in relation to its public nuisance claim and that such relief could implicate a federal question. The Court, therefore, finds that the Purdue Defendants did not remove this case based upon plaintiff's Original Petition as that petition did not provide the necessary notice of a federal question but, in fact, removed this case on a different basis – plaintiff's interrogatory response.

Accordingly, the Court finds that the Purdue Defendants' removal is not barred by the Stipulation.[2]

[2] In its motion, plaintiff also asserts that the Purdue Defendants conceded that no federal question exists in this case based upon the statement in the Stipulation that plaintiff's "claims presently set forth in Plaintiff's Original Petition are properly brought in the District Court of Cleveland County, State of Oklahoma." Stipulation at ¶ 2. Upon review of the parties' submissions, the Court finds that the Purdue Defendants made no such concession. A claim raising a federal question may be properly brought in a state court, as a state court may address federal claims. Federal courts do not have sole jurisdiction over all claims raising federal questions. A case in state court that raises a federal question, however, may be removed to federal court.

B. Purdue Defendants' prior motion to dismiss

Plaintiff asserts that in September of 2017, the Purdue Defendants, in their motion to dismiss, already raised, and lost, the preemption issue they now allege as the basis for removal. Plaintiff, therefore, contends that the Purdue Defendants have waived their right to removal, that the Purdue Defendants' Notice of Removal is untimely, and that the state court's ruling on the motion to dismiss is now the law of the case and applies to the question of removal. The Purdue Defendants contend that the issue raised in their motion to dismiss is not the same issue that is the basis for the removal of this case. The Purdue Defendants assert that their preemption argument raised in their motion to dismiss is that there could be no liability as a matter of law for their alleged past misrepresentations in their marketing because those statements were consistent with FDA-approved labeling and labeling decisions. In contrast, the issue pending before this Court is a jurisdictional one that was neither argued to nor passed upon by the state court – whether plaintiff's request for prospective injunctive relief that would affirmatively require defendants to depart from FDA-approved labeling and packaging raises federal questions.

Having carefully reviewed the motion to dismiss, the Court finds that the preemption arguments the Purdue Defendants raised in their motion to dismiss are not the same arguments raised by them in their Notice of Removal. The arguments raised in the motion to dismiss addressed the Purdue Defendants' past conduct – the conduct for which plaintiff is seeking to hold them liable. The arguments raised in the Notice of Removal address the future relief plaintiff is seeking in relation to this case, and particularly in relation to the abatement of the alleged public nuisance. Accordingly, the Court finds that the Purdue Defendants have not waived their right to removal by filing their motion to dismiss and that the state court's ruling on the motion to dismiss does not apply to the question of removal.

Additionally, the Court finds that the Purdue Defendants' Notice of Removal is not untimely. 28 U.S.C. § 1446(b) provides, in pertinent part:

> **(b) Requirements; generally. – (1)** The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> * * *
>
> **(3)** Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

28 U.S.C. § 1446(b)(1),(3). Further, the Tenth Circuit has held that the removal period starts "only after the defendant is able to ascertain intelligently that the requisites of removability are present." *DeBry v. Transamerica Corp.*, 601 F.2d 480, 489 (10th Cir. 1979). Additionally, the Tenth Circuit has found "that 'ascertained' as used in section 1446(b) means a statement that 'should not be ambiguous' or one which 'requires an extensive investigation to determine the truth.'" *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1035 (10th Cir. 1998) (internal citation omitted).

Having carefully reviewed plaintiff's Original Petition, and particularly noting the broad language used in the Original Petition regarding plaintiff's requested relief, the Court finds that the Purdue Defendants would not have been able to ascertain intelligently that the Original Complaint raised federal questions. The Court further finds that it was not until the Purdue Defendants received plaintiff's interrogatory responses that they would have been able to determine that federal questions were raised. As the Purdue Defendants removed this case within

thirty days of plaintiff's interrogatory responses, the Court finds that the Purdue Defendants' Notice of Removal was timely.

C. Settlement privilege

Plaintiff asserts that by filing the Notice of Removal, the Purdue Defendants are in violation of the settlement privilege under Okla. Stat. tit. 12, § 2408 and the state court's order regarding ongoing settlement negotiations. Plaintiff further asserts that it responded and objected to the Purdue Defendants' interrogatory on the basis that it sought information regarding the ongoing settlement discussions. Having carefully reviewed the parties' submissions, the Court finds that the Purdue Defendants did not violate the settlement privilege or the state court's order by filing their Notice of Removal. The Purdue Defendants' interrogatory did not request information regarding settlement terms and was not made in the context of settlement discussions; instead, it was simply an interrogatory made in the normal course of discovery which sought information regarding the relief sought by plaintiff.

D. Federal question jurisdiction

The Purdue Defendants assert that this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and the principles set forth in *Grable*. Under *Grable*, the test to determine whether a federal court has jurisdiction over a case with state-law claims that allegedly have federal issues embedded within them is whether "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. "That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568

U.S. 251, 258 (2013). Further, "[t]he 'substantial question' branch of federal question jurisdiction is exceedingly narrow – a special and small category of cases." *Gilmore v. Weatherford*, 694 F.3d 1160, 1171 (10th Cir. 2012) (internal quotations and citation omitted).

Having carefully reviewed the parties' submissions, including the Purdue Defendants' Notice of Removal, the Court finds that this case does not satisfy the principles set forth in *Grable* and this Court, therefore, does not have federal question jurisdiction over this case. Specifically, the Court finds that plaintiff's state law claims do not "necessarily raise" a federal issue.[3,4] The Purdue Defendants contend that two specific items listed in plaintiff's thirty-six page interrogatory response setting forth the scope of the complete public abatement and injunctive relief that plaintiff seeks necessarily raise a substantial federal issue. The Court finds otherwise. Any possible requested relief would only need to be addressed if plaintiff prevails on the specific state law claims for which such relief is requested. Further, whether these two specific items of relief – packaging prescription opioids in blister packs and abiding by CDC or other government guidelines related to opioids in all communications with health care providers – will still be requested or even be considered by the trial court after liability has been established, if it, in fact, is established, is simply too remote and attenuated to be considered "necessarily raised."

Accordingly, the Court finds that it does not have jurisdiction over this case and that this case should be remanded back to state court.

---

[3] Because the Court finds that the Purdue Defendants have not shown that a federal issue is necessarily raised, the Court will not address the remaining factors of the *Grable* inquiry.

[4] The Purdue Defendants do not assert that resolution of a substantial question of federal law is necessary in relation to an essential element of plaintiff's state law claims. If the Purdue Defendants made such an assertion, their removal of this case would be improper under the Stipulation and would be untimely.

III. Conclusion

For the reasons set forth above, the Court GRANTS plaintiff's Motion to Remand [docket no. 13] and REMANDS this case to the District Court of Cleveland County, State of Oklahoma.

IT IS SO ORDERED this 3rd day of August, 2018.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE