STATE OF OKLAHOMA, ex rel. MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	
Plaintiff,	**Case No. CJ-2017-816**
VS.	**Judge Thad Balkman**
PURDUE PHARM, L.P., ET AL.	**Special Master: William Hetherington**
Defendants.	

DEFENDANTS' OPPOSITION TO THE STATE OF OKLAHOMA'S MOTION FOR SEPARATE TRIALS AND TO STAY DISCOVERY AND PROCEEDINGS AS TO PHASE II

The State's motion to bifurcate and stay discovery on its "Phase II" claims should be denied. The motion proposes to split the State's lawsuit in two, and to try the State's public nuisance, fraud, and unjust enrichment claims ("Phase I") before trying its statutory fraud claims ("Phase II"). There is no basis for such an order. Separate trials of the State's overlapping claims will not promote judicial efficiency nor is bifurcation necessary to avoid prejudice. To the contrary, the State's piecemeal-litigation proposal will delay final resolution of this case, will unnecessarily burden the parties and the Court, and will prejudice the trial process by, among other things, risking inconsistent judgments. Absent any justification, the State's proposal should be seen for what it is: procedural gamesmanship designed to allow the State to litigate what it perceives to be its strongest claims before its weaker ones and at the same time avoid meeting its discovery obligations, without any justification for shirking its duties as a litigant. The State's motion should be denied.

FACTUAL BACKGROUND

There is no disputing the substantial factual and legal overlap among the State's remaining claims for public nuisance, unjust enrichment, fraud, and for violations of Oklahoma's Medicaid False Claims Act and Medicaid Program Integrity Act. Each claim against each Defendant challenges the same conduct—namely, that each Defendant allegedly "market[ed its] drugs in a manner aimed at downplaying the risks of opioids (specifically the risks of addiction and abuse), overstating their efficacy, and, thus, wrongly increasing" opioid use and abuse in Oklahoma. *See* Pet. ¶¶ 75 (Oklahoma Medicaid False Claims Act), 94 (Oklahoma Medicaid Program Integrity Act, 118-19 (Public Nuisance), 122-26 (Fraud), 131 (Unjust Enrichment). Presentation of these causes of action will necessarily rely on the same documents and witnesses. And the claims against each Defendant will rise or fall based on many of the same questions—*e.g.*, whether the Defendant in fact engaged in deceptive marketing of its opioid medications; whether that alleged conduct caused Oklahoma doctors to write prescriptions that would not otherwise have been written; whether those prescriptions were medically unnecessary or inappropriate; whether each Defendant's conduct caused the State's claimed injuries; and whether the State itself was comparatively negligent for not taking steps to avert the opioid epidemic despite its knowledge of an opioid abuse crisis. Indeed, this legal and factual overlap is a core premise of the State's motion: The State expressly argues that resolution of its Phase I claims "will undoubtedly inform all parties as to the merits of" its Phase II claims. Mot. at 5.

The State's claims—all of them—are scheduled for trial on May 28, 2019. The State pushed hard for that trial date, assuring the Court that "it can and will be prepared for trial by

May 2019."[1] The State never once suggested that it would not be prepared for trial on all its claims; May 2019, the State argued, gave it "plenty of time to complete this case."[2]

Yet the State now asserts that trial should not proceed on schedule on all its claims. Specifically, the State's instant motion asks this Court to split its case in two: The State would try its nuisance, fraud, and unjust enrichment claims in May 2019, while its statutory fraud claims would be stayed in their entirety, including a moratorium on discovery, pending a Phase II trial at some unspecified later date. Bifurcation, the State claims, is necessary to prevent delay "by allowing the parties to focus all of their efforts on resolving the State's claim for public nuisance first and foremost," Mot. at 4, although the State has *not* sought to carve out and try the nuisance claim on its own. The State also asserts that bifurcation is warranted because trying the Phase I claims first will shed light on Phase II claims and possibly promote settlement. *Id.* at 5. As demonstrated below, none of the State's justifications has merit.[3]

ARGUMENT

Section 2018(D) authorizes trial courts, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy," to order

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[1] State of Oklahoma's Motion for Entry of Scheduling Order and Opposition to Defendants' Motion for Appointment of Discovery Master (Dec. 27, 2017) at 2.

[2] *Id.* at 5.

[3] While dividing claims as the State proposes is legally infirm and makes no practical sense, that does not mean there should be a single trial involving all Defendants. Defendants reserve the right to move, at the appropriate time, to sever and/or set the State's claims for separate trials against the different Defendants. Among other things, the State has sued multiple, distinct entities who sold different products, at different times, employing different promotional strategies (to the extent they promoted their drugs at all).

separate trials on a claim or claims. 12 Okla. Stat. 2018(D).[4] "Bifurcation," however, "is not to be routinely ordered." *Herd v. Asarco Inc.*, 2003 WL 25847423, at *3 (N.D. Okla. May 28, 2003). The Tenth Circuit, construing the analogous federal rule,[5] holds "that courts should not bifurcate trials . . . unless the issues to be bifurcated are 'clearly separable.'" *Salmon v. CRST Expedited, Inc.*, 2014 WL 5600931, at *1 (N.D. Okla. Nov. 3, 2014) (quoting *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 964 (10th Cir. 1993)).

Bifurcation is also inappropriate where it "would require relitigation of the issues," *Okla. Transp. Auth. v. George Abdo Tr. Dated 10-15-74*, 2006 OK Civ. App. 11, ¶ 8, or where it would result in two overlapping trials "with the same witnesses and evidence being presented," *Racher v. Lusk*, 2015 WL 9413886, at *2 (W.D. Okla. Dec. 22, 2015). In those circumstances, "bifurcation would result in the inefficient use of court resources rather than promoting judicial efficiency." *Okla. Transp. Auth.*, 2006 OK Civ. App. 11, ¶ 8. And "[r]egardless of efficiency," bifurcation is always inappropriate where it would be "unfair or prejudicial to a party." *Angelo*, 11 F.3d at 9634. Under these standards, the State has not carried its burden to demonstrate that bifurcation is warranted. *See, e.g., Guinn v. CRST Van Expedited, Inc.*, 2011 WL 2181963, at *2 (W.D. Okla. June 2, 2011).

A. Bifurcation Will Not Promote Judicial Economy

The State's principal contention is that bifurcation "can help avoid . . . delay . . . by allowing the parties to focus all of their efforts on resolving the State's claim for public nuisance

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[4] The State's bifurcation request is unusual, which perhaps is why the State marshals no authority in support of it. *See infra* at n.7. Courts usually bifurcate liability from damages, not certain claims from others.

[5] *See* 5 Okla. Prac. Appellate Practice § 4:40 (2017 ed.) (noting that "[t]he Oklahoma statutes authorizing consolidation, severance, and bifurcation of proceedings are borrowed from federal procedural rules").

first and foremost." Mot. at 5. But the argument is puzzling on its face, as the State has *not* proposed to bifurcate *only* its nuisance claim. Phase I would try the State's nuisance *and* unjust enrichment and common-law fraud claims, which overlaps almost completely with the fraud claims to be tried in Phase II. *Compare* Pet. ¶¶ 121-29, *with id.* ¶¶ 75- 101.[6] Regardless of this inconsistency, the State's argument fails in its own right.

Contrary to the State's contention, bifurcation is not likely to promote judicial economy (or avoid delay) given the substantial overlap between the State's Phase I and Phase II claims. As established above, *all* of the State's claims arise from the same nucleus of operative facts, rest on the same core allegations of misconduct, and turn on many of the same contested legal and factual contentions. There is no question that the trials will rely on the same evidence and witnesses. The State does not disagree. *See* Mot. at 5. The State's claims, in other words, are not "clearly separable," *Salmon*, 2014 WL 5600931, at *1, and will invariably "require relitigation of the issues," *Okla. Transp. Auth.*, 2006 OK Civ. App. 11, ¶ 8, and result in overlapping trials (presumably before different juries) "with the same witnesses and evidence being presented," *Racher*, 2015 WL 9413886, at *2. Bifurcation should therefore be denied.

The State nonetheless asserts that bifurcation will "promote judicial economy" by "allow[ing] the parties to streamline their discovery and pretrial efforts to focuses on the claims and defenses at issue in the Phase I trial." Mot. at 6. But given the undisputed factual and legal overlap between *all* of the State's claims, it is difficult to conceive of any meaningful efficiency

[6] Indeed, the State's alleged damages on the common-law fraud claim are "unnecessary payments made by Oklahoma Medicaid." Pet. ¶ 127.

gains from staying discovery on the State's statutory fraud claims.[7] For instance, regardless of whether or not the State's claims are bifurcated, the parties will need discovery on whether each Defendant misleadingly promoted its opioid medications, whether that promotion caused the State's alleged injuries (particularly given the extensive, independent third-party conduct by physicians and others standing between Defendants' sale of FDA-approved opioid medications and the State's public expenditures), and whether the State itself contributed to the opioid abuse crisis by failing to act or, as discovery will likely show, by consistently evaluating evidence and confirming through its own policies the safety and efficacy of opioid medications to treat pain, including chronic pain. These overarching questions are equally dispositive of the State's Phase I and II claims.

Even prescriber- and patient-level data for each prescription that the State claims was issued as a result of each Defendant's alleged misrepresentations, which the State will need to prove its statutory fraud claims, is critically important discovery on the Phase I claims. To that end, if a substantial portion of prescriptions written for a Defendant's opioid medications during the relevant period were medically proper and appropriate, or deemed that way by the State after its independent consideration of the prescription, then the jury may well find that that Defendant neither caused a public nuisance nor was unjustly enriched, which is why Defendants will need this discovery to litigate the claims the State would assign to its "Phase I." The same is necessarily true of the State's common-law fraud claim: If Oklahoma physicians did not rely on a Defendant's representations in writing opioid prescriptions, or if State agents did not rely on

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[7] The State previously argued that staying discovery would be "audac[ious]" because any delay in discovery "is to delay discovery of the truth." *See* The State's Omnibus Response to Defendants' Joint Motion to Dismiss for Failure to State a Claim ("Opp.") at 10.

them in approving reimbursements, then that Defendant will not be liable for fraud. And this discovery is relevant to the State's claimed damages: The State cannot recover for medically necessary opioid prescriptions. The State does not argue otherwise. Nor does it marshal any authority in support of its novel contention that litigants are free to pick and choose which claims they want to try first.[8]

B. Bifurcation Will Delay Final Resolution Of The State's Claims And Will Prejudice The Parties And This Court

If anything, bifurcation is likely to *delay* resolution of the State's Phase I claims. That is because any judgment on those claims would not be final, 5 Okla. Prac. Appellate Practice § 4:40 (2017 ed.) (judgment in bifurcated trial is not a final judgment), meaning the appellate process could not even begin (absent certification) until *after* discovery, motions practice, and then trial on the State's Phase II claims. And if certification were granted, the State's Phase II claims would be severely delayed until after a full Phase I trial and inevitable appeals. The prejudice occasioned by such a delay would likely be substantial as "witnesses disappear" and "memories fade," *Hamilton By and Through Hamilton v. Vaden*, 721 P.2d 412, 417 (Okla. 1986), a concern that is especially pronounced in this case since the State's Phase II claims are predicated on conduct that, in the State's view, reaches well into the past. "Regardless" of any hypothesized "efficiency" gains, bifurcation is inappropriate where (as here) it would be prejudicial. *Angelo*, 11 F.3d at 964.

Nor is this the only type of prejudice that would result from the State's proposal. If the State's claims are bifurcated, each Defendant's witnesses (as well as State employees) would

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[8] *Faulkenberry v. Kansas City Southern Ry. Co.*, 661 P.2d 510, 513 (Okla. 1983), the State's only cited case, was decided before § 2018(D) was enacted and affirmed the *denial* of a motion for bifurcation.

have to sit for duplicative depositions and testify at multiple trials. *See, e.g.*, *Okla. Transp. Auth.*, 2006 OK Civ. App. 11, ¶ 8; *Racher*, 2015 WL 9413886, at *2. Multiple trials would also needlessly consume the time and effort of *both* Defendants' and the State's counsel. It would be more efficient and cost effective for Defendants and for the People of Oklahoma, in other words, if the State's claims were tried together. And duplicative trials would unquestionably burden this Court and its resources. Worse still, given the overlap between the State's Phase I and II claims, bifurcation would create a very real "risk of inconsistent judgments," which would threaten the public's faith in the integrity of the Oklahoma judicial system. *Salmon*, 2014 WL 5600931, at *1.

The State's proposed bifurcation approach also threatens each Defendant's constitutional right to a jury trial. Under Oklahoma law, the "right of trial by jury shall be and remain inviolate." Okla. Const. art. II, § 19. But this right to a jury trial means that only one jury is permitted to make factual findings in connection with a particular issue and "a given issue may not be tried by different, successive juries." *Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999); *see Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (right to jury trial includes "right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact"). Because the State's Phase I claims against each Defendant rest upon many of the same overlapping factual issues as the Phase II claims, a separate successive Phase II trier of fact would need to re-examine and resolve many of the same factual findings of the first Phase I jury—a clear constitutional violation. Tellingly, the State does not address and offers no way of guarding against this constitutional concern. For this additional reason, the State's motion should be denied.

C. Bifurcation Is Not Needed To Abate The "Opioid Epidemic"

The State asserts that avoiding delay on the nuisance claim is particularly important because, if the case is for some reason delayed, the State's ability to abate the opioid abuse crisis would be delayed too. Defendants of course recognize the serious nature of the opioid abuse crisis in Oklahoma, but the State's legal argument suffers from multiple shortcomings. *First*, as explained immediately above, the State's bifurcation plan will not expedite final resolution of its nuisance claim and may in fact delay it. The State's proposal, moreover, is likely to prejudice Defendants and the trial process, and bifurcation is never appropriate in these circumstances. *Second*, the argument rests on a false premise. The State implies that it cannot "begin the process" of addressing "the devastating effects" of the opioid abuse crisis absent a final judicial order, Mot. at 4, but that simply is not true. Whether or not the State has secured its abatement remedy, there is nothing preventing the State from taking measures to combat opioid abuse—indeed, the State's alleged injury in this case consists largely of the "substantial resources" it has purportedly *already* "expend[ed] to combat an escalating opioid abuse epidemic." Pet. ¶¶ 46-49; *see also* Opp. at 7-8.

Third, the abatement relief the State seeks from Defendants is not, as the State has repeatedly claimed, likely to be a life-saving measure. Mot. at 4. The State seeks as "injunctive relief" an order enjoining Defendants' alleged "conduct causing this epidemic." *Id.* But 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. Janssen stopped promoting Duragesic in 2007 and stopped promoting Nucynta when it divested the product in 2015. Purdue and Cephalon likewise have ceased promotion of their products (indeed, Cephalon has not promoted Actiq since 2006), and Teva and Watson/Actavis never promoted the generic opioid medications that they sold. Defendants also participate fully in the FDA-mandated REMS

programs, which provide training and education for physicians on how to prescribe opioid medications safely. And indeed, the Centers for Disease Control and Prevention found that since 2010, the "opioid overdose epidemic" has been "characterized by deaths involving heroin" and "synthetic opioids, particularly illicitly manufactured fentanyl"—*not* Defendants' FDA-approved, prescription-only opioid medications.[9] There is a pronounced disconnect between the State's citation to overdose deaths in the State of Oklahoma and its effort to rush toward trial against three families of companies that manufacture (or previously manufactured) but no longer promote highly-regulated, lawful medications—medications that are reimbursed by the State *to the present day.*

It is no response for the State to shift gears and say it needs more money to abate the opioid epidemic. The State seeks monetary damages on *both* its Phase I and II claims. To the extent the State argues that it could secure *more* in monetary damages on its Phase I claims, that is no basis to grant the State's motion for bifurcation—it is a reason to deny it. No principle allows litigants to structure litigation so that the claims they believe are most valuable go first.

D. Bifurcation Will Not Promote Settlement

Finally, the State says that bifurcation is justified because the jury's "resolution of the State's public nuisance claim will undoubtedly inform all parties as to the merits of the claims in Phase II and will encourage resolution of any remaining claims," and thus a "second trial may be unnecessary." Mot. at 6.[10] But the possibility that resolution of one claim might prompt settlement of another "exists in every case in which" multiple claims are asserted, and the State

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[9] *See* Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report (Sept. 1, 2017) *available at* https://www.cdc.gov/mmwr/volumes/66/wr/pdfs/mm6634a2.pdf.

[10] Again, under the State's own proposal, Phase I would consist of more than just the nuisance claim.

"offers no argument that this case is unique in that regard and no persuasive argument that bifurcation would promote judicial economy." *Guinn*, 2011 WL 2181963, at *3. Indeed, if the law were as the State imagines, a plaintiff would be entitled to bifurcation whenever it asserted multiple claims arising from the same nucleus of operative facts and would be allowed to choose which of its claims to try first. That is not the law. And as noted, a jury verdict on the State's Phase I claims is unlikely to meaningfully expedite final resolution of any claims (and bifurcation may delay it), because the case is almost certain to proceed through the appellate process.

CONCLUSION

The State of course remains free to try only its public nuisance claim and voluntarily dismiss the others. But until it does, the State should not be permitted unilaterally to structure the trial process to maximize its advantage, especially where the State's proposal would result in serious adverse consequences. Accordingly, the State's motion to bifurcate should be denied.

Dated: August 27, 2018

Respectfully submitted,

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CERTIFICATE OF MAILING

Pursuant to Okla. Stat. tit. 12, § 2005(D), this is to certify on August _____, 2018, a true and correct copy of the above and foregoing has been served via the United States Postal Service, First Class postage prepaid, to the following:

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