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

REPLY MEMORANDUM OF DEFENDANTS TEVA PHARMACEUTICALS USA, INC., CEPHALON, INC., WATSON LABORATORIES, INC., ACTAVIS LLC, AND ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC. IN FURTHER SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY

The State's Opposition (the "Opposition") to the Teva Defendants'[1] Motion to Compel Discovery (the "Motion") includes three categories of objections. Each lacks merit.

First, the State objects to Interrogatories Nos. 1 and 2 as unduly burdensome, premature (because they purportedly require expert opinion), and potentially mooted out by the State's pending Motion for Separate Trials. The objections to scope and burden fail because the Interrogatories seek information related only to 245 prescriptions which the State specifically identified in its Petition.[2] Likewise, the State's contention that expert opinion is required to identify facts, including material misrepresentations, which caused the State to approve reimbursement of the prescriptions is equally without merit. Indeed, the Oklahoma Health Care Authority necessarily determined that these prescriptions were necessary and not excessive ***before*** approving reimbursement. The State knows what information it considered in making this determination, and it knows what information the physicians relied upon in prescribing them. It has all the necessary information to respond to this Interrogatory. At a minimum, this basic information should have been collected ***before*** this lawsuit was brought.

The State also argues that Interrogatories Nos. 1 and 2 are improper because the State's Motion for Separate Trials, if granted, "would stay discovery regarding the False Claims Act cause of action to which these Interrogatories relate." But, as demonstrated in the Defendants' opposition to the State's Motion for Separate Trials, that is just not true. All of the State's claims, including its claims for public nuisance, common law fraud, and unjust enrichment, are

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[1] The Motion and this Reply are brought on behalf of Defendants Teva Pharmaceuticals USA, Inc., Cephalon, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc., f/k/a Watson Pharma, Inc. The Defendants are collectively referred to herein as the "Teva Defendants". However, for purposes of the Motion, and contrary to the Opposition, the Interrogatories at issue were served only on behalf of Cephalon, Inc.

[2] The State's assertion that, "Interrogatory Nos. 1-2 request the State identify [sic] each and every medically unnecessary or excessive prescription Teva caused to be filled in Oklahoma as a result of its misrepresentations over 19 years in order to prove its claims, as well as the basis for alleging each and every prescription was 'unnecessary or excessive'" is simply untrue. *See* Pl. Br. at 1. Interrogatories 1 through 6 are expressly limited to the 245 prescriptions that the State itself identified in paragraph 37 and Exhibit 3 of the Petition.

grounded in its allegations that each Defendant made fraudulent misrepresentations that caused Oklahoma healthcare providers to prescribe its branded opioids.

Second, the State objects to Interrogatories Nos. 3 through 6 on the basis that it is producing "business records" from which the Teva Defendants can "derive or ascertain" the answers. This objection is both inadequate and nonsensical, as Interrogatories Nos. 3 through 6 are all premised upon identification of the "unnecessary or excessive" prescriptions that are requested in Interrogatories Nos. 1 and 2. Moreover, Interrogatories Nos. 3 through 6 seek, among other things, identification of the alleged material misrepresentations that caused the State to reimburse "unnecessary or excessive" prescriptions. Only the State is in the position to identify this information, and it is in fact the State's burden to do so by clear and convincing evidence under Oklahoma law.

Third, the State refuses to provide any responses whatsoever to Interrogatories Nos. 7 through 16 on the basis that they exceed the 30-interrogatory limit under the Oklahoma Rules of Civil Procedure. But the plain language of 12 O.S. § 3233 entitles each party to serve up to 30 interrogatories, and the State may not unilaterally decide which Interrogatories it wishes to respond to. The State specifically sued 13 defendants, served process on 13 defendants, made factual allegations regarding 13 defendants, and therefore all 13 defendants are entitled to discovery consistent with the Oklahoma Rules of Civil Procedure. The State's gamesmanship should not be countenanced, and the Motion to Compel should be granted.

I. ARGUMENTS AND AUTHORITIES

A. Plaintiff Has Not Adequately Answered Interrogatories Nos. 1 and 2

The State does not and cannot dispute the relevance of the information sought through Interrogatories Nos. 1 and 2. Indeed, this basic information is critical for the Teva Defendants

to defend against the State's claims, and tracks directly the allegations in the State's Petition. For example, the State alleges:

- "Defendants deceptive and misleading marketing campaign[s] caused Oklahoma to pay millions of dollars for **unnecessary or excessive** opioid prescriptions." *Id.* ¶ 34 (emphasis added).

- "From 2007 to the present the Cephalon Defendants have caused to be submitted approximately 245 prescriptions for reimbursement to the Oklahoma Health Care Authority, on behalf of the Oklahoma Medicaid system, for the Cephalon Defendants' opioids." *Id.*, ¶ 37. The State then specifically listed those 245 prescriptions in Exhibit 3 to its complaint. *Id.*, Exh. 3.

- "**Defendants made false representations to healthcare providers working for the State**, and/or omitted material facts regarding the risks, efficacy, and medical necessity of their opioids[.]" *Id.* ¶ 122 (common law fraud claim)

- "Oklahoma Medicaid would not have incurred the costs associated with paying for **unnecessary opioid prescription** claims but for Defendants' false misrepresentations and omissions regarding the risks, efficacy, and medical necessity of Defendants' opioids." *Id.* ¶ 126 (emphasis added).

See also Pet. ¶¶ 51, 118, 125, 130.

In a transparent effort to manufacture an objection, the State mischaracterizes the scope of the Interrogatories. The State argues that Interrogatories Nos. 1 and 2 "request the State identify each and every medically unnecessary or excessive prescription Teva caused to be filled in Oklahoma as a result of its misrepresentations over 19 years in order to prove its claims, as well as the basis for alleging each and every prescription was 'unnecessary or excessive.'" Pl. Br. at 1. That is untrue. Interrogatories Nos. 1 and 2 are more limited in scope and are narrowly tailored to the State's own allegations. Interrogatory No. 1 explicitly requests identification of the "unnecessary" or "excessive" prescriptions cited throughout the Petition and listed in Exhibit 3—which is strictly limited in scope to the 245 prescriptions identified by the State in its own Petition (and limited temporally from 2007 to 2018). Similarly, Interrogatory No. 2 relates back to No. 1 and requests the basis for alleging that these prescriptions are "unnecessary" or

"excessive". There is simply nothing burdensome or unreasonable about these requests, which are directly related to the State's claims and the Teva Defendants' defenses.

The State next contends that Interrogatories Nos. 1 and 2 "are heavily dependent on the State's experts whose testimony and opinions are not required to be disclosed until the parties have met their expert disclosure and report obligations after further discovery has been conducted." Pl. Br. at 1. But the State already has made allegations in its Petition about this basic factual information—which should have collected ***before*** it filed this lawsuit and is necessary to both state and establish a fraud-based claim. *Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, 861 P.2d 308, 310-11 (requiring plaintiff to plead the time, place, and content of alleged misrepresentation); *see also Norman v. Leach*, 1953 OK 17, 252 P.2d 1020, 1022 (requiring plaintiff to "set forth material facts constituting the alleged fraudulent . . . conduct"). The Teva Defendants merely ask the State to produce it.

Tellingly, the State cites no Oklahoma case law to support its position. Instead, the State cites to an unpublished opinion from the Southern District of New York for the proposition that, "Courts routinely find that interrogatories seeking expert opinions at this stage of the litigation are premature." Pl. Br. at 4 (*citing New Haven Temple SDA Church v. Consol. Edison Corp.*, No. 94 Civ 7128 (AGS)(BAL), 1995 U.S. Dist. LEXIS 8220, at *17 (S.D.N.Y. 1995). In *New Haven Temple*, a religious corporation brought a putative class action against an electric company, seeking damages and injunctive relief on behalf of African-American religious organizations for alleged rate discrimination on the basis of race. The court held that the electric company's interrogatory related to the religious organization's calculation of damages was premature, because the Interrogatory sought a calculation of damages which necessarily required expert testimony. *Id.* at 15. By contrast, Interrogatories Nos. 1 and 2 do not ask for a damages calculation and do not require expert testimony. They merely seek the factual

information that the State intends to use to prove its fraud-based claims—information which it already possesses, bases its allegations, and has already considered in its decision to reimburse the prescriptions at issue.

Incredibly, the State also alleges that Interrogatories Nos. 1 and 2 are improper because they "presuppose the existence of a legal obligation for the State to identify each and every prescription that falls within the 'unnecessary or excessive' category." Pl. Br. at 5. But the discovery rules require this information. Regardless of how the State intends to prove its claims (*id.*), the Teva Defendants are entitled to the discovery of any non-privileged information relevant to their "defense[s.]" 12 O.S. § 3226(B)(1)(a); *see also Scott v. Peterson*, 2005 OK 84, ¶ 6, 126 P.3d 1232, 1234 ("Parties may obtain discovery of any matter not privileged, which is relevant to the subject matter involved in a pending action, whether it relates to a claim or ***defense*** of the party seeking discovery (emphasis added)). By way of example only, the Teva Defendants have the due process right to show, with respect to each allegedly unnecessary or excessive prescription, that the prescription was not written because of any false or misleading statement made to the prescriber, that the prescription was medically appropriate for the patient, based upon the independent medical judgment of the prescriber, that the patient received a benefit from that prescription, and/or that the State independently chose to reimburse for that prescription.

Indeed, the entire theory of the State's case is based upon an allegation that Cephalon falsely marketed drugs "in a manner aimed at downplaying the risks of opioids . . . overstating their efficacy, and, thus, wrongly increasing" opioid prescriptions and abuse in Oklahoma. *See, e.g.*, Pet. ¶ 75 . This fraud-based allegation serves as the basis for each of the State's five causes of action. *See, e.g., id.* ¶¶ 94 (Oklahoma Medical Program Integrity Act), 118-119 (Public Nuisance), 122 (Fraud), 131 (Unjust Enrichment). To defend against this case, the Teva

Defendants need to know what prescriptions are at issue and what supposed fraudulent statements purportedly caused them to be written. Put simply, Interrogatories Nos. 1 through 6 go to the very heart of the State's claims and seek information, including identification of false material misrepresentations and allegedly unnecessary prescriptions, that the State must prove by clear and convincing evidence and that the Teva Defendants need to defend such claims.[3]

Finally, the State contends that it has already provided sufficient answers to Interrogatories Nos. 1 and 2 because it stated that "it is more likely than not that: (1) opioid prescriptions written in the State of Oklahoma since 1996 and reimbursed by SoonerCare, other than those written for end-of-life palliative care or for a three-day supply to treat acute pain, were "unnecessary", "excessive", and/or "false, fraudulent, or otherwise reimbursed in violation of the Oklahoma Medicaid False Claims Act." Pl. Br. at 6. This answer, however, fails to provide any of the relevant information. It fails to identify the specific prescriptions linked to the Teva Defendants that the State contends are medically unnecessary or excessive. It fails to identify the specific misrepresentations that allegedly caused them to be written. And it fails to provide any of the necessary details of any alleged fraud. The State must provide specifics to back up its claims, and such half-answers without any meaningful detail are insufficient.

B. Plaintiff Has Not Adequately Answered Interrogatories Nos. 3 Through 6.

The State claims that it has adequately responded to Interrogatories Nos. 3 through 6 because it "agreed to produce non-privileged, responsive and relevant business records from

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[3] The elements of actionable fraud under Oklahoma law are: (1) a false material misrepresentation, (2) made as a positive assertion which is either known to be false or is made recklessly without knowledge of the truth, (3) with the intention that it be acted upon, and (4) which is relied on by the other party to his (or her) own detriment. *Brown v. Founders Bank & Tr. Co.*, 1994 OK 130, 890 P.2d 855, 862 n. 17. Fraud is never presumed and each of its elements must be proved by clear and convincing evidence. *Silver v. Slusher*, 1988 OK 53, 770 P.2d 878; *Bras v. First Bank & Trust Co.*, 1985 OK 60, 735 P.2d 329; *Dawson v. Tindell*, 1987 OK 10, 733 P.2d 407; *Bowman v. Presley*, 212 P.3d 1210, 1218 (Okla. 2009). All the essential elements must be present, and the absence of any one is fatal to recovery. *Steiger v. Commerce Acceptance of Oklahoma City, Inc.*, Okla., 455 P.2d 81 (1969).

which the answer to this interrogatory or parts of this interrogatory may be derived or ascertained." Pl. Br. at 7. But Interrogatories Nos. 3 through 6 are all premised upon identification of the "unnecessary or excessive" prescriptions that are requested in Interrogatories 1 and 2. As such, Interrogatories Nos. 3 through 6 cannot be fully answered without answering Nos. 1 and 2—which the State has not done. Moreover, contrary to Oklahoma law, the State does not identify which Interrogatories—or which "parts" of interrogatories—may be ascertained from the business records that it has not yet produced. Nor does it offer any explanation as to what business records it is producing in response to each Interrogatory, when those records will be produced, or how the records will be responsive to the Interrogatories. It also makes no showing that the burden of deriving the answer from such unidentified documents would be "the same for the party serving the interrogatory as for the party served." 12 O.S. § 3233(C). In short, its response makes no effort to comply with the requirements of Oklahoma law.

Lastly, Interrogatories Nos. 3 through 6 cannot be answered through business records. They seek, among other things, identification of the material misrepresentations that caused the State to reimburse "unnecessary or excessive" prescriptions. This is the State's very theory of liability. The State, and only the State, is in the position to identify this information—which is essential for the Teva Defendants to defend against the State's claims, regardless of how the State may try to prove its case. Because a mere the production of unidentified records, without more, is insufficient to identify these misrepresentations, Plaintiff's Motion should be granted.

C. The State Should Be Ordered To Respond To Interrogatories Nos. 7 Through 16.

The State has refused to answer Interrogatories Nos. 7 through 16 on the ground that the Teva Defendants have exceeded the limit for interrogatories under Oklahoma law. But the rule is clear that "***[a]ny party*** may serve upon ***another party*** written interrogatories to be answered

by the party served . . .." 12 O.S. § 3233. The rule continues by noting that "[t]he number of interrogatories to a party shall not exceed thirty in number." *Id.* The State somehow contorts this rule to reach its self-serving conclusion that "...the State, is only required to respond to a sum total of 30 interrogatories, regardless of the number of parties purporting to serve such interrogatories." Pl. Br. at 9. The State's position is in direct contradiction of the plain language in § 3233, and, as a practical matter, would serve to stymie discovery in all multi-party litigation in the State of Oklahoma.

Here, Cephalon alone has not exceeded this 30-interrogatory limit. In January 2018, Cephalon initially served four interrogatories on the State, thereby leaving 26 remaining Interrogatories that it could use. In its Second Set of Interrogatories, Cephalon issued 16 Interrogatories on the State, which was well within the 30-interrogatory limit. Accordingly, the State is required to respond "fully" to each of the Interrogatories. Its objection is baseless.[4]

Perhaps realizing that its interpretation of the rule does not actually make any sense, the State proposes a unilateral "compromise," whereby it "has agreed to respond to 30 interrogatories from each Defendant family." *Id.* But the State is not done there. The State then unilaterally takes the position that because six of the Defendants (including Cephalon) each previously served four interrogatories, and the Defendants are "jointly defending this litigation," these requests are really "joint requests"—which therefore count for 24 of each "Defendant family" 30-interrogatory limit. *Id.* In short, the State is making up the rules as it goes.

None of the case law cited by the State in its Opposition actually supports the unilateral "compromise" that it is seeking to impose on the Defendants in this case, much less

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[4] Indeed, the State sued 13 defendants individually, served process on 13 defendants, and made specific allegations in its Petition regarding 13 defendants. Each of those 13 defendants is therefore entitled to serve up to 30 interrogatories on the State.

contemplates the use of "join requests" or "Defendant family" to limit the number of interrogatories a party can serve. The State simply cites to the text of Federal Rule of Civil Procedure 33 (limiting service of interrogatories by one party to any other party to 25), and a federal case from the Southern District of New York which discusses discrete subparts counting toward the 25-interrogatory limit. Pl. Br. at 10. However, the rule that applies here is that each Defendant may serve Plaintiff with 30 written interrogatories. 12 O.S. § 3233(A); *see also cf. State of Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 WL 649332, *4 (N.D. Okla. Feb. 26, 2007) (noting that each of the four defendant entities were permitted to serve on the Plaintiff the maximum 25 interrogatories under Federal Rule of Civil Procedure 33(a) "permitting a total of 100 interrogatories"). Because Cephalon alone has served less than 30 interrogatories, the State must answer each of them and its supernumerary objection should be summarily rejected.

II. CONCLUSION

The State has failed to adequately respond to Interrogatories Nos. 1 through 6, and it has wholesale refused to answer Interrogatories Nos. 7 through 16. Consistent with well-settled Oklahoma law, the Teva Defendants respectfully request the Court issue an Order compelling the State to fully and adequately respond to Cephalon's discovery.

Dated: August 27, 2018

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing was emailed this 27th day of August 2018, to the following:

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