IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

v.

(I) 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

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.

FILED

AUG 28 2018

In the office of the
Court Clerk MARILYN WILLIAMS

REPLY OF DEFENDANTS TEVA PHARMACEUTICALS USA, INC. AND CEPHALON INC.'S AND NON-PARTIES PAMELA COSTA AND TIM MULLEN IN SUPPORT OF OBJECTION AND MOTION TO QUASH DEPOSITION SUBPOENA DUCES TECUM

The State's omnibus opposition ("Opposition") to the motions to quash ("Motions") brought by Defendants Teva Pharmaceuticals USA, Inc. and Cephalon, Inc. (collectively "the Teva Defendants"), and non-parties Pamela Costa and Tim Mullen (collectively "Non-Party Sales Representatives"),[1] fails to dispute that the subpoenas (the "Subpoenas"): (1) improperly request the Teva Defendants' documents from non-party current and former employees; (2) seek duplicative discovery from non-party current and former employees, thereby forcing non-parties to produce documents that could more readily be obtained from the Teva Defendants; and (3) are overbroad and, on their face, seek documents that have no relevance to this case and beyond that which is allowed by Section 3226. For each of these reasons, the Motions should be granted.

I. ARGUMENTS AND AUTHORITIES

Pursuant to Okla. Stat. tit. 12, § 2004.1(C)(3)(1), this Court has the authority to quash a subpoena if it "subjects a person to undue burden," or it "requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title." Information that is not relevant to the claims or defenses of any party meets that standard, and is not permissible discovery. *See* 12 O.S. § 12-3226.

In their Motions, the Teva Defendants and the Non-Party Sales Representatives have explained that the Subpoena should be quashed for the three independent reasons identified above. The State's Opposition does nothing to change this.

First, the Subpoenas seek Teva documents from non-parties that should be obtained from the Teva Defendants. Tellingly, the State does not dispute that the information it seeks from Costa and Mullen belong to the Teva Defendants, their current (for Costa) or former (for Mullen)

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[1] The State has not opposed the motion to quash of non-party Brian Vaughn.

employer. For this reason alone, the Motions should be granted. *See, e.g., Bostian v. Suhor Indus., Inc.*, No. 4:07-cv-151, 2007 WL 3005177, at *2 (N.D. Okla. Oct. 12, 2007) (recognizing rule).

The State argues that *Bostian* is limited to documents subpoenaed from a current employee and that "all but one of the sales representatives at issue are *former* employees." Opp'n 4–5. But with respect to the Teva Defendants' sales representatives, only one is a former employee. *See* Teva Defendants and Costa Mot. 2; Teva Defendants and Mullen Mot. 2. Moreover, the *Bostian* court did not limit its holding to employees. Instead the *Bostian* court held "[s]ince the documents sought belong to Defendant Suhor, they are appropriately obtained directly from Suhor under Fed. R. Civ. P. 34." 2007 WL 3005177, at *2. This holding recognizes the common sense rule that when documents belong to and are in the possession of a party to the litigation, they first should be obtained from that party, rather than from a non-party.[2]

Similarly, the State is incorrect when it tries to distinguish *Bostian* on the ground "that the subpoena at issue was properly quashed on the independent ground that it required a non-party to travel more than 100 miles." Opp'n 4. The decision to quash the subpoena as to the documents, however, was grounded entirely in the "documents belonging to the defendant corporation . . . ." 2007 WL 3005177, at *2. This same principle applies here.

To try to avoid this holding, the State argues that it "requested the subpoenaed information for the Defendants over a year ago and has either yet to receive a complete production, or the sales

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[2] The State argues that it may subpoena any document in a non-party's "control" and that legal ownership of the document is irrelevant to that analysis. Opp'n 4. But the *Bostian* court rejected this argument, too: "The Court rejects Plaintiff's argument that Mr. Spies should be required to produce the requested documents because under Rule 45, regardless of ownership, he has 'control' of the documents. Although the cases cited by Plaintiff define the term control as used in Rule 45, none of those cases address the situation presented here where documents belonging to the defendant corporation are subpoenaed directly from a non-party employee. Since the documents sought belong to Defendant Suhor, they are appropriately obtained directly from Suhor under Fed.R.Civ.P. 34." *Bostian*, 2007 WL 3005177, at *2.

representatives have documents the Defendants do not." Opp'n 5. Neither argument makes sense. Discovery is ongoing, and if the State believes the Teva Defendants' production is incomplete, the proper remedy is to address this issue with the Teva Defendants, and, if necessary, file a motion to compel pursuant to Section 3237—not a burdensome subpoena on non-parties. *Bostian*, 2007 WL 3005177, at *2. Similarly, the State provides no basis for its conclusory allegation that "sales representatives have documents the Defendants do not." Opp'n 5. Nor can it, given that the documents sought from the sales representatives all relate to their employment with the Teva Defendants, including training and marketing materials and communications with the Teva Defendants, and, thus, would be in the possession of the Teva Defendants. Consistent with the logic of *Bostian*, the Motions should be granted.

Second, under Oklahoma law, discovery that can be received from a party is not the proper subject of a subpoena to a non-party. *Quinn v. City of Tulsa*, 777 P.2d 1331, 1342 (Okla. 1989) (affirming denial of discovery from a non-party that could have been obtained from a party); *see also Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282-JTM-GEB, 2017 WL 6524841, at *3 (D. Kan. Dec. 21, 2017) ("A subpoena that seeks irrelevant, overly broad, or duplicative discovery causes undue burden, and the trial court may quash it on those bases."); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, No. 17-MD-2785-DDC-TJJ, 2018 WL 3818914, at *2 (D. Kan. Aug. 10, 2018) ("Non-parties responding to Rule 45 subpoenas generally receive heightened protection from discovery abuses."). Doing so places an undue burden on the non-party to produce documents that should be obtained from the actual litigants. *Id.* While the Opposition chooses to ignore it, that rule applies here.

The Opposition argues the Teva Defendants have no standing to "object to undue burden on a non-party"; however, the State ignores that the Motions were brought by the Teva Defendants

and the Non-Party Sales Representatives. Even the case cited by the State recognizes that the non-party has standing to object based on undue burden. *See Khumba Film (PTY.), Ltd. v. Does 1-14*, No. 14-CV-02075-WYD-MEH, 2014 WL 4494764, at *1 (D. Colo. Sept. 12, 2014) (recognizing plain language of federal rule 45 "requires the Court to quash or modify a subpoena that . . . subjects a person to undue burden"); *see also Howard v. Segway, Inc.*, No. 11-CV-688-GKF-PJC, 2012 WL 2923230, at *3 (N.D. Okla. July 18, 2012) (modifying similar request for employee records where the "subpoena neither places a temporal limit on the document request nor limits the requested information to items that might be relevant to the issues in this action" and this could result in a "significant amount of information in the requested file that is wholly irrelevant to the claims and defenses herein" and limiting the subpoena in time and scope). As the State acknowledges, the Non-Party Sales Representatives certainly have standing to move to quash on this ground. Opp'n 6. While the State claims that they should have submitted a declaration stating that such discovery is too burdensome, the State simply ignores the logic of *Quinn* and related case law: that duplicative discovery on a non-party necessarily imposes an undue burden, because the discovery should first be obtained from the Teva Defendants (as parties to the litigation).

The State also argues that it is entitled to subpoena the Teva Defendants' documents from the Non-Party Sales Representatives because the Teva Defendants have not completed their production and the Non-Party Sales Representatives may have additional documents than those already requested from the Teva Defendants. Opp'n 7. But this merely concedes that the State's document requests on the Non-Party Sales Representatives are duplicative; thus, it does not remedy the burden on them. Moreover, the State offers nothing more than speculation that the Non-Party Sales Representatives ***may*** possess documents the Teva Defendants are not producing; indeed, it identifies no such Teva document produced by other sales representatives. *See* Opp'n

6–7. This hardly justifies the State's duplicative discovery requests to the Non-Party Sales Representatives.

Third, the State concedes that its document requests to the Non-Party Sales Representatives are grossly overbroad. Opp'n 8. These requests are not limited to the sale or marketing of opioids. They have no temporal limitation. And they are not limited to the subject matter of this case. Because the document requests are grossly overbroad and the State has offered no way of limiting them, the Motions should be granted in their entirety.

Despite recognizing their over breadth, the State speculates that certain unidentified documents sought by the Subpoenas, such as "general sales policies and procedures, general bonus compensation structure, documents regarding sales representative complaints or termination, and many other categories of documents," might ultimately lead to the disclosure of admissible evidence. Opp. 7. But the State fails to explain why these documents are relevant and, even if they were, why they cannot be obtained from the Teva Defendants. Moreover, the State does not dispute that its requests would sweep in a myriad of other irrelevant documents, including personnel files, employee tax documents, and other materials about non-opioid products. Teva Defendants and Costa Mot. 4; *accord* Teva Defendants and Mullen Mot. 4.

While the State remarkably argues that this does not matter and the Non-Party Sales Representatives can simply "exclude" documents they believe are irrelevant from their productions, Opp'n 8, this is the very definition of an "overbroad" and impermissible Subpoena—and is the very basis for the pending Motions. The State's argument, if accepted, not only would effectively gut Rule 3226, but also would force non-parties to guess as to what documents it may need to produce in response to a facially overbroad subpoena. *See Ward v. Liberty Ins. Corp.*, No. CIV-15-1390-D, 2018 WL 991546, at *3 (W.D. Okla. Feb. 20, 2018) (quashing subpoena for use

of "blanket terms such as 'all documents,' 'all marketing materials,' 'all documents regarding' . . . [because such] a discovery request is facially overly broad when it uses such omnibus phrases since it requires the responding party to engage in 'mental gymnastics' to determine what information may or may not be remotely responsive").

It is not the burden of the Non-Party Sales Representatives or the Teva Defendants to properly draft a subpoena that is limited to the subject matter of this action. The scope of discovery is cabined by Rule 3226 and the State is clearly attempting to exceed this scope here. *See Quinn v. City of Tulsa*, 1989 OK 112, 777 P.2d 1331, 1342 ("requirement of [now Rule 3226] that the material sought in discovery be 'relevant' should be firmly applied, and the district courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .'" (quoting *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (first alteration added)).

II. CONCLUSION

The Subpoenas for documents issued to Ms. Costa and Mr. Mullen should be quashed because they were served on non-parties seeking the Teva Defendants' documents, they place an undue burden on a non-party, and they are impermissibly overbroad as drafted.

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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