IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

vs.

(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.,

Defendants.

For Judge Balkman's Consideration

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

REPLY IN SUPPORT OF MOTION OF DEFENDANTS WATSON LABORATORIES, INC., ACTAVIS LLC, ACTAVIS PHARMA, INC., AND TEVA PHARMACEUTICALS USA, INC. FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Despite attaching over 2000 pages of exhibits in its Response in Opposition ("Response"), the State has failed to provide a single piece of evidence that the Generic Manufacturers[1] engaged in any unlawful activity—an essential element of its public nuisance claim.[2] The State's public nuisance claim is predicated on alleged false representations or omissions regarding the risks and benefits of prescription opioids, but the State has not identified a single representation or omission made by the Generic Manufacturers about opioids in Oklahoma, much less one that provides the unlawful act necessary to bring a public nuisance claim. And for good reason: the Generic Manufacturers sold generic medicines and did not promote them.

To try to conceal this fundamental problem and invent a genuine issue of material fact where none exists, the State distorts the law. The State incorrectly argues that the Generic Manufacturers can be held liable for public nuisance based upon the acts of entirely separate entities (*i.e.*, Cephalon, Inc.) that did promote opioid medicines. This ignores black-letter Oklahoma law that each corporation is a separate and distinct entity. The State cannot simply attribute the representations and acts of Cephalon to any or all of the Generic Manufacturers,[3] but must show that each and every Defendant engaged in false marketing in Oklahoma. Yet virtually all of the exhibits the State attaches to its Response relate to Cephalon, or Teva USA after October

---

[1] All capitalized terms are used as defined in the Motion of Defendants Watson Laboratories, Inc., Actavis LLC, Actavis Pharma, Inc., and Teva Pharmaceuticals USA, Inc. for Partial Summary Judgment ("Generic Manufacturers' Motion"). (*See* Generic Mfrs.' Mot. 1–2.)

[2] On April 4, 2019, the State voluntarily dismissed all of its claims other than its claim for Public Nuisance. *See* 4/4/19, Notice of Voluntary Dismissal of Certain Claims Without Prejudice.

[3] As noted in the Generic Manufacturers' Motion, Teva USA is moving for partial summary judgment only as to claims against it prior to October 2011—when it became affiliated with Cephalon. (Generic Mfrs.' Mot. 2 n.1.)

2011. As the uncontroverted evidence from the Generic Manufacturers' Motion shows, the Generic Manufacturers made no representations about the safety and efficacy of their generic medicines and did not fund third-party doctors or organizations.

In addition, when the State's unsupported rhetoric and irrelevant exhibits are cast aside, it is clear that the claims against the Generic Manufacturers rest upon a single premise: they sold generic opioids and benefited from the marketing of other companies. This theory, however, does not involve an unlawful act. And it is preempted as a matter of federal law for the very reasons explained in the Generic Manufacturers' Motion. *See Morris v. PLIVA, Inc.*, 713 F.3d 774, 778 (5th Cir. 2013) ("Any state law-based holding that the generic manufacturers . . . should have ceased manufacturing these products because of insufficient warnings not only violates the duty of sameness but conflicts with FDA's exclusive authority to approve drugs and drug labels."); (Generic Mfrs.' Mot. 16).

Put simply, the State has failed to meet its burden to present evidence showing the existence of a material factual dispute that the Actavis Defendants or Teva USA (prior to October 2011) engaged in any marketing (much less false marketing) of opioid medicines. Accordingly, because the State cannot satisfy the unlawful element of its public nuisance claim, the Court should grant the Generic Manufacturers' motion for summary judgment. *See Abraham v. Trail Lanes, Inc.*, 2014 OK CIV APP 107, ¶¶ 7, 13, 352 P.3d 1256, 1260 (affirming grant of summary judgment on public nuisance claim where plaintiff presented no evidence that defendant acted unlawfully and there was no duty defendant failed to perform).

II. PUBLIC NUISANCE REQUIRES AN UNLAWFUL ACT

"For an act or omission to be a nuisance in Oklahoma, it must be unlawful." *Nuncio v. Rock Knoll Townhome Vill., Inc.*, 2016 OK CIV APP 83, ¶ 8, 389 P.3d 370, 374 (citing Okla. Stat. Ann. tit. 50, § 1). Doing something legal, like selling FDA-approved medicines, cannot form the

basis of a public nuisance claim under Oklahoma law. Okla. Stat. Ann. tit. 50, § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."). The generic opioids sold by the Generic Manufacturers are FDA-approved medicines. And Oklahoma law expressly permits the use of controlled substances—like the Generic Manufacturers' FDA-approved medicines—for the treatment of chronic pain. Okla. Admin. Code § 435:10-7-11; *see also id.* § 475:30-1-2 (permitting physicians to prescribe controlled substances).

The State asserts that "Defendants engaged in a widespread marketing campaign and made false representations to healthcare providers and/or omitted material facts regarding the risks, efficacy, and medical necessity of opioids." (Resp. 8–11 (quoting Statement of Additional Facts ("SAF") ¶ 1.)) Yet, in support of this so-called "fact," the State does not cite a single statement, let alone a false misrepresentation, made by any Generic Manufacturer, and instead cites thousands of pages related to other entities. (*Id.* (citing Exs. 5–8 (all pre-2011 Cephalon, Inc. documents); Ex. 4 (document identified as copyright Actavis Inc., not Actavis LLC or Actavis Pharma, Inc.); Exs. 16–57 (Mar. 7–8, 2019, Kolodny Dep. and accompanying Exhibits, none of which identify false misrepresentations by the Generic Manufacturers)).) This "throw everything against the wall" approach, without identifying any false statement made by the Actavis Defendants or Teva USA (prior to October 2011), does not and cannot defeat summary judgment.[4]

Similarly, the State's additional so-called "facts"—that "Defendants falsely marketed their opioids through the use of 'Key Opinion Leaders'" (SAF ¶ 2); "promoted the false concept of 'pseudoaddiction'" (SAF ¶ 3); and "were active collaborators in the Pain Care Forum . . . and also used seemingly unaffiliated organizations like The American Pain Foundation . . . to spread their

[4] The State attaches the Kolodny transcript and accompanying exhibits in their entirety, rather than excerpting the relevant portions. Even more egregiously, the State fails to provide any pin cite directing the Court to the supposedly relevant material.

misrepresentations" (SAF ¶ 4)—have nothing to do with the Generic Manufacturers. The cited documents and testimony show only that other distinct legal entities funded these doctors and organizations. (*Id.*) The Generic Manufacturers' uncontroverted evidence shows that they did not fund third-party doctors or organizations, or otherwise engage in marketing of their generic opioid medicines. (*See* Generic Mfrs.' Mot. ¶¶ 2–8.) Not surprisingly, the State does not identify a single false marketing statement attributable to any Generic Manufacturer in Oklahoma.

The remainder of the State's "facts" likewise do not point to any false marketing or other unlawful act by the Generic Manufacturers, and, thus, cannot form the basis of its public nuisance claim. (*See* SAF ¶ 5 (correlation between marketing strategy and sale of branded medicines); ¶ 6 (correlation between sales of branded medication and generic medications)[5]; ¶ 7 (Teva is the largest manufacturer of generic opioids); ¶ 8 ("Teva," "Actavis," and "Watson" had distribution agreements with Purdue to sell generic OxyContin or MS Contin).) Indeed, when all the rhetoric is cast aside, these "facts" make clear that the State seeks to hold the Generic Manufacturers liable merely because they sold generic opioid medicines in Oklahoma. This is not an unlawful act, and, in fact, this novel theory of liability is preempted as a matter of law. *See, e.g.*, *Morris,* 713 F.3d at 778 ("Any state law-based holding that the generic manufacturers . . . should have ceased manufacturing these products" is preempted).

---

[5] This is a misrepresentation of Hassler's deposition testimony, but, even if it were not, it still does not present an unlawful act on which public nuisance liability could be imposed. (*See* Ex. 1 to Resp., Hassler Dep. at 271:4–16 (Q: At that time, what unbranded marketing was Teva specifically doing related to chronic pain or opioids? A: I – I don't recall seeing specific initiatives, in that ***it really isn't part of what the generic companies do***. There may be specific small grants in different areas, but generics usually ride in the wake of what a branded company has done to build a market for an innovative product, and then the generic simply announce availability of generic versions of that product and there isn't – ***there isn't much, if any, disease education that generics typically engage in*** that come to mind.); *see also id.* at 271:21–272:9 (testifying that prior to 2011 Teva did not use unbranded marketing materials.)

Put simply, because the State fails to provide evidence of any misrepresentation by the Generic Manufacturers to support its public nuisance claim, the Court should grant the Generic Manufacturers' Motion. *Abraham*, 2014 OK CIV APP 107, ¶ 13, 352 P.3d at 1262.

III. JOINT AND SEVERAL LIABILITY DOES NOT RELIEVE THE STATE OF ITS BURDEN TO SHOW LIABILITY ON THE PART OF EACH SEPARATE DEFENDANT

A prerequisite to the State's joint and several liability theory is a showing of liability. (*See* Resp. 2–3 ("Once proven"; "at fault"; "a cause").) As discussed above, the State has failed to show any unlawful act by the Generic Manufacturers, a necessary element of its public nuisance claim. If the Generic Manufacturers are not individually liable for the State's public nuisance claim, they cannot be jointly liable for that claim either.

The State's reliance on *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 227 Cal. Rptr. 3d 499 (2017), is misplaced. Unlike here, the defendants in *ConAgra* conceded that they marketed their lead paint for interior residential use. *Id.* at 108. As the State identifies, the *ConAgra* defendants instead argued that "their promotions could not have caused the presence of interior lead paint in homes without proof that paint made by each of them was currently present in those homes[.]" (Resp. 3.) This is wholly distinguishable from the Generic Manufacturers argument, which is not that their promotion did not cause the alleged public nuisance, but that there was ***no promotion***—and therefore no unlawful act—to form the basis of the State's public nuisance claim against the Generic Manufacturers. *Abraham*, 2014 OK CIV APP 107, ¶ 13, 352 P.3d at 1262.

IV. THE GENERIC MANUFACTURERS ARE DISTINCT LEGAL ENTITIES AND THE STATE CANNOT SIMPLY DISREGARD THE CORPORATE FORM

It is black-letter law that "'[c]orporations are distinct legal entities, and generally one corporation will not be held responsible for the acts of another.'" *Hitch Enterprises, Inc. v.*

Cimarex Energy Co., 859 F. Supp. 2d 1249, 1265 (W.D. Okla. 2012) (quoting *Gilbert v. Security Finance Corporation of Oklahoma, Inc.*, 152 P.3d 165, 175 (Okla. 2006).) Thus, to hold the Generic Manufacturers liable for its public nuisance claim, the State must identify and provide evidence of an unlawful act constituting the public nuisance for each Generic Manufacturer. As discussed above, the State has failed to do so. Instead, the State has provided evidence (and insufficient evidence at that) related only to Cephalon, a branded manufacturer that did not join the Generic Manufacturers' Motion. The Court cannot disregard the separate corporate existence of these entities. *See McCall v. Chesapeake Energy Corp.*, 2007 OK CIV APP 59, ¶ 28, 164 P.3d 1120, 1127.

Likewise, the State's argument that the "Teva Defendants" are responsible for the acts of Cephalon fails. The evidence cited by the State (Ex. 2 to Resp.) shows only that the Generic Manufacturers' parent corporation (who is not a Defendant in this case) acquired Cephalon[6]—not that any Generic Manufacturer did so. As a result, the State's incorrect argument that a "purchasing corporation is a mere continuation of the selling company," even if true, is simply irrelevant.[7] (Resp. 6, 14 (citing *Pulis v. United States Elec. Tool Co.*, 1977 OK 36 ¶ 5, 561 P.2d 68, 69).) The Generic Manufacturers did not purchase Cephalon; thus, their "[s]eparate corporate

---

[6] Although the State has dismissed its other claims, mooting Cephalon's Motion for Partial Summary Judgment, the State concedes that it settled a subset of these claims with Cephalon. (*See* Resp. 14.) Cephalon intends to separately move for summary judgment on the remaining claim in accordance with the Court's scheduling order.

[7] The State's evidence shows that defendant Teva USA was not the purchasing corporation. (Ex. 2 to Resp., at 1–2 ("Jerusalem, Israel, and Frazer, PA, May 2, 2011 – Teva Pharmaceutical Industries Ltd. (NASDAQ: TEVA) and Cephalon, Inc. (NASDAQ: CEPH) today announced that their Boards of Directors have unanimously approved a definitive agreement under which Teva will acquire all of the outstanding shares of Cephalon . . . expected to be completed in the third quarter of 2011."); *see also* Ex. 2 to Generic Mfrs' Mot., J. Hassler Decl. ¶ 11 (showing generic business of Actavis Defendants was acquired by the parent company of Teva USA in 2016).)

existence will not be disregarded . . . ." *McCall v. Chesapeake Energy Corp.*, 2007 OK CIV APP 59, ¶ 28, 164 P.3d 1120, 1127.

V. THE STATE CANNOT AVOID PREEMPTION

The Generic Manufacturers have demonstrated that, based upon the unique statutory and regulatory requirements applicable to them, any claim based on a failure to warn or communicate the risks of generic opioid medicines is preempted under *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011) and other controlling United States Supreme Court precedent. (*See* Generic Mfrs.' Mot. 10–16.) The State does not dispute this point. Indeed, at bottom, the State's argument appears to be that the Generic Manufacturers should not have sold generic opioids or somehow should not have benefited from the alleged fraud of others—a theory that is also preempted as a matter of law by *Mensing* and its progeny. (*See* Generic Mfrs.' Mot. 16); *see also Morris*, 713 F.3d at 778 (recognizing rule).

Tellingly, the State tries to avoid preemption by conceding that it does not make any failure to warn claim and is basing its public nuisance claim upon affirmative marketing. (*See* Resp. 16.) But on summary judgment, the State can no longer rely on broad, unsupported assertions. Rather, it must present actual ***evidence*** that the Generic Manufacturers engaged in an unlawful act to support its public nuisance claim. *Abraham*, 2014 OK CIV APP 107, ¶ 13, 352 P.3d at 1262. The State has failed to do so.

VI. CONCLUSION

The undisputed facts show that the Generic Manufacturers made no representations about the therapeutic value of their products other than those required by the FDA. Partial summary judgment should be granted to the Generic Manufacturers on the State's public nuisance claim.

[*Signature Page Follows*]

Dated: April 9, 2019

Robert G. McCampbell, OBA No. 10390
Nicholas ("Nick") V. Merkley, OBA No. 20284
Leasa M. Stewart, OBA No. 18515
Jeffrey A. Curran, OBA No. 12255
Ashley E. Quinn, OBA No. 33251
GABLEGOTWALS
One Leadership Square, 15th Fl.
211 North Robinson
Oklahoma City, OK 73102-7255
T: +1.405.235.3314
E-mail: RMcCampbell@Gablelaw.com
E-mail: NMerkley@Gablelaw.com
E-mail: LStewart@gablelaw.com
E-mail: JCurran@Gablelaw.com
E-mail: AQuinn@Gablelaw.com

OF COUNSEL:

Steven A. Reed
Harvey Bartle IV
Mark A. Fiore
Rebecca Hillyer
Evan K. Jacobs
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
T: +1.215.963.5000
E-mail: steven.reed@morganlewis.com
E-mail: harvey.bartle@morganlewis.com
E-mail: mark.fiore@morganlewis.com
E-mail: rebecca.hillyer@morganlewis.com
E-mail : evan.jacobs@morganlewis.com

Nancy L. Patterson
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana St., Suite 4000
Houston, TX 77002-5006
T: +1.713.890.5195
E-mail: nancy.patterson@morganlewis.com

Brian M. Ercole
Melissa M. Coates
Martha A. Leibell
MORGAN, LEWIS & BOCKIUS LLP
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131
T: +1.305.415.3000
E-mail: brian.ercole@morganlewis.com
E-mail: melissa.coates@morganlewis.com
E-mail: martha.leibell@morganlewis.com

Collie T. James, IV
MORGAN, LEWIS & BOCKIUS LLP
600 Anton, Blvd., Suite 1800
Costa Mesa, CA 92626
T: +1.714.830.0600
E-mail: collie.james@morganlewis.com

Tinos Diamantatos
MORGAN, LEWIS & BOCKIUS LLP
77 W. Wacker Dr.
Chicago, IL 60601
T: +1.312.324.1000
E-mail: tinos.diamantatos@morganlewis.com

Steven A. Luxton
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
T: +1.202.739.3000
E-mail: steven.luxton@morganlewis.com

Attorneys for Defendants Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Watson Laboratories, Inc., Actavis LLC,* and *Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.

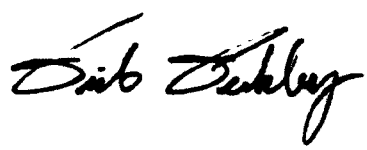
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed this 9th day of April, 2019, to the following:

Attorneys for Plaintiff	Mike Hunter, Attorney General Abby Dillsaver, General Counsel Ethan Shaner, Dep. Gen. Counsel **ATTORNEY GENERAL'S OFFICE** 313 N.E. 21st Street Oklahoma City, OK 73105	Michael Burrage Reggie Whitten J. Revell Parrish **WHITTEN BURRAGE** 512 N. Broadway Ave., Ste. 300 Oklahoma City, OK 73102
	Bradley Beckworth Jeffrey Angelovich Lloyd Nolan Duck, III Andrew G. Pate Lisa Baldwin Brooke A. Churchman Nathan B. Hall **NIX, PATTERSON & ROACH** 512 N. Broadway Ave., Ste. 200 Oklahoma City, OK 73102	Robert Winn Cutler Ross E Leonoudakis **NIX PATTERSON & ROACH** 3600 N. Capital of Texas Hwy. Suite B350 Austin, TX 78746
	Glenn Coffee **GLENN COFFEE & ASSOCIATES, PLLC** 915 N. Robinson Ave. Oklahoma City, OK 73102	

Attorneys for Johnson & Johnson, Janssen Pharmaceutica, Inc., N/K/A Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc. N/K/A Janssen Pharmaceuticals, Inc.	John H. Sparks Benjamin H. Odom Michael W. Ridgeway David L. Kinney **ODOM SPARKS & JONES** 2500 McGee Drive, Suite 140 Norman, OK 73072	Charles C. Lifland Jennifer D. Cardelus Wallace M. Allan Sabrina H. Strong Houman Ehsan Esteban Rodriguez Justine M. Daniels **O'MELVENY & MEYERS** 400 S. Hope Street, 18th Floor Los Angeles, CA 90071
	Stephen D. Brody David Roberts Emilie K. Winckel **O'MELVENY & MEYERS** 1625 Eye Street NW Washington, DC 20006	Daniel J. Franklin Ross B Galin Desirae Krislie Cubero Tongco Vincent S. Weisband **O'MELVENY & MEYERS** 7 Times Square New York, NY 10036
	Amy R. Lucas Lauren S. Rakow Jessica L. Waddle **O'MELVENY & MEYERS** 1999 Ave. of the Stars, 8th Fl. Los Angeles, CA 90067	Jeffrey A. Barker Amy J. Laurendeau Michael Yoder **O'MELVENY & MEYERS** 610 Newport Center Drive Newport Beach, CA 92660
	Larry D. Ottaway Amy Sherry Fischer Andrew Bowman Steven J. Johnson Kaitlyn Dunn Jordyn L. Cartmell **FOLIART, HUFF, OTTAWAY & BOTTOM** 201 Robert S. Kerr Ave., 12th Fl. Oklahoma City, OK 73102	

Attorneys for Purdue Pharma, LP, Purdue Pharma, Inc. and The Purdue Frederick Company	Sheila L. Birnbaum Mark S. Cheffo Hayden Adam Coleman Paul LaFata Jonathan S. Tam Lindsay N. Zanello Bert L. Wolff Mara C. Cusker Gonzalez **DECHERT, LLP** Three Bryant Park 1095 Avenue of the Americas New York, NY 10036	Erik W. Snapp **DECHERT, LLP** 35 W. Wacker Drive, Ste. 3400 Chicago, IL 60601 Meghan R. Kelly Benjamin F. McAnaney Hope S. Freiwald Will W. Sachse **DECHERT, LLP** 2929 Arch Street Philadelphia, PA 19104
	William W. Oxley **DECHERT LLP** U.S. Bank Tower 633 West 5th Street, Suite 4900 Los Angeles, CA 90071	Jonathan S. Tam Jae Hong Lee **DECHERT, LLP** One Bush Street, 16th Floor San Francisco, CA 94104
	Britta E. Stanton John D. Volney John T. Cox, III Eric W. Pinker Jared D. Eisenberg Jervonne D. Newsome Ruben A. Garcia Russell Guy Herman Samuel Butler Hardy, IV Alan Dabdoub David S. Coale **LYNN PINKER COX & HURST** 2100 Ross Avenue, Suite 2700 Dallas, TX 75201	Robert S. Hoff **WIGGIN & DANA, LLP** 265 Church Street New Haven, CT 06510 Sanford C. Coats Joshua Burns **CROWE & DUNLEVY** 324 N. Robinson Ave., Ste. 100 Oklahoma City, OK 73102



Nick Merkley