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.	)

Case No. CJ-2017-816

Judge Thad Balkman

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.

FILED

MAR 29 2019

In the office of the
Court Clerk MARILYN WILLIAMS

ORDER OF SPECIAL DISCOVERY MASTER

NOW, on this 28th day of March, 2019, the above and entitled matter comes on for ruling by the undersigned having heard argument thereon by phone conference on March 25, 2019.

The undersigned heard argument on Janssen Defendant's Emergency Motion For Order To Show Cause why evidentiary preclusion orders should not be imposed against State for failing to comply with previous Orders regarding data

base production and, Teva Defendant's Motions to Compel Corporate Witness Testimony regarding Topics 5, 6, 7, 9 and 36; Topics 30, 32 and 33, and Topic 27.

Janssen Defendant's Emergency Motion For Order To Show Cause

This emergency motion again deals with Defendants' argument that State has been ordered by the undersigned and by Judge Balkman to produce claims data in a de-identified form which reasonably allows Defendants' to be able to obtain relevant information to defend State's claims. The undersigned last entered an order on February 18, 2019, for State to complete production by March 1, 2019, in a form that is either ordinarily maintained or in a de-identified form which is reasonably usable with Defendants able to obtain the relevant information. Janssen argues Defendants continue to be unable to access necessary database information, in this motion, particularly focusing on their inability to cross-reference data from the Medical Examiner and the Fatal Unintentional Poisoning Surveillance System to prescription or medical claims data. Janssen argues Defendants still have no way to access data concerning deaths purportedly linked to opioids against any other database produced by the State, particularly the medical and pharmacy claims data contained in the Oklahoma Medicaid Management Information System. Janssen argues there still remains a mismatch of data between pharmacy and medical claims which cannot be cross referenced to patients in the State's HealthChoice data system and that State has produced HealthChoice pharmacy claims data containing 347,972 de-identified patient IDs but only 223,631 of those IDs are found in the HealthChoice medical claims data.

State responds it has produced all of the de-identified usable data in a form that would allow Defendants access across various databases to the extent possible to include: 1. Medicaid claims data (MMIS database) for over 9 million claims; 2. Medicaid claims data for all medical visits and procedures related to all of the SoonerCare beneficiaries who received an opioid prescription; 3. Medicaid claims data for all non-opioid prescriptions received by all SoonerCare beneficiaries who ever received an opioid prescription; 4. The Medicaid Lock-in Program database showing Medicaid patients who have been "locked-in" to a single prescriber to prevent doctor shopping; 5. The "prior authorization" database which shows the decision made by SoonerCare and Pharmacy Management Consultants related to whether to grant or deny a prior authorization request for opioid prescriptions. State argues Defendants have received the entirety of the MMIS historical record for every SoonerCare beneficiary; 6. Opioid pharmacy claims from HealthChoice

database for State employees insurance, some data which is not housed within State databases; 7. Medical visit and procedural claims for HealthChoice beneficiaries who ever received an opioid prescription; 8. The Oklahoma Department of Mental Health and Substance Abuse Services online query system revealing patients who have received addiction treatment; 9. The Oklahoma Department of Mental Health and Substance Abuse Services treatment episode data; 10. The Oklahoma Chief Medical Examiner's database showing opioid related overdose deaths and related de-identified investigation files for each and, further identified those patients who were SoonerCare recipients; 11. Databases or other State agencies to include the Fatal Unintentional Poisoning Surveillance System Database. State argues Defendants have received from State or have access to all data relied upon by State to prove their claims made. Argument indicated that in some cases, certain databases do not link-up or "talk to" each other such as the State SoonerCare Medicaid database cannot link up with the HealthChoice database, but that Defendants have received or have access to both databases. Counsel for the State indicated that with regard to the difference between the 347,972 HealthChoice pharmacy claims where Janssen argued only 223,631 of those can be found in the HealthChoice medical claims data that State will continue to identify the difference either by linking them up or identifying in another usable way. State is **Ordered** to continue to provide usable information in this context to Defendants. As Janssen argues, Defendants are entitled to the de-identified medical claims history for the approximately 123,000 missing medical claims histories and database information sufficient to allow for Defendants to identify how many individuals died from an overdose and from which opioid drug, if the information is available. This would be information obtainable through the Medical Examiner records and the Fatal Unintentional Poisoning Surveillance System (State maintains this has already been produced, see No. 10 & 11 above), in other words, production pursuant to statute in a form that is either ordinarily maintained or in a de-identified form which is reasonably usable.

I do not find sufficient evidence to establish that the HealthChoice database can be "cross-walked" with the MMIS database. The MMIS/ SoonerCare database contains insurance claims of indigent Oklahomans and HealthChoice database contains the insurance claims of gainfully employed State employees. The evidence shows there is no overlap to be able to provide Defendants with some form of "cross walked" link protocol and, I must accept State's representation that this information has been provided in a de-identified form from both databases.

The record is clear State is not seeking any damages or penalties for false claims related to HealthChoice claims. Other than Ordered herein, I further find there is insufficient evidence to establish Defendants have been denied production of or they do not have access to sufficient data to allow for reasonable tracking of patient claim information through the relevant State claim databases for a patient, sufficient to fairly defend each claim raised by State.

I find it premature and not for the undersigned to determine at this point if evidentiary preclusions should be imposed on State as a sanction.

Therefore, Janssen's Emergency Motion is **Sustained** in part and **Denied** in part.

Corporate Witness Topic Motions To Compel

Oklahoma case law on the requirements for corporate testimony and the extent of judicial authority to compel testimony of a corporate witness is scant. However, the Oklahoma Discovery Code, particularly the discovery sanctions provision at 12 O.S. §3237(A)(2) generally provides the discovering party may seek the entry of an order compelling a deponent's answer to a deposition question when that deponent has failed to answer a question.[1]

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[1] 12 O.S. §3237 (A)(2) provides in pertinent part as follows:

> **If a deponent fails to answer a question propounded or submitted under Section 3230** or 3231 of this title, or a corporation or other entity fails to make a designation under paragraph 6 of subsection C of Section 3230 or subsection A of Section 3231 of this title, or a party fails to answer an interrogatory submitted under Section 3233 of this title, or if a party, in response to a request for inspection and copying submitted under Section 3234 of this title, fails to produce documents or respond that the inspection or copying will be permitted as requested or fails to permit the inspection or copying as requested, or if a party or witness objects to the inspection or copying of any materials designated in a subpoena issued pursuant to subsection A of Section 2004.1 of this title, **the discovering party may move for an order compelling an answer**, or a designation, or an order compelling inspection and copying in accordance with the request or subpoena. The motion must include a statement that the movant has in good faith conferred or attempted to confer either in person or by telephone with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

Id. (emphasis added).

An order compelling a corporate witness to appear at a deposition and/or provide deposition responses is subject to an abuse of discretion standard of review. *See Swinton*, ¶12; *see also Barnett v. Simmons*, 2008 OK 100, ¶23, 197 P.3d 12, 20 (noting the standard of review for a trial court's grant or denial of discovery sanctions is abuse of discretion).[2] "A trial court also has inherent authority to impose sanctions for abuse of the discovery process. . . . The trial court has the power to sanction for abusive litigation practices or for abuse of judicial process, even if an order compelling discovery has not been made." *Barnett,* ¶14. There is a presumption of legal correctness of discovery sanctions issued by the trial court and "cannot be disturbed unless it is contrary to the weight of the evidence or to a governing principle of law." *Hicks v. Cent. Oklahoma United Methodist Ret. Facility, Inc.*, 2017 OK CIV APP 23, ¶3, 423 P.3d 684, 689. The trial court's discretion to determine discovery sanctions is described as "broad, [but] not unbridled." *Barnett*, ¶26. Secondary authority additionally provides the trial court has "wide discretion" in ruling on the motion to compel deposition responses. Paul M. Lisnek, J.D., Ph.D., *Depositions: Procedure, Strategy & Technique,* §8:30 (3d ed. November 2018).

As noted in the Teva Defendants' various Motions to Compel Corporate Witness Testimony, Federal case law construing the similar Federal rule (Fed.R.Civ.P. 30(b)(6)) on the subject of corporate testimony provides some guidance. "The corporate entity has an affirmative duty to designate the representative to speak on its behalf, answering questions that are within the scope of the matters described in the deposition notice and which are 'known or reasonably available' to the company." *ZCT Sys. Grp., Inc. v. Flightsafety Int'l*, 2010 WL 1541687, *2 (N.D. Okla. April 19, 2010) (citation omitted). A corporate party is obligated by the Federal rule "to prepare its designee to be able to give binding answers on its behalf." *Id.* "If the organization fails to produce a designee with sufficient knowledge, it is required to produce an additional designee with adequate

[2] To the extent the issue concerns the boundaries of the trial court's authority concerning statutorily delineated terms, such a legal question involving statutory interpretation is subject to *de novo* review on appeal. *See Heffron v. District Court of Oklahoma County*, 2003 OK 75, ¶15, 77 P.3d 1069, 1076 (construing the boundaries of the trial court's authority concerning a deponent's entitlement to the ordinary witness fee or an expert witness fee as set forth in statute).

knowledge." *Id.* The corporate entity "was obligated to make a 'conscientious good-faith endeavor to designate the persons having knowledge of the matters sought' . . . and 'to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed' by . . . counsel." *Id.* (citations omitted).[3]

Not unlike most depositions of both State and Defendant witnesses in this case, the deposing party frequently gets an answer to a question they don't like and then chooses how much time to spend re-asking the question, rephrasing the question or challenging the answer received from the witness. That is a strategy and choice made by the deposing party on how to deal with a witness's answer that the deposing party gets. When an answer is given the deposing party, be it the State or Defendants, routinely challenges the answer and/or objection as being completely evasive, a refusal to answer based upon unpreparedness or an improper refusal to answer when no privilege is involved. In many circumstances, the answers have been good faith attempts to answer a question or are really questions to a fact witness who is also an expert witness, in an attempt to strategically bind the expert to his or her corporate answer and then the witness does not answer in his or her corporate capacity a question calling for an expert opinion or basis for the expert opinion. Review of the motion transcripts shows this is not always the case. Many times a question is asked and the witness appears to be unprepared to answer the question because the witness has prepared for the deposition factually based upon the claims made by State and the proof model State is choosing to use. A good example is Topic 6 that asks for the witness to describe the "nature and circumstances regarding any prescription of any Opioid manufactured by any Teva Defendant , including Actiq and Fentora, that the State contends caused it harm and for which it is seeking to recover damages in this lawsuit." This is a very broad question seeking "nature and circumstances"

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[3] The U.S. District Court in Kansas has determined a corporate designee "was under an affirmative obligation to educate himself" regarding the case and "implicitly requires persons to review all matters known or reasonably available to it in preparation for the 30(b)(6) deposition." *T&W Funding Co. v. Pennant Rent-A-Car Midwest, Inc.*, 210 F.R.D. 730 (D. Kan. 2002). A corporate witness' lack of preparation or inability to testify as to certain issues may rise to the level of sanctionable conduct. *Id. See Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989)(noting that if the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation). "An inadequate Rule 30(b)(6) designation amounts to a refusal or failure to answer a deposition question." *Id.* "Among the other remedies, the Court can require the corporation to re-designate its witnesses and mandate their preparation for re-deposition at the corporation's expense." *Id.*

testimony for very specific drugs. Same for Topic 7 seeking specifics for every circumstance surrounding every coverage reimbursement or denial decision. In many cited transcript portions I have read, the witness cannot answer that question as phrased. This is usually because the witness has not prepared his or her testimony in that manner as he or she will not testify at trial that specifically based upon State's proof methodology. If a witness does then testify differently and with specifics at trial, having answered this way in their deposition—I wish them luck! The deposing party will then make use of that answer in a manner they so choose. None I have read reserved the right to further review and change or expand their testimony at a later time. There have been some that by agreement, the witness was offered for further deposition at a later date after more research and preparation. Unless it is truly an improper refusal to answer, completely evasive or a circumstance where the corporate witness was clearly unprepared for a proper noticed topic (and there is some), the deposing party is stuck with the answer it gets. Defendants are entitled to discover facts and data knowledge which support the underlying claims and damage determinations State seeks to prove, with more specific detail used as a basis for expert testimony to be testified to at the expert witness deposition.

Therefore, the following Orders will be entered on a topic by topic basis consistent with this analysis:

Teva Defendant's Motions to Compel Corporate Witness Testimony Regarding Topics 5, 6, 7, 9 and 36 (The motion listsTopics 6, 7, 9 and 36 but 5 is included in the argument and does overlap)

Topics 5, 6 and 7: Motion To Compel is **Overruled**;

Topic 9: **Sustained** to the extent this data is still being or has been produced pursuant to previous Orders. Database production is still Ordered and ongoing regarding false or fraudulent claims submitted for payment through the Oklahoma Medicaid Program or any other payment Program;

Topics 11 and 12: Motion To Compel **Overruled**. Defendant's brief does not argue these topics except in a general fashion and I find no transcript testimony where proper prescribing and appropriate use or the risks of Teva products was explored other than discussion concerning potential for addiction. A lot of questions were asked concerning the witness's knowledge of harm caused by Teva

products which the witness made some attempts to answer even though not a noticed topic.

Topic 36: Motion To Compel **Overruled** consistent with previous rulings regarding "unnecessary" or "excessive".

Topics 30, 32 and 33

Topics 30 and 32:

State presented Mr. Travis Tate in his capacity as the Director of Pharmacy for the Oklahoma Employee Group Insurance Division (EGID) to testify to re-noticed topics more narrowly focused on the nature and circumstances behind coverage or reimbursement of prescription opioids manufactured by Teva Defendants. He was to also testify to the design and administration of any pharmacy benefit program or plan, to include changes thereto during the relevant time period relating to the management of reimbursement policy and coverage limits for prescriptions manufactured by Teva Defendants. Review of the brief and cited portions of the deposition transcript reveals this witness was not prepared to testify. It appears this witness's role as Director of Pharmacy for the Oklahoma Employee Group Insurance Division made him the appropriate fact witness to testify to these two topics. Further, the morning of this deposition, State submitted four binders of documents presumably relevant to this deposition. It is unreasonable to expect proper preparation for these two topics in that time period and questioning of this witness demonstrated he had not reviewed the documents himself.

Therefore, regarding Topics 30 and 32, Teva Defendant's motion to compel further deposition is **Sustained** and State is **Ordered** to produce this witness or another witness fully prepared to testify for a period not to exceed four hours.

Topic 33: Motion To Compel **Overruled**

Topic 27

Topic 27 was noticed to produce a witness as previously ordered by the undersigned on this topic. Ms. Holderread testified that she had learned she was going to be testifying about this topic 10 minutes before arriving at her deposition. She stated she had done nothing to prepare herself for this topic and had no time to communicate with anyone else together information relevant to this topic. The

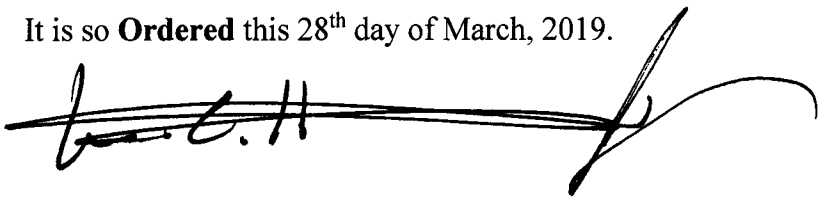
same occurred with Mr. Tate that his preparation for Topic 27 consisted of one phone call lasting 5 to 6 minutes with Mr. King. Testimony was offered by Ms. Holderread that she believed most communications between The Oklahoma Health Care Authority and third-party insurers took place by electronic means and would be included in the claims database. However, she did not inquire and really did not know if that was true or had taken place.

The way Topic 27 as phrased it can be interpreted different ways as argued to the undersigned. State interprets the topic to mean a witness that could describe how and under what circumstances there is communications between pharmacy benefit managers, third-party insurers and the different agencies. State argues there are no separate or individualized claims that had not been provided to defendant's if that is what they are seeking. The form of Teva Defendant questions seems to seek inquiry into all communications with third-party insurers and/or pharmacy benefit managers from the Oklahoma Bureau Of Narcotics; the Attorney General's Office; The Oklahoma State Board of Medical Licensure and Supervision; the Oklahoma State Board of Osteopathic Examiners; the Oklahoma Dental Board; the Oklahoma State Department Of Health; the Oklahoma Department of Mental Health and Substance Abuse Services; the Oklahoma State Board of Pharmacy; and the Oklahoma Department Of Corrections. If this is the intent, it is overbroad, burdensome and virtually impossible to comply with.

Therefore, as to Topic 27, I find that neither witness was prepared to testify to the topic however interpreted, and State is **Ordered** to present a witness to testify to Topic 27 consistent with this Order and limited to four hours.

The witness is **Ordered** to be prepared to testify and describe how and under what circumstances there is communications between the above listed agencies and benefits managers/third-party insurers. The State is further **Ordered** to provide no less than 48 hours before the deposition a sampling of electronic communications and/or written communications from each of the above listed agencies thus identifying types of communications used. The sampling is to include communications from each year 2010 through 2018 in order to cover a fair period of time and describe with reasonable certainty content and who the third-party insurers and pharmacy benefits manager were.

It is so **Ordered** this 28th day of March, 2019.



William C. Hetherington, Jr.

Special Discovery Master