



APR 02 2019

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

In the office of the
Court Clerk MARILYN WILLIAMS

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, 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
The Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

*(To Be Heard By The
Honorable Thad Balkman)*

**THE STATE'S COMBINED REPLY REGARDING ITS BRIEFING ON THE LEGAL
AUTHORITY TO SEVER CLAIMS AND CONSOLIDATE ACTIONS, AND RESPONSE
TO DEFENDANTS TEVA PHARMACEUTICALS USA, INC., CEPHALON, INC.,
WATSON LABORATORIES, INC., ACTAVIS LLC, AND ACTAVIS PHARMA, INC.,
f/k/a WATSON PHARMA, INC.'S MOTION FOR SEVERANCE
AND SEPARATE TRIALS**

1. The underlying basis for the parties' briefing on severance and consolidation was the likelihood of the Purdue Families ("Purdue") filing bankruptcy and the resulting delay on the

Court's scheduled trial date of May 28, 2019. By virtue of the State's settlement with Purdue, that basis—and accompanying delay—no longer exists.

2. The Teva Defendants' request to sever this action similarly makes no legal or practical sense. Teva's Motion was based on the taint of Purdue and not wanting to share a table at trial (despite their ongoing business relationship related to OxyContin). That concern no longer exists. Moreover, this is an indivisible injury case. The State has asserted *one* action stemming from *one* nuisance and seeks *one* set of damages/abatement, for which there is joint and several liability amongst the Defendants. The purpose of joint and several liability is to "ensure that a plaintiff will be fully compensated for indivisible injuries caused by multiple tortfeasors." *Evanston Ins. Co. v. Aminokit Labs., Inc.*, No. 15-cv-02665-RM-NYW, 2019 WL 479204, at *6 (D. Colo. Feb. 7, 2019); *see also McDermott, Inc. v. AmClyde*, 511 U.S. 202, 221 (1994) (purpose of joint and several liability is to ensure that where the ability to recover from one defendant is impaired, "other defendants, rather than an innocent plaintiff [are] responsible for the shortfall."); *Restatement (Third) of Torts: Apportionment of Liability* (2000); *Restatement (Second) of Torts* § 875 (1979).

3. All the State must show for joint and several liability to attach is that a defendant is *a cause*—not *the cause*—of the State's injuries. *See* Okla. Stat. tit. 23, § 15; *compare Nat'l Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc.*, 1989 OK 157, ¶ 14, 784 P.2d 52, 56 (under Oklahoma law, joint and several liability allows a "plaintiff to recover all of his damages from any tortfeasor regardless of the degree of negligence that party contributed to the plaintiff's damages...."); *Stevens v. Barnhill*, 1954 OK 29, ¶ 11, 266 P.2d 463, 465 ("[W]here the separate and individual acts of several persons combine to produce directly a single injury, *each is responsible for the entire result* even though the act of one person alone may not be the cause of

the injury.”) (citations omitted, emphasis added). Once proven, *all defendants* become responsible for damages jointly and severally. *See id.*; 8 Okla. Prac., Product Liability Law § 3.10 (2017 ed.) (“If the state was a plaintiff in a cause of action against multiple defendants and established liability against those defendants, the state could employ the doctrine of joint and several liability and recover 100% of the damages suffered by the state against a defendant who was, for example, only 10% or 1% at fault.”).

4. In cases of joint and several liability, when a defendant is dropped from the case for whatever reasons—such as voluntary settlement, consent judgment, etc.—the plaintiff may proceed against the remaining defendants. *See Whitehead v. Williams*, 1946 OK 34, ¶ 8, 165 P.2d 618, 619 (“The general rule is that plaintiff may, where the liability of defendants is joint and several, or several, dismiss the action as to some of the defendants and continue the action as to the remaining defendants.”) (citation omitted).

5. This case began as a single action and remains one action. Indeed, if trial were to start tomorrow it would be as one action, which is also a function of joint and several liability—permitting a plaintiff to seek recovery against joint tortfeasors in a single action. *Landers v. E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 734 (Tex. 1952) (“Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers ... the injured party may proceed to judgment ... *against all in one suit.*”) (emphasis added).

6. Defendants have literally been associated with each other for years, and proudly so. As noted in the State’s most recent Motion to De-Designate, it was Defendant Johnson & Johnson (“J&J”)—through a web of foreign and domestic wholly owned J&J subsidiaries, including Tasmanian Alkaloids Pty Limited and Noramco, Inc.—that created, grew, imported and supplied

to J&J and its other co-conspirators, including Purdue and Teva, the narcotic raw materials necessary to manufacture the opioid pain medications thrust upon the unsuspecting public since the 1990s. *See* State’s Motion to De-Designate Allegedly Confidential Documents at 4 (filed Feb. 26, 2019). Moreover, documents produced in discovery show J&J has overtly *bragged* about its partnership with Purdue.

7. Further, Teva has had an ongoing business relationship with Purdue selling generic OxyContin ever since its attempt to steal Purdue’s patent failed. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

8. Defendants have ridden each other’s coattails, profited off of each other’s marketing endeavors over the last two decades, and worked together on joint ventures. They formed and met as part of a secretive outfit known as the Pain Care Forum to promote access to their products. Defendants used the same KOLs. Defendants used the same Front Groups. Defendants used the same paid speakers at times. Their conduct is inextricably intertwined and completely symbiotic.

9. In this case, Defendants also have litigated *everything* together. They operate under a joint defense agreement, and they have orchestrated their discovery strategies as a team. Thus begs the question, because Defendants have proceeded jointly in this litigation for multiple years, how can they claim prejudice now when working together has been beneficial for them all this time? How can they legitimately disassociate themselves from one another's conduct when that same conduct made them billions of dollars? Any notion Defendants would somehow be prejudiced if they sat at the same table for a few weeks, in light of their longstanding relationship for years, is confusing at least and patently false at best.

10. Defendants themselves have stated a solution will be very difficult and very hard to figure out—"multifaceted" is what they say. Complex. Expensive. Everyone thus agrees that the instant case is multifaceted, very complex, and joint and several liability is real. Common issues of law and fact abound, and permanent severance would not reduce the volume of evidence in this case or even lessen the length of trial. However, instead of one trial that could last 2-4 months, Defendants propose the Court order *multiple trials that could last 2-4 months each*. Defendants' proposal, if granted, would plainly thwart the Court's intent to timely try this case and constitute a considerable waste of judicial resources, time, and expense.

11. Finally, the State believes Oklahoma jurors are more knowledgeable than Defendants give them credit and will understand this issue. Jurors have become increasingly sophisticated. They try and determine fact issues in extremely complicated cases involving multiple counts, counterclaims, cross claims, third party complaints, multiple plaintiffs and defendants, with a high degree of perception. Properly instructed, there is no indication that a jury, when faced with the evidence, would not perform its duties conscientiously and intelligently.

Defendants cannot show any prejudice if this action were severed and subsequently consolidated for trial.

12. Thousands of lives are literally at stake and the people of Oklahoma deserve to have their rights vindicated in a timely manner. A case of this type requires the trial court to exercise unique discretion. This is especially true in light of the fact the Court has consistently stated that it intends to keep the May 2019 trial date.

WHEREFORE, the State requests that the Court deny Defendants' Motion for Severance and award such further relief the Court deems proper.

DATED: April 2, 2019

Respectfully submitted,



Michael Burrage, OBA No. 1350
Reggie Whitten, OBA No. 9576
WHITTEN BURRAGE
512 N. Broadway Avenue, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: mburrage@whittenburrage.com
rwhitten@whittenburrage.com

Mike Hunter, OBA No. 4503
ATTORNEY GENERAL FOR
THE STATE OF OKLAHOMA
Abby Dillsaver, OBA No. 20675
GENERAL COUNSEL TO
THE ATTORNEY GENERAL
Ethan A. Shaner, OBA No. 30916
DEPUTY GENERAL COUNSEL
313 N.E. 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-6246
Emails: abby.dillsaver@oag.ok.gov
ethan.shaner@oag.ok.gov

Bradley E. Beckworth, OBA No. 19982

Jeffrey J. Angelovich, OBA No. 19981

Lisa P. Baldwin, OBA No. 32947

Trey Duck, OBA No. 33347

Drew Pate, *pro hac vice*

NIX PATTERSON, LLP

512 N. Broadway Avenue, Suite 200

Oklahoma City, OK 73102

Telephone: (405) 516-7800

Facsimile: (405) 516-7859

Emails: bbeckworth@nixlaw.com

lbaldwin@nixlaw.com

jangelovich@nixlaw.com

tduck@nixlaw.com

dpate@nixlaw.com

Glenn Coffee, OBA No. 14563

GLENN COFFEE & ASSOCIATES, PLLC

915 N. Robinson Ave.

Oklahoma City, OK 73102

Telephone: (405) 601-1616

Email: gcoffee@glenncoffee.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was emailed on April 2, 2019, to:

Sanford C. Coats
Joshua D. Burns
CROWE & DUNLEVY, P.C.
Braniff Building
324 N. Robinson Ave., Ste. 100
Oklahoma City, OK 73102

Sheila Birnbaum
Mark S. Cheffo
Hayden A. Coleman
Paul A. Lafata
Jonathan S. Tam
Lindsay N. Zanello
Bert L. Wolff
Marina L. Schwartz
DECHERT LLP
Three Byant Park
1095 Avenue of Americas
New York, NY 10036-6797

Patrick J. Fitzgerald
R. Ryan Stoll
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
155 North Wacker Drive, Suite 2700
Chicago, Illinois 60606

Robert G. McCampbell
Nicholas Merkley
GABLEGOTWALS
One Leadership Square, 15th Floor
211 North Robinson
Oklahoma City, OK 73102-7255

Steven A. Reed
Harvey Bartle IV
Jeremy A. Menkowitz
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921

Brian M. Ercole
MORGAN, LEWIS & BOCKIUS LLP
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131

Benjamin H. Odom
John H. Sparks
Michael Ridgeway
David L. Kinney
ODOM, SPARKS & JONES PLLC
HiPoint Office Building
2500 McGee Drive Ste. 140
Oklahoma City, OK 73072

Charles C. Lifland
Jennifer D. Cardelus
Wallace Moore Allan
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071

Stephen D. Brody
David Roberts

Larry D. Ottaway
Amy Sherry Fischer

O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

Daniel J. Franklin
Ross Galin
O'MELVENY & MYERS LLP
7 Time Square
New York, NY 10036

Robert S. Hoff
Wiggin & Dana, LLP
265 Church Street
New Haven, CT 06510

Britta Erin Stanton
John D. Volney
John Thomas Cox III
Eric Wolf Pinker
LYNN PINKER COX & HURST LLP
2100 Ross Avenue, Suite 2700
Dallas, TX 75201

FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Ave, 12th Floor
Oklahoma City, OK 73102

Eric W. Snapp
DECHERT LLP
Suite 3400
35 West Wacker Drive
Chicago, IL 60601

Benjamin Franklin McAnaney
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

Amy Riley Lucas
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067


Michael Burrage

EXHIBIT 1

(Filed Under Seal)

EXHIBIT 2

(Filed Under Seal)

EXHIBIT 3

(Filed Under Seal)

EXHIBIT 4

(Filed Under Seal)

EXHIBIT 5

(Filed Under Seal)

EXHIBIT 6

(Filed Under Seal)

EXHIBIT 7

(Filed Under Seal)