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

TEVA DEFENDANTS' OPPOSITION TO STATE'S MOTION TO COMPEL COMPLIANCE WITH TRIAL SUBPOENAS

I. INTRODUCTION

Plaintiff the State of Oklahoma (the "State") has moved to compel compliance with two trial subpoenas—(a) one addressed to Defendants Watson Laboratories, Inc., Actavis LLC, Actavis Pharma, Inc., Cephalon, Inc. and Teva Pharmaceuticals USA, Inc. (collectively, the "Teva and Actavis Defendants") commanding them to produce a corporate representative at trial to have him testify ***about the exact same topics*** about which the State deposed a corporate representative ***for over 50 hours***; and (b) another addressed to Mr. John Hassler as corporate representative for the Teva and Actavis Defendants commanding his appearance at trial ("Motion"). But these subpoenas are procedurally and substantively flawed on their face.

Indeed, contrary to the State's theory that the "Teva Defendants never moved to quash" these subpoenas, (Mot. at 2), the Teva Defendants moved to quash these subpoenas on April 22, 2019. ("Teva and Actavis Defendants' Motion to Quash"). As stated in the Teva and Actavis Defendants' Motion to Quash and restated here once more, the Court should deny the State's Motion because (i) the subpoenas were improperly served on Mr. Hassler while he was in Oklahoma for the sole reason of attending depositions in this action, and (ii) there is simply no legal authority allowing the State to compel the Teva and Actavis Defendants to produce a corporate representative at trial, much less allowing the State to choose Mr. Hassler, a non-resident, as the corporate representative for the Teva and Actavis Defendants.

First, Oklahoma law has long followed the great majority of jurisdictions in holding that nonresident witnesses like Mr. Hassler are immune from service while in the state for the purpose of civil proceedings, including depositions. Here, the State does not dispute that Mr. Hassler is a non-resident that was present in Oklahoma solely because of a deposition notice issued to the Teva and Actavis Defendants. As such, he was immune from service while in the state for that purpose,

and the State's service of the trial subpoenas on Mr. Hassler during this time is improper under Oklahoma law.

In an effort to escape this inconvenient fact, the State cites out-of-state cases to argue that Mr. Hassler's immunity from service is inapplicable here because (i) the immunity extends only to service of summons, not trial subpoenas, and (ii) the immunity does not apply when a party is served with respect to the same action that required him to be in the state for civil proceedings. Both of these arguments are meritless.

The Supreme Court of the United States, the Supreme Court of Oklahoma, and Plaintiff's own cited cases make clear that the immunity extends to "service of process," which necessarily includes service of trial subpoenas. *See Commercial Bank & Tr. Co.*, 1980 OK 3, 605 P.2d 1323, 1326; *Lamb v. Schmitt*, 285 U.S. 222 (1932). And while it is true that some courts have denied immunity when an individual is served with process regarding the same action that required him to be in the state for civil proceedings, Plaintiff points to no Oklahoma decision recognizing such an exception, and further, none of Plaintiff's cited out-of-state cases involved service of a trial subpoena to a non-resident corporate representative. Contrary to what the State asks from this Court, the Supreme Court has made clear that the immunity should be withheld "only as judicial necessities require" *Lamb*, 285 U.S. at 225. (1932), and, on this basis, immunity applies even when the individual is served with respect to the same action that required him to be in the state for civil proceedings.[1]

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[1] *See Kelly v. Pennington*, 78 Colo. 482, 485, 242 P. 681, 682 (1926) (recognizing that the "general rule" of immunity is "exemption [] from service of civil process in ***any*** action," and rejecting argument to "limit its application to another or new action") (emphasis added); *Frier v. Terry*, 230 Ark. 302, 304, 323 S.W.2d 415, 417 (1959) (same); *Int'l Plastic Harmonica Corp. v. Harmonic Reed Corp.*, 69 F. Supp. 515, 516 (E.D. Pa. 1946) (same); *Singer v. Reising*, 154 Misc. 239, 241, 276 N.Y.S. 714, 716 (Mun. Ct. 1935) (same); *Wallach v. Ne. Airlines, Inc.*, 15 Misc. 2d 762, 763, 181 N.Y.S.2d 949, 951 (Sup. Ct. 1958); *Roos v. H.W. Roos Co.*, 64 Ohio App. 464, 466, 28 N.E.2d 1008, 1008 (1940) (same).

Second, the Oklahoma Rules of Civil Procedure (and the Federal Rules of Civil Procedure) do not provide any vehicle to compel the Teva and Actavis Defendants to produce a corporate representative a trial. The State cannot re-write the Oklahoma Rules of Civil Procedure to attempt to do so.

For these reasons, the Court should quash the State's trial subpoenas, enter a protective order relieving the witnesses and parties subject to said subpoenas from any obligation to comply therewith, and deny the State's Motion.

II. BACKGROUND

John Hassler appeared as the corporate representative witness for the Teva and Actavis Defendants in response to each of the State's 12 O.S. § 3230(C)(5) deposition notices. Mr. Hassler serves as the Senior Vice-President and General Manager within Teva USA's Central Nervous System therapeutic area. He is an employee of Teva USA but is not an officer of Teva USA or any of Teva and Actavis Defendants. Mr. Hassler lives in Missouri and was present within Oklahoma only to appear for depositions. This testimony was provided to the State based on corporate representative notices served on the Teva and Actavis Defendants, attendance was mandatory under the statute.

On February 21, 2019, during a corporate representative deposition scheduled by the State, Mr. Hassler was served with two trial subpoenas. (February 21, 2019 Deposition of John Hassler, 283:8-12, attached as Exhibit 1 to the Teva and Actavis Defendants' Motion to Quash.)[2] Teva and Actavis counsel objected to these subpoenas as served and reserved the right to challenge the same. (Ex. 1, 285:8-11.) These subpoenas attempted to require that the Teva and Actavis

[2] Unless otherwise noted, all references to exhibits are to exhibits in the Teva and Actavis Defendants' Motion to Quash.

Defendants produce a corporate representative at trial and that Mr. Hassler appear as a corporate representative of the Teva and Actavis Defendants during trial. (Exs. 2, 3.)[3]

On April 12, 2019, in response to trial subpoenas Janssen received from the State materially similar to those at issue here, the Janssen Defendants filed a motion to quash the subpoenas and moved for a protective order. ("Janssen Defendants' Motion to Quash"). On April 22, 2019, the Teva Defendants filed a motion to quash the trial subpoenas at issue here and moved for a protective order, joining and adopting the arguments set forth in the Janssen Defendants' Motion to Quash.

Now the State moves this Court for an order requiring compliance with the two trial subpoenas the Teva Defendants moved to quash on April 22, 2019, incorrectly stating that the "Teva Defendants never moved to quash the subpoenas." (Mot. at 2.)

III. ARGUMENT

A. Service of the Trial Subpoenas is Invalid.

The subpoena power outlined in 12 O.S. § 2004.1 is clear: there is no authority to subpoena a nonresident witness outside of the state to attend trial in Oklahoma. *See* 12 O.S. § 2004.1(A); *see also, Craft v. Chopra,* 1995 OK CIV APP 135, 907 P.2d 1109, 1111 (finding that "neither the Oklahoma Pleading Code, § 2004.1, nor the comments thereto, extend the reach of Oklahoma discovery process (including 'the limits of Oklahoma courts' subpoena powers') beyond state boundaries.") The State is well aware of this limitation, which is why it waited to attempt service

[3] The Teva and Actavis Defendants' Motion to Quash incorrectly stated that one of the trial subpoenas requested that Mr. Hassler appear at trial in his individual capacity. *Id.* at p.2.

upon Mr. Hassler (a resident of Missouri) until he was present in Oklahoma to give deposition testimony as a corporate representative in this case.

The State's effort to find a loophole in § 2004.1's clearly delineated subpoena power, however, has been foreclosed by Oklahoma law. Courts in this state have long recognized the policy that "all nonresidents, while they are attending court proceedings, either as suitors, or as witnesses, are privileged from service of summons while there on that business." *Ada Dairy Products Co. v. Superior Court,* 258 P.2d 939, 944 (Okla. 1953) (citing *Burroughs v. Cocke & Willis,* 1916 OK 130, 156 P. 196, 197); *see also, Commercial Bank & Tr. Co. v. Dist. Court of Fourteenth Judicial Dist. In & For Tulsa Cnty.,* 1980 OK 3, 605 P.2d 1323, 1326 ("When a non-resident party to an action, or a witness, comes into the state or the county for the sole purpose of attending a trial, he is immune from the service of process during his attendance and for a reasonable time thereafter to enable him to return to his residence." (citing *Stewart v. Ramsay,* 242 U.S. 128, 129 (1916)). An analogous Oklahoma Statute, 12 O.S. § 399, is also consistent with the policy discussed in these cases, stating that a witness cannot be served with a summons in a county in which he does not reside, while appearing in that county to respond to a subpoena. The policy of immunity from service applies equally to those participating in depositions as well as trial. *See Burroughs,* 1916 OK 130, 156 P. at 198.

Here, the State does not dispute that Mr. Hassler was present in Oklahoma solely because of a deposition notice issued to the Teva and Actavis Defendants. As such, he was immune from service while in the state for that purpose, and the State's service of the trial subpoenas on Mr. Hassler during this time is improper under Oklahoma law.

To try to avoid this reality, the State cites out-of-state cases to argue that Mr. Hassler's immunity from service is inapplicable here because: (a) the immunity extends only to service of

summons, not trial subpoenas; and (b) the immunity does not apply when a party is served with respect to the same action that required him to be in the state for judicial proceedings. (Mot. at 4.) These arguments fail because Oklahoma law recognizes no such exceptions—and out-of-state cases cannot displace contrary binding Oklahoma law.

Service of process necessarily includes service of trial subpoenas, and the Supreme Court of Oklahoma has made clear that immunity from service when an individual is in a state for civil proceeding extends to all "service of process"—not just service of summons. *See Commercial Bank & Tr. Co.*, 1980 OK 3, 605 P.2d 1323, 1326 ("When a nonresident party to an action, or a witness, comes into the state or the county for the sole purpose of attending a trial, he is immune from the *service of process* during his attendance . . .) (emphasis added); *Thomas v. Blackwell*, 1935 OK 648, 172 Okla. 487, 46 P.2d 509, 512 ("It appears to be the general rule that nonresident suitors and witnesses in attending upon a trial in a foreign jurisdiction are for a reasonable time immune from a *service of process* upon them . . .) (emphasis added). Indeed, in *Lamb v. Schmitt*, 285 U.S. 222 (1932), a case cited by the State, the Supreme Court also made clear that the immunity extends to all "service of process." 285 U.S. 222 at 225.

The State's other argument—that immunity against service of process is not applicable when service is with respect to the same action that required the individual to be in the state for civil proceedings—is similarly without merit. While it is true that some courts have denied immunity when there is service is with respect to the same action, Plaintiff points to no Oklahoma decision recognizing such an exception. Indeed, none of the State's cited out-of-state cases involved service of a trial subpoena to a non-resident corporate representative; thus, they are entirely inapposite. Contrary to what the State asks from this Court, the Supreme Court has made clear that the immunity should be withheld "only as judicial necessities require" *Lamb*, 285 U.S.

at 225. (1932), and, on this basis, numerous courts have held that the immunity applies even when the individual is served with respect to the same action that required him to be in the state for civil proceedings. *See Kelly v. Pennington*, 78 Colo. 482, 485, 242 P. 681, 682 (1926) (recognizing that the "general rule" of immunity is "exemption [] from service of civil process in ***any*** action," and rejecting argument to "limit its application to another or new action"); *Frier v. Terry*, 230 Ark. 302, 304, 323 S.W.2d 415, 417 (1959) (same); *Int'l Plastic Harmonica Corp. v. Harmonic Reed Corp.*, 69 F. Supp. 515, 516 (E.D. Pa. 1946) (same); *Singer v. Reising*, 154 Misc. 239, 241, 276 N.Y.S. 714, 716 (Mun. Ct. 1935) (same); *Wallach v. Ne. Airlines, Inc.*, 15 Misc. 2d 762, 763, 181 N.Y.S.2d 949, 951 (Sup. Ct. 1958); *Roos v. H.W. Roos Co.*, 64 Ohio App. 464, 466, 28 N.E.2d 1008, 1008 (1940) (same). This Court should hold the same here.

As described above, the State's attempt to effect service upon Mr. Hassler while he was in Oklahoma for the sole purpose of attending depositions in this action should fail based on the long-standing immunity that protects litigants and witnesses from service while in a jurisdiction to attend official civil proceedings. This policy is "neither unique nor novel." *Ada Dairy Products Co.*, 258 P.2d at 943-44. It is "a principal of law of ancient vintage (and) has always been well settled and favorably enforced." *Id.* Based on this long-standing policy, the Court should enter an order denying the State's Motion and quashing the trial subpoenas for lack of proper service.

B. <u>There Is No Legal Authority for a Corporate Representative Trial Subpoena</u>

While the Oklahoma Rules of Civil Procedure allow and set forth the procedures for depositions of corporate representatives, 12 O.S. § 3235, they do not provide any method for a party to compel a corporation to designate a corporate representative to testify at trial. *See* 12 O.S. § 2004.1. This is consistent with the Federal Rules of Civil Procedures, which also provide no method for what the State seeks to do here. FED. R. CIV. P. 45(c)(1). Thus, there is no basis to

compel a corporation to provide a corporate representative for trial. And the State certainly cannot invent a new Rule of Civil Procedure by borrowing from a discovery statute and then serving a subpoena on an employee who was not authorized to accept service on its behalf. For each of these independent reasons, the Motion should be denied.

1. The State Cannot Manufacture A New Rule Of Civil Procedure And Require The Teva And Actavis Defendants To Designate A Corporate Representative To Appear For Trial.

At the same time it attempted to personally serve Mr. Hassler with a trial subpoena in his capacity as corporate representative for the Teva and Actavis Defendants, it also handed him a document purporting to compel the Teva and Actavis Defendants to present a corporate representative to testify at trial on 47 separate topics—the exact same topics for which Mr. Hassler provided over ***50 hours*** of corporate witness deposition testimony. (Ex. 2.) The State's attempt to use the procedures set forth in the Oklahoma Discovery Code for corporate discovery depositions to subpoena a witness to testify at trial is improper.

Title 12 O.S. § 3235(C)(5) allows for a party to notice and subpoena a public or private corporation, partnership, or governmental agency as a *deponent*. The statute clearly applies to discovery depositions only and says nothing of trial subpoenas being allowed under the same procedure. Indeed, the State has already deposed the Teva and Actavis Defendants' corporate witness—Mr. Hassler—on these topics already. It would absolutely make no sense for the State to be allowed to a second chance to address these same topics at trial. The State already has corporate testimony on these topics and need only to designate that testimony for it to be admitted at trial. The State's application of Oklahoma's discovery deposition procedures for a trial subpoena is not only unprecedented, but is also in conflict with spirit of § 2004.1 and § 3230 and should not be allowed here.

While neither the Oklahoma Rules of Civil Procedures nor the Federal Rules of Civil Procedure provide any method for a party to compel a corporate defendant to designate a corporate representative for trial, the Federal Rules of Civil Procedure[4] do set forth the requirements for commanding a corporate officer to appear at trial. As stated in Rule 45(c)(1), a party can require a person to appear at trial:

> (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
>
> (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
>
> (i) is a party or a party's officer; or
>
> (ii) is commanded to attend a trial and would not incur substantial expense.

FED. R. CIV. P. 45(c)(1)

More fundamentally, the Advisory Committee Notes to Subdivision (c), however, make clear that "Rule 45(c)(1)(A) does ***not*** authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state." *See* FED. R. CIV. P. 45 (Advisory Committee Notes) (emphasis added). Here, Mr. Hassler is not an officer of any of the Teva and Actavis Defendants, and, as a resident of Missouri, would be required to travel well over 100 miles to attend trial in Oklahoma. Further, no officer of the Teva and Actavis Defendants resides, is employed, or regularly transacts business in person in Oklahoma. Thus, even under the federal

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[4] § 2004.1 was modeled after its federal counterpart, Rule 45 of the Federal Rules of Civil Procedure, and as such, federal jurisprudence can be instructive in the interpretation of the state statute. *Adams v. Continental Carbon Co.,* 2012 OK CIV APP 74, ¶10, 285 P. 3d 703, 706 (citing *Barnett v. Simmons,* 2008 OK 100, ¶16, 197 P.3d 12, 18 and *Payne v. Dewitt,* 1999 OK 93,18-9, 995 P.2d 1088, 1092-93).

procedure for compelling a corporate officer's attendance at trial, which is arguably broader than Oklahoma's procedure, the State's attempt would fail.

Citing to out-of-state cases and out-of-context excerpts from Oklahoma statutes, the State asks that the Court grant its motion to compel because otherwise the Teva and Actavis defendants may "escape appearing at trial entirely." (Mot. 4-6.) But allowing a corporate defendant to avoid being forced to put a corporate representative on trial is precisely what the Oklahoma and Federal Rules of Civil Procedure contemplate. Moreover, Plaintiff can certainly play deposition testimony from the corporate representative at trial. As the State concedes, no Oklahoma court has addressed this issue, much less resolved it by making up a new Rule that allows for what the State wants to do here (Mot. at 4), and for good reason: the proper way to change the Oklahoma Rules of Civil Procedure is through amendment.

Other courts to address this issue have reached the same conclusion. The Sixth Circuit explicitly held that the Federal Rules of Civil Procedure simply do not allow a party to compel a corporate defendant to designate a corporate representative to testify at trial. In *Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 553 (6th Cir. 2015), plaintiff, a mortgagor, brought an action against loan servicer corporation in Ohio district court, and—as the State has done here—filed a motion to compel the corporate defendant to produce a corporate representative at trial to testify as to twenty-six topics. 799 F.3d at 549. The district court denied plaintiff's motion to compel and the Sixth Circuit affirmed. *Id.* at 553. The Sixth Circuit made clear that the only available option for plaintiff to require the corporate defendant to produce a corporate representative at trial was to "subpoena a corporate witness who either 'resides, is employed, or regularly transacts

business in person' in Ohio." *Id.* And, if no individual fit that description, plaintiff "could have taken a deposition of a corporate officer during discovery for its use at trial." *Id.*[5]

Like the Sixth Circuit in *Hill*, this Court should deny the State's attempt to compel the Teva and Actavis Defendants to produce a corporate representative at trial (Ex. 2), and it should also deny their attempt to subpoena Mr. Hassler as the Teva and Actavis Defendants corporate representative, because he does not "reside, is employed, or regularly transact business in person" in Oklahoma or 100 miles from Oklahoma.

2. Mr. Hassler Was Not Authorized To Receive Service Of A Subpoena On Behalf Of The Teva Or Actavis Defendants.

As stated in Section II.A, handing a copy of a purported subpoena issued to the Teva and Actavis Defendants to Mr. Hassler while he is in the state for a deposition is not proper service. Further, service is also improper for the additional reason that Ms. Hassler is an *employee* of Teva USA—he is not a corporate officer, managing or general agent, or otherwise authorized to receive service of a subpoena on behalf of Teva USA, much less on behalf of all of the Teva and Actavis Defendants. Title 12 O.S. § 2004.1. Under Oklahoma law, service on a non-resident corporation may be accomplished via service "to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process" on behalf of the corporate defendant. Title 12 O.S. § 2004.1 (C)(1)(c)(3). Mr. Hassler is neither. He is an employee of Teva USA only—not an officer, managing or general agent, or an agent otherwise authorized to accept service—and therefore service on Mr. Hassler is ***not*** a proper method for serving Teva

[5] In response to the Sixth Circuit's decision, plaintiff wrote a letter to the Rules Committee seeking an amendment to Rule 45. *See* Letter from Troy Doucet to Rules Committee, August 21, 2015, *accessible at* https://www.uscourts.gov/sites/default/files/15-cv-x-suggestion_doucet_0.pdf (requesting a change to Rule 45 based on the Sixth Circuit's decision "that a plaintiff cannot use Rule 45 to force a representative of a non-resident corporate defendant to appear at trial . . ."). That rule, however, has never been changed.

USA, much less all of the Teva and Actavis Defendants. *Magnolia Petroleum Co. v. Evans Lumber Co.*, 1960 OK 116, 351 P.2d 1067, 1071 (applying rule); *Denison Peanut Co. v. Moss*, 1953 OK 290, 262 P.2d 161, 162 (same).

Because there is no legal authority for the issuance of a topic-specific, corporate representative trial subpoena, and because even if there was, it was not properly served, the State's trial subpoenas to Mr. Hassler and to the Teva and Actavis Defendants should be quashed and the State's Motion should be denied.

IV. CONCLUSION

Based on the above arguments and authorities, the Teva and Actavis Defendants respectfully request that the trials subpoenas be quashed, a protective order be entered relieving the witnesses and parties subject to said subpoenas from any obligation to comply therewith, and the State's Motion be denied.

Dated: May 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed this 15th day of May, 2019, to the following:

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