IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

v.

PURDUE PHARMA L.P.; *et al.*

Defendants.

For Judge Balkman's Consideration

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

TEVA AND ACTAVIS DEFENDANTS' SUPPLEMENTAL RESPONSE AND PROPOSED TRIAL PLAN

I. INTRODUCTION

Pursuant to the Court's March 1, 2019 Order, Teva Pharmaceuticals USA, Inc. ("Teva USA"), Cephalon, Inc. ("Cephalon"), Watson Laboratories, Inc. ("Watson"), Actavis LLC ("Actavis LLC"), and Actavis Pharma, Inc. ("Actavis Pharma")[1] submit this Supplemental Response and Proposed Trial Plan in support of their pending motion to sever (the "Motion"). The Teva and Actavis Defendants should be severed from any trial because: (a) they were misjoined under 12 O.S. § 2020 and (b) even if joinder were possible, the Court should exercise its discretion to order separate trials. *See* Motion, at 4–5.

As set forth in the Motion, the parties are misjoined because the State cannot establish that its claims against all Defendants arise out of the same transactions or occurrences; instead, as

[1] Cephalon and Teva USA are referred to as the Teva Defendants. Watson, Actavis, LLC, and Actavis Pharma are referred to as the Actavis Defendants. Notably, the Actavis Defendants ***do not include*** Actavis Inc., a separate corporate entity which is now known as Allergan Plc. Pet. ¶15 & caption (identifying defendant Allergan Plc as being formerly known as "Actavis, Inc."). The State served Allergan Plc, and undersigned counsel does not represent it in this case.

discovery has confirmed, they are competitors which manufacture different medicines, utilize different means to market their medicines (to the extent they are marketed at all), and have sold and marketed their medicines at different times. Motion at 13–17. Moreover, severance is necessary because the Teva and Actavis Defendants will be prejudiced by a single trial that includes the other Defendants; indeed, the State has repeatedly contended that the Purdue Defendants created the opioid crisis and intends to introduce evidence specific to the Purdue Defendants that will inflame the jury as to all Defendants. *Id.* at 5–8. The jury also will be confused by the presentation of voluminous evidence about twelve different companies, an array of different opioid medicines (approved at different times for different indications), and different marketing efforts. *Id.* at 20–21. And a joint trial will be grossly inefficient—with each witness potentially being asked about the conduct of each of the twelve different companies. *Id.* at 22–23.

In addition, the Teva and Actavis Defendants have special considerations which logically require a separate trial. These include the following:

- **Cephalon** – Cephalon only manufactured and promoted two opioids—Actiq and Fentora. Cephalon launched Actiq in 2001, five years after Purdue introduced OxyContin, and it stopped promoting Actiq in 2006, when it launched Fentora. Unlike the opioids sold by the other Defendants, Actiq and Fentora are unique immediate-release opioids indicated for break-through cancer pain in opioid-tolerant patients. Before a prescription is written and dispensed, the TIRF REMS Program requires that physicians acknowledge in writing both the risks and limited indications of these medicines. These medicines are so unique that the State only reimbursed ***245*** Actiq and Fentora prescriptions between 2007 and June 2017, and has identified ***no*** prescriptions over 21 years that are medically unnecessary. Further, the State ***has released Cephalon for all claims*** submitted to the State's Medicaid Program as a result of Cephalon's promotion of Actiq prior to 2007 (which is the only time period that Cephalon ever promoted Actiq). *See* Cephalon's February 26, 2019 Motion for Partial Summary Judgment.

- **Teva USA** – Prior to 2011, Teva USA only manufactured and did not promote generic opioid medicines. Teva USA only became affiliated with Cephalon in 2011, long after the State contends the Purdue Defendants created the opioid epidemic.

- **The Actavis Defendants** – The Actavis Defendants manufactured only generic opioids. The Actavis Defendants did not promote their generic opioids to physicians in

Oklahoma or anywhere else. *See* The Actavis Defendants' March 15, 2019 Motion for Partial Summary Judgment.

As a result of these unique circumstances, it would be grossly prejudicial and inefficient to try the Teva and Actavis Defendants in one trial combined with all other Defendants. A separate trial, by contrast, will allow the jury to assess the unique witnesses, issues, and evidence specific to the Teva and Actavis Defendants without the risk of jury confusion and prejudice. This will reduce the time and scope of each trial, while ensuring that each family of Defendants gets a fair trial consistent with fundamental due process principles under the Oklahoma and United States Constitutions.[2]

II. BRIEF IN SUPPORT

Separating trials of the corporate families will result in substantial savings in trial time and a substantial reduction in confusion for the jury.

Evidence and Exhibits. Several important issues only would need to be addressed in a trial involving the Teva and Actavis Defendants. This includes, but is not limited to, the following:

1. The evidence and issues concerning the lack of marketing by generic manufacturers, including the Actavis Defendants and Teva USA.

2. The evidence and issues concerning the promotion and sale of Actiq and Fentora, the only opioid medicines promoted by any of the Teva or Actavis Defendants and not any other Defendants. As a result, instances of allegedly improper marketing by the Purdue Defendants would not be relevant to this trial.

---

[2] The Defendant-families are: (1) the Purdue Defendants; (2) the Janssen/Johnson & Johnson Defendants; and (3) the Teva and Actavis Defendants.

3. The evidence and issues concerning the TIRF REMS Program and the FDA-approved Physician-Prescriber Agreements that were used to ensure that doctors and patients are aware of the risks and indications of Actiq and Fentora.

4. The evidence and issues concerning the State's release of Cephalon from liability for claims submitted to the Oklahoma Medicaid Program.

5. The evidence and issues concerning any unbranded third-party statements or publications sponsored by the Teva Defendants and whether those statements or publications can or cannot be attributed to the Teva Defendants.

6. The evidence and issues, including expert testimony, concerning the State's efforts to show that the Teva and Actavis Defendants caused the billions in damages that the State seeks to collect.

Fact Witnesses. The State has taken 169 non-expert depositions in this matter so far, including 102 fact witnesses and 67 days of testimony from corporate representatives of the Defendants. Out of the 102 fact witnesses deposed in this case, only 8 have been current or former employees of the Teva and Actavis Defendants, accounting for less than 8% of all fact witnesses. Out of the 67 days of corporate representative depositions in this case, only 15 have been on behalf of the Teva and Actavis Defendants, accounting for less than 23% of all corporate witnesses. In other words, the Teva and Actavis Defendants' fact testimony accounts for a mere 13.6% of the total testimony in this case.

With one trial, the jury would only have to hear and evaluate fact witness testimony pertaining to the Teva and Actavis Defendants—not the testimony of the 94 other fact witnesses that the State has deposed. The jury likewise would only hear corporate representative testimony from the Teva and Actavis Defendants; it would not have to sit through and keep track of the 52

days of corporate representative testimony from the other Defendants and struggle to distinguish testimony as to the Teva and Actavis Defendants from the vast majority of testimony that will be relevant only to other Defendants. Significantly reducing the number of fact witnesses would significantly reduce the risk of jury prejudice and confusion.

Expert Witnesses. Defendants have identified 29 expert witness. The Teva and Actavis Defendants expect to call at least 6 expert witnesses at trial. With a separate trial as to the Teva and Actavis Defendants, the jury would only hear expert testimony from and pertaining to the Teva and Actavis Defendants, rather than testimony from 23 other experts retained by the other Defendants. In fact, the State would not have to present certain experts, too, such as Dr. Art Van Zee, whose testimony is limited to the Purdue Defendants.

Length of Trial. The current trial is expected to last between two and three months. If severance is granted and the Teva and Actavis Defendants are tried separately at a later date, the length of that trial would be reduced significantly. A single trial as to all Defendants will be significantly longer than separate trials due to, at a minimum, three opening arguments, cross-examination of the State's witnesses by all Defendants, separate arguments regarding the admissibility of evidence, and, at a minimum, three closing arguments. Each of these critical components of trial will be elongated by the need for each Defendant or Defendant-family to distinguish itself and its arguments from other Defendants, as opposed to simply arguing the issue at hand. In other words, this Court would not have to preside over multiple three-month trials; the successive trial involving the Teva and Actavis Defendants would be substantially shorter in length.

Avoiding Prejudice and Confusion. The State seeks to hold each Defendant jointly liable not only with every other Defendant in the same corporate family, but also with all other

Defendants in this case. (For example, the Teva and Actavis Defendants are now affiliated with each other (as of late 2016) but have no corporate affiliation with the Purdue and Janssen Defendants.) However, there is no basis to impose joint and several liability in this case, as the Teva and Actavis Defendants intend to demonstrate at summary judgment. And contrary to the State's view, the mere fact that one corporation is affiliated with another does not mean the corporate form can be ignored and liability can be imposed on each company, absent some wrongdoing by that company. *Gilbert v. Security Financial Corp.*, 2006 OK 58, 152 P.3d 165; *Kenkel v. Parker*, 2015 OK 81, ¶12, 362 P.3d 1145 ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct, separate entities.").

Nonetheless, regardless of the State's theory of liability, if all Defendants are tried together, the State still would have to prove—and the jury would have to hear—evidence regarding the distinct actions taken (or not) by twelve separate corporate entities. This includes, for instance, inflammatory statements and evidence pertaining to the Purdue Defendants—years before Actiq or Fentora was ever marketed—that have no connection to the Teva and Actavis Defendants. The jury also will have to make a finding as to each separate corporation. That is unworkable. Trying them by corporate family would simplify matters significantly.

Overlap Is No Barrier To Severance. The Teva and Actavis Defendants recognize that, if severance is granted, there will be some overlap in the trials. But there is always some factual overlap any time severance is granted.[3] And granting severance will ensure greater judicial efficiency and help avoid jury confusion. Each Defendant is entitled to a fair and impartial trial.

---

[3] Indeed, multiple trials involving overlapping issues may need to be conducted independent of what happens in this case. For instance, there will be overlap between this case and the cases by the State's subdivisions in federal court; there will be overlap between this case and cases brought by tribes in Oklahoma; there will be overlap between this case and any subsequent case which might be brought by the State against other defendants in the future.

See, e.g., *Baker v. Waterman S.S. Corp.*, 11 F.R.D. 440, 441 (S.D.N.Y. 1951) ("A paramount consideration at all times in the administration of justice is a fair and impartial trial to all litigants. Considerations of economy of time, money and convenience of witnesses must yield thereto."); *Philips Elecs. N. Am. Corp. v. Contec Corp.*, 220 F.R.D. 415, 418 (D. Del. 2004) (ordering separate trials based on "a substantial risk of prejudice to [one defendant] were the jury to believe that [it] is somehow linked to [its co-defendant]"). That can only be achieved by severing the Teva and Actavis Defendants.

An example of the problems that could be created in a joint trial is presented by *Delaney v. Morris*, 1944 OK 51, 145 P.2d 936. In that case, the plaintiff, Delaney, brought suit to recover damages for injury to his land as a result of the pollution of streams crossing his land against two defendants, Delaney and the Ark Royalty Company. On appeal, the Oklahoma Supreme Court held that the joinder for trial was prejudicial with respect to Delaney:

> We are of the opinion from the pleadings and evidence that had Morris sued Ark alone, he could have recovered from Ark for the entire damage done to his property, ... On the other hand, we are of the opinion that had Morris sued Delaney alone, Morris would not have been permitted to show, or to have the jury take into account, the damage done to his land by the pollution cast thereon by Ark, south of that point where the two ravines joined. There is no rule of law that would have authorized Morris to recover against Delaney for the pollution cast onto Morris' land by Ark where it was so clearly distinct and separable from that of Delaney.

Id. at 938–939. The court concluded that the trial court erred in ruling on the requested instructions and that the judgment against Delaney must be reversed. *Id.* at 939. Those very problems and potential appellate issues can be avoided with the trial plan urged here in which claims against the Teva and Actavis Defendants are tried separately from the claims against the other Defendants.

III. CONCLUSION

The State suffers no prejudice under this trial plan. The State chose to bring a massively complicated case against thirteen defendants simultaneously, without regard to rules of joinder. Because the parties are misjoined, the Court should grant the pending Motion. At a minimum, for purposes of trial, the claims against the Teva and Actavis Defendants should be tried separately to avoid prejudice and jury confusion and to promote efficiency. This Court should adopt this Trial Plan as a method to achieve an efficient and just determination of the issues.

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

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed this _____ day of March 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 **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

Robert G. McCampbell

S500367