

The Teva and Actavis Defendants agree that the Court has the legal authority to sever the claims against certain parties in this lawsuit pursuant to Oklahoma law. To that end, the Teva and Actavis Defendants intend to file an independent motion in short order seeking severance on the grounds that: (a) they are misjoined in this lawsuit as a matter of Oklahoma law; and (b) a joint trial would severely prejudice the Teva and Actavis Defendants and confuse the jury, thereby depriving them of their constitutional due process rights. For these very same reasons, consolidation for purposes of trial is not appropriate.

I. BACKGROUND

On February 14, 2019, the Court orally ordered the Parties to provide briefing on the Court's authority to sever claims and consolidate actions. (2/14/19 Hearing Tr. at 17:25–18:4.) The Court also requested briefing on the issue of prejudice to the Defendants arising from severance and consolidation. (*Id.* at 18:10–11.) On February 15, 2019, the State submitted its Response to the Court's Order to Provide Briefing on the Legal Authority to Sever Claims and Consolidate Actions ("State's Submission").

In its Submission, the State argues that it is within the Court's inherent and statutory power to (1) sever claims into separate actions and (2) consolidate those actions for purposes of discovery and trial. (State's Submission at 1–2.) In essence, the State seeks severance in name but not practice. The State suggests that after severance, discovery may continue on its present joint course and that the trials may be consolidated, so that there is one joint trial involving multiple claims against twelve separate Defendants—notwithstanding that the claims are based upon separate and distinct marketing (if any) of distinct opioid medicines manufactured by distinct Defendants approved at different times and subject to different FDA requirements.¹

¹ The State says "[s]everance and consolidation are purely docketing-control processes allowing a court to sever a case into separate cause numbers . . ." (State's Submission at 3.) However, the State cites no support for this proposition that severance of claims has no significance. Severance and consolidation are statutory constructs that have critical implications far beyond "docketing-control purposes."

II. DISCUSSION

A. Oklahoma Law Permits Severance.

The Teva Defendants and Actavis Defendants agree with the State that the law permits severance in this case for various reasons. There are several statutory tools that allow the Court to sever claims against a party (or parties) in a multi-party action—and, thus, hold a separate trial as to those claims and parties.

First, Section 2021(C) of the Oklahoma Code provides that “[a]ny claim against a party may be severed and proceeded with separately.” Okla. Stat. Ann. tit. 12, § 2021(C). It is undisputed that the Court has the statutory authority to sever the claims against the Defendants.

Second, severance is appropriate when parties are misjoined under Section 2020(A)(2). When parties are misjoined, they “may be dropped” and “[a]ny claim against a party may be severed and proceeded with separately.” Okla. Stat. Ann. tit. 12, § 2021.

Lastly, even if parties are properly joined, the Court may “order separate trials or make other orders to prevent delay or prejudice.” Okla. Stat. Ann. tit. 12, § 2020(C); *see also* Okla. Stat. Ann. tit. 12, § 2018(D) (providing that “in furtherance of convenience or to avoid prejudice,” a court “may order a separate trial of any claim”). This is yet another severance tool that the Court has to guard against prejudice and jury confusion in a single trial.²

B. Certain Defendants Can And Should Be Severed From This Action.

At oral argument before this Court, the State argued severance of the Purdue Defendants is necessary in the event that the Purdue Defendants file for bankruptcy in the near future, which

² In its submission, the State relies upon Section 2018(D) as the basis for severance of the claims against the Purdue Defendants. This reliance is misplaced because Section 2018(D) deals with a trial court’s authority to hold a separate trial for particular claims—not severance of all claims against a party in a multi-party lawsuit. This principle, however, is also embodied in Section 2020(C), which addresses separate trials for distinct parties.

would stay the case against all Defendants. (2/14/19 Hearing Tr. at 10:1–3.) The Teva and Actavis Defendants agree that severance—and, thus, separate trials—is warranted, but in a different form and for two different reasons: (1) the Teva and Actavis Defendants are misjoined pursuant to Oklahoma law; and (2) there is high risk of prejudice, jury confusion, and inefficiency—and a violation of due process principles—if the claims against the Teva and Actavis Entities are tried in a single trial with the claims against the Purdue and Janssen Defendants. For these reasons, the Teva and Actavis Defendants intend to file a motion to sever promptly.

First, under Okla. Stat. tit. 12, § 2020(A)(2), the State misjoined the Defendants in this action. The claims against the Teva and Actavis Defendants arise out of entirely separate marketing transactions, if any, from the claims against the Purdue and Janssen Defendants. Indeed, the State attempts to hold each liable for distinct alleged marketing conduct leading to distinct alleged prescriptions. As discovery has made clear, the Defendants are actually competitors that 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*. Because the Teva and Actavis Defendants are misjoined, they should be severed from this lawsuit. *See, e.g., Watson v. Batton*, 1998 OK CIV APP 50, ¶ 5, 958 P.2d 812, 814; *see also Graziose v. American Home Products Corp.*, 202 F.R.D. 638, 639-41 (D. Nev. 2001) (granting severance under Fed. R. Civ. P. 20).

Second, the prejudice to the Teva and Actavis Defendants would be overwhelming if subjected to a joint trial for reasons that will be addressed in more detail in the forthcoming motion. The significant risk of “guilt by association” in a single trial involving all Defendants in this case not only would prejudice the Teva and Actavis Defendants, but also would violate their due process rights. *See, e.g., Wynn v. Nat’l Broad. Co.*, 234 F. Supp. 2d 1067, 1089 (C.D. Cal. 2002). Separate

trials also are necessary to prevent jury confusion, given that a single jury would need to keep track of and make determinations about voluminous and complex evidence (or lack thereof) concerning twelve different companies and their various distinct products that were approved and marketed, if at all, at distinct times and in distinct ways. Particularly given this strong likelihood of jury confusion, a single joint trial also would be less efficient; each Defendant will have the right and obligation to put on separate evidence, and each witness will need to be asked about the conduct of each company. *See, e.g., Cohen v. D.C. Nat'l Bank*, 59 F.R.D. 84, 88 (D.D.C. 1972) (recognizing and applying principle). A single trial will not be fair to the jury or the Defendants.

C. Following Severance, Consolidation For Trial Purposes Is Inappropriate.

For the very same reasons that severance is appropriate, consolidation for trial purposes is *inappropriate*. Indeed, the State does not and cannot address how consolidation for purposes of trial would be appropriate following severance of claims against particular parties. Severance should take place to avoid the very prejudice that a joint trial would create. Post-severance consolidation for trial purposes would defeat that rationale.

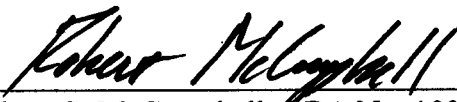
Further, the State's rationale that Purdue should be severed because of the State's concern about a potential bankruptcy is a powerful argument *against* consolidation for trial, not in favor.

III. CONCLUSION

The Teva Defendants and Actavis Defendants agree with the State that it is within the Court's authority to sever all claims against particular Defendants and respectfully request that the Court sever the Teva Defendants and Actavis Defendants so that they may proceed separately from the other Defendants. The cases, once severed, should not be consolidated for trial purposes for the reasons set forth herein and in the Teva Defendants' and Actavis Defendants' forthcoming motion to sever.

Dated: February 22, 2019

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**IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA**

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

Case No. CJ-2017-816

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. §

Submitted to:
The Honorable Thad Balkman

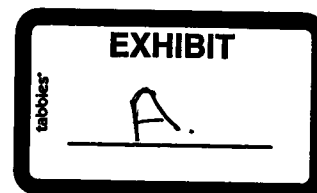
STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED
FEB 15 2019

In the office of the
Court Clerk MARILYN WILLIAMS

**THE STATE'S RESPONSE TO THE COURT'S ORDER TO PROVIDE
BRIEFING ON THE LEGAL AUTHORITY TO SEVER CLAIMS AND
CONSOLIDATE ACTIONS**

On February 14, 2019, the Court orally ordered the parties to provide briefing on the Court's authority to sever claims and consolidate actions. The Court further specifically requested briefing on the potential of prejudice to Defendants arising from severance and consolidation. In accordance with that order, the State of Oklahoma ("the State") respectfully submits that the Court



possesses the inherent and statutory power to (1) sever claims into separate actions and (2) consolidate those actions for purposes of discovery and trial.

Authority

There can be no reasonable dispute that the Court possesses the inherent power and statutory authority to sever claims and consolidate actions for trial, and to manage its docket in this manner. *See, e.g., Winters v. City of Okla. City*, 1987 OK 63, ¶8, 740 P.2d 724, 726 (“Inherent powers [are] those which are necessary to the exercise of all others. These are the court’s inherent powers to manage its own affairs so as to achieve the orderly and timely disposition of cases. These powers are implicit in the existence of a judicial system, and are a necessary incident to the exercise of a court’s jurisdiction.”) (internal quotation omitted); *Hambright v. City of Cleveland*, 1960 OK 184, ¶16, 360 P.2d 493, 496 (“Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.” (quoting 14 Am. Jur., Courts § 171)).

The Court’s statutory power to sever comes from 12 O.S. § 2021, which states “[a]ny claim against a party may be severed and proceeded with separately.” The Court’s statutory power to consolidate comes from 12 O.S. § 2018(C), which states “[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

Severance and consolidation are perfectly allowable and common-sense tools the Court may use to control its docket and preserve a trial date. To be clear, such severance and consolidation does not change the prosecution and defense of the litigation. Pleadings will not

change. Existing petition and answers remain in effect. Motions will not change. All prior orders remain in full force and effect. Discovery master and settlement master processes do not change.

Severance and consolidation are purely docketing-control processes allowing a court to sever a case into separate cause numbers (for example, CJ-2017-816-1 and CJ-2017-816-2), and then consolidate those causes for discovery and trial. The State respectfully submits that severance and consolidation can occur through a single, simple order.

Lack of Prejudice

If severance and consolidation occur as described above, everything about this matter would remain the same. The Original Petition and all pleadings filed as of the date of the severance/consolidation order would remain the same. All orders issued to date remain the same. The Special Master and Settlement Master appointments remain the same. The Scheduling Order remains the same. The trial date remains the same. And the trial would remain the same. The only thing that would change is that some of the State's claims would bear a new cause number.

Because severance and consolidation are purely *procedural* mechanisms which allow a court to efficiently and economically control its docket—they do not affect the *substance* of the case—there necessarily can be no prejudice to Defendants.

CONCLUSION

Pursuant to 12 O.S. §§ 2021 and 2018(C) and the Court's inherent authority to efficiently manage the matters on the Court's docket, the Court undoubtedly possesses the power to sever and consolidate claims before it. Further, such severance and consolidation will not cause any prejudice to Defendants.

Respectfully submitted,

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