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, 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

Honorable Thad Balkman

DEFENDANTS JANSSEN PHARMACEUTICALS, INC. AND JOHNSON AND JOHNSON'S RESPONSE TO THE COURT'S REQUEST FOR BRIEFING ON SEVERANCE AND CONSOLIDATION

Although discovery is ongoing and summary judgment remains months away, the State asks the Court to sever Purdue's case and commit to a consolidated trial against all Defendants in May 2019. Janssen does not object to a severance that serves only to assign Purdue a unique case number. The State's request for a consolidated trial, however, is premature and misguided—the potential prejudice that consolidated proceedings would pose for Janssen cannot

be fairly evaluated in the context of briefing on the Court's authority to engage in the two-step process suggested by the State. That prejudice is significant and will be addressed by separate motion.

But deficiencies in the State's proposal are plainly apparent at the present time. The State's consolidation request is undercut by its asserted reasons for seeking severance: If the State believes the threat of a Purdue bankruptcy sufficiently ominous to warrant formally splitting this case in two or three, it cannot credibly insist on a joint trial that such a bankruptcy would throw into immediate chaos.

I. ARGUMENT

Janssen does not oppose severing the State's case against Purdue and assigning it a unique case number. But as the State's brief makes clear, that severance would be merely a "*procedural* mechanism[]" and would "not affect the *substance* of the case" in any way. State Br. 3. By the State's own account, the severance should change nothing about the case.

Given the State's insistence that severance is a formality, it is unclear why severance is needed *now*. The State suggests it is necessary because Purdue might declare bankruptcy *in the future*. But that is empty speculation. Whether severance would be justified if Purdue declares bankruptcy can be addressed if and when a bankruptcy is declared. Indeed, motions to sever a bankrupt party are usually filed and granted only *after* the party declares bankruptcy. *See, e.g.*, *LaRosa v. Pecora*, 650 F. Supp. 2d 507, 509-10 (N.D.W. Va. 2009); *Broad. Music, Inc. v. N. Lights, Inc.*, 555 F. Supp. 2d 328, 331-32 (N.D.N.Y. 2008); *Anderson v. Cain*, 391 B.R. 378,

379-80 (E.D. Tex. 2007). No matter: Given the State's representation that no substantive consequences will attach, Janssen does not oppose the State's request.[1]

But the State's misguided and premature bid to consolidate the newly severed cases, which holds potential to fundamentally shape the character of this litigation, is not similarly innocuous. A ruling on consolidation under 12 Oklahoma Statute § 2018 requires the Court to consider the prejudice to the parties, confusion to the jury, and judicial economy. *Bianca v. Indep. Sch. Dist. No. 1 of Tulsa Cty.*, 2012 WL 2327832, at *2 (N.D. Okla. June 19, 2012).[2] The benefits and harms of consolidation, including the scope of common issues and the potential prejudice from a shared trial, cannot be evaluated in a vacuum—they depend on which claims survive summary judgment and what evidence emerges in discovery. Janssen believes the evidence will demonstrate a severe risk of prejudicial spillover and confusion from a joint trial with different defendants who sold different products at different times using different promotional strategies. But such a consolidation decision can be properly made only after the record is developed and summary judgment crystallizes the legal and factual questions to be tried. Without the benefit of the full evidentiary and legal picture, the Court can only speculate whether consolidation is appropriate.

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[1] Consistent with the State's assurance that "everything about this matter would remain the same" (State Br. 3), Janssen requests that the caption continue to list the Defendants in their current order, so that if the Court ultimately decides to consolidate proceedings, the order of proof continues to correspond to the styling of its petition.

[2] Because § 2018 tracks its federal counterpart, Federal Rule of Civil Procedure 42, this Court can and should look to federal cases interpreting Rule 42. *See, e.g.*, 5 Okla. Prac. Appellate Practice § 4:40 (2018 ed.); *A-Plus Janitorial & Carpet Cleaning v. Employers' Workers' Comp. Ass'n*, 936 P.2d 916, 927-28 (Okla. 1997).

In addition to being premature, the State's request for consolidation is at war with its argument for severance. The same bankruptcy concerns that the State cites to justify severance overwhelmingly militate against a consolidated trial. Judicial economy and avoidance of prejudice would be poorly served by devoting enormous resources to preparing and litigating a massive multi-defendant trial that could be brought into disarray at a moment's notice by a major co-defendant's bankruptcy. *See id.* If a possible Purdue bankruptcy justifies formally severing Purdue's case, it justifies containing the potential fallout by separately trying the State's distinct case against Purdue.

The State's suggestion that any such consolidated trial adhere to the current timetable regardless of a defendant bankruptcy is similarly premature. The Court may grant a continuance "for good cause shown," 12 Okla. Stat. § 667, and must continue the case if necessary to ensure all Defendants have a "reasonable opportunity to prepare for trial," *Bookout v. Great Plains Reg'l Med. Ctr.*, 939 P.2d 1131, 1135 (Okla. 1997) (quotation omitted). Those questions, too, cannot be resolved in the abstract. It is impossible to speculate how a Purdue bankruptcy at some future date would affect the parties' trial preparations, and whether any disruptions could be cured on the current schedule. Janssen's trial strategy could be significantly affected if Purdue is no longer involved in this litigation, and Janssen could need time to adjust its approach accordingly. The Court would likewise have to make a number of rulings that could require a reasonable postponement—for example, whether, and if so to what extent, evidence about Purdue would be admissible as to other Defendants. At this point, when a Purdue bankruptcy is only a possibility imagined by the State, there is no way to gauge whether potential prejudice or disruption may warrant a continuance.

Janssen thus reserves its right to seek a continuance if an eleventh-hour Purdue bankruptcy causes disruptions that threaten to derail its trial strategy and preparations. It likewise reserves any and all federal or state law rights it might have due to a Purdue bankruptcy declaration. None of those issues can be addressed now, based on speculation and an incomplete record. They turn on substantive legal principles that can only be applied to concrete facts.

CONCLUSION

For the foregoing reasons, whether or not the Court formally assigns the Purdue Defendants a unique case number, the Court should deny the State's request that the Court now commit to trying all Defendants together in a consolidated trial on the current schedule.

Respectfully submitted,

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CERTIFICATE OF MAILING

Pursuant to Okla. Stat. tit. 12, § 2005(D), and by agreement of the parties, this is to certify on February 22, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:

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