IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	§	
Plaintiff,	§	STATE OF OKLAHOMA } S.S. CLEVELAND COUNTY } FILED MAR 12 2019 In the office of the Court Clerk MARILYN WILLIAMS
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.,	§	Case No. CJ-2017-816 The Honorable Thad Balkman (To be heard by The Honorable William C. Hetherington, Special Discovery Master) JURY TRIAL DEMANDED
Defendants.	§	

THE STATE'S RESPONSE TO PURDUE'S MOTION TO RE-OPEN
THE EXPERT DEPOSITION OF DR. ART VAN ZEE

Dr. Van Zee is one of the 23 retained experts by the State in this case. Dr. Van Zee was on the ground floor of the early days of the OxyContin abuse crisis in the Appalachian region. He had first hand encounters with executives from Purdue regarding this issue. Dr. Van Zee met with Purdue executives nearly twenty years ago to discuss the OxyContin problem in his area, and he has witnessed firsthand the impact Purdue's marketing tactics for OxyContin has had on his

community. As such, he will provide expert testimony about the marketing and promotion of OxyContin and its long-term impact on his geographic region. *See* State's Expert Disclosures (12/21/18) at Exhibit V. Specifically, the State's expert disclosure of Dr. Van Zee lists the following subject matters, facts, and/or opinions:

- His personal experience with the OxyContin problem and the history of the OxyContin problem.
- His early communications with Purdue Pharma.
- The marketing and promotion of OxyContin.
- What Purdue knew about the potential for OxyContin addiction and abuse, and when they knew it.
- Other contributing factors to the spread of the OxyContin problem.
- The long-term consequences of the OxyContin problem for his region.

See Motion, Ex. B at 1. Dr. Van Zee was not designated as an expert on the appropriate medical treatment for pain, chronic pain, or the use of opioids for chronic pain. The limited information about his own practice that provides the basis for some of his opinions is in his treatment of addiction, including the use of buprenorphine--not on the treatment of pain. His expert opinions are based on his direct knowledge of what Purdue's widespread marketing strategies can accomplish, and they are limited to these topics.

Despite the clear parameters of Dr. Van Zee's expert disclosure, Purdue repeatedly questioned him: (1) about information regarding his specific patients; and (2) about topics related to expert opinions he did not set forth in his disclosures, on which he has not been designated by the State and will not offer at trial. These improper lines of questioning garnered objections from the State's counsel and led to instructions for Dr. Van Zee not to answer. Apparently dissatisfied with the testimony it received from Dr. Van Zee, Purdue is now seeking a do-over, requesting the

Court to re-open his deposition. Purdue's Motion should be denied for several reasons.

First, Purdue argues the State did not and cannot provide any legitimate basis for instructing Dr. Van Zee not to answer certain questions. Purdue is wrong. Section 3230(E)(1) of Title 12 provides, in pertinent part, that a party may instruct a deponent not to answer "when necessary to enforce a limitation on evidence directed by the court...." This is exactly one of the bases the State provided when it instructed Dr. Van Zee not to answer. For example, Purdue asked Dr. Van Zee about treatment plans for the 200-250 patients for whom he prescribes opioids. *See Motion at Ex. A, p. 149.* Concerned Purdue was about to violate the terms of the Court's order limiting discovery of specific patient information, the State's counsel instructed Dr. Van Zee not to answer. *Id.* ("Object to form. It's very vague. The judge has already ordered in this case that there's not going to be any facts or testimony about individual patients, and that's what this is getting into. So that's contrary to the judge's orders." (D. Pate)). This instruction is specifically authorized under the statute and was a proper instruction given to Dr. Van Zee during his deposition. While Purdue may now contend it has no intention of delving into patient data if the deposition is re-opened, it does not render the instruction improper at the time it was given, and it certainly does not entitle Purdue to fees and costs.

Second, it has become increasingly clear during the depositions of the State's experts and non-party doctors that Defendants are engaged in a strategy to backdoor expert testimony outside the scope of properly designated expert opinion testimony. For example, Purdue questioned Dr. Van Zee about how he assesses and treats pain in his specific patients, despite the fact that his testimony is about the marketing and promotion of Oxycontin generally. *See* Motion, Ex. B at 1. Purdue claims that Dr. Van Zee will "rel[y] on his personal history as a practicing physician to form the basis for the opinions he intends to offer." Motion at 2. This is an over-generalization.

Dr. Van Zee is a practicing physician and he witnessed Purdue's marketing and has researched it heavily. That is how he is qualified to offer his opinions. Purdue does not identify a single instance in Dr. Van Zee's disclosure where he has been designated to testify about appropriate pain treatment or where he is relying on any experience he has in that regard for his testimony.

Purdue also questioned Dr. Van Zee about what he considers a "medically unnecessary prescription"—clearly seeking an expert opinion on a topic Purdue is well aware is being covered by different experts retained by the State. These lines of questioning are irrelevant and outside the scope of the testimony being provided by Dr. Van Zee. The fact that Purdue chose to spend its deposition time with this witness on topics not within his wheelhouse is no fault of the State, does not warrant re-opening his deposition, and does not constitute sanctionable conduct. If Purdue intended to elicit expert opinions from Dr. Van Zee outside of what the State has designated, then it had the opportunity to disclose him as an expert on such issues, and it failed to do so.

Third, the majority of Purdue's Motion is focused on the goals of cross-examination and Purdue's inherent right to "probe the basis for an expert's opinion." Motion at p. 4. The State agrees that a party or his counsel cannot deprive the opposing party the right to cross-examination a witness; however, "the law is satisfied when a party has been given sufficient notice of the time and place of taking the deposition and has been afforded a reasonable opportunity for cross-examination." *Boatman v. Coverdale*, 1920 OK 98, ¶ 6, 193 P. 874, 875. Purdue cannot legitimately argue it was deprived of this opportunity. Defendants were allotted six hours to question Dr. Van Zee. They chose to use the time as they saw fit. Between his detailed expert disclosure and this lengthy deposition, Defendants know exactly what Dr. Van Zee will testify to at trial. Moreover, to the extent Purdue was seeking to elicit testimony to support a potential *Daubert* challenge against Dr. Van Zee, it was provided ample opportunity to obtain such

testimony. The State instructing Dr. Van Zee not to answer questions implicating the Court's prior orders and/or outside the scope of his expert testimony certainly did not deprive Purdue of a meaningful cross-examination.

Fact discovery closes in this case in three (3) days. Expert discovery closes April 1. There are numerous other experts who need to be deposed on both sides. The parties cannot waste time trying to elicit non-designated expert opinions and deposing experts multiple times. Defendants have been given more than sufficient opportunity to test and understand the basis for Dr. Van Zee's opinions, and the goals of cross-examination have certainly been fulfilled. The State's objections and instructions during the deposition were legitimate, and there is simply no good faith basis for re-opening Dr. Van Zee's deposition and subjecting him to additional questioning. The Court has broad discretion in handling discovery, and the State respectfully requests it to deny unnecessary additional discovery of this expert and allow the parties to move past discovery and prepare for trial.

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