



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.)

Case No. CJ-2017-816
Judge Thad Balkman

**TO BE HEARD BEFORE THE
HONORABLE JUDGE THAD
BALKMAN**

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED

MAR 14 2019

In the office of the
Court Clerk MARILYN WILLIAMS

**PURDUE'S RENEWED OBJECTION AND MOTION TO EXCLUDE CAMERAS
FROM TRIAL AND MEMORANDUM OF LAW IN SUPPORT**

As the United States Supreme Court observed, “[t]he temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses.” *Estes v. State of Tex.*, 381 U.S. 532, 549 (1965). That temptation is likely to overwhelm the participants here, which will result in a show trial intended to play to a court of public opinion, not a court of law. A televised trial in this matter will be fundamentally unfair. It will deny Purdue due process. It will interfere with the jobs of the jurors, the witnesses, and the lawyers. It will make an already long trial schedule even longer. It will encourage theatrics, and impede the search for truth. Purdue therefore renews and formalizes its objection to video transmission and recording in this matter.

Purdue acknowledges the Court already ruled on this request last August.¹ The Court attempted to address the Defendants’ legitimate concerns by appointing a special master to craft an order limiting cameras in the courtroom. But even the most “innocuous” or “unobtrusive” camera set-up cannot change the fact that cameras in the courtroom fundamentally alter the dynamics at trial. And since that time, though, the baseless rhetoric of the State’s lawyers has only increased at every deposition and every hearing. Numerous times, the State has taken to the press or twitter, using inflammatory, prejudicial, and misleading language in an apparent effort to influence these proceedings, to exert pressure on the Defendants.² If this is the way the State conducts itself now, what will happen when there are television cameras rolling for months?

¹ At the Court’s request, Defendants submitted a letter (dated May 9, 2018) to the Court with their position on whether television cameras should be allowed in the courtroom to broadcast the trial. That letter, which objected to cameras during trial, is incorporated herein by reference and attached as Exhibit A.

² On February 14, for example, Attorney General Hunter issued a press release that disclosed previously confidential documents and stated, “[t]he company’s actions are absolutely appalling...Although there was strong suspicion Purdue was engaging in these deceitful acts, seeing it in black and white is unnerving.” Aside from the fact that this statement may violate Rule 3.6 of the Oklahoma Rules of Professional Conduct with respect to trial publicity, Attorney

In response to Purdue's renewed motion, the State will no doubt argue that the Defendants want to avoid press and public scrutiny of this trial. This is false. To be clear: *Purdue has no objection to press coverage of this trial.* Purdue and the other Defendants *asked* to try this case in the largest courtroom in Cleveland County, Oklahoma—a courtroom big enough to accommodate the parties and interested members of the press. There is no doubt the case will draw media scrutiny. All Purdue asks is the opportunity to prove these points in calm, dignified proceedings in a court of law. On the other side of the aisle, the State wants a media circus in order to distract from the lack of evidence to support its case. The Court should not provide that stage. Purdue urges the Court to reconsider its decision to allow video-cameras in the courtroom.

ARGUMENT

The last several months of this litigation have been anything but calm and dignified. Cameras in the courtroom will only heighten the emotion and the temptation to play to the cameras rather than focus on the task at hand. Allowing cameras in the courtroom would deny the Defendants due process, by compromising the jury's ability to judge the Defendants fairly, impartially, and based solely upon the evidence introduced at the trial rather than extraneous factors. The presence of cameras in the courtroom, unlike the press, is not a normal occurrence. When cameras are present, that fact is plain to the jurors, no matter how unobtrusive the equipment. This raises the danger that some jurors will look upon the trial as unusual and consequently believe that a particular verdict is expected of them. Indeed, the Supreme Court recognized that broadcasting a trial has a psychological impact on jurors, noting that "it is not only possible but highly probable that [televising a trial] will have a direct bearing on [a juror's]

General Hunter's conduct is a preview of what to expect from the State when the cameras are rolling at trial.

vote.” *Estes*, 381 U.S. at 545. Specifically, “televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them.” *Id.* Likewise, the fact that a trial is being broadcast may impress on the jury “the notorious character” of the proceeding. *Id.* at 536-37. Indeed, “[f]rom the moment the trial judge announces that a case will be televised it becomes a cause celebre.” *Id.* at 545. In the face of this intense spotlight, it is not reasonable to assume that jurors will resist the temptation to watch the nightly news or log on to see how the trial day’s events were reported—even with the Court admonishing them not to do so.

Cameras also influence witnesses, making effective presentation of evidence significantly more difficult and “imped[ing] the search for truth.” *Estes*, 381 U.S. at 546-47. A person changes their behavior, even in public, with the knowledge that she or he is being filmed. *See id.* at 547 (A witness’s knowledge that testimony may be viewed by a “vast audience” causes an “incalculable” impact); *Hollingsworth v. Perry*, 558 U.S. 193, 195 (2010) (*per curiam*) (“There are qualitative differences between making public appearances regarding an issue and having one’s testimony broadcast throughout the country.”).

Cameras may also prevent a witness from offering a complete presentation of testimony for fear that a widespread broadcast would be embarrassing. Specifically, witnesses may be reluctant to give testimony that offends prevailing public sentiment. The presence of cameras could also have the more subtle effect of making some witnesses more nervous, which jurors could interpret as a lack of credibility, even though their nervousness was attributable to the camera and not to untruthful testimony. Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 *Ariz. St. L.J.* 1489, 1513 (2012) (citing *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 83 (Statement of Hon. Jan E. Dubois, J., U.S.

District Court for the Eastern District of Pennsylvania) (expressing concern that 64% of the participating judges found that cameras made witnesses more nervous)).

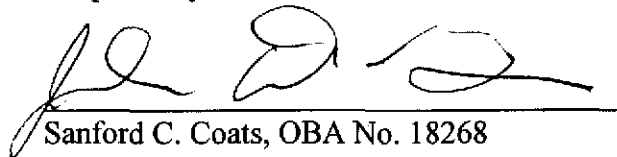
Other witnesses (or lawyers) may allow their theatrical flair to come to the fore and “ham it up” for the television viewers. *See Estes*, 381 U.S. at 547 (“Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization.”). “Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statements may be severely undermined.” *Id.* The potential for exposure to a vast audience on the internet and television may cause a witness to focus more on his “role” in the broadcast than his role in the trial. *See United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985).

CONCLUSION

If cameras are allowed in the courtroom, the risk of fundamental unfairness and prejudice is simply too great. There would be no way to ensure a fair and impartial jury. There would be no way to protect the witnesses from the undue influence of the cameras. And the likelihood of outrageous conduct warranting a mistrial would increase. Purdue therefore asks the Court to ban all cameras from the courtroom during the pendency of these proceedings.

Date: March 14, 2019

Respectfully submitted,



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CERTIFICATE OF MAILING

This is to certify on March 14, 2019, a true and correct copy of the above and foregoing has been served via e-mail to the following:

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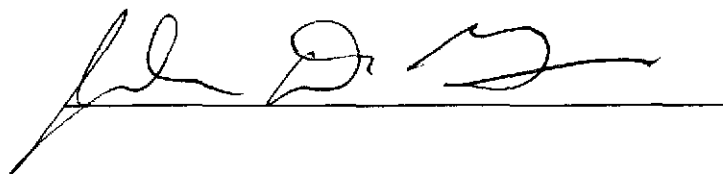
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May 9, 2018

VIA HAND DELIVERY

Hon. Thad Balkman
District Judge
Cleveland County Courthouse
200 S. Peters
Norman, OK 73069

Re: *Oklahoma ex rel. Hunter v. Purdue Pharma, LP*, No. CJ-2017-816
(Okla. Dist. Ct.): Response to Letter by The Oklahoma Publishing Co.

Dear Judge Balkman:

I write on behalf of Defendants Purdue Pharma, L.P., Purdue Pharma, Inc.; The Purdue Frederick Company, Inc.; Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Johnson & Johnson, Inc.; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc.; Watson Laboratories, Inc.; Actavis LLC; and Actavis Pharma, Inc., f/k/a Watson Pharma, Inc.

This letter is in response to Your Honor's request to respond to a May 7, 2018 letter by The Oklahoma Publishing Co. to allow its television cameras in the courtroom to broadcast the trial in this matter. Defendants respectfully submit that the Court should defer decision on this request until a time closer to trial, so that the Court may have the opportunity to fully consider all evidentiary issues, including those related to the presentation of testimony and other evidence involving confidential health information. If, however, the Court considers this issue ripe for consideration, then Defendants respectfully oppose the request by The Oklahoma Publishing Co.

As an initial matter, whether cameras may be permitted at trial is a premature question. The trial in this matter is scheduled over a year from now on May 28, 2019, and the Court has not yet had an opportunity to consider several evidentiary issues that will affect this decision – principally those related to testimony about

EXHIBIT A

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and documents containing "Confidential Protected Health Information" under the protective order pursuant to the federal Health Insurance Portability and Accountability Act (HIPAA). (See Apr. 11, 2018 Agreed Qualified Protective Order for Protected Health Information.) The Order states that the parties and the Court need to resolve "[t]he procedures for use of designated confidential documents during ... the trial." (*Id.* ¶ 6.) The Order prohibits "disclosure of designated Confidential Protected Health Information in open Court" absent prior "consideration by the Court." (*Id.*) Given the nature of the claims in this matter and the likelihood that testimony and documents will be introduced at trial regarding specific patients' Confidential Protected Health Information, the Court will need to determine the procedures for presenting this evidence and protecting it from unnecessary disclosure. This Court is not presently in a position to make those determinations at this stage of discovery and will not likely be able to fully hear the issues until after pretrial proceedings have concluded. Further, no prejudice will inure to The Oklahoma Publishing Co. if this Court defers until its decision pending consideration of the evidence to be introduced at trial. Accordingly, the request by The Oklahoma Publishing Co. is premature and should be deferred until after pretrial proceedings in this matter are completed.

If the Court considers the issue ripe for resolution now, then Defendants respectfully oppose the request. Members of the public will be able to come to the courthouse during the trial and observe the trial from the gallery. But the presence of cameras—no matter how unobtrusive or limited in number—will detract from the fundamental objective of a trial: the pursuit of truth. The use of television cameras "cannot be said to materially contribute to [the] objective of a fair trial." *Nichols v. District Court*, 2000 OK CR 12 ¶ 6 (Okla. Crim. App. 2000), citing *Estes v. Texas*, 381 U.S. 532, 544 (1965). Cameras in the courtroom during trial inject an "irrelevant factor" into court proceedings and distort the integrity of the judicial process. See *Nichols*, 2000 OK, at ¶¶ 6, 8. This risk is magnified when the Plaintiff is an elected official, for whom video may be used to promote political or electoral ambitions.

Broadcasting this trial across the internet and airwaves presents a needless but serious risk of undermining Defendants' right to be tried by a fair and impartial jury. Sensationalizing a trial through a media broadcast may "cause actual unfairness" in ways "so subtle as to defy detection" and that are beyond "control by the judge." *Nichols*, 2000 OK CR, at ¶ 6. Specifically, Defendants are concerned about the effect of cameras on jurors, witnesses, and the parties' ability to secure a fair trial. A multi-year study by the Federal Judicial Center into the effect of cameras in state and federal courtrooms found that "the intimidating effect of cameras on some witnesses and jurors [is] cause for concern" and resulted in the ongoing ban on cameras in most federal court proceedings. See *Hollingsworth v.*

Perry, 558 U.S. 183, 193 (2010) (staying the broadcast of a bench trial). “While some of the dangers” from a televised trial “are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage.” *Estes v. Texas*, 381 U.S. at 548.

First, jurors will be unduly influenced by the presence of cameras in the courtroom, even if a limited number of cameras are unobtrusively stationed in court. The knowledge that an event is being broadcast inevitably changes its character, as the U.S. Supreme Court summarized in *Estes*:

[W]e know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror’s eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Estes, 381 U.S. at 546. “Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them.” *Id.* at 545. This outside influence may sway jurors to support the prevailing opinion of the case presented in the media—not by the evidence presented in court. *Id.*

In addition to the distraction posed by cameras, the fact that a trial is being broadcast may also impress on the jury “the notorious character” of the proceeding or defendants. *Estes*, 381 U.S. at 536-37. The Supreme Court recognized that broadcasting a trial has a psychological impact on jurors, noting that “it is not only possible but highly probable that [televising a trial] will have a direct bearing on [a juror’s] vote.” *Id.* at 545. Research after *Estes* into the psychological impact of cameras in the courtroom supports this view. See, e.g., J. Marvelley, *Lights, Camera, Mistrial: Conflicting Federal Court Local Rules & Conflicting Theories on the Aggregate Effect of Cameras on Courtroom Proceedings*, 16 Suffolk J. Trial & App. Advoc. 30, 48 (2011) (“If the jury is aware of the public’s disposition in a case, the jury may then try to decide in accordance with public opinion.”).

Second, cameras should not be permitted in the courtroom because their presence will impact witnesses. A witness’s knowledge that testimony may be viewed by a “vast audience” causes an “incalculable” impact. *Estes*, 381 U.S. at 547. A person

changes their behavior, even in public, with the knowledge that they are being filmed. "Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization." *Id.* The potential for exposure to a vast audience on the internet and television may cause a witness to focus more on his "role" in the broadcast than his role in the trial. See *United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985). Any impact on the witness's testimony necessarily "impede[s] the search for truth." *Estes*, 381 U.S. at 546-47. The witnesses in this case should be focused only on their role in the fact-finding process, not how their demeanor or choice of words will appear in a subsequent news or online broadcast.

It is likely that video of this trial will be disseminated not just on a nightly newscast but on the internet. This undermines the privacy interests of both jurors and witnesses, who could have video of themselves permanently broadcast over the internet. Both jurors and witnesses perform a public service by appearing in court and should not lose control over the nature and breadth of their own "internet presence" by responding to a demand to appear in court.

Finally, the presence of cameras in the courtroom will impact the parties to this litigation. The broadcast of courtroom proceedings, including pretrial proceedings, will make it more difficult for the parties to select a fair and unbiased jury, including for the reasons noted above. The problem of jury selection will be compounded if there is ever need for a new trial. Even if the trial goes to a verdict by the first jury impaneled in this case, the broadcast may impact subsequent proceedings in the case. Together, these risks outweigh the marginal benefit of permitting the journalists covering this trial to use their cameras in court. The law entrusts the jury, not the media, with the responsibility of assessing the credibility of evidence.

The State asserts in its May 7, 2018 letter that "a trial is a public event." While true, it is immaterial to the question at hand. Under Oklahoma law, "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." *Nichols*, 2000 OK CR, at ¶ 7; accord *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978). Contrary to the State's view (as well as that of The Oklahoma Publication Co.) that cameras are necessary to report on the trial proceedings (Ltr. at 1), the U.S. Supreme Court rejected that argument and held that "there is no constitutional right" to have the testimony of a live witness "recorded and broadcast." *Nixon*, 435 U.S. at 609.

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The Oklahoma Publishing Co. claims that their cameras would be "quiet and unobtrusive." (Ltr. at 2.) That is immaterial. "Even in an era of lightweight, silent, unobtrusive television cameras, there is a sense that the knowledge of being televised might cause the judge, jurors or witnesses to be distracted — whether by embarrassment, self-consciousness, anxiety or desire to 'star.' It is not unreasonable, whatever may be the precise facts in any particular trial, for the courts to prefer that the 'actors' concentrate on their roles in the trial rather than on their roles on television." *Kerley*, 753 F.2d at 622.

The cases cited by the State are also off point. *Craig v. Harney*, 331 U.S. 367 (1947) did not address the use of cameras or other recording devices in court. Nor did *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which involved the closure of a trial to the public and removal of journalists from the courtroom.

The State and The Oklahoma Publishing Co. rely on *Lyles v. State*, 1958 OK CR 79, 330 P.2d 734 (Okla. Cr. App. 1958), but that court did not grapple with the effects of cameras on the judicial process. Video coverage of the *Lyles* trial was limited to a five-minute recess when the court was not in session and before the jury was selected. *Id.* at 738. After *Lyles* was decided in 1958, research and judicial decisions in Oklahoma and around the country have concluded that cameras negatively impact the judicial process. See, e.g., *Nichols*, 2000 OK CR, at ¶¶ 9-10 (holding that televising a trial can violate due process); *Hollingsworth*, 558 U.S. at 193 (denying a request to broadcast a civil bench trial); *United States v. Hastings*, 695 F.2d 1278, 1284 (11th Cir. 1983) (denying media organizations' application for order permitting them to use electronic audiovisual equipment during trial due to the adverse impact on jurors, witnesses, and other trial participants).

The public's right to observe a trial should never outweigh the key function of the jurors at the center of the fact-finding process. The risk of prejudice to a fair proceeding is too great to justify the presence of cameras in the courtroom. Defendants respectfully submit that The Oklahoma Publishing Co.'s request to bring television cameras in the courtroom to broadcast the trial of this matter be denied.

Sincerely,


Sanford C. Coats
For the Firm

SCC:sg

Hon. Thad Balkman
May 9, 2018
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