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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, 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 The Honorable Thad Balkman ***Submitted to***: **Judge Thad Balkman** STATE OF OKLAHOMA CLEVELAND COUNTY } S.S. FILED MAY 03 2019 In the office of the Court Clerk MARILYN WILLIAMS

THE STATE'S RESPONSE TO TEVA'S MOTION *IN LIMINE* #9
(To Exclude New Opinions By Experts Or Expert Reliance On New Evidence)

INTRODUCTION

Public trial is deeply woven into the fabric of our judicial system. Fundamental to its ethos. Public trials are the backdrop to Atticus Finch's defense of Tom Robinson and Clarence Darrow's cross-examination of William Jennings Bryan. And the reason why courts across the Nation, including this one, are located in the town square. "With us, a trial is by very definition a proceeding open to the press and to the public." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 599, 100 S. Ct. 2814, 2840 (1980) (Stewart, J. concurring). Yet Defendants want to bar the Court's doors and suppress the evidence from ever seeing the light of day.

Motions *in limine* are not appropriate in bench trials. The whole point of a motion *in limine* is to make sure that potentially prejudicial evidence and statements never get to the fact finder (jury) because any damage cannot be undone. Here, the Court is the fact finder. And Defendants, not the State, have taken every single item they can think of, written it down, alerted the fact finder, told the fact finder about it, used bold headings, and will argue about it in open court. So, rather than keep any complained-of statements or evidence secret, Defendants have deliberately drawn the only fact finder's attention to it. That defeats the entire purpose of a motion *in limine.*

To be clear, Defendants' Motions in *Limine* are not about this fact finder. Quite the contrary, these Motions *in Limine* are solely about preventing an open, public trial—part of a metastasizing effort to shield their conduct from the public eye. First J&J and Teva improperly designated well over 90% of their production confidential—***over 3 million documents***—despite assurances to the Court that they would not blanket designate.[1] Then they fought tooth-and-nail to

[1] This number doesn't event take into account the 100,000+ blank documents produced by J&J that simply state, "Withheld as Not Responsive." Defendants' production is an astonishing abuse the Protective Order by any measure, but especially considering that J&J has no competitive interest in documents created before 2016 when it divested its global "pain management franchise." *See* State's Mtn. to De-Designate, Feb. 26, 2019.

prevent the public from seeing *any* of their documents by moving on two separate occasions to exclude cameras from the courtroom. And they sought to move the trial. And every time a document is shown to the Court—or a witness' testimony is played—they clear the courtroom. Now they file motions to seal masquerading as "Motions *in Limine*."

For all of Defendants' claims that the State has no case, they sure are worried about the evidence seeing the light of day. But Defendants eviscerated any argument about concealing evidence from the public based on a fear of statements impacting unknown foreign jurors when they publicly stated to all the unknown jurors that the State's case is baseless. They did not have to make those statements. But they did:

> Sabrina Strong, attorney for Johnson & Johnson and its subsidiary Janssen Pharmaceuticals, issued a statement to NPR and other media outlets saying the move by Hunter showed that most of the claims were without merit . . . . "We will continue to defend against the remaining baseless and unsubstantiated allegations."

https://www.npr.org/2019/04/04/710101827/oklahoma-drops-some-claims-to-refocus-lawsuit-against-opioid-makers. And, having done so, Defendants opened the door. As the Court saw just last Friday in Defendants' own documents: when they speak, they have a duty not to omit material information. Telling the whole world that the State's claims are baseless certainly blew that door wide open.

Beyond their title, Defendants' Motions do not even pretend to be motions *in limine*. Indeed, Defendants make no bones about the fact that these are not motions to keep information away from a jury. Quite the contrary, these Defendants' purpose is clear. "[T]he concern is not about the judge in this case but exposure of prejudicial information to millions of Americans, including countless prospective jurors in hundreds of matters pending against Janssen and J&J across the country." Janssen MIL No. 12 at 4; *see also* Jansen MIL Nos. 1, 5, 8, 9, 10, 13; Teva MIL Nos. 2, 3, 4, 5, 6, 7, 10. There is no case, none, that says the Court can consider hypothetical,

non-existent future trials in other states, that may never be conducted, under unknown laws and rules, when deciding what the State can use at this bench trial. Even if Defendants' motions were motions *in limine*, they fundamentally misunderstand the Court's duty to the public.

It is not the Court's job to shield the public—hypothetical jurors in other forums or otherwise—from information. Quite the opposite. Centuries of English-American judicial tradition charge the Court with empowering the public through access to trial and to information. *See generally Richmond_Newspapers v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814 (1980). The justifications for this obligation are manifold and recognized in Oklahoma:

> [T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

In re in re the Okla. Bar Ass'n to Amend the Rules of Prof'l Conduct, 2007 OK 22, ¶ 4, 171 P.3d 780, 855. There is no more important judicial event in Oklahoma than this case. Indeed, the Court recognized this mandate when it allowed cameras in the courtroom over the very same protests regurgitated in Defendants' Motions *in Limine*: "'A trial is a public event. What transpires in the courtroom is public property . . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." Aug. 22, 2018 Order at 2 (citing *Craig v. Harney,* 331 U.S. 367,67 S.Ct. 1249,91 L.Ed. 1546 (1947)).

The public's right to access does not end at the trial either. Rather, "the privilege extends, in the first instance, to materials on which a court relies in determining the litigants' substantive

rights." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987). This right includes presumptive access to all documents used at trial. *See Shadid v. Hammond*, 2013 OK 103, ¶¶ 1-2, 315 P.3d 1008 (Taylor, J. concurring) ("Court records are public records . . . . Sealing a public record should be a very rare event that occurs in only the most compelling of circumstances."). Indeed, the Court's Protective Order envisions no restriction on the use of "Confidential" information at trial, and restriction on the use of "Highly Confidential – Attorneys' Eyes Only" information only "by a separate stipulation and/or court order." *See* Amended Protective Order, ¶ 16 (Apr. 16, 2018). Defendants' arguments that the Court must protect the public from the evidence is entirely backward.

Defendants repeatedly trumpet other false narratives in support of their argument that the Court should conceal evidence from the public. They argue that the State seeks to punish Defendants where no punitive claim exists. Likewise, they argue that the State unfairly seeks to have Defendants alone pay for the entire opioid crisis. It does not. The legislature has expressly carved out joint and several liability for cases like this one, 23 O.S.§ 15, and the State brought its case accordingly. It's not unfair, it's the law. Defendants could have joined additional parties. *See* Scheduling Order (Jan. 29, 2018). They did not. They could have produced or sought evidence of other causes. They did not. And they can try to seek contribution for a 17-billion-dollar Judgment (or whatever amount the Court decides) from all the phantom causes of the crisis that they claim exist when this case is over. They did not do this because—in all likelihood—Defendants have a joint defense agreement with every manufacturer in the national cases, and they have refused to allege or testify that any drug company had anything to do with causing this crisis. All of these actions were part of Defendants' strategy. That strategy may have been a bad one, but it doesn't mean that this case is unfair. And it doesn't mean that the Court should whitewash the record of

all the evidence Defendants don't like.

LEGAL STANDARD

Even in Defendants' inverted world where the Court functions to conceal information from the public, their Motions *in Limine* must fail. Motions *in limine* are not concerned with considerations of the general public, only the jury. *Middlebrook v. Imler, Tenny & Kugler, M.D.'s Inc.*, 1985 OK 66, ¶ 12, 713 P.2d 572, 579 ("The function of a motion in limine is to preclude introduction of prejudicial matters ***to the jury***." (emphasis added)). Of course, this is a bench trial. There is no Oklahoma jury to prejudice here. And in a bench trial, the rationale underlying pre-trial motions *in limine* does not apply. Where there is no jury, to the extent the evidence is prejudicial to the moving party, the judge has already seen it, and any benefit of shielding the evidence from the eyes of the trier of fact is absent. *See id.*

Likewise, there is no efficiency to be gained, as a party aggrieved by an order in limine must make an offer of proof of the excluded matter at trial. *Id.* For these reasons, trial courts are advised to deny motions *in limine* in non-jury cases:

> In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted.

9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2411 (3d ed. 2008) (quoting *Builders Steel Co. v. CIR*, 179 F. 2d 377, 379 (8th Cir. 1950)).[2] As stated more pointedly

[2] *See also* Am. Jur. 2d *Trial* § 45 (2015) ("[T]he use of a motion in limine to exclude evidence in a case tried by the court without a jury has been disapproved on the grounds that it can serve no useful purpose in a nonjury case…granting of such a motion in a bench trial constitutes an error.");

by one trial court, "This is a bench trial, making any motion in limine asinine on its face." *Cramer v. Sabine Transportation Co.*, 141 F. Supp. 2d 727, 733 (S.D. Tex. 2001)).

A party seeking to exclude evidence in limine bears a heavy burden even in a jury trial. Under Oklahoma law, all relevant evidence is admissible unless otherwise prohibited, and the standard for relevance is very liberal. *See* 12 O.S. § 2402; *United States v. Leonard*, 439 F.3d 648, 651 (10th Cir. 2006). Relevant evidence is defined as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S. § 2401. "[A] fact is 'of consequence' when its existence would provide the fact-finder with a basis for making some inference, or chain of inferences, about an issue that is necessary to a verdict," but it only need to have "any tendency" to do so. *United States v. Jordan*, 485 F.3d 1214, 1218 (10th Cir. 2007). Accordingly, "court[s] are often reluctant to enter pretrial rulings which broadly exclude evidence, unless it is clear that the evidence will be inadmissible ***on all potential grounds***." *Martin v. Interstate Battery Sys. of Am., Inc.*, No. 12-CV-184-JED-FHM, 2016 WL 4401105, at *1 (N.D. Okla. Aug. 18, 2016) (emphasis added); *Middlebrook*, 1985 OK 66, ¶ 12 ("Error is committed, if at all, when in the course of the trial the court rules on the matter.").

Defendants are using motions in limine collectively to attempt to silence the State, stifle

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United States v. Heller, 551 F.3d 1108, 1111-12 (9th Cir. 2009) (stating that the need for a motion *in limine* became moot once the defendant waived his right to a jury trial); *LaConner Assocs. Ltd. Liab. Co. v. Island Tug and Barge Co.*, No. C07-175RSL, 2008 U.S. Dist. LEXIS 109863, at *2 (W.D. Wash. May 15, 2008) (when ruling on motions *in limine*, a court is forced to determine the admissibility of evidence without the benefit of the context of trial); *Capitol Neon Signs, Inc. v. Indiana Nat'l Bank*, 501 N.E.2d 1082, 1083 (Ind. Ct. App. [4th Dist] 1986) ("The trial court erred when it granted CNSI's motion in limine. Such motion has no place in a court trial."). The more prudent course in a bench trial, therefore, is to resolve all evidentiary doubts in favor of admissibility. *See Commerce Funding Corp. v. Comprehensive Habilitation Servs., Inc.*, No. 01 Civ 3796 (PKL), 2004 U.S. Dist. LEXIS 17791, at *5 (S.D.N.Y. Sept. 3, 2004); *Balschmiter v. TD Auto Fin., LLC*, No. 13-CV-1186-JPS, 2015 U.S. Dist. LEXIS 66629, at *4-5 (E.D. Wis. May 21, 2015).

justice, and prevent the admission of any evidence whatsoever. Motions in limine should not be used as gag orders. The Court ordered a televised trial on August 22, 2018. For purposes of deciding Defendants' motions in limine in this bench trial, the Court should not consider other states' laws, unknown jurors, or other hypothetical trials in other jurisdictions that may never happen. The Motions *in Limine* should be denied.[3]

ARGUMENT

Teva's Motion *in Limine* #9 seeks to exclude three different types of testimony of the State's experts: (1) any expert opinions not previously disclosed in expert disclosures or depositions; (2) expert testimony regarding documents not disclosed at the expert's deposition; and (3) expert testimony based on a review of "all documents" or other large, general categories of documents. Teva's Motion is entirely speculative and is exactly the type of ruling that should be made in context when and if the issue arises during trial.

A. Teva's Motion to Exclude "New" Evidence Or Documents Is Speculative And Unwarranted.

To be clear, none of the State's experts intend to provide expert opinions outside the scope of their disclosures, nor do they intend to provide "new" opinions or deviate from the disclosures and testimony already provided. The State has repeatedly argued that its experts provided more in their disclosures than they were required to provide under the rules, and Defendants deposed them all at length. Those depositions were questions asked by Defendants for their purposes. There is simply no way of knowing the nuances of what will happen at trial while an expert is on the stand. The State has not examined these witnesses yet so they cannot be limited to the scop of Defendants' cross examination. That is why Oklahoma's disclosure rules use the language

[3] Because the Court ordered the Parties to address each *limine* topic individually, and the State does not know which response the Court will read first, the State has included this Introduction and Legal Standard section into each of its responses.

"anticipate at trial." The State listed and disclosed what it anticipated the experts' opinions and conclusions to be at trial. Now the State will ask its questions framed within the confines of those Disclosures. Nothing more is required. If "new" expert opinions beyond what is set forth in the disclosures are for some reason attempted to be offered during trial, which is not anticipated by any of the State's experts, Defendants can raise their objection and the Court can address the matter at that time. However, a *carte blanche* ruling on an issue that cannot be defined and may never arise is unnecessary and premature.

Further, Teva continues to rely on Fed. R. Civ. P. 26 and case law applying its provisions to the experts in this case. As the Court is well aware, 12 O.S. § 3226(B)(4) is more narrow in terms of what experts are required to provide in their disclosures, rendering case law addressing the expert requirements of Rule 26 largely inapplicable. In fact, the cases relied upon by Teva in its Motion address "placeholder" expert reports, not opinions—reports not required under § 3226. *See, e.g., Richardson v. Watco Companies, Inc.*, 2011 WL 12842517, at *4 (W.D. Okla. Apr. 29, 2011) ("It would make a mockery of [the expert report] requirement if a party were allowed to file what was essentially a placeholder report by the deadline and then fill in the blanks, or change the substance, later."). These cases are inapposite. Regardless, the State's experts have no intention of changing their testimony at trial.

Teva also seeks to prohibit experts from providing opinions on documents not disclosed at the expert's deposition and/or providing testimony on "general categories" of documents. However, "an expert may testify in terms of opinion or inference and give reasons therefor without previous disclosure of the underlying facts or data, unless the court requires otherwise." 12 O.S. § 2705. Teva has cited to no authority in support of the position that an expert cannot continue to review materials and educate himself after his deposition and prior to trial. In fact, for most of the

State's experts, they live and breathe this topic every day, and it is a function of their employment to stay abreast of changes in the opioid crisis. To say their opinions cannot be elaborated upon based on newly acquired information is simply not realistic. With respect to someone like Dr. Andrew Kolodny, his knowledge of this crisis is expansive, and his testimony will not only be based on the documents he has reviewed in this case, but decades of experience as an addiction specialist. He may not be able to pinpoint exactly which bates-labeled document a specific piece of information came from, especially when he has reviewed hundreds of documents produced by Defendants, and he is under no obligation to do so. Defendants are certainly still able to challenge his opinions. Moreover, Defendants are attempting to hold the State's experts to a standard they will likely not meet themselves. For example, Defendants will likely present an expert with data he or she has never seen before, or question the expert about a demonstrative or summary prepared specifically for trial, and such questioning may result in opinions Defendants have never heard. The State certainly has no intention of objecting to presentation of such a document to the expert on grounds that it was not specifically disclosed during his or her deposition. The expert can testify on issues presented to him to the best of his or her ability, and the State will be provided an opportunity for re-direct.

An expert is certainly entitled to elaborate upon and explain his conclusions at trial, and he will subject himself to cross-examination. To the extent Defendants want to challenge an expert's knowledge or determine the basis for his opinion, they can do so during trial. Again, the State's experts have no intention of altering their testimony, but to the extent an expert sees a document produced in this case that bolters his or her position, there is no prohibition on providing pertinent testimony. However, none of the parties have a crystal ball, and no one can predict with certainty how the trial will unfold. These issues can and should be addressed in context at trial.

CONCLUSION

For the reasons set forth above, the State respectfully requests the Court deny Teva's Motion *in Limine* #9 in its entirety, and for such further relief the Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was emailed on May 3, 2019 to:

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