IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	§	
Plaintiff,	§	
vs.	§	Case No. CJ-2017-816 The Honorable Thad Balkman
(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.,	§	***Submitted to***: **Judge Thad Balkman**
Defendants.	§	STATE OF OKLAHOMA } S.S. CLEVELAND COUNTY } **FILED** **MAY 03 2019** In the office of the Court Clerk MARILYN WILLIAMS

THE STATE'S RESPONSE TO JANSSEN'S MOTION IN LIMINE #7
(To Exclude Purdue Evidence For Purposes Of Liability)

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

Defendants move to preclude the State from introducing all evidence regarding the Purdue entities on the misguided and incorrect assumption such evidence will be introduced to establish Defendants' liability for the public nuisance this case seeks to abate. One thing is certain, Defendants' culpability for the nuisance at issue will be established via their own conduct, but for purposes of trial and the presentation of the State's case, evidence relating to Purdue is still relevant and admissible. The State alleges that Defendants collaboratively conducted a nationwide marketing campaign that included Oklahoma, to influence prescriptions and dependency by downplaying the risks addiction and exaggerating the efficacy of their respective opioids. This story cannot be completely told without reference to Purdue. Although Purdue was indeed present at the beginning of the opioid crisis, Defendants willfully joined the campaign to spread disinformation and create a segment of society tethered to their products under the common thread of addiction and dependency. Accordingly, Defendants' Motion in Limine on this issue should be denied.

First, Defendants' Motion is unnecessary since this case is set to be tried before the Court. Courts have recognized that "[i]n a bench trial, [motions in limine] are unnecessary, as the Court

[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.

can and does readily exclude from its consideration inappropriate evidence of whatever ilk." *Cramer v. Sabine Transp. Co.*, 141 F. Supp. 2d 727, 733 (S.D. Tex. 2001). Nonetheless, "[t]he court has the power to exclude evidence in limine ***only when evidence is clearly inadmissible on all potential grounds***." *Schlegel v. Li Chen Song*, 547 F. Supp. 2d 792, 796 (N.D. Ohio 2008) (citation omitted, emphasis added). Therefore, "[u]nless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *See id.* Here, Defendants admit that such evidence may be admitted for another purpose. Def.'s Mot. at 3. Defendants do not come close to meeting this heavy burden and their Motion should be denied on this ground alone.

Second, Defendants incorrectly assert that because the State settled its claims with Purdue, evidence and argument regarding its conduct is no longer relevant. In fact, the opposite is true. In fact, the Consent Judgment with Purdue provides that the State (or any party for that matter) is not precluded from introducing any evidence regarding Purdue's conduct at trial. *See* Consent Judgment, ¶ 6.1(h). And all the depositions of Purdue are not hearsay and admissible if the witness is not available at trial. Indeed, the testimony and the documents are admissible, as are any business records. Defendants had full opportunity to participate in every Purdue deposition, so there is no prejudice.

Additionally, as stated, Defendants readily admit such evidence is relevant if admitted for another purpose. "Relevant evidence" means 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. Okla. Stat. tit. 12, § 2401. Evidence will be produced at trial that shows Defendants collectively funded and used the same marketing strategies, same Key Opinion Leaders (KOLs), and participated in the same "unbiased" advocacy groups in their efforts

to "educate" the public on the efficacy and supposed benefit of their respective drugs. This conduct, taken together, started the opioid crisis that continues to plague the State today. Thus, Purdue's absence does not preclude evidence of its behavior. Subpart (e) of § 2801(B) provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" does not constitute hearsay. *Id.* § 2801(B)(2)(e). For a statement of a co-conspirator to be admissible, a plaintiff must establish by a preponderance of the evidence that a conspiracy existed, that the declarant against whom the statement is offered were members of the conspiracy, and that the statement was made in the course of and in furtherance of the conspiracy. *United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1242 (10th Cir. 1996). Application of the co-conspirator exception does not change if the co-conspirator making the statement is ***not a party to the lawsuit***. *See, e.g., Davidson v. Scully*, 148 F. Supp. 2d 249, 253 (S.D.N.Y. 2001) (evidence regarding non-party co-conspirators is admissible against a party co-conspirator) (citing *United States v. Nixon*, 418 U.S. 683, 701 (1974); *see also United States v. Flynn*, 216 F.2d 354, 359-60 (2nd Cir. 1954) (discussing the "ordinary rule" that before the acts and declarations of third parties can be used against a defendant, a prima facie case of conspiracy must be made against the defendants, the defendants must be connected with it by competent evidence, and the acts or declarations of the third parties must be shown to be in furtherance of and within the contemplation of the conspiracy); *Santana Products, Inc. v. Sylvester & Assoc., Ltd.*, No. 98 CV 6721(ARR), 2006 WL 7077215, * 11 (E.D.N.Y. 2006) (evidence of acts by non-party co-conspirators is admissible to establish a defendant's liability, as long as independent evidence is introduced to establish the existence of the conspiracy).

Therefore, evidence relating to Purdue is relevant to the State's nuisance claim. Moreover, such evidence is relevant to the issue of joint and several liability. Defendants' collaborative efforts

in this case establish that each of them bear responsibility for the nuisance that is the opioid crisis in Oklahoma. These efforts are inextricably intertwined with those of Purdue and should be admitted.

Third, subpart (b) to Section 2801(B) states a statement is not hearsay if the statement is offered against a party and is a statement of which the party has manifested an adoption or belief in its truth. This is referred to as an "adoptive admission." Relevant here, joinder of the person/company making the statement as a defendant to the lawsuit is not necessary to establish a finding of adoptive admission. "What is required for admission under Rule 801(d)(2)), regardless of whether the statements were made by a party or non-party, is conduct or words by which defendants manifest their adoption of or belief in the truth of a statement or statements." *Austin v. Pennsylvania Dep't of Corr.*, No. 90-7497, 1993 U.S. Dist. LEXIS 197, at *14 (E.D. Pa. Jan. 7, 1993). In order for a statement of a third party to be deemed an "adoptive admission," the "surrounding circumstances, including circumstances and nature of the underlying statement itself, must be examined to determine whether an intent to adopt the statement is fairly reflected by the act or failure to act which is in question." *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 262 F. Supp. 2d 251, 262 (S.D.N.Y. 2003) (quoting *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1062 (D. Mo. 1985)).

The typical cases involving an adoptive admission of a third party are when a party prepares a report or takes action based upon inferences drawn from the third party's statement, or when a party incorporates the third party's statement into its own affirmative effort to achieve a desired result to support its position. *See, e.g. Lear Automotive Dearborn v. Johnson Controls, Inc.*, 789 F. Supp. 2d 777 (E.D. Mich. 2011); *see also Grundberg v. Upjohn Co.*, 137 F.R.D. 265, 270 (D. Utah 1991) (party used clinical reports by non-party physicians in support of effort to secure FDA

approval of new drug); *Wagstaff v. Protective Apparel Corp.*, 760 F.2d 1074, 1078 (10th Cir. 1985) (party reprinted and distributed newspaper articles that made representations about the party's financial condition); *Schering Corp v. Pfizer, Inc.*, 189 F.3d 218, 239 (2d Cir. 1999) (party prepared report summarizing and drawing inferences from survey data that incorporated out-of-court statements of third parties); *Agricultural Ins. Co. v. Ace Hardware Corp.*, 214 F.Supp.2d 413, 416 (S.D.N.Y. 2002) (party prepared accident report that relied in part on out-of-court statements of eyewitnesses). "Adoption can be manifested by any appropriate means, such as language, conduct, or silence." *Horvath v. Rimtec Corp.*, 102 F.Supp.2d 219, 223 n. 3 (D.N.J. 2000). Whether a defendant manifested an adoption of the truth in a document is a preliminary question of fact to be decided by the court, which is not bound by the rules of evidence in its fact-finding. *United States v. Harrison*, 296 F.3d 994, 1001 (10th Cir. 2002).

Defendants collaborated with Purdue and rode its coattails in reaping substantial profits through the sale of their respective opioids. Throughout the years, Defendants manifested their adoption and belief in several Purdue representations, and the Court should exercise its discretion and consider such evidence before making a sweeping assumption of preclusion, which Defendants would have the Court to do. As stated *supra*, a motion in limine should be granted only where the evidence at issue is inadmissible on any potential grounds. The State has shown at least ***five*** grounds that are applicable here (relevance, co-conspirator statements, adoptive admissions).[4] The Court does not weigh the evidence in reviewing a motion in limine, as that is a function more appropriately reserved for summary judgment. *C & E Servs., Inc. v. Ashland Inc.*, 539 F. Supp. 2d 316, 323 (D.D.C. 2008). Evidence relating to Purdue is thus admissible and

[4]Statements from Purdue's employees would also be admissible under § 2804 as statements against interest and statements made during a prior proceeding.

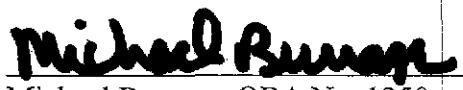
Defendants' Motion should be denied.

Finally, Defendants have failed to show evidence relating to Purdue is inadmissible on all potential grounds. Nonetheless, should the Court find a dispute exists over whether such evidence is admissible, the State respectfully requests that the Court refrain from making a ruling until the evidence is more developed at trial. "[A] court is almost always better situated during the actual trial to assess the value and utility of evidence. Consequently, a court should reserve its rulings for those instances when the evidence plainly is "inadmissible on all potential grounds," ... and it should typically defer rulings on relevancy and unfair prejudice objections until trial when the factual context is developed...." *Wilkins v. Kmart Corp.*, 487 F. Supp. 2d 1216, 1218–19 (D. Kan. 2007). Accordingly, Defendants' Motion should be denied on this additional basis.

CONCLUSION

For the reasons set forth above, the State respectfully requests the Court deny Janssen's Motion *in Limine* #7 in its entirety, and for such further relief the Court deems proper.

Respectfully submitted,



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