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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.	§	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
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In the office of the
Court Clerk MARILYN WILLIAMS

THE STATE'S RESPONSE TO TEVA'S MOTION *IN LIMINE* #4
(Regarding Purdue 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

Without the benefit any factual development, Defendants broadly contend that "[a]ll documents and statements obtained directly from Purdue are irrelevant to the remaining case against the Teva and Actavis Defendants" and move to preclude the State "from relying on, or making any reference to, evidence which was obtained from or applies solely to Purdue Pharma L.P., Purdue Pharma, Inc. or The Purdue Frederick Company (collectively, 'Purdue')." Def.'s Mot. at 1. Notwithstanding Defendants' self-serving protestations, evidence relating to Purdue is relevant to the State's remaining claims against Defendants. As the Court is well aware, the State alleges Defendants, collectively, participated in a deceptive and misleading marketing campaign that understated the risks of addiction and overstated the efficacy of their respective opioids, thereby creating a public nuisance and indivisible injury in the form of the opioid crisis in Oklahoma. Although Defendants attempt to distance themselves from Purdue, painting its actions as the "unilateral actions of a competitor entity," Def.'s Mot. at 5, these Defendants, from Day One, were members with Purdue in advocacy groups such as the Pain Care Forum, which they used to promote their agenda that opioids were the cure for America's ailments. Teva and Purdue literally sell the same drugs through a distribution and supply agreement. They all funded

[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.

Responsible Opioid Prescribing—a book containing devastating misinformation about opioids—which was disseminated to state medical boards across the country, including Oklahoma's. Purdue even paid its sales representatives bonuses based on their sales of Teva opioids. Defendants' hands-off posture at this stage of the proceedings, after many years of profiting off of one another's conduct, is patently absurd. Despite its absence, Purdue's role in this conspiracy is an integral part of the story.[4] These defendants 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. Such evidence is germane to the complete story behind the continuing opioid crisis in Oklahoma and the Court should exercise its discretion and consider it. For this and the following reasons, Defendants' Motion should be denied.

Defendants recognize that the fact this case is being tried to the Court vitiates their arguments regarding unfair prejudice. Indeed, courts have recognized that "[i]n a bench trial, [motions in limine] are unnecessary, as the Court 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.* Moreover, "[i]t is worth noting that a motion in limine should not be used to resolve factual

[4] 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).

disputes or weigh evidence." *C & E Servs., Inc. v. Ashland Inc.*, 539 F. Supp. 2d 316, 323 (D.D.C. 2008) (citation omitted). Such is the function of a motion for summary judgment, which comes with its own set of procedural safeguards. *See id.* Accordingly, a motion in limine cannot be used as a substitute for a motion for summary judgment. *See id.* (citing *Provident Life & Accident Ins. Co. v. Adie*, 176 F.R.D. 246, 250 (D. Mich. 1997)). In limine rulings are preliminary in nature because they determine the admissibility of evidence before the factual record has actually been developed. Thus, in limine rulings are not binding on the court and may be revisited at trial. *Ohler v. United States*, 529 U.S. 753, 759 (2000).

A. Defendants' Motion In Limine Should Be Denied As A Poorly Disguised Motion For Summary Judgment

Defendants' Motion challenges the State's evidentiary burden of proof relating to causation. *See* Def.'s Mot. at 2, 4 ("This ignores the State's burden to show causation through relevant and admissible evidence. The conduct of Purdue cannot be admitted as evidence to prove wrongdoing by the [Defendants]. ... Evidence related to Purdue's actions cannot lead to a reasonable presumption or inference proving the Teva and Actavis Defendants committed an 'unlawful act'"....) (emphasis omitted). "In other words, their motion in limine is a summary judgment motion in disguise." *Drumm v. Schell*, No. 4:07-CV-357, 2008 WL 2412953, at *2 (M.D. Pa. June 10, 2008). The deadline for dispositive motions has come and gone, and Defendants should not be permitted multiple opportunities at challenging the State's case. In addition, Defendants' Motion regarding causes challenges the weight of the State's evidence as opposed to its admissibility. This is also an improper use of a motion in limine. *George v. Ford Motor Co.*, No. 03 CIV. 7643 (GEL), 2007 WL 4355048, at *2 (S.D.N.Y. Dec. 11, 2007) ("Defendant's argument that the plaintiffs cannot succeed in raising a material issue for the jury, with or without these witnesses' testimony, is a thinly-disguised (as well as belated and procedurally flawed)

motion for summary judgment, in the guise of a motion in limine."). As stated more fully in the State's response to Defendants' Motion for Summary Judgment, substantial evidence exists in the record showing that Defendants conducted a nationwide marketing campaign, that included Oklahoma, to influence prescriptions and dependency. These efforts are inextricably intertwined with Purdue's efforts, are relevant to the State's nuisance claim, and should be admitted.

B. Evidence Relating To Purdue Is Relevant

"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. 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); *see also United States v. Hines*, 717 F.2d 1481, 1488 (4th Cir. 1983) ("[The statement's] admissibility turns on the existence of substantial evidence of the conspiracy other than the statement itself.").

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).

Purdue's absence at trial does not preclude application of § 2801(B)(2)(e). Evidence has been produced, and will be produced at trial, that shows Defendants collectively 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. Not only is this evidence relevant to the State's claims of conspiracy, they are also relevant to the issue of joint and several liability. The evidence challenged by Defendants, specifically, Sackler family emails, training materials, marketing documents, and public relations communications, all relate to all Defendants' unbranded marketing strategies. Accordingly, evidence relating to Purdue is indeed relevant to this case and should be admitted.

Moreover, statements from Purdue's employees are admissible under § 2804 as statements against interest and statements made during a prior proceeding and should be admitted.

C. Alternatively, The Court Should Abstain From Ruling Until The Matter Is Fully Developed At Trial

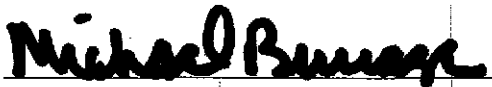
Defendants have failed to show evidence relating to Purdue is inadmissible on all potential grounds. Nonetheless, should the Court find a dispute exists over whether such evidence is admissible, the State respectfully requests that the Court refrain from making a ruling until the evidence is more developed 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 Teva's Motion *in Limine* #4 in its entirety, and for such further relief the Court deems proper.

Respectfully submitted,



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