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 TEVA'S MOTION *IN LIMINE* #2
(To Exclude References To Defendants' Litigation Strategy And Conduct)

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 factfinder. 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 prevent the public

[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.

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

The Teva Defendants and Actavis Defendants (collectively "Defendants") filed their Motion *In Limine* #2 To Exclude References To Defendants' Litigation Strategy And Conduct ("Motion") to exclude all mention of defendants' joint defense of this case, any assertions of privilege, any mention of their motion practice and fraudulent removal of the case, and lastly the failed Motion to Continue filed in the Oklahoma Supreme Court. The information Defendants' seek to exclude is highly relevant, and Defendants' requested exclusions are overbroad and speculative. For the following reasons, Defendants' Motion should be denied.

A. Defendants' Joint Defense Is Relevant And Should Not Be Excluded.

Defendants' joint defense is highly relevant, and because there are no concerns of prejudicing a jury, Defendants' request should be denied. The State is not seeking privileged information or communications like Defendants suggest. The fact itself that a joint defense agreement exists between parties is not privileged information and is relevant. *See U.S. ex rel. Health Dimensions Rehabilitation, Inc. v. Rehabcare Group, Inc.*, 2013 WL 5340910, at *2 (E.D. Mo. Sept. 23, 2013) (Denied motion *in limine* in part to allow parties to discuss the existence of a joint defense agreement); *see also Harris Corporation v. Federal Express Corporation*, 2010 WL

[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.

11474447, *2 (M.D. Fla. July 19, 2010) (Evidence of the existence of a joint defense agreement was relevant to show potential bias of witness, and motion *in limine* was denied). The Defendants' have been working together to defend this case in its entirety, and their conduct is highly relevant to the conspiracy between Defendants.

Further, the authority Defendants rely upon in their Motion was in the context of a jury trial, and here, there is no jury. In *Data Treasury Corp. v. Wells Fargo & Co.*, the court granted the motion *in limine* prohibiting the discussion of the defendants' joint defense agreement because it **was a jury trial**, and the court did not want the jury to be confused. 2010 WL 11538713, at *21-22 (E.D. Tex. Feb. 26, 2010). Here, **there is no jury**. The Court, who is aware that the Defendants' have a joint defense agreement, is the trier of fact. Thus, any potential risk of prejudice which could outweigh the discussion of Defendants' joint defense is gone. A motion *in limine* is only to be granted when evidence is so highly prejudicial that it cannot be cured, and even then, it is not binding, and the ruling may be revisited during trial. Without a jury, there is no risk of prejudice, and therefore, it is proper for the Court to address this issue as it comes up at trial, rather than make a preliminary ruling based on speculation from the Defendants.

Further, Defendants' reliance on *Warren Distribution Co. v. InBev USA L.L.C.*, is misplaced, as the issue before the court was whether or not the defendants had to produce their joint defense agreement on a motion to compel, which the court denied. 2008 WL 4371763, at *4 (D.N.J. Sept. 18, 2008). Here, the issue is not whether or not the State can view the actual agreement between parties, but whether or not the State can discuss the joint defense itself during trial.

Because Defendants' joint defense agreement is highly relevant, and there is no risk of prejudice because a jury has been eliminated in this case, the Court should deny Defendants'

Motion.

B. Defendants Request To Exclude "Assertions of Privilege" Is Overbroad And Speculative.

Defendants' request that the Court "preclude any reference, comment, evidence, or testimony relating to the fact that any party or witness refused to answer questions or to respond to discovery, either on the basis of an asserted privilege or upon instruction by counsel to not answer based upon asserted privilege" is overbroad and speculative. *See* Motion, at 3. Motions *in limine* "should rarely seek to exclude broad categories of evidence, as the court is almost always better situated to rule on evidentiary issues in their factual context during trial." *Colton Crane Co., LLC v. Terex Cranes Wilmington, Inc.*, 2010 WL 2035800, at *1 (C.D. Cal. May 19, 2010). Broad pre-trial evidentiary rulings, like that requested by a generalized motion *in limine*, present a serious risk of excluding admissible evidence. *E.I. DuPont De Nemours & Co. v. Kolon Indus., Inc.*, 564 Fed.Appx. 710, 715 (4th Cir. 2014). "District courts routinely deny a motion in limine that does not specify the evidence or the argument to be excluded because such a motion is premature." *A.Hak Indus. Servs. BV Techcorr USA, LLC, Techcorr USA Mgmt., LLC v. A.Hak Indus. Servs. B.V.*, 2014 WL 12591696, at *1–2 (N.D.W. Va. Dec. 18, 2014). Defendants have not provided specific circumstances, testimony, or evidence which they are concerned with, and are asking the Court to categorically deny evidence. This is improper, and because Defendants' request is overbroad and speculative, Defendants' Motion should be denied.

C. To The Extent The Defendants' Motion Practice And Removal Becomes Relevant During Trial, The State Should Be Allowed To Present Relevant Evidence On the Subject.

The State does not challenge Defendants' request to the extent that the Defendants do not open the door to discuss the litigation of the case and the Defendants' Motion practice. Defendants have complained several times to the Court about lacking time, or other issues, and to the extent

the Defendants raise these issues during trial or they become relevant, the State reserves the right to present evidence on this matter. The alleged "chilling effect" which the Defendants claim would exist if their conduct during litigation is brought up during trial is misplaced and false. No such chilling effect exists because the conduct of the Defendants has already happened, and the Defendants' conduct has taken place in open Court. The Court is already aware of the Defendants' conduct throughout litigation, including naming the Court as a defendant and arguing that the Special Master abdicated his duties as a judge, no new information exists, and there is no chilling effect.

Specifically, with regards to the filing of removal, Defendants misrepresent what happened. Removal was not just Purdue. Defendants all expressly agreed to join the removal of the case. In order for removal to be fully effective, Defendants had to jointly remove the case, and therefore, Defendants' statement that it was Purdue who removed the case is inaccurate. Again, to the extent that the Defendants open the door for removal to be discussed, the subject will become relevant, and the State should be allowed to present evidence on the subject.

D. To The Extent The Defendants' Motion To Compel Becomes Relevant During Trial, The State Should Be Allowed To Present Evidence On The Matter.

Again, the State does not challenge Defendants' request to exclude to the extent that the Defendants do not open the door for the State to discuss the Defendants' Motion to Compel. If the Defendants' do open the door and it becomes relevant during trial, the State reserves the right to present relevant evidence regarding the Motion to Compel.

CONCLUSION

For the reasons set forth above, the State respectfully requests the Court deny Teva's Motion *in Limine* #2 in its entirety, and for such further relief the Court deems proper.

Respectfully submitted,

Michael Burrage, OBA No. 1350
Reggie Whitten, OBA No. 9576
WHITTEN BURRAGE
512 N. Broadway Avenue, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: mburrage@whittenburragelaw.com
rwhitten@whittenburragelaw.com

Mike Hunter, OBA No. 4503
ATTORNEY GENERAL FOR
THE STATE OF OKLAHOMA
Abby Dillsaver, OBA No. 20675
GENERAL COUNSEL TO
THE ATTORNEY GENERAL
Ethan A. Shaner, OBA No. 30916
DEPUTY GENERAL COUNSEL
313 N.E. 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-6246
Emails: abby.dillsaver@oag.ok.gov

CERTIFICATE OF SERVICE

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

Johnson & Johnson, Janssen Pharmaceuticals Inc, Ortho McNeil Janssen Pharmaceuticals Inc., Janssen Pharmaceuticals Inc., Janssen Pharmaceutica Inc.:

Benjamin H. Odom
John H. Sparks
Michael W. Ridgeway
David L. Kinney
ODOM, SPARKS & JONES PLLC
HiPoint Office Building
2500 McGee Drive Ste. 140
Norman, OK 73072

Larry D. Ottaway
Amy Sherry Fischer
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma City, OK 73102

Stephen D. Brody
David K. Roberts
Emilie Winckel
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

Charles C. Lifland
Jennifer D. Cardelus
Wallace M. Allan
Sabrina H. Strong
Esteban Rodriguez
Houman Ehsan
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071

Michael Yoder
Jeffrey Barker
Amy J. Laurendau
O'MELVENY & MYERS LLP
610 Newport Center Drive
Newport Beach, CA 92660

Daniel J. Franklin
Ross Galin
Desirae Krislie Cubero Tongco
Vinvent Weisbnad
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036

Amy Riley Lucas
Jessica Waddle
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 9006

Allergan Plc, Actavis Plc, Actavis Inc., Watson Laboratories Inc., Watson Pharmaceuticals Inc., Actavis Llc, Actavis Pharma Inc., Watson Pharma Inc.:

Robert G. McCampbell
Travis J. Jett
Nicholas V. Merkley
Ashley E. Quinn
Jeffrey A. Curran
GABLEGOTWALS
One Leadership Square, 15th Floor
211 North Robinson
Oklahoma City, OK 73102-7255

Brian M. Ercole
Martha Leibell
Melissa Coates
MORGAN, LEWIS & BOCKIUS LLP
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131

Steven A. Reed
Harvey Bartle IV
Jeremy A. Menkowitz
Evan K. Jacobs
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921

Mark A. Fiore
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540

Steven Andrew Luxton
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Michael Burrage

Michael Burrage