



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

v.

- (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.

For Judge Balkman's
Consideration

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.

FILED
APR 26 2019

In the office of the
Court Clerk MARILYN WILLIAMS

**TEVA DEFENDANTS' AND ACTAVIS DEFENDANTS'
MOTION IN LIMINE #2 TO EXCLUDE REFERENCES
TO DEFENDANTS' LITIGATION STRATEGY AND CONDUCT**

Teva Pharmaceuticals USA, Inc. ("Teva USA"), Cephalon, Inc. ("Cephalon"), Watson Laboratories, Inc. ("Watson"), Actavis LLC ("Actavis LLC"), and Actavis Pharma, Inc. ("Actavis Pharma")¹ move this Court to preclude the State from referring to or otherwise offering at trial, information or evidence in any form (whether through direct or cross-examination, expert testimony or through exhibits of any type) and from presenting in any

¹ Cephalon and Teva USA are referred to as the "Teva Defendants." Watson, Actavis, LLC, and Actavis Pharma are referred to as the "Actavis Defendants."

manner (whether in opening statements, questions to witnesses or experts, objections, closing arguments, or otherwise) the following:

A. DEFENDANTS' COOPERATION DEFENDING AGAINST THE STATE'S CLAIMS

The State should not be permitted to suggest that any coordination among the Defendants in their defense of this action is evidence of an alleged conspiracy. By suing all Defendants in a single action, the State created the need for them to work together in defending against the State's claims. They have done so. This reflects the practical realities of complex litigation—not evidence of a “conspiracy.” *See, e.g., DataTreasury Corp. v. Wells Fargo & Co.*, 2010 WL 11538713, at *21-22 (E.D. Tex. Feb. 26, 2010) (granting motion in limine to exclude discussion of the defendants' joint defense of the case; although there was some probative value to the evidence under the facts of that case, “any probative value” regarding those issues was “substantially outweighed by the danger of unfair prejudice” in light of the plaintiffs' conspiracy allegations); *see also Warren Distrib. Co v. InBev USA L.L.C.*, 2008 WL 4371763, at *4 (D.N.J. Sept. 18, 2008) (denying motion to compel production of joint defense agreement because “[t]he fact that a joint defense agreement was signed is not evidence of the conspiracy plaintiffs allege existed.”).

Further, the ability of litigants to work together in defending a case where a plaintiff has chosen to make them co-defendants is protected as a privilege under Oklahoma law. *See* 12 O.S. § 2502(B)(3) (creating a privilege where an attorney communicates with “an attorney or representative of an attorney representing another party in a pending action concerning a matter of common interest therein.”).

The Court should preclude the State from making any reference to Defendants' coordinated defense or any other suggestion that their cooperation is proof of an alleged conspiracy.

B. ASSERTIONS OF PRIVILEGE

The Court should 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 an asserted privilege. The Oklahoma Evidence Code makes clear that “[a] claim of privilege . . . is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.” 12 O.S. § 2513(A). Section 2513 is “designed to prevent the destruction of the privilege by innuendo,” as comments on privilege can “diminish greatly any value that is afforded by the privilege.” 3 Okla. Practice, Okla. Evidence § 35.07. The Court should enter an order precluding any reference by counsel or any witness to the fact that a party invoked a privilege in this case, including the attorney-client privilege and the common interest privilege, 12 O.S. §§ 2502(B)(1), (3).

C. MOTION PRACTICE AND REMOVAL

As the Court well knows, this has been a contentious and hard-fought litigation. In legitimate defense of the State’s claims, Defendants have filed numerous motions, including motions to dismiss, motions for summary judgment, motions to continue, *Daubert* motions, and motions in limine. Although Defendants did not prevail on most of those motions, they filed them in good faith and were well within their rights as litigants to do so. The fact that Defendants pursued these standard and legally authorized motions is irrelevant to the issues to be tried in this litigation. *See* 12 O.S. § 2402. Thus, the State should be precluded from referring to any motion practice during trial.

Similarly, the Court should preclude any reference to the removal of the case to federal court. The State has argued the removal—filed by Purdue, which is no longer a Defendant in the action—violated a stipulation of the parties. However, the federal court expressly found the

stipulation *did not* prohibit filing the removal, Aug. 3, 2018 Order at 5, *State of Okla. v. Purdue*, CIV-18-574-M (W.D. Okla.), but it remanded the case to this Court because it concluded the case did not present a federal question. The removal and subsequent remand have no bearing whatsoever on the merits of this case. Any reference to them by the State would have no purpose other than to attempt to cast Defendants in a negative light.

Defendants' counsel have an ethical duty to "zealously assert[] the client's position under the rules of the adversary system." Okla. Rules of Prof. Conduct, Preamble. Those rules permitted Defendants to file every motion they filed and allowed Purdue to remove this case to federal court. If the State could use this conduct against Defendants at trial, it would undermine Defendants' rights to defend themselves and have a "chilling effect, which could unfairly penalize [litigants] by inhibiting their attorneys from zealously and effectively representing their clients within the bounds permitted by law." *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995) (citation omitted). Any reference to Defendants' legitimate litigation conduct has no place at trial and should be excluded.

D. MOTION TO CONTINUE

Similarly, for the reasons set forth above, the Court should preclude any reference to the motion to continue before this Court and the Application for Writ filed at the Supreme Court. Although the motion to continue was denied, the motion was filed in good faith and supported by citations to the record and the law. It is simply a motion that was denied. Also, the State likes to characterize the Application for Writ as Defendants suing the district court judge. That is inaccurate. As explained in Muchmore and Ellis, *Oklahoma Civil Procedure*, § 13.460[2], "In an application for a writ challenging the action by the trial court, the trial judge is technically the respondent, and the style must so indicate The real party in interest is the adverse party, and that party should file the necessary response" *See also id.* Form 13.462. That is exactly


what happened here. Defendants did not sue this Court, and it is unfairly prejudicial to allow televised comments asserting Defendants did. Similarly, it is well documented that Defendants asked for a continuance to have more time to prepare for trial and based on the State's actions during discovery. It would be unfairly prejudicial to allow Plaintiff to suggest on television that the motion for continuance should be taken as evidence that the defense case lacks merit.

CONCLUSION

For the foregoing reasons, the Teva Defendants and Actavis Defendants ask that the Court grant this Motion in Limine and instruct the State and all counsel not to mention, refer to, interrogate about, or attempt to convey in any manner, either directly or indirectly, any of these matters, and further instruct the State and all counsel to warn and caution each of their witnesses to follow the same instructions.

Dated April 26, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed this 26th day of April, 2019, to the following:

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