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.,	§	William C. Hetherington Special Discovery Master *To be heard by the Honorable Thad Balkman, District Judge*
Defendants.	§	

THE STATE'S RESPONSE TO CITY OF OKLAHOMA CITY, CITY OF LAWTON, CITY OF ENID, CITY OF MIDWEST CITY AND CITY OF BROKEN ARROW'S AMENDED JOINT MOTION TO INTERVENE

The City of Oklahoma City, City of Lawton, City of Midwest City and City of Broken Arrow (collectively hereinafter as "Movants") have taken the remarkable step of seeking party status in this case solely for the purpose of having this Court declare that they are ***not*** parties to this case—*i.e.*, that the Consent Judgment does not apply to them. For

the numerous reasons set forth below, Movants' Amended Joint Motion to Intervene ("Motion") is substantively and procedurally flawed and must be denied.

ARGUMENT

Among many, Movants' Motion must be denied for at least the following reasons: (1) Movants fail to identify a legitimate interest in this case; (2) the impairment of the claimed interest Movants identify is purely hypothetical; and (3) Movants' Motion is untimely.

A. Lack of A Legitimate Interest in This Case

As Movants acknowledge, Oklahoma's intervention statute requires Movants to identify "an interest in the property or transaction that is the subject matter of the litigation and that the disposition of the action impairs or impedes the intervenor's interests." Motion at 6 (citing 12 OKLA. STAT. § 2024(A)(2)). Movants wholly fail to satisfy this requirement.

Movants' state that "Movants are not parties to this action," the Attorney General does not represent them in this litigation, and their claims are "separate and distinct" from those asserted in this case. Motion at 9. As such, Movants' position must be that the Attorney General lacks the authority to bind them and that their claims have not been released by the settlement agreement or Consent Judgment. These conclusions flow naturally from Movants' stated positions (Motion at 9), as well as their prosecution of litigation separate and apart from this case. Motion at 2.

In sum, Movants' stated position is that they possess ***no*** interest in the property or transaction that is the subject matter of this litigation. In fact, Movants repeatedly point out that their "interests" exist solely in the property or transaction that is the subject of their

own litigation with Purdue. *See, e.g.*, Motion at 6, 7 & 9. This is entirely antithetical to the statute's requirement and the concept of intervention.

This is precisely why the Motion is illogical on its face. Movants ask the court to make them parties to this case (to intervene) just so the Court can then declare that they are ***not*** parties to this case—*i.e.*, that the Consent Judgment does not apply to them. A motion to intervene is clearly not the proper mechanism for such a declaration.

Because Movants have failed to satisfy—and actually affirmatively disprove—this core requirement of intervention, Movants' Motion must be denied.

B. Movants' Identified "Interest" is Hypothetical and Contingent

The "interest" Movants actually identify is the "concern[ ] [that] the Consent Judgment ***may*** be misinterpreted ***by another court***...." Motion at Ex. 1, ¶ 15 (emphasis added);[1] *id.* at 7 ("the Consent Judgment...contains ambiguous language that ***could*** be wrongfully construed ***by another court***....")(emphasis added).[2]

Assuming, *arguendo*, that such an interest could exist in this litigation, Movants still are not entitled to intervene as a matter of right because their purported impairment is purely hypothetical. "An interest that is . . . contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule for intervention as of right." *Brown v. Patel*, 2007 OK 16, ¶19, 157 P.3d 117, 125.

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[1] Exhibit 1 is Movants' Joint Petition for Intervention, which is the pleading that will govern if intervention is granted.

[2] These statements further confirm that Movants' "interest" exists in a separate case in a separate forum, and not this case.

There are at least two events that must occur before Movants' alleged interest is put at issue: (1) Movants elect not to opt-in to the Purdue settlement; and (2) Purdue raises an affirmative defense of *res judicata* and/or accord and satisfaction in another court based on this Court's entry of the Consent Judgment. Only then would another court have the opportunity to potentially "misconstrue" the Consent Judgment. Unless and until these contingencies are realized, Movants' purported interest in avoiding misinterpretation by another court remains hypothetical and, thus, an inappropriate ground for intervention.

C. Movants' Application Should Be Denied as Untimely

Even if the Court were to ignore Movants' affirmative statements, suspend disbelief and accept that Movants' interest in pursuing their claims against Purdue in separate litigation in another forum equates to an interest in this litigation, Movants' application for intervention is untimely.

A prerequisite to intervention is a "***timely*** application" to intervene. 12 OKLA. STAT. §2024(A) (emphasis added). According to Movants, the "timeliness of a motion to intervene is evaluated 'in light of all of the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.'" Motion at 6 (citation omitted). When measured against each of these circumstances, Movants' 11th hour application—submitted almost two years after this action was filed, the month before trial is to begin, and on the heels of a settlement with a Defendant against whom Movants have already sued on their own—is plainly untimely.

1. *Length of Time Since Movants Knew of Their Interest in the Case*

Movants have failed to carry their burden to show that their Motion represents a "timely" application to protect their interest in their own claims against Purdue by intervening in *this* case.

The Motion does not identify when Movants learned of their "interest" in pursuing claims against Purdue. *See* Motion at 6-7. Given the substantial media coverage surrounding every step of this litigation, it is certainly reasonable to assume Movants "knew" of this lawsuit two years ago, in the summer of 2017, when the State filed it. But Movants did not seek intervention at any point in 2017 to protect the interest they now say requires protection.[3]

Nor did they do so at any point in 2018 as the State continued to prosecute this case. This is in spite of the facts that (i) many of the Movants filed *their own* lawsuits against Purdue in 2018, and (ii) Movants received a subpoena from the Defendants in this lawsuit in approximately November of 2018. Motion at 4. Movants even filed a motion to quash that subpoena in this action in December of 2018. *See* Motion to Quash and for Protective Order for Subpoena Duces Tecum of the City of Broken Arrow filed on December 14, 2018. And in their motion to quash, Movant Broken Arrow stated quite plainly: "the Subpoena seeks to require a ***non-party to this action*** to scour its records for documents ***bearing no connection with the causes asserted, defenses alleged, or damages sought in the captioned case brought by the State of Oklahoma – not Broken Arrow***." *Id.* at 2. Yet,

[3] To be clear, for the reasons set forth above the State believes any such application would have been properly denied then as it should be now.

still, with full knowledge of this action in 2018, Movants never sought intervention in this case to protect the interest they now say mandates protection.

Instead, Movants waited until (i) almost two years after this case was filed, (ii) months after they filed their own litigation, (iii) months after they filed court documents disclaiming any interest in this action before this Court, and (iv) only after a partial resolution of the State's claims was reached with one set of Defendants, to come into this Court and assert that Movants actually had an interest in *this case* all along. On top of all of that, Movants filed their application only the month before the existing parties will go to trial. That is not a record of "timeliness." A party claiming an interest in litigation is not afforded the right to sit back and allow the litigation to proceed for years, then belatedly assert an interest in the case after a partial resolution is reached. Movants' "wait-and-see" approach is the opposite of acting "timely."

The length of time between when Movants knew of their alleged interest in this case and when Movants filed their application to intervene weighs heavily in favor of denying the Motion.

2. Prejudice to the Existing Parties

The parties to this case will be prejudiced if Movants are allowed to intervene. If this case has taught the State and this Court anything, it is that these Defendants will use anything to delay the May 28, 2019, trial date. Undoubtedly, if additional parties are added to this case, Defendants will again attempt to derail the trial by removing it. Indeed, Movants claim that some of their own cases against these Defendants are pending in federal court because they were wrongfully removed. *See* Motion at 2. This case is one month from

trial, and adding additional parties will prejudice the parties preparing the case for trial—especially given the risk of another fraudulent removal.

Moreover, allowing Movants to intervene—particularly in light of the imaginary, tenuous, hypothetical, contingency-based "impaired interest" they put forward—sets a dangerous precedent. Numerous other counties or cities theoretically could come forward to ask this Court to allow them into the case—for the sole purpose of declaring that they are not a part of the case. Movants' theory of intervention, if endorsed, would prejudice all civil litigants by opening a revolving door that, in cases of public interest, could be walked through *ad infinitum* by other "wait-and-see-ers" who would prefer a slight correction or modification to a resolution reached by the parties that spent years putting themselves in the best position to decide whether a resolution is appropriate. In short, the prejudice to the existing parties that would follow Movants' intervention here weighs heavily in favor of denying the Motion.

3. *Prejudice to the Applicant*

Movants face no prejudice if their Motion is denied. Their Motion is premised on a set of contingencies—(1) Movants elect not to opt-in to the Purdue settlement; and (2) Purdue raises an affirmative defense of *res judicata* and/or accord and satisfaction in another court based on this Court's entry of the Consent Judgment. Only then would another court have the opportunity to potentially "misconstrue" the Consent Judgment. But even accepting all of Movants' speculation as true and assuming their contingencies actually occurred, Movants would not be prejudiced if their Motion were denied.

Instead, they would be in a forum—the very forum in which they chose to file their lawsuits—arguing against an affirmative defense of *res judicata* and/or accord and satisfaction. And, they would make many of the same arguments set forth in their Motion.

For example, Movants state that their "interests are not represented" here because the "Attorney General represents the State of Oklahoma and not cities and counties, which have separate and distinct claims." Motion at 9. In other words, Movants argue here they cannot be bound by the Consent Judgment because they did not have the opportunity to be heard in the underlying litigation—the same grounds that would prevent the Consent Judgment from being used against them as *res judicata* in their own cases.

In short, Movants will not be prejudiced if their request to be made a party, just so the Court may declare they are not a party, is denied. Instead, even in a perfect storm where all of these contingencies occurred, Movants will still have a full and fair opportunity in the forum they chose to demonstrate why they are not bound by the Consent Judgment. Because Movants will suffer no prejudice if their Motion is denied, this factor weighs heavily in favor of its denial.

4. *Existence of any Unusual Circumstances*

Finally, there are significant and unusual circumstances that weigh against allowing Movants to intervene. First, Movants do not seek to intervene to join this case and litigate their claims. They have already filed their own lawsuits. Instead, they (improperly) ask this Court to make them temporary parties to this action, only to then declare them non-parties to this action. The futility to Movants' request is palpable.

Second, the Defendants have repeatedly attempted to delay the upcoming trial. The prospect of adding parties raises a real risk of another frivolous removal. Lastly, the historic nature of this case in and of itself makes the last-minute procedural maneuvering proposed by Movants particularly unique and unusual.

In the end, these Movants have known about this action for months—if not years—yet never before attempted to intervene before now. For all of these reasons, Movants' Motion is untimely and should be denied on that ground alone.

D. Conclusion

Based on the foregoing defects in Movants' Amended Joint Motion to Intervene, whether considered individually or collectively, Movants' Motion must be denied.

Respectfully submitted,

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