



STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
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APR 26 2019

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

v.

PURDUE PHARMA L.P., *et al.*,

Defendants.

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816

Judge Thad Balkman

William C. Hetherington
Special Discovery Master

DEFENDANTS JANSSEN PHARMACEUTICALS, INC.
AND JOHNSON & JOHNSON'S MOTION IN LIMINE NO. 3
TO EXCLUDE EVIDENCE REGARDING ADVOCACY GROUPS

Defendants Janssen Pharmaceuticals, Inc. (“Janssen”)¹ and Johnson & Johnson (“J&J”) respectfully move the Court for an order excluding from trial all evidence and argument regarding allegedly improper statements or activities of advocacy or trade organizations with which Janssen or J&J associated, absent a showing that Janssen specifically intended to further the statement or activity in question. Relying on such evidence in establishing Janssen or J&J’s liability would violate their right of association under the First Amendment.

BRIEF IN SUPPORT

In support of this Motion *in Limine*, Janssen and J&J show the following:

I. INTRODUCTION

Like countless American companies, nonprofit organizations, and government entities and officials, Janssen and J&J have long associated with advocacy organizations. These organizations share information, offer educational programs and other resources, and advocate for their constituents. Association with these groups is not only commonplace, legal, and altogether proper—but also one of the fundamental freedoms protected by the First Amendment.

The Supreme Court has recognized that assembling for the purpose of sharing and disseminating ideas is vital to society and that the First Amendment forbids the government from imposing liability on a defendant for merely associating with an organization. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). Even asserting that a group has engaged in illegal activity does not cancel this prohibition: Liability attaches only if the government can show that a defendant specifically intended to further that illegal activity. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982).

¹ “Janssen” also refers to Janssen Pharmaceuticals, Inc.’s predecessors, Ortho-McNeil-Janssen Pharmaceuticals, Inc. and Janssen Pharmaceutica, Inc.

Although the State has not identified exactly what evidence regarding advocacy or trade organizations it plans to introduce at trial, it has made no secret that it will seek to hold Janssen and J&J liable for these groups' statements and activities. But absent a showing that Janssen or J&J specifically intended to further the particular statements or activities the State intends to challenge, admitting this evidence would violate the First Amendment by punishing Janssen and J&J for mere association. The Court should forbid the State from relying on such evidence in attempting to establish Janssen and J&J's liability.

II. AUTHORITIES AND ARGUMENT

The First Amendment shields Janssen and J&J's right to associate with trade and advocacy organizations. U.S. Const. amend. I (protecting "the right of the people peaceably to assemble"). That protection extends across a broad range of activities: "The freedom to associate with others for the dissemination of ideas—not just by singing or speaking in unison, but by pooling financial resources for expressive purposes—is part of the freedom of speech." *McConnell v. FEC*, 540 U.S. 93, 255 (2003) (overruled on other grounds by *Citizens United v. FEC*, 558 U.S. 310 (2010)). And it applies equally to all types of advocacy: "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *Patterson*, 357 U.S. at 460–461. As a result, any government action that "may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* "Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection." *In re Asbestos School Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994).

Even if the State alleges that a group with which Janssen or J&J associated engaged in acts that are not protected by the First Amendment, liability may not attach absent a showing that

Janssen or J&J “held a specific intent to further” those activities. *Claiborne Hardware Co.*, 458 U.S. at 920. In *In re Asbestos School Litigation*, for instance, a former asbestos manufacturer had donated to and attended meetings of a group that the plaintiff alleged “disseminated misleading information about the danger of asbestos in schools.” 46 F.3d at 1287-88. After the district court denied the defendant’s summary judgment motion, the Third Circuit issued a writ of mandamus and held that imposing liability would be a “clear and indisputable” First Amendment violation. *Id.* at 1289. Even if the organization engaged in unlawfully misleading activities, there was “simply no evidence” that defendant “specifically intended to further such wrongful conduct.” *Id.* at 1290.

Here, the State seeks to hold Janssen and J&J liable for the conduct of organizations with which they associated. In its Petition and its October 30, 2017 omnibus opposition to defendants’ motions to dismiss for failure to state a claim (“MTD Opp.”), for instance, the State seeks to hold Defendants generally responsible for statements made by the American Academy of Pain Medicine (“AAPM”) and the American Pain Society (“APS”) in their consensus statements about and guidelines for the use of opioids for chronic non-cancer pain. *See* State’s Petition ¶ 65; MTD Opp. at 26-27.

But the State cannot show that Janssen or J&J specifically intended to further any purportedly improper statements in those challenged documents. The State has no evidence that Janssen or J&J helped develop the groups’ consensus statements or guidelines at all. And even if it did, the State would need to further show that Janssen or J&J intended to further the specific, allegedly unlawful claims within those challenged documents. *See Taylor v. Airco, Inc.*, 503 F. Supp. 2d 432, 445-47 (D. Mass. 2007) (evidence that defendant “may have participated in drafting” data sheet allegedly containing misrepresentations was insufficient to show that

defendant intended to further such misrepresentations). Janssen contributed to AAPM and APS and attended their meetings—activities protected by the First Amendment’s core associational rights and insufficient to establish any liability for the supposedly improper statements in the consensus statements or guidelines. *In re Asbestos School Litig.*, 46 F.3d at 1287-88, 1294; *In re Welding Fume Prods. Liab. Litig.*, 526 F. Supp. 2d 775, 804–06 (N.D. Ohio 2007) (defendant’s attendance at trade group meetings, even if defendant knew of supposedly improper scheme to avoid public disclosure of dangers associated with product, was insufficient to show defendant intended to further the scheme). The Court should thus exclude any evidence about the AAPM and APS consensus statements or guidelines because it is irrelevant to the issue of Janssen or J&J’s liability.

Challenged statements in the book *Responsible Opioid Prescribing: A Physician’s Guide* by Dr. Scott Fishman have even less connection to Janssen and J&J, and similarly provide no basis for imposing liability on them. The State asserts that the book misrepresents the benefits and risks of opioids in the treatment of chronic pain, and attempts to tie Janssen to the book by claiming that organizations to which Janssen contributed—including AAPM—sponsored the book, and that Dr. Fishman had served as a consultant to Janssen. MTD Opp. at 30-32. But Janssen’s mere association with a group that sponsored the book, and with Dr. Fishman in connection with separate matters, cannot establish that Janssen intended to advance *any* statements in the book—let alone the specific statements the State challenges. *Claiborne Hardware Co.*, 458 U.S. at 920; *In re Asbestos School Litig.*, 46 F.2d at 1287-88, 1294. The Court should thus exclude any evidence about statements in Dr. Fishman’s book for purposes of establishing Janssen or J&J’s liability.


The same is true for any other evidence of statements or activities of third parties unless the State can somehow prove Janssen or J&J specifically intended to further those statements or activities. The State must do more than assert that Janssen or J&J made financial contributions to these groups or even that they intended to advance separate statements or activities of these groups. For each particular, supposedly improper statement or activity it hopes to use to establish Janssen or J&J's liability, the State must show that Janssen or J&J intended to further that specific statement or activity—and it must do so before introducing that evidence. Short of that, the Court must exclude this evidence or else violate Janssen and J&J's right of association. *See Claiborne Hardware*, 458 U.S. at 920.

III. CONCLUSION

For all these reasons, the Court should grant Janssen and J&J's Motion *in Limine* and issue an order barring the State from introducing any statements made by trade groups or advocacy organizations of which Janssen or J&J was a member, absent evidence showing a specific intent to advance the statements at issue.

Dated: April 26, 2019

Respectfully submitted,

By:  _____

Benjamin H. Odom, OBA No. 10917
John H. Sparks, OBA No. 15661
Michael W. Ridgeway, OBA No. 15657
David L. Kinney, OBA No. 10875
ODOM, SPARKS & JONES, PLLC
Suite 140
HiPoint Office Building
2500 McGee Drive
Norman, OK 73072
Telephone: (405) 701-1863
Facsimile: (405) 310-5394
Email: odomb@odomsparks.com
Email: sparksj@odomsparks.com
Email: ridgewaym@odomsparks.com
Email: kinneyd@odomsparks.com

Larry D. Ottaway, OBA No. 6816
Amy Sherry Fischer, OBA No. 16651
Andrew Bowman, OBA No. 22071
Jordyn L. Cartmell, OBA No. 31043
Kaitlyn Dunn, OBA No. 32770
FOLIART, HUFF, OTTAWAY & BOTTOM
12th Floor
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
Telephone: (405) 232-4633
Facsimile: (405) 232-3462
Email: larryottaway@oklahomacounsel.com
Email: amyfischer@oklahomacounsel.com
Email: andrewbowman@oklahomacounsel.com
Email: jordyncartmell@oklahomacounsel.com
Email: kaitlyndunn@oklahomacounsel.com

Of Counsel:

Charles C. Lifland
Wallace Moore Allan
Sabrina H. Strong
O'MELVENY & MYERS, LLP

400 S. Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-6000
Facsimile: (213) 430-6407
Email: clifland@omm.com
Email: tallan@omm.com
Email: sstrong@omm.com

Stephen D. Brody
David Roberts
O'MELVENY & MYERS, LLP
1625 Eye Street NW
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
Email: sbrody@omm.com
Email: droberts2@omm.com

**ATTORNEYS FOR DEFENDANTS
JANSSEN PHARMACEUTICALS, INC.,
JOHNSON & JOHNSON, JANSSEN
PHARMACEUTICA, INC. N/K/A JANSSEN
PHARMACEUTICALS, INC., AND
ORTHO-MCNEIL-JANSSEN
PHARMACEUTICALS, INC. N/K/A/
JANSSEN PHARMACEUTICALS, INC.**

CERTIFICATE OF MAILING

Pursuant to Okla. Stat. tit. 12, § 2005(D), and by agreement of the parties, this is to certify on April 26, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:

Mike Hunter
Attorney General for
The State of Oklahoma
Abby Dillsaver
Ethan Shaner
General Counsel to
The Attorney General
313 NE 21st
Oklahoma City, OK 73105
Telephone: (405)521-3921
Facsimile: (405) 521-6246
Email: mike.hunter@oag.ok.gov
Email: abby.dillsaver@oag.ok.gov
Email: ethan.shaner@oag.ok.gov

Michael Burrage
Reggie Whitten
J. Revell Parrish
WHITTEN BURRAGE
Suite 300
512 North Broadway Avenue
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Email: mburrage@whittenburragelaw.com
Email: rwhitten@whittenburragelaw.com
Email: rparrish@whittenburragelaw.com

Bradley Beckworth
Jeffrey Angelovich
Lloyd Nolan Duck, III
Andrew Pate
Lisa Baldwin
Brooke A. Churchman
Nathan Hall
NIX, PATTERSON, LLP
Suite 200
512 North Broadway Avenue
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Email: bbeckworth@nixlaw.com
Email: jangelovich@nixlaw.com
Email: tduck@nixlaw.com
Email: dpate@nixlaw.com
Email: lbaldwin@nixlaw.com
Email: bchurchman@nixlaw.com
Email: nhall@nixlaw.com

Robert Winn Cutler
Ross Leonoudakis
Cody Hill
NIX, PATTERSON, LLP
Suite B350
3600 North Capital of Texas Highway
Austin, TX 78746
Telephone: (512) 328-5333
Facsimile: (512) 328-5335
Email: winncutler@nixlaw.com
Email: rossl@nixlaw.com
Email: codyhill@nixlaw.com

Glenn Coffee
GLENN COFFEE & ASSOCIATES, PLLC
915 North Robinson Avenue
Oklahoma City, OK 73102
Telephone: (405) 601-1616
Email: gcoffee@glenncoffee.com

ATTORNEYS FOR PLAINTIFF

Sanford C. Coats
Joshua D. Burns
CROWE & DUNLEVY, PC
Suite 100
Braniff Building
324 North Robinson Avenue
Oklahoma City, OK 73102
Telephone: (405) 235-7700
Facsimile: (405) 272-5269
Email: sandy.coats@crowedunlevy.com
Email: joshua.burns@crowedunlevy.com

Of Counsel:

Sheila Birnbaum
Mark S. Cheffo
Hayden A. Coleman
Paul A. LaFata
Lindsay N. Zanello
Bert L. Wolff
Mara C. Cusker Gonzalez
Jenna C. Newmark
DECHERT, LLP
Three Bryant Park
1095 Avenue of Americas
New York, NY 10036-6797
Telephone: (212) 698-3500
Facsimile: (212) 698-3599
Email: sheila.birnbaum@dechert.com
Email: mark.cheffo@dechert.com
Email: hayden.coleman@dechert.com
Email: paul.lafata@dechert.com
Email: lindsay.zanello@dechert.com
Email: bert.wolff@dechert.com
Email: maracusker.gonzalez@dechert.com
Email: jenna.newmark@dechert.com

Benjamin F. McAnaney
Hope S. Freiwald
Will W. Sachse
Chelsea M. Nichols
Cory A. Ward
Meghan R. Kelly
Nicolas A. Novy
DECHERT, LLP
2929 Arch Street

Philadelphia, PA 19104
Telephone: (215) 994-4000
Facsimile: (215) 655-2043
Email: benjamin.mcananey@dechert.com
Email: hope.freiwald@dechert.com
Email: will.sachse@dechert.com
Email: chelsea.nichols@dechert.com
Email: cory.ward@dechert.com
Email: meghan.kelly@dechert.com
Email: nicolas.novy@dechert.com

Erik W. Snapp
DECHERT, LLP
Suite 3400
35 West Wacker Drive
Chicago, IL 60601
Telephone: (212)849-7000
Facsimile: (212) 849-7100
Email: erik.snapp@dechert.com

Jonathan S. Tam
Jae Hong Lee
DECHERT, LLP
16th Floor
One Bush Street
San Francisco, CA 94104
Telephone: (415) 262-4500
Facsimile: (415) 262-4555
Email: jonathan.tam@dechert.com
Email: jae.lee@dechert.com

William W. Oxley
DECHERT, LLP
Suite 4900
US Bank Tower
633 West 5th Street
Los Angeles, CA 90071
Telephone: (213) 808-5760
Facsimile: (213) 808-5760
Email: william.oxley@dechert.com

Lindsey B. Cohan
DECHERT, LLP
Suite 2010
300 West 6th Street
Austin, TX 78701-2961
Telephone: (212) 394-3000
Facsimile: (512) 394-3001
Email: lindsey.cohan@dechert.com

Britta E. Stanton
John D. Volney
John T. Cox, III
Eric W. Pinker
Jared D. Eisenberg
Jervonne D. Newsome
Elizabeth Yvonne Ryan
Andrea MeShonn Evans Brown
Ruben A. Garcia
Russell G. Herman
Samuel B. Hardy, IV
David S. Coale
Alan Dabdoub
LYNN PINKER COX & HURST, LLP
Suite 2700
2100 Ross Avenue
Dallas, TX 75201
Telephone: (214) 981-3800
Facsimile: (214) 981-3839
Email: bstanton@lynnllp.com
Email: jvolney@lynnllp.com
email: tcox@lynnllp.com
Email: epinker@lynnllp.com
Email: jeisenberg@lynnllp.com
Email: jnewsome@lynnllp.com
Email: eryan@lynnllp.com
Email: sbrown@lynnllp.com
Email: rgarcia@lynnllp.com
Email: rherman@lynnllp.com
Email: shardy@lynnllp.com
Email: dcoale@lynnllp.com
Email: adabdoub@lynnllp.com

Robert S. Hoff
WIGGIN & DANA, LLP
265 Church Street
New Haven, CT 06510
Telephone: (203) 498-4400
Facsimile: (203) 363-7676
Email: rhoff@wiggin.com

Michael T. Cole
NELSON MULLINS RILEY & SCARBOROUGH, LLP
Suite 600
151 Meeting Street
Charleston, SC 29401
Telephone: (843) 853-5200
Facsimile: (843) 722-8700
Email: mike.cole@nelsonmullins.com

**ATTORNEYS FOR DEFENDANTS
PURDUE PHARMA, LP,
PURDUE PHARMA, INC., AND THE
PURDUE FREDERICK
COMPANY, INC.**

Robert G. McCampbell
Travis V. Jett
Ashley E. Quinn
Nicholas V. Merkley
Leasa M. Stewart
GableGotwals
15th Floor
One Leadership Square
211 North Robinson
Oklahoma City, OK 73102-7255
Telephone: (405) 235-5567
Email: rmccampbell@gablelaw.com
Email: tjett@gablelaw.com
Email: aquinn@gablelaw.com
Email: nmerkley@gablelaw.com
Email: lstewart@gablelaw.com

Of Counsel:

Steven A. Reed
Rebecca J. Hillyer
Evan J. Jacobs
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2321
Telephone: (215) 963-5000
Email: steven.reed@morganlewis.com
Email: rebecca.hillyer@morganlewis.com
Email: evan.jacobs@morganlewis.com

Harvey Bartle, IV
Mark A. Fiore
Morgan, Lewis & Bockius, LLP
502 Carnegie Center
Princeton, NJ 08540-6241
Telephone: (609) 919-6600
Email: harvey.bartle@morganlewis.com
Email: mark.fiore@morganlewis.com

Brian M. Ercole
Melissa M. Coates
Martha A. Leibell
Morgan, Lewis & Bockius, LLP
Suite 5300
200 South Biscayne Boulevard
Miami, FL 33131

Email: brian.ercole@morganlewis.com
Email: melissa.coates@morganlewis.com
Email: martha.leibell@morganlewis.com

Steven A. Luxton
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 739-3000
Facsimile: (202-739-3000
Email: steven.luxton@morganlewis.com

Tinos Diamantatos
Morgan, Lewis & Bockius, LLP
77 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 324-1000
Facsimile: (312) 324-1001
Email: tinos.diamantatos@morganlewis.com

Collie F. James, IV
Morgan, Lewis & Bockius, LLP
Suite 1800
600 Anton Boulevard
Costa Mesa, CA 92626
Telephone: (714) 830-0600
Facsimile: (714) 830-0700
Email: collie.james@morganlewis.com

**ATTORNEYS FOR DEFENDANTS
CEPHALON, INC., TEVA
PHARMACEUTICALS USA, INC.,
WATSON LABORATORIES, INC.,
ACTAVIS, LLC, AND ACTAVIS PHARMA,
INC. F/K/A WATSON
PHARMA, INC.**



Benjamin H. Odom, OBA No. 10917
John H. Sparks, OBA No. 15661
Michael W. Ridgeway, OBA No. 15657
David L. Kinney, OBA No. 10875
ODOM, SPARKS & JONES, PLLC
Suite 140
HiPoint Office Building
2500 McGee Drive
Norman, OK 73072
Telephone: (405) 701-1863
Facsimile: (405) 310-5394
Email: odomb@odomsparks.com
Email: sparksj@odomsparks.com
Email: ridgewaym@odomsparks.com
Email: kinneyd@odomsparks.com

**ATTORNEYS FOR DEFENDANTS
JANSSEN PHARMACEUTICALS, INC.,
JOHNSON & JOHNSON, JANSSEN
PHARMACEUTICA, INC. N/K/A
JANSSEN PHARMACEUTICALS, INC.,
AND ORTHO-MCNEIL-JANSSEN
PHARMACEUTICALS, INC. N/K/A/
JANSSEN PHARMACEUTICALS, INC.**