STATE OF OKLAHOMA
CLEVELAND COUNTY } S.S.
FILED In The
Office of the Court Clerk
APR 26 2019
In the office of the
Court Clerk MARILYN WILLIAMS

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.	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. 7 TO EXCLUDE PURDUE EVIDENCE FOR PURPOSES OF JANSSEN OR J&J'S LIABILITY

Defendants Janssen Pharmaceuticals, Inc. ("Janssen")[1] and Johnson & Johnson ("J&J"), move this Court for an order excluding from trial evidence and argument regarding Purdue Pharma L.P., Purdue Pharma, Inc. or The Purdue Frederick Company (collectively, "Purdue") for the purpose of establishing the liability of Janssen or J&J. This Motion *in Limine* is made on the grounds that conduct by Purdue, which settled all claims with the State on March 26, 2019, cannot establish liability on the part of the other Defendants in the case. Janssen and J&J accordingly respectfully request that their Motion be granted, and for such other relief as the Court deems just and proper.

BRIEF IN SUPPORT

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

Evidence and argument regarding Purdue's conduct is irrelevant to establishing Janssen and J&J's liability and should be excluded. *See* 12 O.S. § 2402. The State has long been clear that it believes Purdue played the central role in causing the opioid crisis. Its Petition against Defendants alleged virtually nothing about Janssen and J&J.[2] By contrast, the State's Petition alleged wrongdoing by Purdue on page after page. The Petition names Purdue, not Janssen or J&J, in its allegations about Defendants' significant profits, *id.* ¶ 21 ("For example, Purdue's sales of OxyContin alone have generated estimated sales of more than $35 billion since its release in 1996."), deceptive marketing, *id.* ¶ 53 ("For example: Defendant Purdue distributed a series of advertisements . . . . Purdue distributed a promotion video . . . . Purdue trained its sales

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[1] "Janssen" also refers to Janssen Pharmaceuticals, Inc.'s predecessors, Ortho-McNeil-Janssen Pharmaceuticals, Inc. and Janssen Pharmaceutica, Inc.

[2] In one instance, the Petition alleges that the Janssen Defendants caused claims for reimbursement to be submitted to the Oklahoma Health Care Authority, a claim that has since been voluntarily dismissed. Petition ¶ 38; *see* Notice Vol. Dism. (Apr. 4, 2019). And in the other, the Petition alleges that "Janssen made unsubstantiated representations" about one of its opioid medications, though the Petition offers no additional detail. Petition ¶ 53.

representatives . . . . Purdue misrepresented OxyContin in medical journal advertisements . . . ."), marketing campaigns, *id.* ¶ 55 ("Purdue, from 1996-2001, hosted dozens of national pain-management and speaker-training conferences . . . ."), and the funding of advocacy organizations, *id.* ¶ 64.

The State's emphasis on Purdue's wrongdoing is not limited to the Petition. Throughout the litigation, the State continued to emphasize to the Court that Purdue played a central role in creating the opioid crisis in Oklahoma. *See, e.g.*, Pl. Opp. to Purdue Mot. Quash (May 4, 2018), at 2 ("Purdue's fraudulent marketing scheme created the opioid epidemic . . . ."). In arguments to the Court, the State represented that Purdue is "the genesis of why we're all here today," Ex. A, Dec. 5, 2017 Hr'g Tr. at 25:15-21, and that the epidemic allegedly started in 1996, when "Purdue let the lion out of the cage . . . when OxyContin was brought to market and promoted in an aggressive, concentrated, and targeted way," Ex. B, Aug. 30, 2018 Hr'g Tr. at 57:17-58:1.

Because Purdue settled its claims with the State on March 26, 2019, evidence and argument regarding its conduct is no longer relevant to establishing Purdue's liability. Such evidence is, *a fortiori*, irrelevant to establishing Janssen and J&J's liability. Under Oklahoma law, "evidence is relevant" only "if it legally tends to prove some matter in issue or tends to make a proposition in issue more less probable." *Witt v. Martin*, 1983 OK CIV APP 33, 672 P.2d 312, 320 (internal quotation marks omitted). Oklahoma law similarly excludes "remote" facts with no bearing on establishing the elements of a plaintiff's claim. *Sch. Dist. No. 39 v. Hicks*, 1929 OK 337, 280 P. 606, 608 ("[R]emote and collateral facts from which no fair and reasonable inference can be drawn are to be excluded." (internal quotation marks omitted)). At trial, the State bears the burden of proving that Janssen and J&J "unlawfully" committed "an act or omit[ed] to perform a duty," resulting in a public nuisance. 50 O.S. § 1; *see also Nuncio v. Rock Knoll Townhome Village, Inc*,

2016 OK CIV APP 83, ¶ 8, 389 P.3d 370, 374 ("For an act or omission to be a nuisance in Oklahoma, it must be unlawful."). At issue therefore is Janssen and J&J's conduct, and Purdue's acts or omissions have no bearing on that determination.

Of course, certain evidence pertaining to Purdue may be introduced for purposes *other than* establishing Janssen and J&J's liability, so long as such evidence is otherwise admissible under the rules of evidence. Indeed, this Court may allow evidence to be admitted for some purposes but not others, and it should do so here. *See* 12 O.S. § 2106 ("When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court shall upon request restrict the evidence to its proper scope and instruct the jury accordingly."). But the State should not be able to introduce evidence of Purdue's conduct as a substitute for its lack of evidence of wrongdoing by Janssen and J&J.

* * * * *

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 evidence or argument about Purdue to establish Janssen and J&J's liability.

Dated: April 26, 2019

Respectfully submitted,

By:____________________________

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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:

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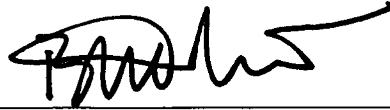

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EXHIBIT A

1 IN THE DISTRICT COURT OF CLEVELAND COUNTY

2 STATE OF OKLAHOMA

3

STATE OF OKLAHOMA, ex rel.,)
4 MIKE HUNTER)
ATTORNEY GENERAL OF OKLAHOMA,)
5)
Plaintiff,)
6)
vs.) Case No. CJ-2017-816
7)
(1) PURDUE PHARMA L.P.;)
8 (2) PURDUE PHARMA, INC.;)
(3) THE PURDUE FREDERICK)
9 COMPANY;)
(4) TEVA PHARMACEUTICALS)
10 USA, INC;)
(5) CEPHALON, INC.;)
11 (6) JOHNSON & JOHNSON;)
(7) JANSSEN PHARMACEUTICALS,)
12 INC.;)
(8) ORTHO-McNEIL-JANSSEN)
13 PHARMACEUTICALS, INC.,)
n/k/a JANSSEN PHARMACEUTICALS;)
14 (9) JANSSEN PHARMACEUTICA, INC.)
n/k/a JANSSEN PHARMACEUTICALS,)
15 INC.;)
(10) ALLERGAN, PLC, f/k/a)
16 ACTAVIS PLC, f/k/a ACTAVIS,)
INC., f/k/a WATSON)
17 PHARMACEUTICALS, INC.;)
(11) WATSON LABORATORIES, INC.;)
18 (12) ACTAVIS LLC; AND)
(13) ACTAVIS PHARMA, INC.,)
19 f/k/a WATSON PHARMA, INC.,)
)
20 Defendants.)

21

TRANSCRIPT OF PROCEEDINGS
22 **HAD ON DECEMBER 5, 2017**
AT THE CLEVELAND COUNTY COURTHOUSE
23 **BEFORE THE HONORABLE THAD BALKMAN**
DISTRICT JUDGE
24

25 REPORTED BY: ANGELA THAGARD, CSR, RPR

1 defendants are moving to dismiss claims where plaintiffs are
2 saying that these medicines are not effective for what they
3 were approved for, or that they basically should have said that
4 their products, the risks don't -- the risks outweigh the
5 benefits, or anything that's squarely, and most of what I said
6 in the complaint, I think is preempted.
7 And to answer your question directly, and hopefully I
8 have, to the extent that there would be a claim of a fraudulent
9 or off label marketing above and beyond, and again, I think you
10 hit on the one, the pseudoaddiction one, again, I can argue
11 that I think it's covered here, but that would be one that it
12 might be a harder argument for me to make than it would be with
13 respect to the others.
14 THE COURT: Okay. Thank you, Mr. Cheffo. I
15 appreciate it.
16 Mr. Burrage, you want to respond to those arguments, and
17 then I'll let the other defendants go?
18 MR. BURRAGE: Yes, your Honor. With regard to the
19 preemption issue, my co-counsel, Brad Beckworth, will address
20 those issues.
21 THE COURT: Sure.
22 Mr. Beckworth?
23 MR. BECKWORTH: May it please the Court. Your Honor,
24 it's a pleasure to be here. I appreciate the opportunity to
25 present our arguments.

1 You know, the first thing I would say is that counsel for
2 Purdue admitted there's an issue with opioids. I think that
3 may be the understatement of the case so far. I don't think
4 there's an issue with opioids. I think there's an epidemic
5 with opioids. I think there's a crisis with opioids.
6 I think it's probably already the worst, most severe
7 public health crisis this state and indeed the country has ever
8 seen, and I think as the years roll on, we'll realize and look
9 back at today and know we were just at the tip of the iceberg
10 at seeing the consequences of the conduct that these
11 gentlemen's clients caused in this state.
12 Now, while we heard them admit that there was an issue
13 with opioids, we didn't hear them admit who started it. It was
14 started in 1996 with Purdue, in their aggressive marketing
15 campaigns, which we're going to talk about today. But I don't
16 think there can be any dispute that the genesis of why we're
17 all here today started with the Sackler family and their
18 company, Purdue, and then everyone else conspiring with them
19 and on their own to sell these drugs at the great deadly
20 consequence of addiction and death here in the state of
21 Oklahoma.
22 And I also think that it's interesting we didn't hear
23 anything from Purdue about the fact that while they want our
24 claims to be something they're not, they didn't want to talk
25 about what they are, which is claims largely predicated on

1 mismarketing and misbranding, and that this company pled guilty
2 to criminal conduct for exactly what we're alleging here today,
3 and that that conduct still continues today and never stopped
4 after that criminal conduct was admitted to.
5 Now, your Honor, one other thing that was omitted in that
6 too was that the arguments that Purdue and all the defendants
7 raise on preemption and primary jurisdiction were rejected not
8 once but twice by the Northern District of Illinois.
9 Now, we take issue that they've relied on such heavy -- so
10 heavily on federal case law, but it's interesting to me that
11 they rely on that Chicago case for other issues that I'm sure
12 the other folks will talk about today. But they don't talk
13 about it in the context that they lost that argument twice in
14 the preemption and primary jurisdiction context.
15 Your Honor, before I get into the crux of our response,
16 just to kind of give the Court a little roadmap of what we're
17 going to do today if the Court will allow us, I'm going to get
18 into some facts about the marketings I think that are germane
19 to the issue of preemption, but Mr. Whitten is going handle the
20 bulk of that.
21 I know he has a fairly detailed presentation on our
22 factual allegations and just kind of the overall fact pattern
23 that we're dealing with here. He'll also handle the other
24 issues related to dismissal related to specific claims of some
25 of the defenses that the defendants brought up.

EXHIBIT B

1 IN THE DISTRICT COURT OF CLEVELAND COUNTY

2 STATE OF OKLAHOMA

3

STATE OF OKLAHOMA, ex rel.,	)	
4 MIKE HUNTER	)	
ATTORNEY GENERAL OF OKLAHOMA,	)	
5	)	
Plaintiff,	)	
6	)	
vs.	)	Case No. CJ-2017-816
7	)	
(1) PURDUE PHARMA L.P.;	)	
8 (2) PURDUE PHARMA, INC.;	)	
(3) THE PURDUE FREDERICK	)	
9 COMPANY;	)	
(4) TEVA PHARMACEUTICALS	)	
10 USA, INC;	)	
(5) CEPHALON, INC.;	)	
11 (6) JOHNSON & JOHNSON;	)	
(7) JANSSEN PHARMACEUTICALS,	)	
12 INC.;	)	
(8) ORTHO-McNEIL-JANSSEN	)	
13 PHARMACEUTICALS, INC.,	)	
n/k/a JANSSEN PHARMACEUTICALS;	)	
14 (9) JANSSEN PHARMACEUTICA, INC.	)	
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15 INC.;	)	
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16 ACTAVIS PLC, f/k/a ACTAVIS,	)	
INC., f/k/a WATSON	)	
17 PHARMACEUTICALS, INC.;	)	
(11) WATSON LABORATORIES, INC.;	)	
18 (12) ACTAVIS LLC; AND	)	
(13) ACTAVIS PHARMA, INC.,	)	
19 f/k/a WATSON PHARMA, INC.,	)	
	)	
20 Defendants.	)	

21

TRANSCRIPT OF PROCEEDINGS
22 **HAD ON AUGUST 30, 2018**
AT THE CLEVELAND COUNTY COURTHOUSE
23 **BEFORE THE HONORABLE THAD BALKMAN**
DISTRICT JUDGE

24

25 REPORTED BY: ANGELA THAGARD, CSR, RPR

1 made -- we have not presented any illusions about the fact that
2 we intend to use statistical modeling to present that claim.
3 That is something that is done in false claims cases.
4 We'll at some point present that issue to Judge
5 Hetherington when we talk about what the discovery scope should
6 look like with respect to our responses. It's not uncommon at
7 all in false claims cases. It's not uncommon here.
8 Mr. Burrage and Mr. Whitten successfully tried the Burgess
9 case where statistical sampling was used there on a bad faith
10 fraud claim that was affirmed by the Supreme Court. It's not
11 an unheard of issue. In fact, it's quite common.
12 Our nuisance claim is different, though, your Honor. The
13 nuisance claim doesn't require intent. It doesn't require
14 reliance. It doesn't require proof of fraud. It requires
15 unlawful conduct.
16 And as we talk about how this case gets presented, going
17 back to the history a little bit, we had an opioid crisis and
18 epidemic in this country around 1870 to 1900; people coming
19 back from the civil war with a lot of problems. And we had
20 doctors and others that were giving away heroin and
21 opioid-based products. It was really bad. It was a national
22 epidemic.
23 Through education and outreach, the government was able to
24 stop that problem. In 1915 there was a law that was passed
25 that dealt with the controlled substances, and then we had

1 prohibition that came after it. But a lot of what happened
2 with those laws was unnecessary by that time because we had
3 educated the public and doctors about the dangers associated
4 with opioid addiction and abuse and misuse.
5 One of the things that had to happen was not only that we
6 educated doctors, but that folks that had been prescribing and
7 giving away those types of drugs had to get out of the system,
8 and we had to have different, better educated, and differently
9 educated folks come into the system and understand that this
10 was not the way to treat pain in this country.
11 From 1915 to 1996, we didn't have this problem. The
12 opioid epidemic had been discovered and it had been caged and
13 it was not a problem. Yes, we had some heroin. Yes, we had
14 some Oxycodone related issues; percodan -- or percocet created
15 some problems. But we didn't have a widespread opioid
16 epidemic. We didn't.
17 1996, Purdue let the lion out of the cage, and it has run
18 wild and it has destroyed parts of this country state by state.
19 And you can watch it move across the map on a timeline and see
20 how it got here. But that's what happened.
21 You can trace it to a very specific point in time, and
22 that is when OxyContin was brought to market and promoted in an
23 aggressive, concentrated, and targeted way to consumers and
24 doctors, practitioners, prescribers, and pharmacists across
25 this country. That's what happened. That's what we're dealing

1 with.

2 And so this case on the nuisance claim will be very
3 simple. Is there a crisis; does it affect the public health.
4 Does it affect the public at large, and did the defendants
5 commit some unlawful act that got us there.

6 But that unlawful act doesn't have to be intent and it
7 doesn't have to be fraud and it doesn't require reliance and it
8 doesn't require clear and convincing evidence. And it really
9 is that simple. I'm not saying the case is simple. It's not.
10 It is complex and it is hard.

11 And I'll just leave you with this. We've heard a lot
12 about Tobacco because it was a very important case. As
13 Mr. Brody talked about, I think he worked at the Department of
14 Justice during part of their Tobacco endeavors. It's been an
15 important part of my life and our firm.

16 But hearing somebody that wasn't involved in that case
17 talk about what actually happened there is kind of like yogi
18 bear used to say, it's deja vu all over again. Judge Folsom
19 trifurcated that case.

20 If you look at that order, what he said about Rule 42(B)
21 is it provides a very important mechanism that is desperately
22 needed in this day of complex litigation. That was in 1997.
23 That was one year after Purdue let the lion out of the cage.
24 There is a lot that has happened since then.

25 And there are courts, state courts and federal courts

1 across this country, who have relied upon whatever their
2 version of what this rule is to bifurcate trials, whether by
3 claim or by issue.
4 I would submit to the Court that this can be done. I
5 would submit to the Court that it should be done. And I would
6 submit to the Court that one of the great powers you'll have,
7 if you choose to use one jury for this, is that -- we talk
8 about efficiency and economy and witnesses, you know. You have
9 the power to control us as lawyers and the parties on how we
10 present our claims and facts to a jury.
11 And if we get to the second phase and issues have been
12 decided or facts that you've already seen, your Honor,
13 presented to the jury, and you understand them better, the same
14 jury is sitting there and they've already heard it, I think you
15 will be able to narrow quite heavily how and what is presented
16 to the jury as we go forward with those other issues.
17 So I don't mean to say it's simple in the sense that it's
18 not important, and this is a heavy issue. It is. But I think
19 putting this nuisance claim out on its own in the phase 1 is
20 the right way to go. Thank you, your Honor.
21 THE COURT: Thank you, Mr. Beckworth.
22 Go ahead.
23 MR. BRODY: Can I just make one point in response,
24 and it's a very simple point, your Honor. The mere fact that
25 elements may vary from count to count makes no difference for