



STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk

MAY 03 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. 13 SEEKING
TO EXCLUDE EVIDENCE OF OTHER ALLEGED WRONGFUL ACTS

REDACTED VERSION

THIS DOCUMENT WAS FILED IN ITS ENTIRETY APRIL 26, 2019,
UNDER SEAL
PER COURT ORDER DATED APRIL 16, 2018

Defendants Janssen Pharmaceuticals, Inc. (“Janssen”)¹ and Johnson & Johnson (“J&J”) move this Court for an order excluding from trial all evidence and argument involving J&J’s or Janssen’s unrelated alleged wrongful acts, including those alleged in unrelated litigation or investigations. Such statements should be excluded because they are irrelevant to the issues to be decided at trial, would unfairly prejudice Janssen and J&J, would unnecessarily prolong the trial, constitute improper propensity evidence, and are inadmissible hearsay. *See* 12 O.S. §§ 2401, 2402, 2403, 2404. Janssen and J&J respectfully request that their Motion *in Limine* be granted, and for such other relief as the Court deems just and proper.

BRIEF IN SUPPORT

In support of this Motion, the Defendants show the following:

I. INTRODUCTION

This case is about FDA-approved pain-management opioid products and how manufacturers marketed them. It is not about talcum powder, antipsychotic drugs, pelvic mesh, or any of Janssen or J&J’s numerous other non-opioid products. Yet the State hopes to knit these disparate threads together by introducing evidence about allegations of unrelated wrongs against J&J and Janssen, including those alleged in investigations or litigation. Well-established Oklahoma law prohibits this improper use of “other wrongs” evidence to prove liability for the wrongs alleged here. Evidence of other alleged wrongs is also inadmissible because it is irrelevant, prejudicial, and likely to waste time. And much of this evidence would amount to nothing more than inadmissible hearsay. This Court should grant this Motion *in Limine* and preclude this evidence at trial.

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

II. ARGUMENT

The State has repeatedly referred to Janssen and J&J's other products and to alleged wrongs connected to those products:

- Relying on a news summary, the State recently argued that “the public is only now learning that concealing the deadly and known risks associated with its products represents the *modus operandi* of J&J, as the U.S. Department of Justice has now issued subpoenas to J&J regarding undisclosed tests conducted in the 1970s about the risk of cancer that accompanies J&J's baby powder products.” See Ex. A, State's Mot. for De-Designation of Conf. Docs. (Feb. 26, 2019) (“State's Motion for De-Designation”) at 4-5 (citing Ex. B, *DOJ and SEC subpoena Johnson & Johnson in talc power asbestos probe*, NBC News, Feb. 21, 2019 (“NBS News summary”)).
- The State filed a motion to compel seeking documents related to a settlement and guilty plea that ended a government investigation into whether Janssen promoted antipsychotic drug Risperdal for the treatment of dementia, a condition for which it lacked FDA approval. See Mot. to Compel Production of Corporate-Integrity Monitoring Records, No. CJ-2017-816 (Mar. 15, 2019) at 4.

The Court should exclude these types of references and arguments from the trial.

Other alleged wrongs evidence is inadmissible propensity evidence. The State hopes to use “other wrongs” evidence for a purpose expressly prohibited by Oklahoma law: to demonstrate an alleged *modus operandi*. Evidence of “other crimes, wrongs, or acts is not admissible . . . to show action in conformity therewith.” 12 O.S. § 2404(B). In other words, courts do not admit evidence of “other wrongs” to show a defendant's propensity to commit an alleged wrong. See *id.*; *Walters v. Monarch Life Ins. Co.*, 57 F.3d 899, 903 (10th Cir. 1995) (affirming exclusion of evidence of “other wrongs” and respective litigation). The alleged wrongs in the unrelated investigations or litigation have nothing to do with the motives behind J&J's or Janssen's promotion of opioid products. See *Hopkins AG Supply LLC v. Brunswick Cos.*, 2019 WL 386860, at *3 (10th Cir. Jan. 30, 2019) (evidence of unrelated fraudulent acts is irrelevant to whether the defendant had an “intent” to commit the alleged fraudulent conduct at issue). And no exception

applies here. 12 O.S. § 2404(B) (“other wrongs” evidence is “not admissible” unless it is offered as “proof of motive,” “intent,” or the like). The Court should exclude this evidence.

Evidence of other alleged wrongs is not relevant. Evidence is relevant and admissible only if it “tend[s] 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, 2402. “[T]he commission of an act charged against a person may not be proved by showing a like previous act to have been committed by the same person.” *Harrod v. Sanders*, 1929 OK 228, 278 P. 1102, 1105, *overruled on other grounds by Wolff v. Okla. Ry. Co.*, 1939 OK 113, 87 P.2d 671. Here, disputed claims that J&J knew about alleged harmful effects of its talcum powder products or promoted Risperdal to treat an illness outside its FDA-approved indication have no bearing on the subject matter of this case—the marketing of FDA-approved opioid products. *James v. State Farm Mut. Auto. Ins. Co.*, 1991 OK 37, 810 P.2d 365, 370 (allegations of discrimination in an unrelated lawsuit inadmissible under section 2402 because it had no bearing on claims in pending matter).

Evidence of other alleged wrongs is unduly prejudicial. If this were a jury trial, the Court would surely exclude evidence of other alleged wrongs as unduly prejudicial and confusing. *See, e.g., Myers v. Mo. R.R. Co.*, 2002 OK 60, ¶37, 52 P.3d 1014, 1033 (excluding under Rule 2403 evidence of the defendant’s other wrongs, including “railroad policies illustrating . . . indifference to safety” and prior safety violations); *James*, 1810 P.2d at 370 (excluding evidence of wrongs alleged in unrelated litigation because the “jury might be confused and misled by [the] allegations . . .”). Though some courts hold that prejudice exclusions are unnecessary in bench trials, *see, e.g., United States v. Kienlen*, 349 F. App’x 349, 351 (10th Cir. Oct. 19, 2009), those decisions have little application here where the concern is not about the judge in this case but about exposing

prejudicial information to millions of Americans, including countless prospective jurors in hundreds of matters pending against Janssen and J&J across the country. The Court's decision to allow cameras in the courtroom means that any prejudicial evidence admitted here will infect each and every opioid-related trial that proceeds after this one. The Court should therefore bar any such evidence. *See State of New Jersey v. Miller*, 165 A.2d 829, 831 (N.J. App. Div. 1960) ("Even in a trial without jury, a defendant should not be required to contend with inadmissible evidence, where it appears that it may have a prejudicial effect." (citation omitted)).

Admission of other alleged wrongs evidence would waste time. If the Court admits other-wrongs evidence, J&J and Janssen will need to introduce rebuttal evidence to dispute those allegations, creating a wasteful and unnecessary trial within a trial. *See, e.g., Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988) (excluding evidence of other wrongs because its admission would create "a trial within a trial"); *see also* 12 O.S. §§ 2403.

Other alleged wrongs evidence should be excluded to the extent it is inadmissible hearsay. The State's "other wrongs" evidence includes out-of-court statements—such as news reports or evidence of prior litigation—that amount to inadmissible hearsay under section 2801 and 2802 of the Oklahoma Evidence Code. *See* Ex. A, State's Motion for De-Designation at 4-5 (citing Ex. B, NBC news summary). The Court must exclude this inadmissible evidence. For example, the news summary regarding talcum powder is an out-of-court statement that relies on yet another out-of-court statement. Ex. B, NBC News summary at 1. *See also Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir. 2002) (evidence of wrongs alleged in "a prior, unrelated case" is inadmissible hearsay when offered to prove that the defendant committed the alleged wrongs). Such evidence is inadmissible hearsay and should be excluded.

III. CONCLUSION

The Court should grant Janssen and J&J's Motion *in Limine* and issue an order barring the State from introducing any evidence or argument about Janssen's or J&J's other alleged wrongful acts, including in unrelated litigation or investigations.

Dated: April 26, 2019

Respectfully submitted,

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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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EXHIBIT A

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

vs.

- (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.

STATE OF OKLAHOMA
CLEVELAND COUNTY } S.S.

FILED

FEB 26 2019

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816

REDACTED FOR PUBLIC FILING

UNREDACTED VERSION FILED
UNDER SEAL

**THE STATE'S MOTION FOR DE-DESIGNATION OF ALLEGED
CONFIDENTIAL DOCUMENTS AND BRIEF IN SUPPORT**

The State of Oklahoma ("State") moves for an order from this Court de-designating documents that Defendants Janssen Pharmaceuticals, Inc. and Johnson & Johnson (collectively "J&J") have produced in this litigation, yet improperly marked as "confidential" under the Protective Order in order to unjustifiably shield this information from the eyes of the public. With this Motion, the State asks this Court to end J&J's secrecy once and for all.

motor vehicles.⁵ In 2012, Oklahoma had the fifth-highest unintentional poisoning death rate and prescription opioids contributed to the majority of these deaths.⁶ In 2014, Oklahoma's unintentional poisoning rate was 107% higher than the national rate.⁷ There are more prescription drug overdose deaths each year in Oklahoma than overdose deaths from alcohol and all illegal drugs combined.⁸ Oklahoma leads the nation in non-medical use of opioid painkillers.⁹ And, in 2016, Oklahoma ranked number one in the nation in milligrams of opioids distributed with approximately 877 milligrams per adult resident.¹⁰

In the midst of this Public Health Emergency, Oklahomans deserve answers. Our Legislature, Governor, policymakers and doctors need to know the truth about how one particular company, J&J, inserted itself into our State and sought to influence every opioid-related decision the State made or considered—from scheduling to swallowing. This need exists now more than ever because our Legislature is currently in Session, and that Session will end as this trial begins. By then it will be too late. Yet, J&J continues to fight to keep these answers concealed. In the dark. Away from the public.¹¹

In his Public Health Emergency Declaration and subsequent speeches on the issue, President Trump has called on “every state, local, and Federal agency” to take up arms in combatting this Public Health Emergency.¹² The Oklahoma Legislature has enacted numerous Bills aimed at addressing this crisis and cleaning up the catastrophe Defendants created over the

⁵ Petition, ¶5.

⁶ *Id.*, ¶23.

⁷ *Id.*, ¶24.

⁸ *Id.*, ¶25.

⁹ *Id.*, ¶27.

¹⁰ *Id.*, ¶26.

¹¹ As demonstrated below, J&J continues this course despite the plain fact that J&J cannot meet its burden of establishing that documents regarding products and entities it divested itself of in 2016 are entitled to any protection, let alone establishing “good cause” by showing the particular harm or prejudice that will occur if the designation is removed.

¹² See Remarks by President Trump on Combatting the Opioid Crisis (Mar. 19, 2018), available at <https://www.whitehouse.gov/opioids/>.

past Legislative Sessions. And, the Legislature is *currently* considering more and more legislation in the current Session. See Exhibit 6.

However, to-date, J&J has managed to shield from public scrutiny J&J's infiltration of every level of local, state and national government. The Legislature most certainly deserves to be fully informed of the facts revealed in this litigation in order to continue its urgent efforts to fight this Public Health Emergency. Now. In the current Legislative Session. Before another Bill comes to the Floor. Before another life is lost.

The public, just like the Oklahoma Legislature, deserves to know the full extent of J&J's efforts to influence policymakers at all levels of government in order to increase sales of their (and their co-conspirators') drugs. The public recently received a glimpse into the answers to these questions, when the Complaint against Purdue filed by the Attorney General of the Commonwealth of Massachusetts became public.¹³ The revelations in the Massachusetts Complaint put the world on notice about Purdue. And, the public outcry that followed, including protests by those who lost their loved ones to Defendants' deadly scheme, was deafening.¹⁴ It is sad that Oklahomans have to learn about this case from a document filed in Massachusetts because of improper confidentiality designations. But, it is even sadder that the policymakers of this State have no idea about the role J&J played in creating the crisis in Oklahoma. J&J was there arm-in-arm with Purdue (and Teva) the whole way.

However, the public disclosure of Purdue's sinister actions is a drop in the bucket compared to the evidence generated in this litigation, demonstrating precisely how J&J—a "family company"—acted as the kingpin behind this Public Health Emergency, profiting at every stage.

¹³ See, e.g., NPR.org, *Lawsuit Details How The Sackler Family Allegedly Built an OxyContin Fortune* (Feb. 1, 2019), available at <https://www.npr.org/sections/health-shots/2019/02/01/690556552/lawsuit-details-how-the-sackler-family-allegedly-built-an-oxycontin-fortune>.

¹⁴ See, e.g., NYTimes.com, *Guggenheim Targeted by Protesters for Accepting Money From Family With OxyContin Ties* (Feb. 9, 2019), available at <https://www.nytimes.com/2019/02/09/arts/protesters-guggenheim-sackler.html>.

Indeed, the public is only now learning that concealing the deadly and *known* risks associated with its products represents the *modus operandi* of J&J, as the U.S. Department of Justice has now issued subpoenas to J&J regarding undisclosed tests conducted in the 1970s about the risk of cancer that accompanies J&J's baby powder products.¹⁵ Urgent, immediate and complete exposure to the public of J&J's primary role in creating this public health crisis has become paramount.

With this Motion, the State asks this Court—in the name of the public health of Oklahoma citizens—to end J&J's secrecy and bring this urgent information to public light. The public and policymakers should know whether any of the following occurred at the direction of J&J (of course, if they did not occur, then J&J should have no problem agreeing to make all of its documents public):

- Did J&J target children?
- Did J&J target Veterans returning from deployment?
- Did J&J target the elderly?
- Did J&J deploy sales representatives to Oklahoma, like Purdue did?
- Did J&J block legislation and regulatory action aimed at limiting opioid availability?
- Did J&J pay “neutral” third parties as part of its internal marketing plan?
- Did J&J partner with Purdue?

These are questions to which the public and Oklahoma policymakers deserve urgent answers. And, these answers are currently hidden behind J&J's improper confidentiality designations that this Court can end by granting this Motion.

A few examples demonstrate the urgency and public import of such an action by this Court.

¹⁵ See, e.g., NBCNews.com, *DOJ and SEC subpoena Johnson & Johnson in talc powder asbestos probe* (Feb. 21, 2019), available at <https://www.nbcnews.com/business/business-news/doj-sec-subpoena-johnson-johnson-talc-powder-asbestos-probe-n973901>.

In his Public Health Emergency Declaration, President Trump identified children as among those most “devastated” by this public health crisis.¹⁶ But to-date, the public has not seen the full truth—that J&J specifically ██████████ in its campaign to addict ██████████ ██████████ to its deadly heroin pills and patches. Not just any ██████████. There is nothing confidential, proprietary, or moral about J&J’s campaign to target ██████████ in order to increase its drug sales. ██████████ Oklahoma’s most vulnerable populations—██████████—deserve to know this information in order to protect ██████████ from becoming the next victims of addiction and/or death, courtesy of J&J—a so-called “family company.” So does the Legislature. And allowing J&J to continue to suppress this truth not only belies President Trump’s call to action, but it puts the lives of Oklahomans in danger.

In his Public Health Emergency Declaration, President Trump informed the country that “since the 1990s, there has been a dramatic rise in opioid pain medication prescriptions.”¹⁷ But to-date, J&J has managed to shield from public scrutiny that it was J&J—through a web of foreign and domestic wholly owned J&J subsidiaries, including Tasmanian Alkaloids Pty Limited (“Tasmanian Alkaloids”) and Noramco, Inc. (“Noramco”)—that created, grew, imported and supplied to J&J and its other co-conspirators, including Purdue, the narcotic raw materials necessary to manufacture the opioid pain medications thrust upon the unsuspecting public since the 1990s. There is nothing confidential or proprietary about these facts.

Indeed, in the midst of the public backlash over this crisis, **J&J divested itself of its global “pain management franchise,”** and these supply-chain entities specifically, in 2016. J&J faces no competitive disadvantage by publicly disclosing information about these companies it no longer owns. The public, on the other hand, deserves to know the face and name of the source, supplier

¹⁶ See Presidential Memorandum for the Heads of Executive Departments and Agencies (Oct. 26, 2017), available at <https://www.whitehouse.gov/opioids/>.

¹⁷ See Presidential Memorandum for the Heads of Executive Departments and Agencies (Oct. 26, 2017), available at <https://www.whitehouse.gov/opioids/>.

basis for its pre-July 2016 documents, including the sample documents submitted here, to remain confidential, the Court should grant the State's Motion and order that J&J's pre-July 2016 documents be de-designated and non-confidential.

In sum, the public interest outweighs any privacy concerns by J&J. The State's Motion begs two pivotal questions: what is the confidential nature of J&J's pre-July 2016 documents and where is the competitive harm if they were disclosed? The fact is there is no confidential information at issue and no harm (other than rightful shame) that would be suffered if the subject documents lost their confidential designation. While these materials reveal a lot about J&J, legitimate confidential or proprietary concern is nowhere on that list. Accordingly, given the overwhelming public need and interest in J&J's pre-July 2016 documents, the Court should strike the confidentiality designations made by J&J and order that J&J's pre-July 2016 documents be exposed to the public.

CONCLUSION

WHEREFORE, the State respectfully requests that the Court grant its Motion to De-designate Confidential Documents and award such further relief deemed equitable and just.

Respectfully submitted,



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EXHIBIT B



BUSINESS NEWS

DOJ and SEC subpoena Johnson & Johnson in talc powder asbestos probe

Johnson & Johnson reportedly knew for decades that small amounts of asbestos, a known carcinogen, had been occasionally found in its talc and powder products.



Feb. 21, 2019, 3:52 AM PST

By Reuters

Johnson & Johnson said Wednesday it has received subpoenas from the Justice Department and the Securities and Exchange Commission related to litigation involving alleged asbestos contamination in its signature Baby Powder product line.

The company said it intends to "cooperate fully with these inquiries and will continue to defend the Company in the talc-related litigation."

The disclosure in Johnson & Johnson's annual report on Wednesday is the first time that the company disclosed it had received subpoenas from federal agencies regarding its talc powder products.

The Justice Department and the SEC did not immediately respond to requests for comment.

A Reuters report on Dec. 14 revealed that Johnson & Johnson knew for decades that small amounts of asbestos, a known carcinogen, had been occasionally found in its talc and powder products, according to tests from the 1970s to the early 2000s – information it did not disclose to regulators or the public.

The Reuters article prompted a selloff in Johnson & Johnson shares, erasing about \$40 billion from the company's market value in one day, and a public relations crisis as the healthcare conglomerate faced widespread questions about the possible health effects of one of its most iconic products.

4/4/2019

DOJ and SEC subpoena Johnson & Johnson in talc powder asbestos probe

Johnson & Johnson said that the federal inquiries "are related to news reports that included inaccurate statements and also withheld crucial information" that had already been made public.

The company added that "decades of independent tests by regulators and the world's leading labs prove Johnson & Johnson's baby powder is safe and asbestos-free, and does not cause cancer."

Johnson & Johnson faces lawsuits involving 13,000 plaintiffs who allege use of its talc products, including Baby Powder, caused cancer.