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

OBJECTION TO STATE'S PROPOSED JUDGMENT AND MOTION TO CORRECT OR MODIFY JUDGMENT UNDER 12 O.S. § 1031.1 FOR DEFENDANTS JOHNSON & JOHNSON AND JANSSEN PHARMACEUTICALS INC. AND BRIEF IN SUPPORT

INTRODUCTION

The State's proposed final judgment is an exercise in overreach. As set forth below, it impermissibly disregards the Court's judgment, announced on August 26, that "the State did not present sufficient evidence of the amount of time and costs necessary, beyond year one, to abate the Opioid Crisis." *See* Judgment After Non-Jury Trial at 41 (Aug. 26, 2019) ("August 26 Judgment"). It also attempts to backtrack from the concession, made in the State's own proposed findings and conclusions, that the final judgment amount must be offset by the amounts of the settlements already entered by Purdue and Teva. *See* Notice of the State's Proposed (1) Final Judgment & (2) Findings of Fact and Conclusions of Law, at 4 (July 31, 2019). And it turns a blind eye to a calculation error in the August 26 Judgment that mistakenly overstates the Abatement Plan's claimed yearly cost for a component of its NAS-related services, inflating the Court's intended judgment amount by over $100 million. *See* August 26 Judgment at 35 (inadvertently calculating Abatement Plan's average yearly cost for developing and disseminating NAS treatment evaluation standards as $107,683,000 rather than $107,683).

For all of these reasons, and others discussed below, the State's proposed judgment should be rejected in its entirety and the Court should exercise its authority under 12 O.S. § 1031.1 to modify and correct the August 26 Judgment to provide Defendants (collectively referred to as "Janssen") a credit for the amount of the Purdue and Teva settlements and to correct the inadvertent mathematical error in the NAS-related services component of the Abatement Plan.

I. THIS COURT'S FINDINGS AND CONCLUSIONS DO NOT PERMIT THE STATE TO RELITIGATE ITS CASE

Janssen objects to the State's request for an order "establishing a process … to review … any actions and costs necessary for future years, including whether Defendants are required to

replenish the Abatement Fund," Ex. A, State's Proposed Judgment, at 4, and to similar proposed language suggesting that this Court has authorized the State to retry its case in future years, *see id.* at 3 ("Defendants are … **ORDERED** to abate the public nuisance they created, as directed by this and any future orders of this Court."); *id.* ("For year one of the abatement process, the Court adopts the State's abatement plan as modified and set forth in the Court's Judgment after Non-Jury Trial."). The State has already had the chance to prove its case, and this Court concluded that the State "did not present sufficient evidence of the amount of time and costs necessary, beyond year one, to abate the Opioid Crisis." August 26 Judgment at 41. This Court should not change this holding.

The Court's insufficiency finding forecloses the State from a second bite at the apple. Under Oklahoma law, "[w]here an entire right has been once litigated and passed on upon its merits, it should not be stirred up again. To allow a second trial in such a case would be against public policy," *Harness v. Myers*, 1930 OK 61, ¶ 31, 288 P. 285, 291, and would violate due process by subjecting Janssen to repeated attempts to prove the same allegations, ignoring res judicata and estoppel rules, and depriving Janssen of the procedural and substantive rights standardly granted to Oklahoma defendants.

In addition, the State's proposed proceeding violates separation of powers. In pronouncing its judgment, the Court explained that whether "additional programs and funding are needed over an extended period of time … are determinations to be made by our legislators and policymakers." Hr'g Tr. (Aug. 26, 2019) at 6. The State's contrary request to instead continuously litigate its case via de facto annual appropriations hearings would encroach on legislative and executive authority and deepen the separation of powers problems inherent in the State's requested remedy. *See Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 2007 OK 30,

158 P.3d 1058. It has no basis in this Court's August 26 Judgment, and no place in the Court's final judgment.

In addition, because this Court found sufficient proof only for the first year of the State's abatement plan, and even for that year did not find every item requested to be reasonable and necessary, the State's proposed judgment errs in asserting, without qualification, that "[t]he actions and costs outlined in the State's proposed abatement plan are reasonable and necessary to abate the public nuisance." Ex. A, Proposed Judgment, at 3. That sweeping statement conflicts with this Court's August 26 Judgment and should not be included in any final judgment.

II. JANSSEN IS ENTITLED TO A CREDIT FOR THE PURDUE AND TEVA SETTLEMENTS

Janssen objects to the State's suggestion that Janssen is not entitled to a credit for the State's settlements with Teva and Purdue. The State's assertion that Janssen never requested such a credit is wrong—Janssen expressly demanded a settlement credit in the parties' joint Pretrial Conference Order, and Janssen did so again in its Trial Brief. *See* Pretrial Conference Order (May 23, 2019) at 52; Trial Br. of Defs. Johnson & Johnson and Janssen Pharmaceuticals Inc. (May 24, 2019) at 104. Moreover, Oklahoma law allows defendants to request the findings supporting a settlement credit even *after* the factfinder's initial liability ruling. *See Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, ¶ 20, 933 P.2d 272, 280 (noting finding of third-party fault supporting settlement credit could be requested through "either (1) a pre-submission objection to the trial court's form of verdict .... or (2) a post-submission objection—before the jury's discharge—when the verdict was brought into the courtroom but before its acceptance by the trial judge"). That rule makes sense: If defendants had to request such a finding before a liability determination, they would frequently be forced to concede the validity of the liability theories against them by arguing that those same theories make similarly situated settling parties

liable. Consistent with the Oklahoma rule, Janssen reiterates that it is entitled to a credit for the settlements entered by Purdue and Teva for claims the State has at all times asserted jointly against them and Janssen. *See* 12 O.S. § 832(H).

Indeed, Janssen's entitlement to the credit is so uncontroversial that the State's own initial Proposed Final Judgment, appended to its Proposed Findings of Fact and Conclusions of Law, conceded that "Defendants are entitled to a settlement credit in the amount of $355,000,000 to account for the settlements entered between the State and the former defendants who settled and were dismissed." *See* Notice of the State's Proposed (1) Final Judgment & (2) Findings of Fact and Conclusions of Law (July 31, 2019) at 4. As the State recognized when it made that concession, the trial evidence entitles Janssen to a settlement credit under 12 O.S. § 832(H).

That Janssen continues to maintain that the State's case suffered fundamental legal and factual flaws does not change that conclusion: The same reasoning the Court used to find Janssen liable for the opioid abuse crisis applies equally to Purdue and Teva, as evidenced by the Court's own findings. *See Nichols,* 1996 OK 118, ¶ 19, 933 P.2d at 280 ("A judgment debtor's § 832H claim to settlement proceeds' credit is conditioned upon the settling party's liability in tort for the same injury.") (emphasis omitted). In support of its statement that Janssen "act[ed] in concert with others," the Court cited to trial evidence accusing Purdue of engaging in same type of conduct alleged against Janssen.[1] Similarly, in describing Noramco's and Tasmanian Alkaloids'

[1] *See* August 26 Judgment at 9 (*citing* June 26, 2019 (PM) Trial Tr. (White Test.) at 30:16-20 ("in 1996, Purdue, Johnson & Johnson, Janssen, and a host of other people … began in targeting Oklahoma and other states with this type of marketing") *and* June 13, 2019 (PM) Trial Tr. (Kolodny Test.) at 22:7-13 ("In 2007, when Purdue Pharma was convicted criminally of claiming that OxyContin was less addictive because of its extended-release formulation, Johnson & Johnson … continued to do exactly what … Purdue Pharma was convicted criminally of doing. They promoted their products as having lower abuse potential.")).

sales of raw materials, this Court repeatedly faulted Janssen for API sales to Purdue and Teva.[2] This shows that the Court believed that Teva and Purdue's conduct was also wrongful, and a cause of the opioid epidemic. But for their settlements, Purdue and Teva would have been liable under the State's nuisance theory for the same injuries for which this Court held Janssen liable. That is exactly why the State itself recognized, in its initial proposed judgment, that Janssen is entitled to a credit for the amount of their settlements. Accordingly, Janssen again requests that this Court grant it a settlement credit and reduce its award to account for the State's $355,000,000 recovery from Purdue and Teva.

III. THE STATE'S PROPOSED JUDGMENT INCORPORATES A CALCULATION ERROR INFLATING JANSSEN'S LIABILITY

The State's proposal also fails to correct a calculation error in the Court's August 26 Judgment which inadvertently inflated the amount awarded for developing and disseminating NAS treatment evaluation standards by over $107 million. From the method the Court used to calculate the amounts awarded for other abatement categories discussed in the August 26 Judgment, it is apparent that the Court intended to award for each of the identified periodic-expense categories an amount equal to the average annual expense provided in the State's abatement plan. For these NAS-related services, the abatement plan called for an annual average expenditure of $107,683. *See* State Ex. 4734 at 53.[3] Yet the Court's judgment found the yearly cost for this item to be $107,683,000, or 1,000 times greater than annual average under the Plan.

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[2] *See* August 26 Judgment at 6 ("Defendants, through these subsidiaries, supplied the following opioid APIs to other drug manufacturers in the U.S., including Purdue and Teva."); *id.* at 8 ("Through Noramco, Defendants supplied API to other opioid manufacturers, including Teva.").

[3] The State's abatement plan calculated expenses for these services over a ten-year cycle—$155,587 for the first year and $102,360 for each of the next nine, for an average of $107,683 per year over ten years. State Ex. 4734 at 53. The Court's award of $107,683,000 adds three zeros to that average, erroneously increasing Janssen's liability by $107,575,317.

August 26 Judgment at 35. No evidence supports this higher amount, which appears simply to reflect a mistaken addition of three zeros to the calculation of the annual average, yet the State's proposed judgment fails to account for this discrepancy.

The Court's final judgment should correct this inadvertent error, reducing the amount awarded for these expenses to $107,683 and avoiding a judgment that vastly exceeds the State's request and supporting evidence for this cost item.

IV. THE STATE'S PROPOSED JUDGMENT MISCHARACTERIZES THE COURT'S DEFINITION OF THE PUBLIC NUISANCE

The State's proposed judgment states that "[t]he public nuisance is the State's opioid crisis." State's Proposed Judgment, Exhibit A, at 2. That statement misreads this Court's August 26 Judgment, which found that the public nuisance was "misleading marketing of both [Janssen's] drugs and opioids generally." August 26 Judgment at 26. Janssen objects to the State's revision, which conflicts with Oklahoma law's definition of a nuisance as an "act or omi[ssion]." 50 O.S. § 1.

V. THE STATE'S PROPOSED JUDGMENT FAILS TO ADEQUATELY SPECIFY PERMISSIBLE CATEGORIES OF EXPENDITURES FOR THE AWARD

The State proposes that its recovery be unlawfully placed in an "Opioid Lawsuit Abatement Fund of the State of Oklahoma," and fails to state what constraints, if any, would then govern the recovery's distribution. Under Oklahoma law, the Attorney General must "pay into the State Treasury, immediately upon its receipt, all monies received by the Attorney General belonging to the state." 74 O.S. § 18b. Nothing in Oklahoma law authorizes the Attorney General to instead direct litigation proceeds to special-purpose funds. The creation of a similar fund for tobacco settlement proceeds required a voter-approved amendment to the Oklahoma Constitution. *See* Okla. Const., art. X, § 40 (creating Tobacco Settlement Endowment

Trust Fund). No equivalent authority allows the Attorney General to direct his award in this case in the same manner.

Although Oklahoma law requires the Attorney General to remit all cash recoveries to the Treasury, such an unconditional cash transfer is not a permissible public nuisance remedy. In proposing that the State's award be transferred to the Treasury in conformance with Oklahoma law, Janssen does not waive and continues to advance its positions that the award is not a valid public nuisance remedy and that the judgment constitutes damages that entitled Janssen to a jury trial. In addition, if this Court chooses to direct the award to a special-purpose fund, its final judgment should clearly specify the restrictions that govern disposition of the fund's proceeds.

VI. THE STATE'S PROPOSED JUDGMENT INCORPORATES FATAL LEGAL, FACTUAL, DISCOVERY, AND EVIDENTIARY ERRORS

Out of an abundance of caution, in the event this Court were to later construe this filing as a new trial motion, *see* 12 O.S. § 653(C), Janssen additionally objects to the State's Proposed Judgment on the following grounds.

1. Entry of judgment against Janssen is inappropriate because Janssen's marketing and sale of FDA-approved opioid medications was not actionable under the public nuisance statutes, 50 O.S. §§ 1 and 2. The Oklahoma Supreme Court has authoritatively construed Oklahoma's nuisance statute to regulate "a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person or entity of property lawfully possessed, but which works an obstruction or injury to the right of another." *Briscoe v. Harper Oil Co.*, 1985 OK 43, ¶ 9, 702 P.2d 33, 36. Oklahoma courts have always honored that limitation, recognizing nuisance claims only in cases involving real property use or narrow categories of conduct historically considered "nuisances per se." Under those settled principles, the sale and marketing of lawful products does not qualify as a public nuisance, and judgment therefore should be entered for Janssen.

2. The fact that some of the conduct alleged against Janssen happened to take place on Oklahoma soil does not establish a sufficient connection to property use to qualify as a public nuisance. *See, e.g.*, *State v. State Capital Co.*, 1909 OK 200, ¶ 10, 103 P. 1021, 1026 (rejecting public nuisance claim based on Oklahoma company's marketing of liquor because doing so "would be tantamount to holding that every crime was a nuisance").

3. The Court's interpretation of Oklahoma's public nuisance statutes to reach any conduct that "annoy[s], injure[s] or endanger[s] the comfort, repose, health or safety of Oklahomans," August 26 Judgment at 29, violates the Fourteenth Amendment's void-for-vagueness doctrine because it "fails to provide a person of ordinary intelligence fair notice of what is prohibited" and "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also* U.S. Const. amend. XIV, § 1. Moreover, discarding settled limitations on those statutes' scope and attaching massive liability to a novel statutory construction also unconstitutionally deprives Defendants of fair notice. *See Bouie v. City of Columbia*, 378 U.S. 347, 350-55 (1964); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 n.22 (1996).

4. The State is not entitled to recover a monetary award addressing the alleged consequences of a public nuisance. The Oklahoma nuisance statute defines a nuisance as conduct—either an "act" or an "omi[ssion]," 50 O.S. § 1—and limits the relief available to the State in a public nuisance action to "abat[ing]" a "nuisance," 50 O.S. § 11. By limiting the State to abatement of the act or omission constituting the nuisance, the statute precludes the Court's award of money to remedy the alleged consequences of Janssen's conduct.

5. A judicial remedy directing hundreds of millions of dollars toward an array of new and existing government programs violates the separation of powers under Oklahoma's Constitution.

The Oklahoma Constitution vests policymaking and fiscal decisions "exclusively in the Legislature." *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 2007 OK 30, ¶ 20, 158 P.3d 1058, 1065. That authority extends to "all rightful subjects of legislation," Okla. Const. art. V, § 36, including programs "to protect and serve the public health," *Cryan v. State*, 1978 OK CR 91, ¶ 15, 583 P.2d 1122, 1125. Because the Oklahoma Constitution vests these functions exclusively in the legislature, it bars the Court's authorization of government spending and its determination that the spending should be funded at Janssen's expense.

6. Janssen was entitled to have the State's public nuisance action tried by a jury. Oklahoma law and the U.S. Constitution require that "[i]ssues of fact arising in actions for the recovery of money ... be tried by a jury." 12 O.S. § 556; *see also* Okla. Const. art. II, § 19 ("The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Thousand Five Hundred Dollars...."); U.S. Const. amends. VII; XIV, § 1. Because the only remedy the State requested was a cash payment compensating it for expenses allegedly necessitated by Janssen's conduct, Janssen was entitled to a jury trial on the State's public nuisance claim.

7. The Court's conclusion that Janssen's marketing was false and misleading and thus an unlawful act under 50 O.S. § 1 rested on legally insufficient evidence and was against the weight of the evidence. Among other things, the State's evidence regarding Janssen's marketing consisted largely of unreliable expert testimony, including by Commissioner Terri White, Renzi Stone, and Dr. Jason Beaman. *See, e.g.*, 12 O.S. § 2702 (expert testimony must be "the product of reliable principles and methods").

8. There was insufficient evidence to support the conclusion that specific statements attributed to Janssen were false and misleading, including, but not limited to: (a) that chronic

pain was undertreated; (b) that Janssen's opioid medications were safe and effective for the treatment of chronic non-cancer pain; (c) that Duragesic was less abused than OxyContin and hydrocodone; (d) that Duragesic improved function in patients with chronic pain; (e) that doctors should be aware of the concept of pseudoaddiction; (f) that the Porter and Jick article *Addiction Rare in Patients Treated with Narcotics* was a valid data point about addiction risks; and (g) that a study by Dr. Russell J. Portenoy found a 2.6% rate of drug misuse among patients on long-term use of oxycodone for non-cancer pain. At a minimum, the Court's findings were against the weight of the evidence.

9. It was prejudicial error to admit Dr. Andrew Kolodny as an expert on eight separate topics. Dr. Kolodny served as a de facto member of the State's legal team rather than a traditional expert, and lacked qualifications on many of the subjects on which this Court admitted him as an expert. He offered days of speculative narrative testimony that allowed the State to inject hearsay and its own interpretation of evidence into the case under the imprimatur of Dr. Kolodny's asserted expertise. *See* Defendants' Motion to Strike Testimony of Dr. Andrew Kolodny (June 17, 2019); *Selvidge v. United States*, 160 F.R.D. 153, 156 (D. Kan. 1995) ("An expert witness should never become one party's expert advocate."); *Raley v. Hyundai Motor Co.*, 2010 WL 199976, at *4 (W.D. Okla. Jan. 14, 2010) (experts should not be permitted to offer opinions "that are, in substance, the arguments of counsel").

10. The Federal Food, Drug, and Cosmetic Act ("FDCA") preempts the Court's imposition of liability on Janssen for promoting its long-acting opioid medications for chronic non-cancer pain. Because Janssen's promotions qualify as "labeling" under FDA regulations, the State cannot impose a duty on Janssen to depart from its medications' labels if there is "clear evidence" the FDA would disallow the change. *See, e.g., Merck Sharp & Dohme Corp. v.*

Albrecht, 139 S. Ct. 1668, 1676-78 (2019); *Strayhorn v. Wyeth Pharm., Inc.*, 737 F.3d 378, 394 (6th Cir. 2013). The FDA's 2013 rejection of a petition requesting dosage and duration restrictions on the use of long-acting opioids for chronic non-cancer pain provides clear evidence that the FDA would not have approved a similar manufacturer-initiated label change and thus bars liability for Janssen's promotion of its medications for chronic non-cancer pain.

11. In addition, the FDCA preempts the Court's imposition of liability for statements consistent with the labels of Janssen's medications because the act vests the FDA with the power to both approve new prescription drugs and regulate their marketing and promotion, *see, e.g.*, 21 U.S.C. §§ 352(n), 355(d), as part of a comprehensive regulatory scheme that aims to give doctors and the public access to information that the FDA has found to be accurate. Imposing state-law liability for promotion consistent with FDA-approved labeling stands as an obstacle to the FDA's objective of ensuring the public's access to complete information necessary for medications' safe and effective use. *See, e.g., Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996). Accordingly, this Court cannot impose liability on Janssen for making statements consistent with its products' labeling, including representations that opioids are safe and effective for chronic pain or that prescribers should be aware that drug-seeking behavior might arise from inadequately treated pain (i.e., pseudoaddiction).

12. The First Amendment bars this Court from imposing liability on Janssen for promoting its opioids for a lawful, FDA-approved indication: The treatment of chronic non-cancer pain. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-77 (2002).

13. The Court also erred in imposing liability for statements consistent with the FDA-approved labels of Janssen's products because, under the Oklahoma nuisance statute's safe

harbor provision, "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." 50 O.S. § 4.

14. The evidence was legally insufficient to support a conclusion that Janssen's conduct was a factual or proximate cause of Oklahoma's opioid abuse crisis, or the sole factual or proximate cause thereof, and the Court's finding of causation was against the weight of the evidence. Among other things, no evidence measured the effects of Janssen's alleged conduct. The State's causation evidence consisted entirely of conclusory and unreliable expert testimony. *See* 12 O.S. § 2702 (expert testimony must be "the product of reliable principles and methods"); *Christian v. Gray*, 2003 OK 10, ¶ 36, 65 P.3d 591, 607 ("An expert's opinion on causation must be more than ipse dixit."). The evidence also showed that many others, including other pharmaceutical manufacturers, doctors, and criminal enterprises, bore causal responsibility for the Oklahoma opioid crisis.

15. The judgment against Janssen violates the Excessive Fines Clauses of the U.S. and Oklahoma Constitutions. In both criminal and civil cases the "Excessive Fines Clause limits the government's power to extract payments" intended "as punishment for some offense," *Austin v. United States*, 509 U.S. 602, 609-10 (1993), and are "grossly disproportionate" to the defendant's fault, *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019). The State's lawyers and witnesses made clear that the State's case served a punitive purpose,[4] and the resulting award

[4] *See* June 25, 2019 (AM) Trial Tr. (White Test.) at 87:13-18 (stating that Janssen is "[implying] that because we can only show they killed some of those Oklahomans … they should get to walk away scot-free. That's not right"); July 8, 2019 (AM) Trial Tr. (Beckworth Arg.) at 62:11-17 (demanding that "somebody build[] a wall around Princeton, New Jersey, that shuts this company down, … makes them come in and account and say, 'We did it, we know we did it, opioids were really bad and we oversold them and … we deceived the public and doctors'").

against Janssen resulted in disproportionate punitive liability violating the Excessive Fines Clause.

16. Janssen is entitled to judgment under *Walters v. Prairie Oil & Gas Co.*, 1922 OK 52, 204 P. 906, which holds that a plaintiff who contributes to a harm resulting from a nuisance must produce evidence that will enable the court to separate the damage inflicted by the defendants from the damage resulting from the plaintiff's acts. The evidence showed that the State, among other things: (1) gave preferential reimbursement treatment to widely abused hydrocodone and oxycodone under its Medicaid Program[5]; (2) waited for years to address "doctor shopping" among drug-seeking patients[6]; and (3) waited years to take action against Oklahoma doctors committing egregious prescription violations.[7]

17. Joint and several liability is inappropriate because Janssen did not act in concert with all of the other alleged tortfeasors whose conduct caused the Oklahoma opioid crisis, which include

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[5] June 26, 2019 (AM) Trial Tr. (White Test.) at 74:2-15 (immediate-release opioids were placed into Tier 1); Janssen Ex. 1515, DURB Meeting Packet (Feb. 13, 2013), at 29-30 ("Tier-1 products are covered with no prior authorization necessary") (*admitted June 26, 2019*); Janssen Ex. 1816, DURB Meeting Packet (July 12, 2017) at 117 (*admitted June 26, 2019*); Janssen Ex. 3875, OHCA Quality Team Day 2015 Project Application (implementing identifying quantity limits on "short-acting painkillers") (*admitted June 26, 2019*); Janssen Ex. 3757, Email regarding Supplemental Rebates at 4 (explaining that the State "appreciate[d]" Purdue's "effort to offer additional rebates and partner with the state of Oklahoma to better serve our members"); Janssen Ex. 344, August 15, 2016 SoonerCare Bulletin (*admitted June 13, 2019*) (explaining that "brand name Oxycontin will be preferred over generic Oxycodone extended-release (ER) tablets for all tablet strengths" and that 10, 15, and 20mg OxyContin strengths "are Tier-1 and available without prior authorization") (*admitted June 13, 2019*).

[6] *See* Janssen Ex. 637 (*admitted June 26, 2018*) (September 2008 email demonstrating that the State's knowledge of "very alarming" rates of doctor shopping); June 20, 2019 (PM) Trial Tr. (Hawkins Test.) at 104:17-20 (State waited until 2015 to require prescribers to check State prescription monitoring program before writing opioid prescriptions).

[7] *See, e.g.*, Janssen Ex. 218 at 6 (*admitted June 25, 2019*) (2007 Oklahoma State Board of Medical Licensure and Supervision investigation report identifying dangerous prescribing practices by suspected pill-mill doctor Ronald Myers); Janssen Ex. 595 (*admitted June 25, 2019*) (State takes action against Myers eight years later, in 2015).

other pharmaceutical manufacturers, doctors, and criminal enterprises. *Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, ¶ 10, 920 P.2d 122, 126.

18. Joint and several liability is inappropriate because the State did not suffer a "single" injury supporting this Court's imposition of joint and several liability. *See Walters*, 1922 OK 52, ¶ 4, 204 P. at 908; *Delaney v. Morris*, 1944 OK 51, ¶ 6, 145 P.2d 936, 938. The State's trial evidence demonstrated that the opioid abuse crisis is a collection of smaller, separate harms, consisting of individual injuries for individual Oklahomans, each of which has its own distinct causes. These separate harms preclude this Court's imposition of joint and several liability.

19. The Court's imposition of joint and several liability on Janssen is disproportionate, grossly excessive, and arbitrary, and therefore violates Oklahoma law and the Due Process Clauses of the United States and Oklahoma Constitutions. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); *BMW of N. Am.*, 517 U.S. at 575 (liability should not be "wholly disproportioned to the offense").

20. The Court also erred in holding Janssen jointly and severally liable because Janssen's liability is apportionable. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 643 F. Supp. 2d 461, 469-70 (S.D.N.Y. 2009).

21. The imposition of joint and several liability on Janssen without evidence of concerted action or single injury, and without considering apportionment, deviates from the ordinary Oklahoma requirements for joint and several liability and therefore deprives Janssen of due process of law. U.S. Const. amend. XIV, § 1; Okla. Const. Art. II, § 7.

22. The imposition of responsibility on Janssen to abate the entire Oklahoma opioid abuse crisis without a finding that Janssen alone proximately caused the entire crisis violates due process of law. U.S. Const. amend. XIV, § 1; Okla. Const. Art. II, § 7.

23. The State prejudiced Janssen by refusing to produce investigative files for Oklahoma doctors who committed misconduct related to opioid prescribing. Those files could have allowed Janssen to determine whether the doctors' misconduct involved Janssen medications, as well as the reasons that the State delayed in taking action against them. *See* Defendants' Motion Pursuant to 12 O.S. § 2509(C) To Exclude Evidence Or Argument That Janssen Improperly Marketed Opioids To Doctors For Whom The State Refused To Produce Requested Investigative Files (May 28, 2019).

24. Oklahoma law requires a court to grant appropriate relief to any party "deprived of material evidence" because of "a claim of governmental privilege." 12 O.S. § 2509(C). At trial, the State introduced evidence that Janssen marketed opioids to doctors for whom the State withheld investigative files under governmental privilege, impairing Janssen's defense and allowing the State to present a one-sided story. The Court prejudicially erred by failing to correct that prejudice by barring the State from basing evidence or argument on Janssen's marketing to doctors for whom the State refused to produce investigative files. *See* Defendants' Motion Pursuant to 12 O.S. § 2509(C) To Exclude Evidence Or Argument That Janssen Improperly Marketed Opioids To Doctors For Whom The State Refused To Produce Requested Investigative Files (May 28, 2019).

25. The Court prejudicially erred by refusing to compel the State to produce participant-level claims data for Oklahoma patients who received a prescription for an opioid medication. *See* Defendants' Motion to Compel Discovery Regarding Claims Data (Sept. 7, 2018).

26. The Court erred in imposing liability for speech that was fully protected by the First Amendment and Article II, § 22 of the Oklahoma Constitution. The speech for which the Court assessed liability was not "commercial speech" at all, but statements about medical and scientific questions by non-profits, advocacy groups, and doctors. All of the challenged speech addressed contested scientific and medical issues of public importance, including the science of chronic pain and the extent to which opioid medications can be effective for the long-term treatment of chronic non-cancer pain. Such speech on "public health" is "clearly a matter of public consonance," *Magnusson v. New York Times Co.*, 2004 OK 53, ¶ 12, 98 P.3d 1070, 1075, and thus "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection," *Connick v. Myers*, 461 U.S. 138, 145 (1983).

27. Even if it were determined to be "commercial speech," the speech on which the Court relied to impose liability was protected under the First Amendment because it was not false or misleading, *Pearson v. Shalala*, 164 F.3d 650, 656-58 (D.C. Cir. 1999); *see Revo v. Disciplinary Bd. of the Supreme Ct. for the State of N.M.*, 106 F.3d 929, 933 (10th Cir. 1997) (inherently misleading speech is "incapable of being presented in a way that is not deceptive"), nor otherwise subject to liability under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

28. The Court erred in imposing liability for lobbying and petitioning activities protected by the Petition Clause of the First Amendment and Article II, § 3 of the Oklahoma Constitution. The U.S. Supreme Court has held that the Petition Clause protects efforts to inform and influence policy by engaging in public advocacy and lobbying of government. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

29. The Court erred in imposing liability on Janssen for funding or otherwise associating with third-party groups and medical practitioners, many of whom engaged in speech and advocacy about the treatment of pain. Janssen's association with those third parties is protected under the First Amendment, under which "[c]ivil liability may not be imposed merely because an individual belonged to a group." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982). That remains the law even if the defendant made financial contributions. *See In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) ("Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.").

30. The Court erred in holding Janssen liable for the conduct of two former J&J subsidiaries, Noramco and Tasmanian Alkaloids, despite legally insufficient evidence to pierce the corporate veil. The rule that a parent corporation "is not liable for the acts of its subsidiaries" is a "general principle of corporate law deeply ingrained in our economic and legal systems." *United States v. Best Foods*, 524 U.S. 51, 61 (1998) (quotation omitted). The State's evidence addressed at most two of the nine factors Oklahoma courts use to determine whether a corporation can be held liable for its subsidiaries' conduct. *See Oliver v. Farmers Ins. Group of Cos.*, 1997 OK 71, ¶ 8, 941 P.2d 985, 987. The weight of the other factors—especially the subsidiaries' independent day-to-day operations—compelled a finding of corporate independence.[8] The Court's imposition of liability for conduct by Noramco and Tasmanian Alkaloids was against the weight of the evidence.

[8] *See* Grubb Depo. Tr. at 271:18-274:2 (played July 10, 2019) (testifying that Noramco owned its own manufacturing facilities, operated independently from Janssen day to day, developed its own business plans, and selected its own product lines).

31. The Court erred in imposing liability on Janssen and J&J for Noramco's and Tasmanian Alkaloids' sales of raw materials for prescription opioid medications. The Controlled Substances Act and its implementing regulations preempt state-law liability based on the federally regulated supply of raw materials. Annual quotas that the DEA sets to "insure an adequate and uninterrupted supply of ... basic classes of controlled substances," 21 C.F.R. § 1303.12(a), strictly governed Noramco's production and sale of API. Similarly, under the CSA's implementing regulations, American companies wishing to purchase narcotic raw materials from manufacturers such as Tasmanian Alkaloids had to receive explicit authorization from the DEA in the form of an import permit. The Court's imposition of liability for those federally authorized sales directly countermands the DEA's authorization and "effectively challenge[s]" the DEA's judgment that those sales were necessary to meet the nation's medical needs. *Marentette v. Abbott Labs., Inc.*, 886 F.3d 112, 117 (2d Cir. 2018); *see Barnett Bank*, 517 U.S. at 31; 21 U.S.C. § 826(a)(1) (API quota system designed to "provide for the estimated medical ... needs of the United States."); 21 U.S.C. § 952(a)(1) (CSA authorizes the importation of "such amounts of crude opium, poppy straw, [or] concentrate of poppy straw . . . as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes.").

32. In addition to preempting the State's claim, that DEA authorization pursuant to the Controlled Substances Act also forecloses liability for Noramco's and Tasmanian Alkaloids' sales because, under the Oklahoma nuisance statute's safe harbor provision, "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance." 50 O.S. § 4.

33. In addition, Noramco's and Tasmanian Alkaloids' sales could not form a basis for liability because those companies are component suppliers with no role in making the finished

product at issue. Under Oklahoma law, a component supplier can be held liable only "when [it] substantially participates in the design of the final integrated product." *Swift v. Serv. Chem., Inc.*, 2013 OK CIV APP 88, ¶¶ 21-22, 310 P.3d 1127, 1132-33.

34. The Court prejudicially erred in admitting a 1998 FDA letter criticizing certain convention posters promoting Duragesic, and in relying on that letter to impose liability. *See* State Ex. 4128, FDA Letter (*admitted June 28. 2019*). The letter arose from the FDA's special investigation of specific incidents, and thus was inadmissible hearsay not falling under any Oklahoma hearsay exception. *See* 12 O.S. § 2803(8)(d) (excluding "factual findings resulting from special investigation of a particular complaint, case or incident" from public records hearsay exception); *Ortho-McNeil-Janssen Pharm., Inc. v. State*, 432 S.W.3d 563, 579 (Ark. 2014).

35. This Court also prejudicially erred in admitting the 2004 FDA Warning Letter and relying on it to impose liability. *See* State Ex. 38, 2004 FDA Warning Letter (*admitted May 30, 2019*). The letter arose from the FDA's special investigation of specific incidents, and thus was inadmissible hearsay not falling under any Oklahoma hearsay exception. *See* 12 O.S. § 2803(8)(d) (excluding "factual findings resulting from special investigation of a particular complaint, case or incident" from public records hearsay exception); *Ortho-McNeil-Janssen Pharm., Inc. v. State*, 432 S.W.3d 563, 579 (Ark. 2014).

36. The Court prejudicially erred in admitting the report of the President's Commission on Combating Drug Addiction and the Opioid Crisis, *see* State Ex. 1349 (*admitted June 3, 2019*), which likewise constituted inadmissible hearsay not falling under any Oklahoma hearsay exception. Like the FDA letters, the report arises from a "special investigation of a particular

complaint, case, or incident," 12 O.S. § 2803(8)(d), and is therefore inadmissible. This Court erred in relying on it to impose liability on Janssen.

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CERTIFICATE OF SERVICE

This is to certify that on this 25th day of September, 2019, a true and correct copy of the foregoing instrument was mailed as follows:

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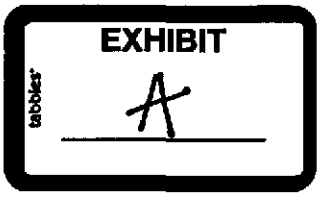
Larry D. Ottaway

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**
	§	**Judge Thad Balkman**
(1) PURDUE PHARMA L.P.;	§	
(2) PURDUE PHARMA, INC.;	§	
(3) THE PURDUE FREDERICK COMPANY;	§	
(4) TEVA PHARMACEUTICALS USA, INC.;	§	**William C. Hetherington**
(5) CEPHALON, INC.;	§	**Special Discovery Master**
(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.	§	

FINAL JUDGMENT

Based upon the Court's findings of fact and conclusions of law set forth in its Judgment after Non-Jury Trial, which is attached and incorporated fully as if set forth herein, the Court enters judgment in favor of Plaintiff and against Defendants, Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc.,



n/k/a Janssen Pharmaceuticals, Inc., and Janssen Pharmaceutica, Inc., n/k/a Janssen Pharmaceuticals, Inc., ("Defendants") as follows:

1. A public nuisance, as defined by 50 O.S. §§1 and 2, exists in the State of Oklahoma. The public nuisance is the State's opioid crisis. And Defendants were a direct and proximate cause of it.

2. Defendants unlawfully committed acts and omitted to perform duties, which have and continue to annoy, injure and endanger the comfort, repose, health and safety of others.

3. The nuisance has affected and continues to affect at the same time entire Oklahoma communities and neighborhoods, as well as a considerable number of Oklahomans, although the extent of the harm inflicted upon individual Oklahomans may be unequal.

4. Defendants' acts and omissions were a cause-in-fact of the public nuisance in Oklahoma.

5. Defendants' acts and omissions were a direct cause of the public nuisance in Oklahoma.

6. Defendants' acts and omissions were a proximate cause of the public nuisance in Oklahoma.

7. No act or omission by the State was a direct or proximate cause of the public nuisance.

8. There are no intervening causes that supervened Defendants' acts and omissions as a direct cause of the State's injuries, or otherwise defeat a finding that Defendants were a direct and proximate cause of the public nuisance.

9. The acts and omissions Defendants committed are not protected or otherwise immunized from liability under Oklahoma law, federal law, or the U.S. Constitution.

10. This public nuisance is not permanent and can be abated.

11. Equitable abatement is a proper remedy against a public nuisance.

12. Equitable abatement is the appropriate remedy to address this public nuisance.

13. Defendants are, therefore, **ORDERED** to abate the public nuisance they created, as directed by this and any future orders of this Court.

14. The actions and costs outlined in the State's proposed abatement plan are reasonable and necessary to abate the public nuisance.

15. For year one of the abatement process, the Court adopts the State's abatement plan as modified and set forth in the Court's Judgment after Non-Jury Trial. The programs, services, and costs broadly identified by the Court shall be referred to from now on as the "Abatement Plan."

16. To facilitate the categories of action identified in the Abatement Plan as necessary to begin to abate the public nuisance in Oklahoma in year one, Defendants are hereby **ORDERED** to pay **$572,102,028** to the State via wire transfer to the Attorney Trust Account of Whitten Burrage pursuant to wiring instructions provided by Whitten Burrage. After Outside Counsel attorneys' fees and costs have been subtracted pursuant to the Legal

Services Agreement dated June 23, 2017, as amended on June 7, 2019, Whitten Burrage shall deposit the balance of the funds into the Opioid Lawsuit Abatement Fund of the State of Oklahoma ("Abatement Fund"). The Abatement Fund shall be used, wherever and to the extent possible, consonant with the Legislature and Governor, to accomplish the abatement of the public nuisance in accordance with the Abatement Plan.

17. The Court retains jurisdiction over the parties and this matter to oversee the abatement until its completion for the purpose of administering complete relief and entire justice. The Court shall enter further orders pertaining to the evaluation and administration of the Abatement Plan, including an order establishing a process by which the interested parties shall reconvene to review the progress of the Abatement Plan and address any actions and costs necessary for future years, including whether Defendants are required to replenish the Abatement Fund and by what amount. Such process will remain in place until the public nuisance is abated so far as reasonably practical, as measured by the rates of opioid use disorder, unintentional opioid overdose, and neonatal abstinence syndrome return to levels reasonably similar to those that existed in 1996.

18. Under Oklahoma law, Defendants are not entitled to a settlement credit to account for the settlements entered between the State and the former defendants who settled and were dismissed, because there has been no finding of fault entered against any other potential tortfeasor, nor was any such finding requested by Defendants before or during trial.

19. This equitable abatement remedy does not compensate the State or any of its programs, including any state Medicaid program, for past, present or future damages. This

equitable abatement remedy does not compensate the State or any of its programs, including any state Medicaid program, for any past harm or overpayment.

20. This equitable abatement remedy does not impose a penalty on Defendants.

21. This matter, as an action to abate a public nuisance, was properly tried to the Court sitting in equity as factfinder.

22. The amount set forth in this judgment shall bear interest to the extent permitted and in the amounts prescribed in 12 O.S. § 727.1 for post-judgment interest.

23. Plaintiff is hereby awarded, and entitled to collect from Defendants, all costs allowed by law. Plaintiff shall file an application setting forth the amount of such costs as prescribed in 12 O.S. § 696.4.

24. Pursuant to agreement between the State and its Outside Counsel governing the Oklahoma Action, Outside Counsel is expressly entitled to collect attorneys' fees from the abatement proceeds as a result of the Judgment entered in this action. Outside Counsel is also entitled to compensation for all reasonable costs incurred in prosecuting this action as hereinafter determined by the Court. The attorneys' fees owed to Outside Counsel are fair, reasonable and appropriate under Oklahoma law. Outside Counsel are entitled to payment of the contractually agreed amounts from the abatement proceeds without further order from this Court and may obtain such payment by presenting this judgment. Consistent with the terms of that agreement, Outside counsel is also permitted to seek reimbursement of any future costs they may incur in prosecuting this action by subsequent application to this Court.

25. To the extent any argument or objection set forth by Defendants in their Renewed Motion for Judgment, or any other Motion, filing or pleading, is not specifically addressed by the Court's findings of fact and conclusions of law, such argument and/or objection made by Defendants is hereby denied and overruled.

It is so ORDERED.

DATED this ___ day of _____, 2019.

_____
Honorable Thad Balkman, District Judge