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 Honorable Thad Balkman JURY TRIAL DEMANDED

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY UNTIL THE COURT RULES ON DEFENDANTS' MOTIONS TO DISMISS

The State of Oklahoma, by and through its Attorney General ("the State"), seeks to force Defendants[1] to respond to twenty-eight exceedingly broad requests for production of documents, as well as thirteen sweeping interrogatories, in advance of this Court's resolution of Defendants' joint and individual motions to dismiss. Those motions challenge the viability of the State's Petition on its face. If granted, they will put an end to this litigation, obviating the need for the costly and burdensome discovery that the State demands. Moreover, the amended Oklahoma Discovery Code, effective as of November 1, 2017 and now governing this matter, provides that discovery should not commence until motions to dismiss have been resolved. Specifically, without leave of court, interrogatories, requests for production of documents, or requests for admission may only "be served on any party *after* the filing of an answer." 12 O.S. §§ 3233(A),

[1] Defendants in this matter are: Purdue Pharma L.P.; Purdue Pharma, Inc.; The Purdue Frederick Company; Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc., n/k/a Janssen Pharmaceuticals, Inc.; Janssen Pharmaceutica, Inc., n/k/a Janssen Pharmaceuticals, Inc.; Watson Laboratories, Inc.; Actavis LLC; and Actavis Pharma, Inc., f/k/a Watson Pharma, Inc.

3234(B), 3236(A) (emphasis added). This well-reasoned policy carries particular force when the requested discovery is as expansive as it is in this matter.

In its Response, the State tries unsuccessfully to downplay the burden on Defendants and judicial resources if discovery were permitted to proceed at this early stage. But contrary to the State's assertions, Defendants cannot respond to the documents requests and interrogatories—most of which are ***Oklahoma-specific***—by simply repurposing the materials they have produced in other matters. What is more, the State's Response assumes that all of its discovery requests will inevitably need to be fulfilled once the motions to dismiss are resolved. However, as set forth in the Defendants' pending motions to dismiss, the State's Petition is legally deficient and should be dismissed for multiple reasons. If the Court agrees, no discovery will be necessary. At the very least, the State is decidedly incorrect that its requests "inevitably must be answered." (*See* Response at 1.)

For these reasons and the reasons set forth in their Motion for a Protective Order, Defendants urge this Court to conserve judicial resources and avoid unnecessary burden and cost by imposing a brief stay of discovery until the motions to dismiss, which are set to be argued early next month, are resolved.

I. THE STATE'S DISCOVERY REQUESTS ARE PREMATURE.

Oklahoma courts have broad discretion to enter any order "to protect a party or person from annoyance, harassment, embarrassment, oppression or undue delay, burden or expense," whenever good cause is shown, in connection with discovery. 12 O.S. § 3226(C); *see also, e.g.*, *Quinn v. City of Tulsa*, 1989 OK 112, ¶ 63, 777 P.2d 1331, 1342 ("judges should not hesitate to exercise appropriate control over the discovery process"). Among other things, this discretion empowers courts to extend the deadlines for responding to written discovery. 12 O.S. §§ 3233(A), 3234(B)(4)(a).

Plaintiffs argue that their discovery is "not claim-specific and thus, inevitably must be answered." (Response at 1.) Not so. For example, if the Court dismisses all claims except Plaintiff's Consumer Protection Act and public-nuisance claims, it would be unreasonable to require Defendants to fulfill the State's request for documents concerning "research regarding the amount of reimbursement for Your opioids prescriptions that would be paid by Medicare and/or Oklahoma's Medicaid Program." (Plaintiff's Request for Production No. 28.) And, if even just one of Defendants' motions is granted in its entirety, that Defendant should not have to undergo the immense burden and expense of responding to these discovery requests before it is known if there is even a valid claim against that Defendant. Forcing all Defendants to engage in discovery efforts on the basis of mere allegations—some or all of which the Court may find legally deficient—would be premature.[2] This is precisely why the Court first should determine which of these expansive claims—if any—may proceed as a matter of law before requiring Defendants to engage in costly and burdensome discovery efforts on the basis of challenged allegations.

In recognition of exactly this principle, the Oklahoma Legislature has conclusively determined that discovery before a petition has been answered is premature. 12 O.S. §§ 3233(A), 3234(B), 3236(A). The amended Oklahoma Discovery Code, which became effective on November 1, 2017, bars discovery demands at this stage of litigation absent leave of court. *Id.* The sound policy that motivated the Legislature to adopt that amendment could not be clearer, and plainly supports the requested stay in this case. And, consistent with the well-settled rule that amendments to procedural rules (as opposed to substantive changes in law) apply to

[2] Underscoring this point, the State devotes nearly seven pages of its Response to rehashing the allegations of the Petition and attempting to rebut Defendants' Motions to Dismiss. (Response at 4–7, 8–11.)

matters pending at the time the amendment becomes effective, this procedural rule now governs the issue before the Court.

"[R]emedial or procedural statutes which do not create, enlarge, diminish, or destroy vested rights may operate retrospectively, and apply to pending actions or proceedings." *Anagnost v. Tomecek*, 2017 OK 7, ¶ 15, 390 P.3d 707, 712 (quoting *Forest Oil Corp. v. Corp. Comm'n of Oklahoma*, 1990 OK 58, ¶ 11, 807 P.2d 774, 781–82). The Oklahoma Supreme Court has emphasized, "A purely procedural change is one that affects the remedy only, and not the right." *Id.* (quoting *Forest Oil Corp.*, ¶ 11, 807 P.2d at 782). In contrast, "[s]tatutes which act as a *complete bar* to assertion of an interest affect rights rather than just remedies." *Id.* (citation omitted) (emphasis added).

The statutory revisions at issue here relate to purely procedural matters. They serve only to defer discovery until an answer has been filed, rather than "create, enlarge, diminish, or destroy vested rights." *See id.* In other words, the revisions impact only the remedy of *when* discovery may take place, not the *right* to conduct discovery in an action or the substantive right of a plaintiff to recover. As such, they plainly apply to this case.

II. RESPONDING TO THE STATE'S DISCOVERY REQUESTS AT THIS JUNCTURE WOULD BE UNDULY BURDENSOME.

Not only are the State's discovery requests premature, but forcing Defendants to respond to them now would run afoul of Oklahoma's prohibition on discovery that causes a party unnecessary "burden" or "expense." 12 O.S. § 3226(C); *see also Quinn*, 1989 OK 112, ¶ 63, 777 P.2d at 1342. The State contends that Defendants have not "shown in any detail" how responding to its discovery demands might inflict such oppression, burden, or expense. (Response at 12). This is incorrect—and ignores the critical issue of the timing of discovery. As explained in their opening brief, the State's discovery requests demand documents and other

electronic data dating back over twenty years, even documents stored in databases that have been taken offline. Nearly all of the requests are objectionable, at least in part, on their face. But putting aside their scope, even starting the process of collecting and reviewing the massive volume of documents covered by the State's sweeping demands will impose enormous monetary and operational burdens on Defendants—burdens which may be unnecessary if the requests are obviated or narrowed through resolutions of the motions to dismiss or subsequent revision of the scope of discovery.

Forcing Defendants to respond to the State's sweeping discovery demands at this early stage in the litigation also will result in the unnecessary expenditure of the Court's judicial resources. Particularly given the overbreadth of the State's requests, discovery disputes are likely to arise, and these disputes will have been completely unnecessary if the Defendants or claims involved are subsequently dismissed. The Oklahoma Legislature's recent enactment of revised rules of civil procedure recognizes the importance of avoiding such unnecessary disputes. The Court should do the same here.

The State suggests that responding to its discovery demands will be a straightforward task because Defendants "are already complying with subpoenas from other attorneys general regarding the same conduct." (Response at 12.) But that assertion ignores that this case deals with Oklahoma prescriptions, patients, and claims, and, thus, nearly all of the State's discovery requests are ***specific to Oklahoma*** (or must be limited as such).[3] Defendants' responses to the subpoenas of other states and municipalities have been tailored to similar location-specific requests. Moreover, discovery in other ongoing actions against Defendants is proceeding on different timelines; fact discovery has not moved forward in any action other than the *City of*

[3] *E.g.*, Plaintiff's Request for Production Nos. 16, 19, 22, 28; Plaintiff's Interrogatories Nos. 2, 4, 6, 8, 9, 11, 12.

Chicago litigation, and, even there, it did so only after the court's rulings on multiple dispositive motions and is not close to complete. The State's apparent assumption that Defendants can somehow turn to an existing repository of discovery materials to immediately fulfill its demands in this Oklahoma-specific case is incorrect, and completely overlooks the overwhelming burden and expense that will confront Defendants if they are forced to comply before their dispositive motions are resolved.

In stark contrast, a brief stay of discovery will ***not*** impose a hardship upon the State. As the State acknowledges, this matter involves conduct allegedly occurring over a period of years. Contrary to the State's assertions, it would not be prejudiced by a stay in discovery while the Court adjudicates Defendants' motions to dismiss. Nor does the State provide any explanation for how it would be prejudiced by a short stay, particularly where the State waited until 2017 to bring claims based on allegations dating back more than a decade ago. As the Oklahoma Legislature recognized, and as the Oklahoma Discovery Code now dictates, the sequencing of discovery after the disposition of motions to dismiss does not burden or prejudice claimants.

As the Legislature recognized, the State's insistence that this case implicates matters of significant public interest is not a basis to start with discovery before the Court determines whether the State has even pled a claim. Nor is the State's insistence that it has raised issues of public concern a reason to ignore the myriad and intractable legal and factual problems with the State's claims in this case. The State asserts that Defendants engaged in a far-reaching fraud over a period of decades, yet ignores, among other things, that all of the prescription pharmaceuticals had FDA-approved labels and risk-management programs that warned of potential addiction, that not a single one of the Defendants ***ever*** prescribed a single opioid to any Oklahoman, and that doctors are obligated to be aware of the labels of the medicines they

prescribe. Further, as demonstrated in Defendants' joint and individual motions to dismiss, the Petition is legally deficient ***on its face*** because, among other things, it improperly lumps all Defendants together in violation of Oklahoma law, fails to allege fraud with the requisite particularity, and fails to adequately allege causation or a cognizable injury.[4]

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter an Order staying discovery pending resolution of their recently filed dispositive motions to dismiss.

Dated: November 7, 2017

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[4] *See* Defendants' Joint Motion to Dismiss at 6–8 (improper group pleading), 8–10 (failure to plead fraudulent misrepresentation with requisite particularity), 16–20 (failure to adequately allege causation), 21–36 (failure to state cognizable injury); Purdue Defendants' Motion to Dismiss at 12–14 (lack of particularity), 14–17 (lack of causation); Teva Defendants' Motion to Dismiss at 10–11 (improper group pleading), 11–14 (lack of particularity), 14–17 (lack of causation), 17–20 (no cognizable injury).

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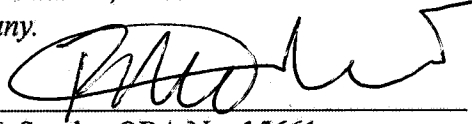
By: 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 7th day of November, 2017 to:

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