



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.; )  
(5) CEPHALON, INC.; )  
(6) J&J; )  
(7) J&J PHARMACEUTICALS, INC, )  
(8) ORTHO-MCNEIL-J&J )  
PHARMACEUTICALS, INC., n/k/a )  
J&J PHARMACEUTICALS; )  
(9) J&J PHARMACEUTICA, INC., )  
n/k/a J&J 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 } S.S.  
CLEVELAND COUNTY }  
**FILED**

DEC 28 2018

In the office of the  
Court Clerk MARILYN WILLIAMS

AMEMDED ORDER OF SPECIAL DISCOVERY MASTER

NOW, on this 28th day of December, 2018, the above and entitled matter comes on for ruling by the undersigned having heard argument thereon on December 20, 2018.

Janssen's Motion for Partial Reconsideration and Modification argument was heard and considered. Janssen's request to reconsider seeks to amend the as-filed December 6th Discovery Master Order only as it relates to findings and Orders entered regarding State's Emergency Motion for Sanctions Against Johnson & Johnson Defendants. Janssen's request is Sustained in part and Overruled in Part as reflected in the amended findings and Orders entered in that section of this Order.

**Teva/Cephalon Group's Motion For Protective Order To Preserve Confidential Status of Hassler Deposition Designations**

This motion seeks to preserve the confidential status of certain designated excerpts of the John Hassler deposition and Exhibit 2 pursuant to the Protective Order and 12 O.S. §3226(C). Argument was presented based upon the exhibit description and designated portions of the testimony relating to trade secrets and other proprietary and sensitive internal business information, decision-making processes, sales strategy and product development sought to be strictly protected and guarded from its competitors and public knowledge. State has responded challenging the designations as being protected. The parties have thoroughly briefed this motion and provided argument and authority.

Teva argues the designated portions fall into three distinct groups those being: Group 1- Information regarding corporate structure, corporate operations to include internal reporting, corporate decision-making processes and proprietary operational information; Group 2-Internal marketing and sales strategy and private company training; Group 3-Information about pharmaceutical development individually and in collaboration with third-party partners and, proprietary development of products to include unreleased pharmaceutical lines.

The Protective Order defines confidential protection mandated in this case which the undersigned is required to consider and determine as to trade secrets whether or not a designation rises to the level of trade secret information and if so, protect "by reasonable means", in this case, by use of the Protective Order. The same analysis has been undertaken with regard to corporate commercial information and proprietary operations as well as internal marketing, training and sales strategies and, products currently or previously under development but unreleased. Having heard argument and considered both Oklahoma and Federal authority, the following Orders are entered:

**Group I**

Page 16, Lines 1-17: Overruled

Page 17, Lines 7-25: Overruled

Page 18, Lines 1-3: Overruled

Page 23, Lines 2-10: Sustained

Page 65, Lines 5-11: Overruled

Page 181, Lines 19-25: Sustained

Page 182, Lines 1-25: Sustained

Page 183, Lines 1-25: Sustained

Page 184, Lines 1-24: Sustained

Page 253, Lines 16-23: Sustained

**Group II**

Page 27, Line 16-25: Lines 16-17 Overruled; Lines 18-25: Sustained

Page 105, Lines 5-25: Overruled

Page 106, Lines 1-25: Overruled

Page 107, Lines 1-12: Overruled; Lines 13-18: Sustained; Lines 19-25: Overruled

Page 108, Lines 1-25: Overruled

Page 110, Lines 1-25: Overruled

Page 111, Lines 1-13: Overruled

Page 116, Lines 5-8: Overruled

Page 118, Lines 11-16: Overruled

Page 119, Lines 12-25: Overruled

Page 122, Lines 1-4: Overruled

Page 133, Line 1-15: Overruled

Page 134, Lines 5-10: Overruled

Page 233, Lines 12-21: Overruled

Page 242, Lines 10-25: Sustained

Page 243, Lines 1-25: Sustained

Page 244, Lines 1-25: Sustained

Page 245, Lines 11-23: Sustained

Deposition Exhibit 2: Motion Overruled

**Group III**

Page 30, Lines 14-25: Sustained

Page 31, Lines 1-25: Sustained

Page 32, Lines 1-25: Sustained

Page 33, Lines 1-25: Sustained

Page 34, Lines 1-25: Sustained

Page 35, Lines 1-25: Sustained

Page 36, Lines 1-25: Sustained

Page 37, Lines 1-13: Sustained

Page 38, Lines 1-25: Lines 1-12: Overruled; Lines 13-25: Sustained

Page 39, Lines 1-25: Sustained

Page 40, Lines 1-6: Sustained

Page 41, Lines 1-24: Sustained

Page 42, Line 25: Overruled

Page 43, Line 1-2: Overruled

Page 201, Lines 4-25: Lines 4-14: Sustained; Lines 15-25: Overruled

### **State's Emergency Motion For Sanctions Against Johnson & Johnson Defendants**

State has filed this motion for sanctions under 12 O.S. §3237 seeking direct sanctions against Johnson & Johnson (Janssen) Defendants (hereinafter J&J) for alleged abusive litigation practices, abuse of judicial process, and violation of the undersigned's Judicial Discovery Master Orders, as well as the assigned trial Judge's Orders. In previous hearings and in this sanction request, State argues consistent abusive discovery tactics to promote delay to the extent the undersigned must issue coercive, if not punitive, sanctions. State describes a number of Orders entered that State alleges J&J Defendants have ignored, violated or intentionally evaded through intentional delay by providing improperly prepared corporate witnesses or fact witnesses not prepared to cover the noticed deposition in a meaningful way. The allegations of abuse include allegations that J&J Defendants consistently withhold documents, challenges, objects to and moves to quash what State argues to be clearly relevant, clear and proper notice and topic areas that under Oklahoma law, demonstrates record behavior that rises to the level of intentional obstruction, "abusive litigation practices, abuse of judicial process, and violation of this Court's Orders". The specific allegations in the State's sanction motion allege multiple allegations supported by specific individual examples State argues warrants at a minimum, coercive sanctions.

J&J responds arguing State misrepresents the facts in support of a baseless demand that the Court should impose sanctions. It argues that State's motion is largely inflammatory rhetoric reduced in reality to three issues: 1. J&J corporate representative Richard Ponder did not answer deposition questions; 2. J&J is responsible for "hiding" two "key" documents even though discovery is ongoing and; 3. J&J's counsel improperly instructed witness Flanary not to answer questions related to one of those documents during his deposition. J&J argues review of the record demonstrates the alleged misconduct did not happen. Mr. Ponder prepared for three full days for his deposition and when presented with the decades-old topics and documents he provided the best substantive answers he could properly within the scope of the noticed topic. Secondly, a second witness has been provided to fill-in perceived deficiencies. Regarding supposed "hidden" documents, one was produced by a third party, not created by J&J and there is no indication that any Defendant employee received it or even participated in the event to which it relates. The other document was actually created and published online in the summer of

2018 by J&J (Janssen). The document was clearly not hidden and was created after the State served its document requests and after J&J (Janssen) began its collection and production for this litigation. Still, Defendants argue it has prioritized collection and commenced production of related documents all as a part of the rolling production process, arguing it defies logic and Oklahoma discovery law to suggest a sanction for failing to produce documents before rolling production is complete and as to documents recently created and immediately placed into the public domain.

State argues during the Flanary deposition, Defendant's counsel objected to a question requesting the witness to read a document out loud into the record, had the witness read the document to himself asking State's attorney to then ask questions. A reading of the transcript reveals Defendant's counsel did allow the witness to read the requested document and ultimately questions were answered and objections preserved in the record. While I find this specific transcript exchange to be a reasonable objection preservation with the State allowed inquiry, State argues a consistent pattern of objections seeking to prohibit the exposure of document content to the record that otherwise is permissible in depositions under Oklahoma law, subject to objection preservation, Protective Order protection and admissibility determination at a later date. J&J argues this is one example of how State's tactics serve to delay the completion of the deposition and creates its own obstruction. Generally, and not specific to this sanction motion, this a frequent Defendant tactic for some Defendants, to keep content out of the record usually in an impermissible way or, is an all-to-frequent situation where the witness has not been presented with the document before the deposition and is not prepared to discuss. J&J also argues, and the record does reflect, many questions asked by State's counsel that are outside the scope of the notice topics. So in some cases, an apparent intentional act by a Defendant and in some cases, the fault of the State for not providing the document ahead of time. Abusive tactics by both.

While the undersigned now understands my Orders as to topic witness production (Topic 41 Lobbying/DURB and Topic 39 Pain Care Forum) and that of Judge Balkman (Re: August 10<sup>th</sup> Order) have now or are being complied with, J&J did fail to comply with these Orders. J&J did produce Mr. Colligen for deposition on November 27 as to Topic 39, before this motion was argued. J&J has offered a witness for a supplemental deposition on Topic 41. On November 9<sup>th</sup> J&J presented its first corporate witness, Mr. Ponder, to testify on these topics and State argues he was "fully unprepared to testify" which resulted in the phone conference hearing with the undersigned where I gave J&J until Friday, November 16<sup>th</sup> to designate a fully prepared witness on that topic. Following that, State argues J&J would not comply but State agreed to take a prepared witness's deposition on November 27<sup>th</sup> and they did.

My review of the Ponder testimony reveals it was not as bad as it seemed at the time, but still demonstrates that Mr. Ponder was either unprepared or intentionally evasive. For example, State indicates through its own research, they learned he had attended at least 46 Drug Utilization Board meetings over 14 years yet he was not able to provide any details about presentations that were made at those meetings, any lobbying efforts to the drug utilization board or much detail at all regarding other pain management initiatives. The record shows many years of minutes from DUR board meetings that apparently, he either attended or J&J did not give him the meeting

minutes to review before his deposition and, he had only reviewed one piece of legislation dealing with opioids where the record shows he should have been familiar with as many as 26 specific legislative actions involving J&J lobbying efforts. State has submitted other examples of apparent intentional failures to prepare witnesses on noticed topics such as collaboration on the Pain Care Forum, adoption of the Federation of State Medical Board guidelines and the adoption of the definition of "pseudo-addiction", familiarity with the Responsible Opioid Prescribing Guidelines and other examples of witness lack of knowledge and apparent intentional witness evasiveness and withholding of documents.

J&J did not originally comply with my Order regarding written responses and did unilaterally provide written responses in lieu of depositions on topics for which State will not accept written responses, notices a deposition and refuses to provide a witness. J&J has now offered witnesses regarding these topics in its November 27<sup>th</sup> email, and it does appear Topics 24 & 40 were still at issue with motions to quash to be filed and being negotiated as of the date of hearing this motion.

### **State's Sanction Requests**

1. J&J must offer a prepared witness on Topics 39 & 41 for at least three hours each with whatever time it takes not counted against the State's total 80 hours; produce the author of the Request for Proposal and Mr. Flanary at the Cleveland County Courthouse to be deposed with the undersigned present;
2. Strike J&J's defenses to include:
  - a. 8th affirmative defense of equity;
  - b. 10th affirmative defense-good faith/reasonable belief as to accuracy and validity;
  - c. 13th affirmative defense-learned intermediary;
  - d. 14th affirmative defense-sophisticated user;
  - e. 15th affirmative defense-informed consent.
3. Revoke Pro Hac Vice admissions of: Stephen Brody, David Roberts, Daniel Franklin, Ross Galin, Amy Lucas, Charles Lifland, Jennifer Cardelus, Wallace Allan, Sabrina Strong, Esteban Rodriguez, Houman Ehsan and Desirae D.C. Tongco;
4. Daily sanction of \$5,000 per day for November 9th through November 27th or until such time as J&J presents a fully prepared witness on topics 39 and 41;
5. The trial Judge to give an instruction to the jury that J&J did not produce the document and instructed witnesses not to testify about it once it was discovered;
6. Order J&J not to instruct any witnesses to not answer a question related to a document unless based upon a duly recognized privilege;
7. Issue sanctions against J&J for clear and repetitive violations of multiple Court Orders, the Oklahoma Discovery code and its abusive litigation practices.

In State's supplemental motion it seeks to clarify violation of two specific orders: 1. The undersigned's Order for J&J to produce a fully prepared witness concerning the Pain Care Forum and collaborative efforts to get Oklahoma to adopt the Federation of State Medical Boards Model Guidelines. Then, 2. State alleges the undersigned ordered J&J to stop instructing witnesses to not answer questions, preserve with an objection and move on, and the undersigned would consider a failure to follow this instruction as obstruction. State alleges J&J has again instructed a witness not to answer a question regarding reading part of a document (J&J Request for Proposal – RFP No. RFP06181) is obstruction and done intentionally as it "would end any defense J&J hopes to mount in this case." J&J continually obstructs any reasonable inquiry into its admitted "collaboration with others" regarding opioid initiatives such as the Pain Care Forum as a part of J&J's role as the primary supplier of the opioid APIs found in opioids manufactured in this country.

Oklahoma law dis-favors sanctions and requires strict adherence to concepts of due process, granting trial Courts and Special Judicial Discovery Master's discretion to recommend (and impose) sanctions authorized by law. Sanctions require specific allegations with specific requested relief and, clear due process warnings. Sanction discretion must be fair and related in the context of the particular claim at issue and the specific discovery Order alleged violated. In civil litigation and certainly in the context of this complex civil litigation, there is a clear distinction between "coercive" and "punitive" sanction. A complete discussion of the due process procedures required by each will not be undertaken in this Order, only to say that both are possible, however, I treat this motion as one suited for "coercive" sanction to compel compliance with previous Orders by the undersigned and the trial Judge.

The following Findings and Orders are entered:

1. State has made specific allegations for sanctions for violation of specific Orders, supported by argument and responded to by J&J;
2. The sanctions are requests for "coercive" sanctions;
3. There is factual record support that abusive discovery behavior on the part of J&J (and other Defendant or Defendant Groups not a part of this motion) has occurred;
4. That due process warnings for **certain** sanctions for violations of specific Orders have **not** been made by the undersigned or the trial Judge until this Order;
5. Regarding State's sanction request No.1, sufficient record warning has been made by the undersigned sufficient to **Sustain** this sanction request, but that J&J has complied as to Topic 39 and is to comply as to Topic 41. J&J is Ordered to offer a prepared witness to testify as to Topic 41, fully prepared to include documents J&J or State must produce prior to the deposition sufficient for reasonable preparation. The undersigned will be present if needed and requested ahead of time and subject to availability conflicts.

J&J is **warned** that if this does not occur within a reasonable period of time, a coercive fine not to exceed \$50,000 per day could be assessed to coerce adequate compliance;

6. Regarding State's sanction request to No. 2, the same is **Overruled** at this time as being premature and constitutes an extreme sanction where a lesser sanction could be appropriate and could be considered when and if appropriate by the trial Judge;
7. Regarding State's sanction request No. 3, the same is **Overruled** and constitutes an extreme sanction were a lesser sanction could be appropriate over one that could result in a lasting professional hardship and seeks to vitiate otherwise lawful professional contractual engagements;
8. Regarding State's sanction request No. 4, the same is **Overruled** where it seeks to impose a "punitive" sanction for past behavior but is **Sustained** to the extent that the undersigned has previously entered and does today enter an Order that requires J&J to present a properly prepared witness or witnesses to testify to Topic 41 with a **warning** that failure to do so could result in a "coercive" daily fine.

It is so **Ordered** this 6<sup>th</sup> day of December, 2018.

A handwritten signature in black ink, appearing to read 'W.C.H.', with a long horizontal stroke extending to the right and a vertical flourish at the end.

William C. Hetherington, Jr.

Special Discovery Master