



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

v.

- (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.

For Judge Balkman's
Consideration

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED
APR 26 2019

In the office of the
Court Clerk MARILYN WILLIAMS

TEVA DEFENDANTS' AND ACTAVIS DEFENDANTS'
MOTION IN LIMINE #4 REGARDING PURDUE EVIDENCE

Defendants, Teva Pharmaceuticals, USA, Inc., and Cephalon, Inc., (the "Teva Defendants") and Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc., f/k/a Watson Pharma, Inc. (the "Actavis Defendants"), hereby move to preclude Plaintiff from relying on, or making any reference to, evidence which was obtained from or applies solely to Purdue Pharma L.P., Purdue Pharma, Inc. or The Purdue Frederick Company (collectively, "Purdue").

INTRODUCTION

Throughout this litigation, the State has made it clear that it believes Purdue created the opioid epidemic. *See, e.g.*, Dec. 5, 2017 Hr’g Tr. at 25:15-21 (Purdue is “the genesis of why we’re all here today”), Ex. 1; Aug. 30, 2018 Hr’g Tr. at 57:17-58:1 (harm caused by opioid epidemic in Oklahoma “can [be] trace[d] ... to a very specific point in time, and that is when OxyContin was brought to market and promoted in an aggressive, concentrated, and targeted way”), Ex. 2; State Resp. to Purdue Mot. to Quash (May 5, 2018), at 2 (Purdue “created [Oklahoma’s] [opioid] epidemic” with the 1996 introduction of OxyContin and an aggressive and novel marketing campaign). The majority of the State’s Petition focuses on Purdue’s conduct. *See, e.g.*, Pet. ¶ 55 (asserting that the “scale of Defendants’ marketing campaign was massive” but then only referencing Purdue conduct, concluding “[i]n other words, Defendant Purdue treated the marketing of a Schedule II controlled substance as if it were peddling paper products.”).

Throughout hearings, depositions, and discovery the State has made it clear its sights are set on utilizing the Purdue defendants’ conduct to vastly overgeneralize about “defendants.” This ignores the State’s burden to show causation through relevant and admissible evidence. The conduct of *Purdue* cannot be admitted as evidence to prove wrongdoing by the *Teva and Actavis Defendants*. The State’s goal in attempting to admit the Purdue Evidence is to incite an emotional response, confusing and obscuring the actual facts and legal principles relevant to deciding the ultimate question in this case, *i.e.*, whether the Teva and Actavis Defendants committed any unlawful acts which created a public nuisance in Oklahoma. While such evidence may be of interest to the television audience and the media, that is not the test. It is not relevant to the issues before the Court and should be excluded.

All documents and statements obtained directly from Purdue are irrelevant to the remaining case against the Teva and Actavis Defendants; Purdue is no longer a party to this action.

Additionally, any minor probative value, if shown by the State, would be substantially outweighed by the prejudicial effect of these documents.

The Teva and Actavis Defendants move to exclude all Purdue-produced documents, Purdue testimony, and Purdue fact witnesses from trial (collectively, the “Purdue Evidence”). Because allowing irrelevant evidence in the form of witness testimony, statements of counsel, or exhibits (all of which have always been outside the control of the Teva and Actavis Defendants) would violate basic evidentiary principles, carry undue risk of prejudice, waste time, confuse the record and would be unfairly prejudicial, the Teva and Actavis Defendants’ Motion in Limine should be granted.

ARGUMENT AND AUTHORITIES

I. EVIDENCE THAT IS NOT LEGALLY RELEVANT MUST BE EXCLUDED FROM TRIAL.

A motion in limine is a pretrial device used to preclude prejudicial statements and questions that have no proper bearing on the issues in the case and which would interfere with a fair and impartial trial. *Braden v. Hendricks*, 1985 OK 14, ¶ 9, 695 P.2d 1343, 1348-49. Questions concerning the sufficiency of evidence, an exhibit’s relevancy, and the weighing of that relevancy, if any, against possible prejudice, are all matters within the Court’s sound discretion. Whinery, “Preliminary Questions for the Trial Court—Admissibility of evidence generally,” 2 *Okla. Prac., Okla. Evidence* § 12.02 (2d ed.); *United States v. Harris*, 534 F.2d 207, 213 (10th Cir. 1975) (citation omitted).

Relevant evidence is “evidence having any tendency 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. Evidence that is not relevant is inadmissible. 12 O.S. § 2402. Under Oklahoma statutory and common law, motions in limine are appropriate to prevent the introduction of prejudicial matters in jury trials. *See* 12 O.S. § 2104(C); *Christian v. Gray*,

2003 OK 10, n. 22, 65 P.3d 591, 610. The same prejudicial concerns may be avoided, however, and judicial economy provided, if the Court rules on these substantial evidentiary issues prior to the bench trial.

II. THE RELEVANCY INQUIRY FOCUSES ON LEGAL RELEVANCY

The shift from a jury trial to a bench trial does not alter the relevancy inquiry. “Relevancy . . . is a condition precedent to admissibility, not an ironclad guarantee of admissibility.” *Torres-Arroyo v. Rullan*, 436 F.3d 1, 7 (1st Cir. 2006). Relevancy is the first, and primary, consideration in the admissibility of evidence. If evidence is not relevant, regardless of the fact finder, it should not be admissible.

Only evidence that provides legal relevance to the specific cause of action before the Court is relevant under the law. *See Witt v. Martin*, 1983 OK CIV APP 33, ¶ 69, 672 P.2d 312, 320 (“Or to put it in the positive, ‘evidence is relevant if it legally tends to prove some matter in issue or tends to make a proposition in issue more or less probable’”) (quotation omitted); *Smith v. Smith*, 1993 OK CIV APP 17, ¶ 4, 847 P.2d 827, 829 (“The issue tendered by Wife is not a question of logical relevancy or whether the evidence logically tends to establish the proposition which it is offered to prove. Rather, it is one of legal relevancy.”). To assess what is legally relevant, the court must frame its analysis based on the facts material to the specific cause of action in the case. *See Marlin Oil Corp. v. Barby Energy Corp.*, 2002 OK CIV APP 92, ¶ 11, 55 P.3d 446, 449–50 (“[I]n assessing the elements of an abuse of process claim, the court stated “[r]elevant evidence is evidence tending to make the existence of a *material* fact more or less probable.” (emphasis added)).

Collateral facts are irrelevant and should also be excluded. *Sch. Dist. No. 39 v. Hicks*, 1929 OK 337, ¶ 13, 280 P. 606, 608. “[R]emote and collateral facts from which no fair and reasonable inference can be drawn are to be excluded.” *Id.* Evidence related to *Purdue’s actions* cannot lead

to a reasonable presumption or inference proving the *Teva and Actavis Defendants committed an* “unlawful act”—therefore the evidence is irrelevant and should be found to be inadmissible. 12 O.S. § 2402; *see also Ross v. Otis Elevator Co.*, 1975 OK 105, ¶ 15, 539 P.2d 731, 733 (“However, exclusion of evidence that has no bearing on and does not tend to prove or disprove any issue raised by the pleadings is not error.”); *United States v. Hernandez-Hernandez*, 519 F.3d 1236, 1242 (10th Cir. 2008) (“[E]vidence may be permissibly excluded ‘where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue.’”) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006)).

The evidence sought to be admitted must be relevant to prove something that remains *at issue*. *See Ritchie v. State*, 1981 OK CR 91, ¶ 6, 632 P.2d 1244, 1245 (“To have probative value, that which is sought to be established must be at issue.”). The Court must assess if the Purdue Evidence is relevant to the State’s only remaining claim against the Teva and Actavis Defendants—public nuisance. Purdue’s conduct and acts will be legally irrelevant to the Court’s assessment of these elements.

III. EVIDENCE PRODUCED BY PURDUE IS NOT RELEVANT TO PROVING TEVA’S LIABILITY

The Court must decide whether the Teva and Actavis Defendants engaged in unlawful conduct that established a public nuisance. The State, however, seeks to blur the lines between corporate entities and pin blame on the Teva and Actavis Defendants for the unilateral actions of a competitor entity. The Purdue Evidence represents internal Purdue policies, documents, discussions, employees, and former employees. The documents were not shared with the Teva and Actavis Defendants either in the course of this lawsuit, or prior to the lawsuit. Additionally, Purdue’s employees and former employees and their statements, are not sanctioned by, or within the control of, any of the Teva and Actavis Defendants entities. If the conduct itself is not the Teva and Actavis Defendants’ or within the Teva and Actavis Defendants’ control, the evidence

about that conduct cannot be used to prove that any of the Teva or Actavis Defendants committed an “unlawful” act or omission that constituted a public nuisance.

Additionally, Purdue is no longer a party to this case. Whether *Purdue’s conduct* constituted a public nuisance in Oklahoma is no longer a relevant aspect of this case. The Purdue Evidence has no bearing on the Teva and Actavis Defendants’ conduct. None of this evidence makes it more or less probable that the Teva and Actavis Defendants’ conduct created a public nuisance. As such, the Purdue Evidence is remote and collateral to the issues in this trial, and no reasonable inference about any relevant issues can be drawn from it. Unilateral action by a unique and separate corporate entity cannot be used to imply conduct on behalf of another corporate entity. The Purdue Evidence is not relevant and must be excluded.

IV. THE PURDUE EVIDENCE IS UNFAIRLY PREJUDICIAL AND MUST BE EXCLUDED.

Evidence that is proffered solely to garner sympathy from the fact finder, or which carries the potential for an inappropriate appeal to the Court’s sympathy, is properly excluded at trial, even if found to be relevant. Whinery, “The exclusion of relevant evidence due to unfair prejudice or other harmful consequences—The harmful effects—Unfair prejudice,” 2 *Okla. Prac., Okla. Evidence* § 14.12 (2d ed.); *Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932, 939-40 (10th Cir. 1994). Even if this Court were to find the Purdue Evidence relevant, it should be excluded because its probative value, if any, is substantially outweighed by the danger of unfair prejudice to the Teva and Actavis Defendants. 12 O.S. § 2403. “The court has not only the discretion but also the duty to exclude evidence of little or no relevance or probative value which might have a prejudicial effect.” *Sec. State Bank v. Baty*, 439 F.2d 910, 913 (10th Cir. 1971); *see also Chesapeake Operating Inc. v. Kast Tr. Farms*, 2015 OK CIV APP 5, ¶ 43, 352 P.3d 1231, 1240 (“The court must seek a balance of probative value and potential prejudice on the facts of each case.”); *Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504, 1512 (10th Cir. 1997) (“Once

relevance has been determined . . . , the district judge must balance the probative value of and the need for the evidence against the harm likely to result from its admission.”) (internal citations and quotations omitted)).

The Purdue Evidence the State seeks to use (as evidenced by its statements at hearings in this case) include emails between members of the Sackler family, internal sales force training materials, marketing documents, and emails to third party public relations groups and marketing companies. These documents span back to 1996—before any Teva entity had even entered the opioid pharmaceutical market. They related to solely internal discussions and decisions and cannot be shown to be influenced by any of the Teva entities. Additionally, the State goes out of its way to utilize these documents in an inflammatory manner. These statements are intended to inflame and detract from the State’s burden to show each individual entity’s liability. There are still nine Defendants in this case, and the Purdue entities are not among them.

The fact that this is a bench trial does not diminish the risk of prejudice to Defendants. The Court has permitted the trial to be televised. The case has already garnered coverage by the national press, which will likely report extensively on the trial. Over 1,500 similar lawsuits have been filed against the Teva and Actavis Defendants throughout the country. Statements by Plaintiff’s counsel and evidence admitted at this trial could well reach—and influence—potential jurors in these other cases. Indeed, various Oklahoma cities, counties, and tribes have filed suit separately and asserted claims that will be tried to a jury *in this state*, where press coverage is the most intense. Thus, it is essential that the rules of evidence be applied as diligently in this case as in any jury trial and the dangers of unfair prejudice to the Teva and Activis Defendants avoided.

V. IRRELEVANT AND UNDULY PREJUDICIAL EVIDENCE TO BE EXCLUDED

The Teva and Actavis Defendants request the Court preclude the State from referring to or attempting to offer all Purdue Evidence, including by not limited to the following:

- A. Purdue's Internal company emails
 - Including internal emails between members of the Sackler family
- B. Purdue's Internal Company Initiatives or Public Relation Campaigns
 - Including references to, and documents concerning "Project Tango"
- C. Purdue emails to third party marketing organizations
 - Including references to, emails and documents related to the Herald Group Project
- D. Purdue Sales Force Training Documents
- E. Purdue Corporate Representative Testimony
- F. Purdue Fact Testimony
 - Including, but not limited to, Purdue Sales Representative Depositions
- G. Purdue emails and documents related to third party groups
- H. Any and all Purdue documents prior to Cephalon's entry into the Opioid Marketplace (2001)
 - Cephalon only manufactured and promoted two opioids—Actiq and Fentora. Cephalon launched Actiq in 2001, five years after Purdue introduced OxyContin, and it stopped promoting Actiq in 2006, when it launched Fentora.
 - Prior to 2011, Teva USA only manufactured and did not promote generic opioid medicines.
 - The Actavis Defendants manufactured only generic opioids. The Actavis Defendants did not promote their generic opioids to physicians in Oklahoma or anywhere else. *See* The Actavis Defendants' March 15, 2019 Motion for Partial Summary Judgment.
- I. Purdue product labels, FDA applications and Oxycontin specific product information
- J. Evidence related to a distribution agreement with Purdue entered to settle an IP lawsuit between the parties

Admission of this evidence would not tend to prove or disprove a material fact in issue against the *Teva and Actavis Defendants* and would instead merely confuse the record and unfairly prejudice the Teva and Actavis Defendants. It should accordingly be excluded. A

decision on the relevancy of these non-party documents should be ruled upon pre-trial. A ruling on relevancy would benefit the Court and both parties—the outcome could have a substantial tailoring effect on the trial.

CONCLUSION

For the foregoing reasons, the Teva Defendants and Actavis Defendants ask that the Court grant this Motion in Limine and instruct the State and all counsel not to mention, refer to, interrogate about, or attempt to convey in any manner, either directly or indirectly, any of these matters, and further instruct the State and all counsel to warn and caution each of their witnesses to follow the same instructions.

Dated: April 26, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was emailed this 26th day of April, 2019, to the following:

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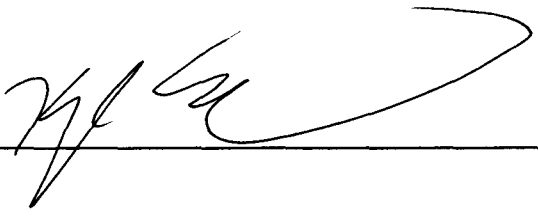


EXHIBIT 1

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IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

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

Plaintiff,)

vs.)

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- (1) PURDUE PHARMA L.P.;)
- (2) PURDUE PHARMA, INC.;)
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- (11) WATSON LABORATORIES, INC.;)
- (12) ACTAVIS LLC; AND)
- (13) ACTAVIS PHARMA, INC.,)
- f/k/a WATSON PHARMA, INC.,)

Defendants.)

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

REPORTED BY: ANGELA THAGARD, CSR, RPR

1 You know, the first thing I would say is that counsel for
2 Purdue admitted there's an issue with opioids. I think that
3 may be the understatement of the case so far. I don't think
4 there's an issue with opioids. I think there's an epidemic
5 with opioids. I think there's a crisis with opioids.

6 I think it's probably already the worst, most severe
7 public health crisis this state and indeed the country has ever
8 seen, and I think as the years roll on, we'll realize and look
9 back at today and know we were just at the tip of the iceberg
10 at seeing the consequences of the conduct that these
11 gentlemen's clients caused in this state.

12 Now, while we heard them admit that there was an issue
13 with opioids, we didn't hear them admit who started it. It was
14 started in 1996 with Purdue, in their aggressive marketing
15 campaigns, which we're going to talk about today. But I don't
16 think there can be any dispute that the genesis of why we're
17 all here today started with the Sackler family and their
18 company, Purdue, and then everyone else conspiring with them
19 and on their own to sell these drugs at the great deadly
20 consequence of addiction and death here in the state of
21 Oklahoma.

22 And I also think that it's interesting we didn't hear
23 anything from Purdue about the fact that while they want our
24 claims to be something they're not, they didn't want to talk
25 about what they are, which is claims largely predicated on

EXHIBIT 2

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STATE OF OKLAHOMA

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MIKE HUNTER)
ATTORNEY GENERAL OF OKLAHOMA,)

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HAD ON AUGUST 30, 2018
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BEFORE THE HONORABLE THAD BALKMAN
DISTRICT JUDGE

REPORTED BY: ANGELA THAGARD, CSR, RPR

1 prohibition that came after it. But a lot of what happened
2 with those laws was unnecessary by that time because we had
3 educated the public and doctors about the dangers associated
4 with opioid addiction and abuse and misuse.

5 One of the things that had to happen was not only that we
6 educated doctors, but that folks that had been prescribing and
7 giving away those types of drugs had to get out of the system,
8 and we had to have different, better educated, and differently
9 educated folks come into the system and understand that this
10 was not the way to treat pain in this country.

11 From 1915 to 1996, we didn't have this problem. The
12 opioid epidemic had been discovered and it had been caged and
13 it was not a problem. Yes, we had some heroin. Yes, we had
14 some Oxycodone related issues; percodan -- or percocet created
15 some problems. But we didn't have a widespread opioid
16 epidemic. We didn't.

17 1996, Purdue let the lion out of the cage, and it has run
18 wild and it has destroyed parts of this country state by state.
19 And you can watch it move across the map on a timeline and see
20 how it got here. But that's what happened.

21 You can trace it to a very specific point in time, and
22 that is when OxyContin was brought to market and promoted in an
23 aggressive, concentrated, and targeted way to consumers and
24 doctors, practitioners, prescribers, and pharmacists across
25 this country. That's what happened. That's what we're dealing

1 with.

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

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

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

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

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

25 And there are courts, state courts and federal courts