IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

vs.

(1) PURDUE PHARMA L.P.;
(2) PURDUE PHARMA, INC.;
(3) THE PURDUE FREDERICK COMPANY;
(4) TEVA PHARMACEUTICALS USA, INC.;
(5) CEPHALON, INC.;
(6) JOHNSON & JOHNSON;
(7) JANSSEN PHARMACEUTICALS, INC.;
(8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;
(9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;
(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.;
(11) WATSON LABORATORIES, INC.;
(12) ACTAVIS LLC; and
(13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,

Defendants.

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED

APR 09 2019

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816

Honorable Thad Balkman

DEFENDANTS JANSSEN PHARMACEUTICALS, INC. AND JOHNSON AND JOHNSON'S RESPONSE TO COURT ORDER ON JURY-TRIAL REQUIREMENTS, BRIEFING SCHEDULE, AND SEVERANCE

REDACTED VERSION

THIS DOCUMENT WAS FILED IN ITS ENTIRETY APRIL 9, 2019, UNDER SEAL PER COURT ORDER DATED APRIL 16, 2018

I. INTRODUCTION

Oklahoma law is clear: "Issues of fact arising in actions for the recovery of money ... shall be tried by a jury." 12 Okla. Stat. § 556. The State still has not dismissed its claims for future and punitive damages, and its "abatement" claim is an undisguised demand [redacted] that the State claims it needs to pay for various government programs it would like to initiate. The State seeks no relief *other* than "the recovery of money." *Id.* Janssen accordingly remains entitled to a jury trial.

Regardless of the factfinder, early rulings on key evidentiary questions will ensure an efficient and fair trial. To be certain, the parties are likely to present some different evidentiary motions in a bench trial than they would in a jury trial, but early decisions on Daubert, motions in limine, and deposition designations may inform the Court's rulings on dispositive motions, save countless hours of trial time, allow the parties to tailor their presentation to the issues the factfinder will ultimately consider, and prevent unwarranted collateral prejudice from this televised proceeding in hundreds of related cases. The Court should therefore adopt a schedule that allows it to fully consider and rule on such motions in the ordinary course.

Finally, almost two years after it filed its Petition and after many months of fact and expert discovery, the State still cannot point to a single transaction or occurrence common to its claims against Janssen and Teva. What it offers instead is conclusory statements and innuendo. If a common transaction or occurrence existed, the State would have identified it by now. Its failure to do so requires severance and separate proceedings against defendants who marketed different drugs, at different times, using different promotional strategies.

II. ARGUMENT

a. A Jury Trial Remains Necessary Because All of the State's Claims For Relief Seek "Recovery of Money"

Oklahoma statutory law lays down a bright-line rule governing the right to a civil jury trial: "Issues of fact arising in actions for the recovery of money ... shall be tried by a jury." 12 Okla. Stat. § 556. Although no jury is required where a cash recovery is "incidental to and dependent upon [an] equitable issue," *Russell v. Freeman*, 1949 OK 256, 214 P.2d 443, 444, there is no dominant equitable issue in this case: Even after its voluntary dismissal of certain claims,[1] *every* form of relief that the State demands from Janssen—future damages, punitive damages, and payment for the State's abatement plan—seeks *only* "the recovery of money." The recovery of money is not incidental to anything. It is all this case is about. Janssen accordingly is entitled to a jury trial.

That conclusion follows straightforwardly from the State's continuing claims for future and punitive damages. The State's notice of voluntary dismissal purports to dismiss the State's cause of action for "compensatory damages, including *past* damages stemming from its public nuisance claim." Pl.'s Ntc. of Vol. Dismissal of Certain Claims at 1 (Exhibit 1) (emphasis added). But it is conspicuously silent about the State's claim for *future* damages, which the State's damages expert, Dr. James Gibson, [redacted] Expert Supp. Disclosures of James L. Gibson, Ph.D. at 46

[1] The State's notice of voluntary dismissal purports to dismiss all claims other than public nuisance "without prejudice to refiling." Exhibit 1 at 1. But textbook res judicata and claim-splitting rules preclude the State from proceeding in a piecemeal fashion by trying its public nuisance claim first and later reviving its fraud, Medicaid false claims, and unjust enrichment theories. *See, e.g., Retherford v. Halliburton Co.*, 1977 OK 178, 572 P.2d 966, 969 ("no matter how many 'rights' of a potential plaintiff are violated in the course of a single wrong or occurrence, damages flowing therefrom must be sought in one suit or stand barred by the prior adjudication").

(Exhibit 2). The dismissal notice likewise says nothing about the State's punitive-damages claim. *See* Pet. Prayer ¶ M. Under blackletter law, those still-undismissed claims entitle Janssen to a trial by jury. *See Smicklas v. Spitz*, 1992 OK 145, 846 P.2d 362, 367 ("If ... damages are sought, the existence of a nuisance and its resulting damages are questions of fact for the jury."); 23 Okla. Stat. § 9.1 ("In an action for the breach of an obligation not arising from contract, *the jury* ... may ... award punitive damages ....") (emphasis added).

So does the State's claim for "abatement." To be sure, Oklahoma courts addressing *traditional* abatement actions have held that "[a] trial by jury is not required in suits brought for an injunction to suppress and abate a public nuisance." *Balch v. State*, 1917 OK 142, 164 P. 776, 777. But the State's "abatement plan" does not seek an injunction against Janssen[2]; rather, the plan lists various government programs that the State would like Janssen to pay for—and the *only* "abatement" remedy the State appears to seek is [redacted] supposedly needed to fund those programs. *See* Dep. of Jessica Hawkins at 54:5-10 (Exhibit 4) [redacted] Supp. Disclosures of Christopher J. Ruhm, Ph.D. at 8, 16 (Exhibit 5). That novel formulation of abatement is very obviously an "action for the recovery of money." 12 Okla. Stat. § 556. Janssen is therefore entitled to a jury trial.

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[2] Indeed, there is nothing for the State to enjoin. Janssen has not promoted any opioid medications since April 2015, when it divested the Nucynta product line. Dep. of Bruce Moskovitz at 51:5-10 (Exhibit 3); see *Post v. Kingdom Hall of Jehovah's Witnesses*, 1955 OK 127, 283 P.2d 528, 529 ("A court will not entertain an action to enjoin a party from doing that which he has already done.").

b. ***Daubert* Motions, Motions in Limine, and Deposition Designations Would Conserve Resources and Streamline Proceedings Even in the Absence of a Jury**

Whether this case is tried to a jury or to the Court, the Court must still decide *Daubert* motions, motions in limine, and objections to deposition designations. While evidentiary issues may differ without a jury, pre-trial rulings will still have an important role to play in narrowing the issues and streamlining the trial. In particular, early evidentiary rulings promise to save dozens, if not hundreds of hours of trial time that could be lost to evidence subsequently deemed inadmissible.

Daubert. "During a bench trial, *Daubert* standards governing the admissibility of expert evidence must still be met," though "concerns regarding unreliable expert testimony reaching a jury obviously do not arise when a district court is conducting a bench trial." *Valley View Dev., Inc. v. United States ex. rel. U.S. Army Corps of Engineers*, 721 F. Supp. 2d 1024, 1047 (N.D. Okla. 2010) (internal quotation marks omitted). To be sure, the Court has "substantial flexibility in admitting proffered expert testimony at the front end, and then deciding ... during the course of trial whether the evidence meets the requirements of ... *Daubert*." *Id.* Still, pre-trial rulings on select *Daubert* motions will benefit the Court and the parties.

Early rulings on certain *Daubert* motions may also simplify summary judgment. The State must identify competent expert evidence to create a genuine issue of fact on various elements of its public-nuisance claim. *See, e.g.*, *Christian v. Gray*, 2003 OK 10, 65 P.3d 591, 601-02 ("When an injury is of a nature requiring a skilled and professional person to determine cause and the extent thereof, the scientific question presented must necessarily be determined by testimony of skilled and professional persons."). And to survive summary judgment, the expert evidence it produces must be "convertible to admissible evidence at trial." *Kennedy v. Midwest City H.M.A., Inc.*, 2006 OK CIV APP 18, 130 P.3d 772, 774 n.2. Early rulings on select *Daubert*

motions will thus be critical to help the Court evaluate what expert testimony, if any, should be taken into consideration in ruling on the parties' summary judgment motions. *See, e.g., In re Williams Securities Litig.*, 496 F. Supp. 2d 1195, 1294-95 (N.D. Okla. 2007) (granting summary judgment to defendants after holding plaintiffs' expert causation testimony inadmissible under *Daubert*).

In addition, pre-trial *Daubert* rulings will help avoid televising—and wasting the Court's and parties' time on—extensive testimony by experts whose opinions the Court subsequently finds to be inadmissible.

Motions in Limine. Motions in limine will also help streamline the trial, while avoiding unnecessary prejudice to proceedings pending in other courts. Numerous grounds for exclusion—from irrelevance to discovery violations—maintain full force no matter who serves as factfinder. *See, e.g., Hohenberger v. United States*, 660 F. App'x 637, 641 (10th Cir. 2016) (affirming exclusion of irrelevant evidence at bench trial). Addressing select motions on such issues before trial will avert constant interruptions by a stream of *ad hoc* evidentiary objections and arguments, and will save time that would be wasted on inadmissible testimony. Moreover, the Court's decision to televise this trial may warrant excluding inadmissible materials prior to trial. There is no conceivable civic benefit to publicly broadcasting inadmissible materials, including highly prejudicial evidence with minimal probative value that would never be presented to a jury. Quite the contrary, doing so could prejudice Defendants in hundreds of related cases pending throughout the nation. That potential for substantial unwarranted collateral prejudice and the absence of any corresponding public benefit warrants a close pre-trial look at potentially inadmissible materials that will not aid the Court's factfinding.

Deposition Designations. A standard deposition designation protocol will likewise assist the parties in properly tailoring evidence to that which is admissible. The Court must make decisions about what is or is not admissible, no matter whether a jury is present or not. In light of the Court's intent to continue to televise the trial, it is imperative that the Court make those decisions and rule on the many objections to deposition testimony before trial. Not only is it necessary to preclude the public and potential future jurors from seeing patently inadmissible evidence, but an orderly designation process at the outset will allow for a more tailored presentation of trial proof. And it will help the parties tailor their presentations to the proof that the Court deems relevant and admissible, rather than expending resources preparing for and rebutting lines of evidence that the Court excludes after the fact.

Scheduling. To realize these benefits, it is essential that: (1) *Daubert* rulings be decided before or contemporaneously with fdispositive motions; and (2) other evidentiary issues are briefed and heard sufficiently ahead of trial for the parties to adapt their evidence to the Court's rulings. The schedule proposed by the Teva defendants in their concurrently filed motion adequately serves those purposes and would provide a viable path to resolve difficult evidentiary issues that will make this trial fairer and more efficient.

c. <u>Purdue's Settlement Does Not Lessen the Need for Severance</u>

Finally, the State's settlement with Purdue does not change the conclusion that its public nuisance claim features no transaction or occurrence involving both Janssen and Teva. Severance is therefore required.

The State's main argument against severance is that it is entitled to a joint trial because it alleges that the opioids crisis is an indivisible injury. The State is wrong that its alleged injuries are indivisible. Those injuries consist of individual doctors who allegedly misapprehend the safety and efficacy of opioid medications and of individual patients who allegedly became

addicted to opioids and suffered related health problems. And Janssen's responsibility or lack thereof for the misapprehensions of any given Oklahoma doctor or the addiction of any given Oklahoma patient can be determined using ordinary causation principles that courts routinely apply in product-liability actions. *See, e.g., Timmons v. Purdue Pharma Co.*, 2006 WL 263602, at *4 (M.D. Fla. 2006) (granting summary judgment for lack of causation evidence on failure-to-warn and fraud claims alleging inadequate warnings caused plaintiff's opioid addiction). The State's failure to present evidence to support such a causation analysis here does not magically make its injuries "indivisible"—it makes the State's causation evidence legally insufficient (a case-dispositive issue the Court will need to address on summary judgment) (a case-dispositive issue the Court will need to address on summary judgment). *See, e.g., Sergeants Benevolent Ass'n Health and Welfare Fund v. Sanofi-Aventis U.S. L.L.P.*, 806 F.3d 71, 97-98 (2d Cir. 2015) (granting summary judgment where "simplistic correlation evidence" failed to establish causation on classwide or individual basis).

In any event, Oklahoma law would require severance even if the State's alleged injuries were indivisible (they are not). As Janssen's severance motion explained, in *Watson v. Batton*, 1998 OK CIV APP 50, 958 P.2d 812, the Court of Civil Appeals held that a plaintiff's assertion that she suffered "an indivisible injury" from two different car accidents did not warrant joinder because "the accidents were separate" and "[e]ach accident was an individual occurrence." *Id.* at 814. That ruling controls this case, where the State (erroneously) claims an indivisible injury, but can point to no common occurrence or transaction linking its claims against Janssen to those against Teva. "The fact that the injuries may be difficult to separate does not, in itself, permit joinder of these completely separate causes of action." *Id.* The State has no response to *Watson*.

The State's other attempts to justify joinder are equally misguided. The State points to the activities of a former Janssen subsidiary, Noramco, which sold active pharmaceutical ingredients for opioid medications to other manufacturers. *See* Pl.'s Combined Reply Re. Briefing on Legal Auth. to Sever Claims and Consolidate Actions at 4-5 (Exhibit 6). But Noramco's sales were made under a comprehensive federal regulatory scheme, *see* 21 C.F.R. 1303.01 *et seq.*, 21 U.S.C. § 801, 826, so federal law preempts any attempt to impose state tort liability for them. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (state tort claims preempted where they would "skew[]" federal agency's "delicate balance of statutory objectives"). Such an attempt would also violate the cardinal rule "that a parent corporation ... is not liable for the acts of its subsidiaries." *United States v. Best Foods*, 524 U.S. 51, 61 (1998). Because the State has no "right to relief" based on Noramco's sales, the sales cannot justify joinder. *See A-Plus Janitorial & Carpet Cleaning v. Emp'rs' Workers' Comp. Ass'n*, 1997 OK 37, 936 P.2d 916, 926 (joinder is permissible only if "right to relief ... relat[es] to or aris[es] out of the same transaction or occurrence").

Nor can the State justify joinder with vague references to "Front Groups." Exhibit 6 at 5. The only group it specifically mentions, the Pain Care Forum, was devoted to constitutionally protected public-policy advocacy. Dep. of Bruce Colligen at 55:7-10 (Exhibit 7); Exh. 2 to Dep. of Bruce Colligen (Exhibit 8); *see Brock v. Thompson*, 1997 OK 127, 948 P.2d 279, 289 ("The clear import of the right-to-petition clause [Okla. Const. Art. 2, § 3] is to immunize from exposure to legal action persons who attempt to induce the passage or enforcement of law or to solicit governmental action"); *accord E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The State does not point to any actionable conduct by the Forum—not one

act—much less to anything the Forum did that would constitute a transaction or occurrence common to the State's claims against Janssen and Teva.

The State's vague and conclusory assertions that [redacted] Exhibit 6 at 5, similarly fails. The State's unexplained innuendo is not enough. It cannot join Janssen and Teva by alleging they participated in the same type of conduct, had relationships with the same people, or were members in the same groups. Nearly two years after filing its case, it must point to a right of relief arising from the "same transaction or occurrence." *A-Plus Janitorial*, 936 P.2d at 926. It has failed to do so and its claims against Janssen and Teva must therefore be severed as misjoined.

CONCLUSION

The State's bid to recover [redacted] in future damages, untold punitive damages, [redacted] to pay for its abatement plan unmistakably make this case an "action[] for the recovery of money" that must be tried by a jury under 12 Okla. Stat. § 556. But however the case is tried, pre-trial rulings on *Daubert*, important evidentiary challenges, and deposition designations promise to conserve Court and party resources. Finally, the State's inability to identify a single transaction or occurrence common to its claims against Janssen and Teva requires that its claims against each defendant be severed and tried separately.

Respectfully submitted,

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CERTIFICATE OF MAILING

Pursuant to Okla. Stat. tit. 12, § 2005(D), and by agreement of the parties, this is to certify on April 9, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:

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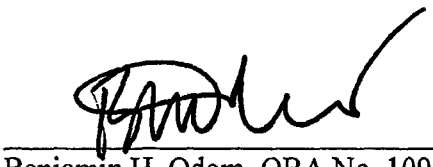

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EXHIBIT 1

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

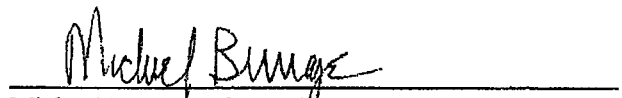
STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	§	
Plaintiff,	§	Case No. CJ-2017-816
vs.	§	The Honorable Thad Balkman
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (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.,	§	William C. Hetherington Special Discovery Master
Defendants.	§	

NOTICE OF VOLUNTARY DISMISSAL OF CERTAIN CLAIMS WITHOUT PREJUDICE

Pursuant to Okla. Stat. tit. 12, §§ 683 and 684, the State of Oklahoma hereby voluntarily dismisses the following causes of action without prejudice to refiling: (1) violation of the Oklahoma Medicaid False Claims Act, (2) violation of the Oklahoma Medicaid Program Integrity Act, (3) Fraud (Actual and Constructive) and Deceit, (4) Unjust Enrichment, and (5) compensatory damages, including past damages stemming from its public nuisance claim. The State does not

dismiss, and will continue to pursue, its cause of action for public nuisance and remedy of abatement under Okla. Stat. tit. 50, §§ 1–2, 8, 11, as well as any and all further equitable relief deemed just and proper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was emailed on April 4, 2019, to:

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EXHIBIT 2

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EXHIBIT 3

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EXHIBIT 4

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EXHIBIT 5

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EXHIBIT 7

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