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

DEFENDANTS PURDUE PHARMA L.P., PURDUE PHARMA INC., AND THE PURDUE FREDERICK COMPANY INC.'S OPPOSITION TO THE CITY OF OKLAHOMA CITY, THE CITY OF LAWTON, THE CITY OF ENID, AND THE CITY OF MIDWEST CITY'S JOINT MOTION TO INTERVENE

Defendants Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc. (collectively "Purdue") respectfully submit this opposition to the joint motion to intervene by the City of Oklahoma City, the City of Lawton, the City of Enid, and the City of Midwest City (collectively "the Cities") for the ostensible purpose of clarifying/modifying the Consent Judgment entered by this Court on March 26, 2019, between the State of Oklahoma ("the State") and Purdue.

I. INTRODUCTION

On March 26, 2019, this Court approved and entered an historic settlement valued at $270 million (the "Settlement"), which provides, among other things, for the creation of a National Center for Addiction Studies and Treatment (the "Center") in Tulsa, Oklahoma. The Settlement "has received national praise for its size, vision and resourcefulness" and is

considered "visionary" and "pioneering."[1] The mission of the Center is to bring meaningful change to those in Oklahoma and around the country suffering from substance use disorders and to eliminate the stigma associated with addiction. The Settlement also created a $12.5 million fund earmarked for municipalities and counties within Oklahoma.

Nevertheless, the Cities seek to intervene in this case in order to ostensibly clarify and/or modify the terms of that Settlement and corresponding Consent Judgment. Their motion should be denied for a host of reasons. *First,* the Cities fail to meet the requisite standard for intervention as of right. They do not and cannot identify a direct, substantial, and legally protectable interest as required under Oklahoma law. Rather, the Cities raise speculative concerns that the Settlement *might* impact their separate lawsuits pending in Oklahoma federal court.

Second, the Cities' motion constitutes an impermissible request for an advisory opinion. An adjudication of the *potential* impact of the Settlement on the Cities' individual cases would run afoul of well-established Oklahoma precedent requiring a definite and concrete case or controversy.

Third, the Cities lack standing for declaratory relief because they fail to present claims of sufficient immediacy as required under Oklahoma jurisprudence.

Fourth, the Cities ask this Court to address a nonjusticiable political question because their claims are hypothetical, rather than definite and concrete. Moreover, in asking this Court to substitute their own policy judgments in the place of the Attorney General's, the Cities fail to provide a manageable judicial standard and would instead have this Court make an initial policy determination of a kind clearly reserved for nonjudicial determination.

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[1] Renzi Stone, *Opioid Deal A Win For Oklahoma,* The Oklahoman (Apr. 7, 2019, 1:06 AM), https://newsok.com/article/5627926/point-of-view-opioid-deal-a-win-for-oklahoma.

II. FACTUAL BACKGROUND

This action was brought by the State through the Attorney General against several pharmaceutical companies, including Purdue. After more than a year of arms-length negotiations under the direction of the court-appointed mediator, Special Settlement Master Layn Phillips, the State and Purdue reached the Settlement, which was approved by this Court on March 26, 2019. Pursuant to the Settlement, Purdue and certain of its owners agreed to pay $270 million, $12.5 million of which will be set aside to establish a fund for cities and counties in Oklahoma that claim they were effected in one way or another by the opioid crisis. The Cities may participate in this fund if they choose to do so.

Separate from the Attorney General's action, the Cities individually sued Purdue in actions currently pending in Oklahoma federal courts. The suits by Midwest City and City of Enid were brought on March 22, 2019, and March 18, 2019—mere weeks before the Settlement was announced—and Purdue was not served in these cases until April 1, 2019, and March 21, 2019, respectively. Purdue has yet to file an answer or motion to dismiss in any of the Cities' pending suits. As a result, the courts in which the Cities' lawsuits are pending have had no opportunity to address whether and/or how the Settlement affects the Cities' claims.

The Cities filed their joint motion to intervene on April 1, 2019, seeking to clarify and/or modify the Consent Judgment because they are "*concerned* the Consent Judgment *may* be misinterpreted by *another court* to release Intervenors' claims against Purdue[.]" Mot. to Intervene, Ex. 1 ¶ 14 (emphasis added).

III. LEGAL STANDARDS

Oklahoma law provides that "[u]pon timely application anyone shall be permitted to intervene in an action...[w]hen the applicant claims an interest relating to the property or

transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest[.]" 12 Okla. St. § 2024(A)(2). Because the Oklahoma statute is substantially similar to Rule 24 of the Federal Rules of Civil Procedure, Oklahoma courts may look to federal case law when interpreting this provision. *Brown v. Patel*, 2007 OK 16, ¶ 17, 157 P.3d 117, 124. Based on federal precedent, Oklahoma courts have interpreted intervention as of right to require the following: "(1) the motion to intervene must be timely; (2) the intervenor must claim a *significant protectable interest relating to the property or transaction that is the subject of the action*; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest." *Id.* (internal citation omitted) (emphasis added); *accord Seminole Nat. of Okla. v. Salazar*, No. CIV-06-556-SPS, 2013 WL 230151, at *3 (E.D. Okla. Jan. 22, 2013).

As the Cities concede, to be a "significant protectable interest," the interest must be "'direct, substantial, [and] legally protectable[.]'" Mot. to Intervene at 6 (quoting *Brown v. Patel*, 2007 OK 16, ¶ 19, 157 P.3d at 125). "[A]n interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule for intervention as of right." *Brown v. Patel*, 2007 OK 16, ¶ 19, 157 P.3d at 125 (internal citation omitted). In other words, "the right to intervene based on a 'legally enforceable interest' cannot be maintained where 'the alleged harm is at best conjectural.'" *Com. v. Philip Morris Inc.*, 40 Pa. D. & C. 4th 225, 262, 1999 WL 633485, at *21 (Pa. Com. Pl. 1999) (quoting *In re Pa. Crime Comm'n Subpoena*, 453 Pa. 513, 522, 309 A.2d 401, 407 (1973)).

IV. ARGUMENT

A. The Cities' Motion For Intervention Must Be Denied Because They Do Not Have A Direct Legal Interest

Because the Cities raise merely hypothetical concerns that other courts could *potentially* interpret the Settlement to bar their claims against Purdue, their asserted legal interest does not satisfy the requirements for intervention as of right. Specifically, a party seeking intervention as of right bears the burden of establishing a sufficient legal interest that is "significantly protectable or direct, substantial, [and] legally protectable." *Brown v. Patel*, 2007 OK 16, ¶ 19, 157 P.3d at 125 (internal quotation marks and citation omitted). If the would-be intervenors' interest is instead "contingent upon the occurrence of a sequence of events before it becomes colorable" or otherwise "remote from the subject matter of the proceeding," the party's motion to intervene must be denied. *Id.* (internal citation omitted).

In *Brown v. Patel,* the Oklahoma Supreme Court held that "a *potential* subrogation interest against an insured's alleged tortfeasor, by itself, [was] too remote to justify an insurer's right to intervene as a matter of right." 2007 OK 16, ¶ 21, 157 P.3d at 125 (emphasis added). As in *Brown v. Patel,* the present motion alleges a theoretical harm to the Cities' interests that cannot occur as a direct result of proceedings in this Court, but rather, would require multiple actions by Purdue and the courts in which the Cities' claims are currently pending. The Cities do not—and cannot—claim any harm flowing as a direct result of this Settlement. As such, the Cities' claimed legal interest in the *potential* impact of the Settlement on their claims pending in other courts does not qualify as a legally enforceable interest and they may not intervene as of right under Oklahoma law.

B. Addressing The Cities' Hypothetical Legal Interests Would Constitute A Prohibited Advisory Opinion

The Cities' motion should be denied for a second but equally dispositive reason: it seeks an advisory opinion. Oklahoma strongly prohibits advisory opinions, which arise where, as here, "a party presents for adjudication antagonistic demands that are merely speculative," *Tulsa Indus. Auth. v. City of Tulsa*, 2011 OK 57, ¶ 13, 270 P.3d 113, 120, or asks a court to "answer hypothetical questions...that may never be subject to review." *Ball v. Wilshire Ins. Co.*, 2007 OK 80, ¶ 1, 184 P.3d 463, 464, 466-67 (internal citations omitted). *See also Scott v. Peterson*, 2005 OK 84, ¶ 27, 126 P.3d 1232, 1240 (Oklahoma courts do not render opinions on "hypothetical and abstract issue[s].").

The Cities do not identify any concrete harm to support their proposed intervention. Instead, the Cities reference the speculative, but as yet undetermined, effect the Settlement might have on their cases. Granting intervention to address these theoretical concerns would therefore constitute a prohibited advisory opinion. The hypothetical nature of the Cities' legal interests is established by their own statements that the Settlement "may" or "could" impact their legal rights. For example, the Cities argue that they "should be given leave to intervene...in light of their substantial interest in preventing the ***potential impairment*** of their rights to continue litigation and seek damages against Purdue." Mot. to Intervene at 5 (emphasis added). They likewise argue that the Consent Judgment "*could be* wrongfully construed by a different court to release cities' and counties' claims" and that the cities and counties' interest "*may* suffer serious impairment if intervention is denied." *Id.* at 7 (emphasis added).

Courts have rejected intervention in analogous circumstances. In *Commonwealth v. Philip Morris Inc.*, multiple non-profit hospitals sought to intervene following settlement of the State's suit against defendant tobacco companies. 40 Pa. D. & C. 4th 225, 1999 WL 633485 (Pa.

Com. Pl. 1999). There, as here, the would-be intervenors claimed they were permitted to "intervene in the remaining phases (*i.e.*, settlement)" because they had "legally enforceable interests at stake insofar as the [settlement] *may* affect their ability to assert, and obtain recovery for, claims they have and/or may have against the settling defendants." 40 Pa. D. & C. 4th at 226, 236, 1999 WL 633485, at *1, *6 (emphasis in original). More specifically, like the Cities, the hospitals argued that several provisions of the settlement, including its broad definitions of "released claims" and "releasing parties," "'could' operate to bar their claims" against the settling defendants. 40 Pa. D. & C. 4th at 237-39, 1999 WL 633485, at *7-8 (internal citation omitted). Based on these concerns, the hospitals requested an "additional contemporaneous order with an additional finding by the court that we are not covered by the language." 40 Pa. D. & C. 4th at 231, n.12, 1999 WL 633485, at *3, n.12. In denying the hospitals' motion to intervene, the court in *Philip Morris* noted the hypothetical nature of their claims that the settlement "could" or "may" impact their ability to sue the settling defendants. The court explained that the hospitals' "concern that the release provisions will render them vulnerable to dismissal...in pursuing a cause of action that already exists or might exist in the future ***fails to present an actual case or controversy ripe for disposition***." 40 Pa. D. & C. 4th at 264-65, 1999 WL 633485, at *22 (internal quotation marks and citation omitted) (emphasis added). There, as here, the "critical factor is that the 'legally enforceable interest' raised...is based on events yet to occur." 40 Pa. D. & C. 4th at 275-76, 1999 WL 633485, at *28.

As in *Philip Morris,* the hypothetical and speculative nature of the Cities' alleged interest is further confirmed by the fact that the "alleged harm...will not flow as a direct consequence of the proceedings before us, but rather if it does in fact occur it would be in connection with *other proceedings that may at some future time be instituted.*" 40 Pa. D. & C. 4th 225, 263–64, 1999

WL 633485, at *22 (emphasis added) (internal citation omitted). Indeed, like the hospitals in *Philip Morris,* the Cities are seeking "determination of an issue that is not actual: whether a contractual defense *might* be raised against them in a different proceeding." 40 Pa. D. & C.4th at 247, 1999 WL 633485, at *13 (emphasis in original). Purdue has yet to even file an answer, let alone move to dismiss any of the Cities' suits based on the Settlement, so "it could be sometime before this defense is asserted–if ever–in an answer." *Id.* Because the alleged harm in the instant case—like that in *Philip Morris*—is therefore plainly contingent on several variables that may or may not occur, "interpretation of the release provisions of the [Settlement] in a vacuum before it has been raised against them–is not yet ripe [and]...would result merely in an advisory opinion without legal effect." 40 Pa. D. & C. 4th 225, 253, 1999 WL 633485, at *16. As such, any ruling on the Cities' claims would be "appropriately decided by the presiding judge in that litigation if, and when, the [Settlement] release provisions are raised." 40 Pa. D. & C. 4th at 228, 1999 WL 633485, at *2. *See also Mishewal Wappo Tribe of Alexander Valley v. Salazar*, No. 5:09-CV-02502 EJD, 2012 WL 4717814, at *4 (N.D. Cal. Sept. 28, 2012), *aff'd*, 534 Fed. App'x 665 (9th Cir. 2013) (revoking intervention by neighboring counties in action by Indian tribe to claim federally held lands, since counties' contention that the tribe's potential development of a Las Vegas-style casino would have a "significant impact on the [counties'] land...assume[d] too much about future events"); *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.,* 725 F.2d 871, 875 (2d Cir. 1984) (intervention denied where would-be intervenor insurer's interest depended on jury verdict for the plaintiff and a finding in a separate action regarding the portion of damages for which the insurer was responsible).

This Court should therefore deny the Cities' unripe motion and permit the courts presiding over the Cities' actions to determine the impact of the Settlement if and when the issue is ever raised.

C. The Cities Lack Standing For Declaratory Relief Because Their Legal Interest Is Not Sufficiently Direct, Immediate, And Substantial

That the Cities appear to seek declaratory relief in asking this Court to enter an order modifying *or clarifying* the Settlement does not change the analysis, since Oklahoma's rule against issuing advisory opinions "does not change when a declaratory judgment is involved." *Knight ex rel. Ellis v. Miller*, 2008 OK 81, ¶ 8, 195 P.3d 372, 374. To invoke jurisdiction under Oklahoma's "declaratory judgment act, there must be an actual, existing controversy between parties having opposing interests, which interests must be direct and substantial, and involve an actual, as distinguished from a possible, potential or contingent dispute." *Id.* (internal citation omitted). Thus, because the Cities' asserted legal interests do "not present circumstances imbued with the immediacy and reality required under Oklahoma's extant jurisprudence to grant a declaratory judgment," *Dank v. Benson*, 2000 OK 40, ¶ 12, 5 P.3d 1088, 1092, declaratory relief is not available to them, and their request that this Court clarify the terms of the Settlement should be denied. *See* Mot. to Intervene at 10.

D. The Cities Present A Nonjusticiable Political Question

In asking this Court to address their hypothetical legal interests, the Cities also present a nonjusticiable political question. *Dank v. Benson*, 2000 OK 40, ¶ 9, 5 P.3d at 1091. To be justiciable—and therefore appropriate for judicial inquiry—a controversy must be definite, concrete, and capable of a decision granting or denying specific relief of a conclusive nature. 2000 OK 40, ¶ 8, 5 P.3d at 1091. As such, the Oklahoma Supreme Court declined to address a State legislator's claim that the House of Representatives would *likely* engage in procedural

conduct in violation of a particular state constitutional requirement, since it presented a hypothetical—rather than definite and concrete—situation and was therefore not a justiciable controversy ripe for judicial review. 2000 OK 40, ¶ 9, 5 P.3d at 1091. The same conclusion applies with equal force here—and weighs against intervention—since the Cities, like the State legislator in *Dank,* base their claim on "a hypothetical situation which may or may not arise" rather than "actual, reported...acts[.]" 2000 OK 40, ¶ 7, 5 P.3d at 1091.

Moreover, because the Cities base their intervention argument "on policy considerations concerning [the Settlement's] potential effects" and do not "invoke a statute or constitutional basis for review of an actual harm suffered", they "fail to provide this court with judicially manageable standards...[and instead] seek[] an initial policy determination of a kind clearly for nonjudicial discretion." *Philip Morris,* 40 Pa. D. & C. 4th at 273-74, 1999 WL 633485, at *27 (internal quotation marks and citation omitted); *see also Baker v. Carr,* 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found...a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"). Thus, in asking this Court to amend the Consent Judgment, the Cities "in essence, are asking this court to make a political, policy decision–or to adopt theirs–in substitution of the attorney general's judgment in entering into a settlement agreement." 40 Pa. D. & C. 4th at 272, 1999 WL 633485, at *26.

CONCLUSION

For the foregoing reasons, Purdue respectfully requests that this Court deny the Cities' motion to intervene.

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Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that on April 18, 2019, a true and correct copy of the above and foregoing has been served via e-mail to the following:

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