



STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk

MAY 03 2019

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

In the office of the
Court Clerk MARILYN WILLIAMS

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

Judge Thad Balkman

William C. Hetherington
Special Discovery Master

DEFENDANTS JANSSEN PHARMACEUTICALS, INC.
AND JOHNSON & JOHNSON'S MOTION IN LIMINE NO. 2 TO EXCLUDE
EVIDENCE REGARDING LOBBYING ACTIVITIES

REDACTED VERSION

THIS DOCUMENT WAS FILED IN ITS ENTIRETY APRIL 26, 2019,
UNDER SEAL
PER COURT ORDER DATED APRIL 16, 2018

Defendants Janssen Pharmaceuticals, Inc. (“Janssen”)¹ and Johnson & Johnson (“J&J”) respectfully move the Court for an order excluding from trial all evidence and argument regarding Janssen or J&J’s participation in lobbying efforts. The First Amendment protects these fundamental petitioning activities, and relying on them to establish liability would thus violate Janssen and J&J’s constitutional rights.

BRIEF IN SUPPORT

In support of this Motion *in Limine*, Janssen and J&J show the following:

I. INTRODUCTION

Like most companies in virtually every industry, Janssen and J&J lobby state and federal governments, aiming to protect their interests and to ensure that regulators and policymakers have access to complete and up-to-date information before making public-policy decisions. This activity is not only commonplace, but constitutionally protected.

The First Amendment shields citizens’ right to petition the government, and lobbying represents a core category of petitioning activity. Recognizing the importance of this right, the Supreme Court and federal circuit courts have repeatedly and consistently ruled that the government cannot subject citizens to liability for petitioning of *any branch* of government, even if a plaintiff alleges a defendant petitioned using improper means. *See, e.g., E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

Here, the State has ignored this clear prohibition, and has signaled that it will attempt to use Janssen and J&J’s legislative and administrative lobbying activities as an alleged basis for

¹ “Janssen” also refers to Janssen Pharmaceuticals, Inc.’s predecessors, Ortho-McNeil-Janssen Pharmaceuticals, Inc. and Janssen Pharmaceutica, Inc.

public nuisance liability. As the First Amendment forbids such a result, the Court should exclude all evidence regarding Janssen and J&J's lobbying activities for purposes of determining liability.

I. ARGUMENT

The First Amendment shields Janssen and J&J from liability over their lobbying activities. See U.S. Const. amend. I (protecting "the right of the people ... to petition the Government"). In the cases of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* and *United Mine Workers of America v. Pennington*, the Supreme Court held that parties cannot be held liable under antitrust laws for petitioning the government, even if the intent of such petitioning is to eliminate competition. See *Noerr*, 365 U.S. 127 (railroads' publicity campaign to promote laws harmful to trucking industry was immune from antitrust liability); *Pennington*, 381 U.S. 657 (joint efforts by miners' union and coal companies to have federal agency impose higher minimum wage for coal suppliers were immune from antitrust liability).

Courts have since expanded this immunity well beyond the antitrust context, recognizing that under this so-called "Noerr-Pennington doctrine, those who petition all departments of the government for redress are generally immune from liability." *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052, 1056 (9th Cir. 2005) (applying Noerr-Pennington to civil rights claim); see *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) (applying Noerr-Pennington to civil-rights and contract-interference claims). Put simply, the First Amendment's right to petition as set forth by Noerr-Pennington shields parties from liability for all sorts of efforts to influence *any* state or federal government entity to pass favorable legislation or take favorable action. *Id.* This robust First Amendment protection applies to lobbying, a textbook petitioning

activity. *See, e.g., GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 883 (10th Cir. 2005) (Noerr-Pennington barred suit premised on defendants’ “lobbying of government officials”); *Manistee Town Ctr. v. City of Glendale*, 227 F.3d 1090, 1092-93 (9th Cir. 2000) (Noerr-Pennington barred suit premised on city’s lobbying of county).²

Here, the State has signaled that it seeks to impose liability on Janssen and J&J for both legislative and administrative lobbying activities. *See* Ex. A, Feb. 5, 2019 Deposition Tr. of Jeff Buel at 35:1-19 [REDACTED]

[REDACTED] In either case, the First Amendment immunizes Janssen and J&J from liability, so any evidence regarding their lobbying activities cannot establish liability. The Court should exclude this irrelevant evidence.

Legislative lobbying. To the extent the State seeks to hold Janssen liable for its legislative lobbying activities in Oklahoma or elsewhere, such lobbying constitutes fundamental petitioning conduct for which the State cannot hold J&J or Janssen liable. *Cal. Motor*, 404 U.S. at 510-11; *Manistee*, 227 F.3d at 1092-93. Even if the State were to assert that J&J or Janssen used improper means when lobbying—for instance, that they misrepresented the risks and benefits of opioids—these activities would remain immune from liability. To cancel that immunity, the State would

² Courts generally agree that the First Amendment shields defendants from liability over petitioning activities. Some courts, however, use the term “Noerr-Pennington immunity” exclusively in antitrust cases; in other contexts, they refer solely to the First Amendment’s petition clause. *Compare White v. Lee*, 227 F.3d 1214, 1231-32 (9th Cir. 2000) (applying Noerr-Pennington to civil rights action; noting that “Noerr-Pennington is a label for a form of First Amendment protection; to say that one does not have Noerr-Pennington immunity is to conclude that one’s petitioning activity is unprotected by the First Amendment”), *with Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 208 F.3d 885, 889-90 (10th Cir. 2000) (acknowledging that parties are immunized from suits seeking to impose liability for petitioning activities, but finding that “such immunity derives from the right to petition,” and it is a “misnomer to refer to it as the Noerr-Pennington doctrine” outside the antitrust context).

have to show J&J and Janssen’s legislative lobbying amounted to a “sham” because it was “‘not genuinely aimed at procuring favorable government action’ at all.” *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991) (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988)). That sole exception to the First Amendment’s protection for legislative petitioning is “extraordinarily narrow,” *Kottle v. Nw. Kidney Ctrs.*, 146 F.3d 1056, 1061 (9th Cir. 1998), and does not apply merely because a party used “improper means” in seeking “favorable government action,” *City of Columbia*, 499 U.S. at 380.

In *International Brotherhood of Teamsters, Local 734 v. Philip Morris Inc.*, for instance, plaintiff brought a RICO action against tobacco manufacturers for allegedly making “misstatements about the relation between smoking and health.” 196 F.3d 818, 826 (7th Cir. 1999). The court held that “[t]o the extent the manufacturers’ statements were designed to influence Congress—to get favorable laws and ward off unfavorable ones—they cannot be a source of liability directly under the *Noerr-Pennington* doctrine.” *Id.* Here, similarly, the State cannot hold J&J or Janssen liable for lobbying activities aimed at influencing the legislature. J&J and Janssen intended to procure favorable government action through their lobbying efforts, and the State has effectively conceded as much. *See* Ex. B, Jan. 31, 2019 Deposition Tr. of Bruce Colligen Tr. 130:10-25 [REDACTED]

[REDACTED] The sham exception does not apply here, and the First Amendment thus immunizes J&J and Janssen from liability over their legislative lobbying activities. The Court should not permit the State to rely on any evidence related to these protected activities for the purpose of establishing liability.

Administrative lobbying. The State may also seek to introduce evidence that J&J participated in administrative lobbying in Oklahoma, but the First Amendment shields such

petitioning activity from liability as well. The same general principles that immunize legislative lobbying likewise apply to administrative lobbying. *See BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524-25 (2002). The same immunity that protects J&J and Janssen from liability for its legislative lobbying, then, also shields them from liability for any administrative lobbying. Although the “sham” exception to Noerr-Pennington is broader in this context—cancelling immunity based on “the knowing and willful submission of false facts to a government agency,” *see Potters Med. Ctr. v. City Hosp. Ass’n.*, 800 F.2d 568, 580 (6th Cir. 1986)—the State can point to no false statements J&J or Janssen made to Oklahoma agencies. The State has no basis to hold Janssen liable for its administrative lobbying, and the Court should exclude as irrelevant any evidence related to that petitioning conduct.

II. CONCLUSION

For all these reasons, the Court should grant Janssen and J&J’s Motion *in Limine* and issue an order forbidding the State from introducing any argument or evidence regarding Janssen or J&J’s lobbying activities.

Dated: April 26, 2019

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 26, 2019, a true and correct copy of the above and foregoing has been served via electronic mail, to the following:

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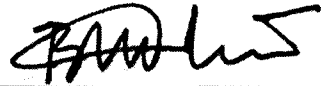
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EXHIBIT A

[FILED UNDER SEAL]

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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.

Case No. CJ-2017-816

- (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., f/k/a
- JANSSEN PHARMACEUTICALS, INC.;
- (9) JANSSEN PHARMACEUTICA, INC.,
f/k/a JANSSEN PHARMACEUTICALS, INC.;
- (10) ALLERGAN, PLC, 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.

ORAL AND VIDEOTAPED DEPOSITION OF JEFF BUEL

FEBRUARY 5, 2019

ORAL AND VIDEOTAPED DEPOSITION OF JEFF BUEL, a
witness produced at the instance of the Plaintiff, was
taken in the above-styled and numbered cause on the 5th
day of February 2019, from 9:09 a.m. to 3:31 p.m.,
before Dawn Baldwin, CSR in and for the State of Texas,
reported by machine shorthand, at the offices of Lynn,
Pinker, Cox & Hurst, LLP, 2100 Ross Avenue, Suite 2700,
Dallas, Texas.

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EXHIBIT B

[FILED UNDER SEAL]

1 IN THE DISTRICT COURT OF CLEVELAND COUNTY

2 STATE OF OKLAHOMA

3 STATE OF OKLAHOMA, ex rel.,
4 MIKE HUNTER,
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5 Plaintiff,

Case Number
CJ-2017-816

6 VS.

7 (1) PURDUE PHARMA L.P.;
8 (2) PURDUE PHARMA, INC.;
9 (3) THE PURDUE FREDERICK COMPANY;
10 (4) TEVA PHARMACEUTICALS USA, INC.;
11 (5) CEPHALON, INC.;
12 (6) JOHNSON & JOHNSON;
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15 PHARMACEUTICALS, INC., f/k/a
16 JANSSEN PHARMACEUTICALS, INC.;
17 (9) JANSSEN PHARMACEUTICA, INC.,
18 f/k/a JANSSEN PHARMACEUTICALS, INC.;
19 (10) ALLERGAN, PLC, f/k/a WATSON
20 PHARMACEUTICALS, INC.;
21 (11) WATSON LABORATORIES, INC.;
22 (12) ACTAVIS, LLC; and
23 (13) ACTAVIS PHARMA, INC.,
24 f/k/a WATSON PHARMA, INC.,

25 Defendants.

3230(C) (5) VIDEO DEPOSITION
OF THE JOHNSON & JOHNSON DEFENDANTS
BY AND THROUGH
CORPORATE REPRESENTATIVE BRUCE COLLIGEN
TAKEN ON BEHALF OF THE PLAINTIFF
ON JANUARY 31, 2019, BEGINNING AT 10:12 A.M.
IN OKLAHOMA CITY, OKLAHOMA

Reported by: Cheryl D. Rylant, CSR, RPR

Video Technician: CJ Shelton

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13 Defendants:

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