



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

**For Judge Balkman's
Consideration**

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.

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED

MAY 14 2019

In the office of the
Court Clerk MARILYN WILLIAMS

NOTICE OF OBJECTION AND NON WAIVER OF JURY

Come now the Teva and Actavis defendants and file this Notice of Objection and Notice of Non Waiver of Jury following up on the hearing Friday, May 10, 2019. As discussed below, the State is now expressing a desire to collect damages despite its having dismissed and waived such claims, and the Teva and Actavis Defendants object to the State being allowed to add damage claims back in at this stage. Second, the Teva and Actavis Defendants state again that they agreed to proceed without a jury because the trial would be limited to abatement. The defendants have not waived jury as to any claim for damages.

DISCUSSION

On April 4, the State filed a Notice of Voluntary Dismissal of certain claims and explicitly dismissed “compensatory damages, including past damages stemming from its public nuisance claim.” At. p.2.

On April 11, 2019, following the State's filing the Notice of Voluntary Dismissal, the Court held a hearing on the issue of whether this case should include a jury trial. The State assured the Court multiple times that it was not seeking damages. Mr. Beckworth: "The State is not pursuing anything other than the abatement remedy. That's it. There is no pursuit at this time, after we've dismissed those claims, of past damages or punitive damages or anything that would be damages. Simply the abatement. I hope that clarifies it." Tr. at p. 7. "So for a long time in this case we had both [civil action and abatement]. At this time we've waived everything but the abatement." Tr. p. 8

In turn, counsel for the Teva and Actavis defendants expressed the need for a clear understanding on what the trial would be about. Tr. p. 52. Counsel expressed the need for a clear understanding that the State was not seeking future damages or punitive damages. *Id.* And that assurance was made by the State. Tr. p. 53. (see also, p. 54, Mr. Beckworth: "Let's address this again. We're not seeking future damages. We're not seeking past damages. We seeking abatement of a nuisance, and that's it.") Based on the assurances from the State, the Teva and Actavis defendants were ready to proceed. Mr. McCampbell: "That being the case, Your Honor, we would be willing to go forward in a non jury context and in a non jury trial." Tr. p. 53.

Nonetheless, at the May 10, 2019 hearing, the State made clear that it is seeking "damages"—not abatement. Indeed, counsel is told the State expressly referred to the relief it was requesting as “damages.” (The parties will need to see the transcript to confirm if that happened.) It even gave a hypothetical confirming this point.

First, it is now clear that the State's "abatement" remedy is a thinly-veiled attempt to recover damages. As the Teva and Actavis Defendants have explained, this is improper—and a basis for summary judgment. (Mot. SJ, at 39-40). For example, at oral argument, the State discussed the hypothetical of a defendant which caused pollution of river. The State argued that it makes no sense for the State to have an abatement remedy to stop the conduct causing the pollution but not have a remedy to require the defendant to pay to clean up the river. However, abatement is the remedy to stop the conduct that is the alleged public nuisance, not to pay damages on past consequences associated with the alleged nuisance. *Atchison Topeka and S.F. v. Kelly*, 1928 OK 256, ¶ 10 (The defendant might abate its nuisance, but that could not, by doing so, restore plaintiff's premises."); *Burlington Northern v. Grant*, 505 F.3d 1013, 1029 (10th Cir. 2007)(Oklahoma law)("one aspect of damages the victim of a temporary nuisance can recover is the cost of restoring the land to its former condition." Internal quotation marks omitted).

In the hypothetical, the State has an abatement remedy to stop the pollution of the river. As to clean up costs that are the consequence of the pollution, the State does not lack a remedy. The remedy is an action for damages for the cost of the clean up. But in this case, the State has waived that remedy and dismissed all such requested relief.

Second, as stated above, the Teva and Actavis Defendants vigorously object to the State seeking or receiving any damages award. All such relief has been dismissed and expressly waived by the State. While it would be grossly prejudicial and improper to allow the State to seek such damages (under a theory of "abatement" or some other relief), the Teva and Actavis Defendants want to make clear that they have not waived a jury trial on any claim for damages. As a result, to the extent the Court permits the State to pursue the current form of their "abatement" theory

(again, just a thinly-veiled demand for past and future damages), the Teva and Actavis Defendants expressly object to doing so in a bench trial and demand a jury trial.

CONCLUSION

This is a critical issue in the case. As a result, the Teva and Actavis Defendants want to be clear with the Court and the State that: (a) they object to the State seeking any damages, regardless of the State's effort to relabel that relief "abatement," and (b) the Teva and Actavis Defendants have not waived a jury trial on any claim for damages sought by the State.

Dated May 14, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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