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 Honorable Thad Balkman

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR A CONTINUANCE

The State responds to Defendants' motion for a continuance by resorting to inflammatory rhetoric, speculation, and misleading, irrelevant assertions that have nothing to do with the motion before this Court. The State does not dispute that it violated the Special Discovery Master's Order requiring the State to ***complete*** its discovery and productions by February 5, 2019 for a host of long-outstanding discovery requests. (Jan. 17, 2019 Hr'g Order at 7 (emphasis added).) The State still remains in violation of this order, among others, despite flooding Defendants with an additional ***1.6 million*** pages – and almost doubling its prior document production – well after the February 5 deadline, and in the waning days of fact discovery. Nor does the State dispute any item in the long list of missing custodial files for witnesses or other missing document categories. (Defs' Mot., Ex. A.)

Defendants have been forced to file motion after motion, and obtain order after order, to wrest basic and essential fact discovery from the State. Yet the State has continued to violate orders to produce this discovery, thereby frustrating the Court's scheduling framework and prejudicing Defendants. The State strategically waited until the end of fact discovery to nearly double its document productions – with more to come – and prevent Defendants from using those

documents for fact depositions that had already occurred or follow-up discovery. The State's private counsel have not devoted the appropriate time, resources, or attention to meeting the State's substantial discovery obligations, despite repeated requests from Defendants and orders from the Court. Rather, an inordinate amount of time, effort, and resources have been expended by the State's outside lawyers with unnecessary motions, hyperbole, name calling, and manufacturing unnecessary disputes and controversies that have only distracted from the actual work that should have been taking place to prepare the case for trial. It is the State, and not the Court or Defendants, who has created the present situation. Fundamental fairness requires that the Court should remedy the consequences of the State's conduct by granting Defendants' motion.

Far from seeking to avoid taking further discovery, as the State erroneously asserts (Opp. at 4), Defendants have been clear in their moving papers that Defendants should be allowed to re-open necessary discovery against the State to the full extent warranted by the State's delinquent discovery responses. (Defs' Mot. at 4.) No doubt, the State will be releasing another flood of documents if it is ever to comply with the Court's orders. Yet, even as matters currently stand, Defendants must be afforded a fair opportunity to depose or re-depose witnesses, update expert disclosures, and depose or re-depose the State's experts using the voluminous documents that have only just been released at the end of fact discovery and any productions that are yet to come.

The merits of Defendants' motion have only strengthened since it was filed. By March 1, 2019, the State was "Ordered to ***complete*** database and code production" for certain State healthcare and claims databases "in a form that is either ordinarily maintained or in a de-identified form which is reasonably usable with Defendants able to obtain the relevant information." (Feb. 14, 2019 Hr'g Order at 4 (emphasis added).) "If Defendants continue to be denied access to necessary databases," then "delay may be the result" of the State's conduct. (*Id.*) Yet the State

violated this order as well. The State still has not produced medical examiner and Fatal Unintentional Poisoning System data in a format that would allow decedents to be matched to Medicaid or Health Choice data. (March 3, 2019 Ltr. from D. Roberts to T. Duck (Ex. A).) Pharmacy and medical claims data still have not been provided to Defendants to allow entries to be compared between the databases and studied. (*Id.*) Defendants have long been deprived of these key data sources, which are needed for the expert-intensive work in this case – both to prepare expert reports and to depose the State's experts on their novel theories.

Even worse, ongoing deposition and other discovery has revealed a disturbing pattern of more fundamental violations of the State's discovery duties. As Purdue has shown in its separate Emergency Motion to Compel, the State's private attorneys did not send the required litigation hold notices to all custodians, leaving open the question of how much potentially responsive evidence the State's employees may have inadvertently or intentionally destroyed. (Purdue Emergency Mot. to Compel at 5-8.) For instance, the State's private counsel waited 302 days after filing suit to issue a litigation hold to the OHCA-contracted group at the University of Oklahoma College of Pharmacy, which administers the SoonerCare pharmacy benefits program, reviews and approves (or denies) all prior authorizations for prescription medications for SoonerCare members, prepares materials for and leads all Drug Utilization Review board meetings, and makes recommendations to the DUR board about prior authorization requirements. (*Id.* at 6-7.) The State also waited almost 10 months to issue a litigation hold to the Department of Mental Health and Substance Abuse Services, one of the agencies for which the State seeks damages. (*Id.* at 7.) It remains undetermined how much discovery has been lost irretrievably from the State's private counsel's failure to preserve documents from these key sources.

Other key documents remain missing. Documents from senior employees at State agencies still remain unproduced. The State knows about these deficiencies from the depositions but will not address them. Among these still-missing documents are those held by the Chief Medical Officer for the Employee Group Insurance Division, the Senior Director of Pharmacy at the Oklahoma Healthcare Authority, and the spokespersons for the Attorney General's Office. (*Id.* at 6.) The State has failed to produce custodial files of ***54*** individuals likely to possess information relevant to the claims and defenses at issue in this lawsuit. (*Id.* at 8-10.) Among these are persons whom ***the State*** identified in its initial disclosures and others as having "a significant number of relevant documents." (*Id.* at 9.)

Though the State points to Defendants' document productions as also being voluminous (Opp. at 2-3), that only supports Defendants' motion to extend the time for expert discovery and trial. Defendants have not objected to the State's belated supplements to its expert disclosures to account for ongoing document productions. Perhaps more importantly, the State was ordered by the Special Discovery Master to ***complete*** certain document productions by February 5, 2019, and certain data productions by March 1. Yet the State indisputably violated those orders. Those orders were necessary because the State refused to produce basic fact discovery in critical areas, whereas Defendants have been producing voluminous documents in earnest throughout the discovery period.

It is obvious that the State is far behind on its discovery obligations. It is long past time for the State to get going. (*See* Opp. at 5.) Defendants cannot be punished for the State's failure to comply with its basic discovery obligations and Court orders compelling such discovery. Defendants need the discovery that is past due – and still outstanding – to properly depose State fact witnesses, prepare Defendants' expert disclosures, and depose the State's more than two-

dozen experts. Defendants must then prepare substantial and complex briefing on *Daubert* and summary judgment issues – with multiple hearings – all of which must be ruled upon long before trial. The State's conduct prejudices Defendants' opportunity to properly present these issues to the Court and truncates the Court's opportunity to review and resolve them.

Unless the schedule is continued, for example, Defendants will be put in the untenable position of having to brief *Daubert* challenges to the admissibility of the State's experts before their depositions are complete. Dispositive motions are due a day before the scheduled *Daubert* hearing. By the time the motions are fully briefed and the *Daubert* hearings concluded, the Court will have only two weeks to consider and decide these critical and threshold legal issues, which may eliminate or narrow issues and evidence to be presented at any trial. All of this leads to the extensive pretrial work that is necessary such as preparing deposition designations from dozens of witnesses (with objections and rulings), exhibit lists for the millions of pages of documents in the case, motions *in limine* on a host of evidentiary issues, and other pretrial briefing, hearings, and rulings.

Whatever may be said about the accelerated schedule that has been in place, it should now be continued to account for the State's dilatory conduct in discovery and the broad and complex work leading up to trial. As Defendants submitted in their moving papers, the trial date should be continued to September 16, 2019; deadlines for expert discovery, *Daubert* motions, dispositive motions, and pretrial filings should be suspended pending further order after the parties submit a proposed schedule; and Defendants should be given leave to re-open necessary discovery from the State arising from voluminous discovery belatedly produced by the State on or since February 21, 2019.

Date: March 6, 2019

Respectfully submitted,

Sanford C. Coats, OBA No. 18268
Joshua D. Burns, OBA No. 32967
CROWE & DUNLEVY, P.C.
Braniff Building
324 N. Robinson Ave., Ste. 100
Oklahoma City, OK 73102
Tel: (405) 235-7700
Fax: (405) 272-5269
sandy.coats@crowedunlevy.com
joshua.burns@crowedunlevy.com

Of Counsel:

Sheila Birnbaum
Mark S. Cheffo
Paul A. LaFata
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, New York 10036
Tel: (212) 698-3500
Fax: (212) 698-3599
sheila.birnbaum@dechert.com
mark.cheffo@dechert.com
paul.lafata@dechert.com

Counsel for Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2019, I caused a true and correct copy of the following:

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR A CONTINUANCE

to be served via email upon the counsel of record listed on the attached Service List.

SERVICE LIST

WHITTEN BURRAGE
Michael Burrage
Reggie Whitten
512 N. Broadway Avenue, Suite 300
Oklahoma City, OK 73102
mburrage@whittenburragelaw.com
rwhitten@whittenburragelaw.com
Counsel for Plaintiff the State of Oklahoma

OKLAHOMA OFFICE OF THE ATTORNEY GENERAL
Mike Hunter
Abby Dillsaver
Ethan A. Shaner
313 NE 21st St
Oklahoma City, OK 73105
abby.dillsaver@oag.ok.gov
ethan.shaner@oag.ok.gov
Counsel for Plaintiff the State of Oklahoma

NIX, PATTERSON & ROACH, LLP
Bradley E. Beckworth
Jeffrey J. Angelovich
Lloyd "Trey" Nolan Duck, III
Andrew Pate
Lisa Baldwin
512 N. Broadway Ave., Suite 200
Oklahoma City, OK 73102
bbeckworth@nixlaw.com
jangelovich@npraustin.com
tduck@nixlaw.com
dpate@nixlaw.com
lbaldwin@nixlaw.com
Counsel for Plaintiff the State of Oklahoma

GLENN COFFEE & ASSOCIATES, PLLC
Glenn Coffee
915 N. Robinson Ave.
Oklahoma City, OK 73102
gcoffee@glenncoffee.com
Counsel for Plaintiff the State of Oklahoma

ODOM, SPARKS & JONES PLLC
Benjamin H. Odom
John H. Sparks
HiPoint Office Building
2500 McGee Drive Ste. 140
Oklahoma City, OK 73072
odomb@odomsparks.com
sparksj@odomsparks.com
Counsel for Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson, Janssen Pharmaceutica, Inc. n/k/a/ Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a/ Janssen Pharmaceuticals, Inc.

DECHERT, LLP
Sheila Birnbaum
Mark S. Cheffo
Paul A. LaFata
Three Bryant Park
1095 Avenue of the Americas
New York, New York 10036
sheila.birnbaum@dechert.com
mark.cheffo@dechert.com
paul.lafata@dechert.com
Counsel for Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc.

O'MELVENY & MYERS LLP
Charles C. Lifland
Jennifer D. Cardelús
David K. Roberts
400 S. Hope Street
Los Angeles, CA 90071
clifland@omm.com
jcardelus@omm.com
droberts2@omm.com
Counsel for Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson, Janssen Pharmaceutica, Inc. n/k/a/ Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a/ Janssen Pharmaceuticals, Inc.

GABLEGOTWALS
Robert G. McCampbell
Nicholas V. Merkley
One Leadership Square, 15th Fl.
211 North Robinson
Oklahoma City, OK 73102-7255
RMcCampbell@Gablelaw.com
NMerkley@Gablelaw.com
Attorneys for Defendants Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. f/k/a/ Watson Pharma, Inc.

MORGAN, LEWIS & BOCKIUS LLP
Brian M. Ercole
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131
brian.ercole@morganlewis.com
Attorneys for Defendants Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. f/k/a/ Watson Pharma, Inc.

O'MELVENY & MYERS LLP
Stephen D. Brody
1625 Eye Street NW
Washington, DC 20006
sbrody@omm.com
Counsel for Defendants Janssen Pharmaceuticals, Inc., Johnson & Johnson, Janssen Pharmaceutica, Inc. n/k/a/ Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a/ Janssen Pharmaceuticals, Inc

MORGAN, LEWIS & BOCKIUS LLP
Steven A. Reed
Harvey Bartle IV
Rebecca Hillyer
1701 Market Street
Philadelphia, PA 19103-2921
steven.reed@morganlewis.com
harvey.bartle@morganlewis.com
rebecca.hillyer@morganlewis.com
Attorneys for Defendants Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. f/k/a/ Watson Pharma, Inc.