



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

**CIVIL ACTION NO. 21-C-9000
DISTRIBUTOR**

THIS DOCUMENT APPLIES TO ALL DISTRIBUTOR CASES

**ORDER DENYING DISTRIBUTOR DEFENDANTS' MOTION TO
COMPEL RESPONSES TO AGGREGATE DISCOVERY REQUESTS**

The Distributor Defendants bring a motion to compel City/County Plaintiffs to produce documents responsive to Distributors' aggregate discovery requests. (Transaction ID 67170869) filed on December 15, 2021. Plaintiffs argue these requests are not relevant to the Phase 1b bench trial. Since the filing of these pleadings, the Discovery Commissioner has entered an order which defines and clarifies the factual issues the Panel ordered to be resolved during the Phase 1b bench trial, namely:

Factual Issue #1: Whether there presently exists an opioid epidemic throughout West Virginia?

Factual Issue #2: Whether the opioid epidemic is an unreasonable interference with public health and safety?

Factual Issue #3: Whether Distributor Defendants engaged in wrongful conduct throughout West Virginia?

Factual Issue #4: Whether the wrongful conduct by Distributor Defendants is capable of causing the opioid epidemic alleged?

Order Granting City/County Plaintiffs' Motion to Compel Distributor Defendants to Disclose Due Diligence Files (Transaction ID 67207971) ("*Phase1b Order*"). Having reviewed the nine (9) discovery requests germane to this motion, the Discovery Commissioner finds that none are reasonably calculated to lead to the discovery of admissible evidence related to the Phase1b trial and/or impermissibly seek discovery from individual City/County Plaintiffs. Consequently, the Discovery Commissioner **DENIES** the motion and makes the following findings:

1. The Discovery Commissioner is mindful that the disputed discovery requests were served, and the briefing on this issue concluded, prior to the issuance of the *Phase1b Order*. The findings herein are made with the intent to provide further guidance regarding the proper scope of discovery for Phase1b. Nothing herein is intended to foreclose the Distributor Defendants' right to defend itself nor present affirmative defenses at the appropriate time. The Panel has directed the Discovery Commissioner to rule upon discovery disputes in order to prepare this case for the Phase1b trial. Consequently, discovery should be limited to those factual issues presented during Phase1b.

2. The disputed discovery requests include subject matters such as the medical standard of care for treatment of pain (RFP#1), the legitimate medical need for prescription opioids (RFP#2) (RFP#7), the volume/impact of prescription opioids actually diverted into West Virginia (RFP#4) (RFP#8), contribution by other potential tortfeasors (RFP#5) (RFP#6) and comparative fault/mitigation of damages (RFP#9). Distributor Defendants argue these subject matters are relevant to other source(s) of the alleged "oversupply" of prescription opioids into West Virginia. (Motion, p.4-5).

3. Factual Issue #1 asks whether there presently exists an opioid epidemic throughout West Virginia and Factual Issue #2 asks whether the opioid epidemic is an unreasonable interference with public health and safety. These are specific and disputed factual predicates for the Phase1a, Phase1b and Phase1c public nuisance claims. The discovery requests do not facially appear related to the first two factual issues. Thus, the sole question presented to the Discovery Commissioner is whether the propounded discovery is reasonably calculated to lead to the discovery of admissible evidence pertaining to Factual Issue #3 and Factual Issue #4.

4. Factual Issue #3 asks whether Distributor Defendants engaged in wrongful conduct throughout West Virginia. Plaintiffs allege Distributor Defendants systemically shipped suspicious orders, in the absence of adequate due diligence, in violation of federal law. See *In re Nat'l Prescription Opiate Litig.*, 2019 U.S. Dist. LEXIS 140020 (N.D. Ohio 2019) (analyzing *Masters Pharm., Inc. v. DEA*, 861 F.3d 206 (2017)). “Suspicious orders” include “orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.” 21 C.F.R. § 1301.74(b). The propounded discovery requests do not appear to directly address Factual Issue #3. The discovery requests appear to relate primarily to affirmative defenses which come into play only if Plaintiffs prevail on Factual Issue #3. The changing standard of care, by way of example, becomes moot if Plaintiffs fail to establish that Distributor Defendants engaged in underlying wrongful conduct.

5. Factual Issue #4 asks whether the wrongful conduct by Distributor Defendants is capable of causing the opioid epidemic alleged. The Discovery Commissioner purposefully formulated this factual issue after repeated discovery disputes regarding the scope and meaning of “general causation” from the *Phase1b Order* (Transaction ID 67207971). The Panel intends to defer common questions related to specific causation to later stages of this litigation. Thus, the scope of Factual Issue #4 is whether the alleged wrongful conduct by the Distributor Defendants is capable of causing diversion (by way of example), not whether (or to what extent) diversion actually occurred in West Virginia. Evidence regarding *de facto* diversion is reserved for later stages of litigation.

6. Bifurcating this formulation of general causation from specific causation will enable the Panel to address disputed factual issues unique to the Manufacturers (Phase1a), the Distributors (Phase1b) and the Pharmacies (Phase1c) before proceeding to a consolidated proceeding for those deemed culpable. Whether and to what extent the culpable defendants are a substantial factor giving rise to and/or fueling the opioid epidemic in West Virginia (specific

causation) will occur at a later stage of this litigation when all the purported causal factors can be presented to the Panel in a cohesive and cogent format.

7. Finally, Distributor Defendants seek discovery directly from the City/County Plaintiffs relating to the incidence of patients with acute or chronic pain in West Virginia (e.g., RFP#3). The Panel previously found that “it would be unduly burdensome, expensive, and cumulative to allow liability discovery from the individual City/County Plaintiffs to determine general causation [...]” October 27, 2021 *Order* (Transaction ID 67047934) ¶13. The Panel has made it clear that the “opioid crisis is ubiquitous. It knows no boundaries and is not limited to a specific city or county in West Virginia. The Panel finds that a consolidated bench trial to determine whether the Distributor Defendants are liable to the City/County Plaintiffs for public nuisance will promote judicial dispatch and economy, while avoiding the prejudice and confusion of multiple, single plaintiff trials. It will also promote convenience of the parties and witnesses, conserve available judicial resources, and substantially decrease the length of time, amount of expense, and burden on all parties of trying multiple lawsuits to determine whether the Distributor Defendants are liable for public nuisance as to each city or county.” *Id.* ¶7.

8. It should be noted that the Panel directed the City/County Plaintiffs to narrow their theories of liability and dismiss their legal claims in accordance with *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 859 S.E.2d 374 (W. Va. 2021) to participate in Phase1b. *Order Regarding Voluntary Dismissal of Legal Claims Discussed During September 10, 2021 Status Conference* (Transaction ID 66980151). The Panel’s staging is purposeful and designed to facilitate a single, statewide abatement remedy if proven. Allowing the Distributor Defendants to re-serve individualized discovery and simply rename it “aggregate discovery”

defeats the purpose of the Panel's directive. Future discovery requests pertaining to the scope of the opioid epidemic in West Virginia should be framed on a statewide basis.

9. Defendant Distributors will have ample opportunity to raise affirmative defenses such as alternative causation, contribution by other tortfeasors, comparative fault and mitigation of damages at a later stage(s) of litigation.

WHEREFORE, the Discovery Commissioner **DENIES** *Defendant Distributors' Motion to Compel Responses to Aggregate Discovery Requests* (Transaction ID 67170869) filed on December 15, 2021 and encourages the parties to further confer on the proper scope of Phase1b discovery, given the recent rulings by the Discovery Commissioner, and abide by the same.

A copy of this Order has this day been electronically served on all counsel of record via File & ServeXpress.

ENTERED: January 12, 2021.

/s/Christopher C. Wilkes
Discovery Commissioner