



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 19-C-9000

THIS DOCUMENT RELATES TO ALL CASES

**ORDER GRANTING CITY/COUNTY PLAINTIFFS' MOTION TO COMPEL
DISTRIBUTOR DEFENDANTS TO DISCLOSE DUE DILIGENCE FILES**

The City/County Plaintiffs bring a motion to compel Distributor Defendants to produce statewide due diligence documents. (Transaction ID 67105702) (Transaction ID 67146934). Distributor Defendants argue these requests are not relevant to the Phase 1b bench trial. (Transaction ID 67131478). For the reasons set forth during the remote hearing (December 22, 2021) and herein, the Discovery Commissioner grants Plaintiff's motion to compel the disclosure of statewide due diligence files. In support, the Discovery Commissioner makes the following findings:

1. Plaintiffs served discovery requests upon the Distributor Defendants which included the following discovery request:

Combined Discovery Request No. 4: Please produce the *due diligence file* for each of your customers in the State of West Virginia. Please identify the Bates range which corresponds to each due diligence file to enable a jury to correlate each due diligence file to each of your customers.

The Discovery Commissioner, serving in a similar capacity in parallel federal court litigation, found the due diligence files are discoverable. See Discovery Ruling No. 2, *Cabell County Commission et al. v. AmerisourceBergen Drug Corporation et al.*, United States District Court for the Southern District of West Virginia (Case 3:17-cv-01362) (Doc. 273) (Filed 04/02/2020) (Faber, J. presiding).

2. Nonetheless, Distributor Defendants argue the due diligence files are not discoverable because: (a) these documents do not comport with "aggregate discovery" ordered by the Panel; (b) these documents are not relevant to the factual issues presented during Phase 1b

of the bench trial; (c) the discovery request is geographically too broad and should be limited to the specific locales of the MLP political subdivisions; and (d) the burden of producing these documents is unreasonable.

3. Distributor Defendants argue, in the alternative, that if Plaintiffs are entitled to discovery of pharmacy-specific information, including diligence files, then common sense, fairness, and due process require that Distributor Defendants be permitted to take symmetrical discovery. Such symmetrical discovery would include, but not be limited to, discovery of Plaintiffs regarding their knowledge and interactions with the Defendant-serviced pharmacies and the sources of prescription opioid diversion in the community. Distributor Defendants note that such discovery was taken, and that evidence resulting from such discovery was presented at trial, in the adjacent Cabell/Huntington litigation in federal court.

4. The Discovery Commissioner finds that the Cabell/Huntington trial was not conducted in phases, as are the instant consolidated cases. The Distributor Defendants' request for symmetrical discovery at this stage is not consistent with the trial methodology ordered by the Mass Litigation Panel in these consolidated cases and, therefore, is not relevant at this time. Whether it may be relevant at a future phase will be addressed at the appropriate time.

5. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. W.V.R. Civ. Proc. 26(b)(1).

6. To determine the scope of discovery and resolve the pending Motion, it is necessary to identify the factual issues which will be presented during Phase 1b (the liability-only trial against Distributor Defendants currently scheduled to begin in July 2022). There continues to be significant disagreement between the parties regarding the precise factual issues to be presented during Phase 1b. This fundamental disagreement continues to generate discovery disputes and has delayed the entry of a case management order. Therefore, and consistent with the authority granted by the Panel, the Discovery Commissioner in deciding discovery disputes finds the following factual issues are the relevant issues which will be tried during the Phase 1b trial:

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?

The Discovery Commissioner recognizes that all issues related to specific causation, percentages of fault and remedy will be addressed during subsequent phases of the bench trial.

7. The Discovery Commissioner notes that Distributor Defendants have objected to this formulation, arguing that it does not align with the elements of public nuisance in West Virginia, or with the Panel's prior orders on that subject. Distributor Defendants have also objected to the scope of the Discovery Commissioner's authority to enter an Order setting forth the issues to be tried during the Phase 1b trial.

8. The Discovery Commissioner disagrees with this argument and believes that it is important that the scope of the discovery allowed must be tailored to the issues to be decided in

the individual trial phases to allow the trials to proceed as scheduled. The Discovery Commissioner further notes that each of these factual issues are necessary for the Plaintiffs to carry their burden of proof. Distributor Defendants dispute each factual issue. Each factual issue may require expert witness testimony. Limiting Phase 1b to these factual issues is consistent with the directive from the Panel, conserves judicial resources, promotes judicial economy and appears consistent with the structured framework for the Panel to proceed.

9. Having framed the factual issues for Phase 1b of the bench trial, the scope of discovery is determined by whether “the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” W.V.R. Civ. Proc. 26(b)(1). The Discovery Commissioner finds that Combined Discovery Request No. 4 comports with the scope of discovery for Phase 1b. Plaintiffs allege Distributor Defendants systemically shipped suspicious orders, in the absence of adequate due diligence, in violation of federal law. Production of documents demonstrating such due diligence, or lack thereof, is therefore at the heart of Plaintiffs’ proof, and is reasonably calculated to lead to the discovery of admissible evidence pertaining to whether Distributor Defendants engaged in wrongful conduct throughout West Virginia (Factual Issue #3).

10. Distributor Defendants object to the geographic scope of Combined Discovery Request No. 4 for several reasons, including that they have already settled claims brought by the State of West Virginia, which they argue is the only entity with the authority to litigate statewide claims for public nuisance, and that the geographic scope includes counties and cities that have pending claims over which this Court lacks jurisdiction (MDL plaintiffs). Furthermore, Distributor Defendants argue that due diligence files should only be produced for customers situated within the geographic boundaries of the named Plaintiffs.

11. The Discovery Commissioner disagrees for two reasons. First, the Panel has noted on several occasions that it intends to make findings of fact on a statewide basis. All the Plaintiffs are political subdivisions within the State of West Virginia. Findings pertaining to the whole necessarily encompass the component parts. Moreover, the Panel has made it clear that there will be a statewide abatement remedy for the whole. The named political subdivisions participating in Phase 1b have waived private damages for public nuisance. Thus, production of statewide due diligence files is consistent with the Panel's trial plan. Second, Plaintiffs contend the suspicious order monitoring system (SOMS) for each Distributor Defendant systemically failed. While it has yet to be determined whether evidence of such failures from surrounding locales is admissible at trial, disclosure of the same is reasonably calculated to lead to the discovery of admissible evidence.

12. Finally, none of these issues, nor the objections, is new to the parties. The same lawyers, and the same Discovery Commissioner, addressed the nature, scope and procedure for production of due diligence files in the parallel federal litigation (nearly 20 months ago) and the same type of documents were admitted into evidence during the bench trial in the summer of 2021. These documents, or the absence of such documents, are fairly within the scope of discovery.

Based on the above the Discovery Commissioner finds that the information requested is relevant and requiring compliance with the requests is not unduly burdensome.

THEREFORE, the Discovery Commissioner overrules Defendants' objections and **ORDERS** the Distributor Defendants to comply with Combined Discovery Request No. 4 on a statewide basis. Compliance is **ORDERED** within thirty (30) days of the entry of this ruling unless an appeal is taken to the Panel.

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

ENTERED: January 4, 2021.

/s/ Christopher C. Wilkes
Discovery Commissioner