



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE: OPIOID LITIGATION**

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

**THIS DOCUMENT APPLIES TO ALL STATE CASES AGAINST PHARMACIES**

**CASE MANAGEMENT ORDER RELATING TO THE PHARMACY CASES**

At a status conference on September 10, 2021, the Mass Litigation Panel severed these matters brought by the State of West Virginia<sup>1</sup> against pharmacy defendants Walgreens Boots Alliance, Inc., Walgreens Co., Walgreen Eastern Co., Inc., (Civil Action No. 20-C-82 PNM), (hereinafter “Walgreens”), Rite Aid of Maryland, Inc. (Civil Action No. 20-C-83 PNM), (hereinafter “Rite Aid”), CVS Pharmacy, Inc., CVS Indiana, LLC, CVS Rx Services, Inc., CVS TN Distribution LLC, West Virginia CVS Pharmacy, LLC (Civil Action No. 20-C-131 PNM), (hereinafter “CVS”), and Walmart, Inc. f/k/a Wal-Mart Stores, Inc., (Civil Action No. 20-C-132 PNM) (hereinafter “Walmart”), (collectively “Pharmacy Defendants”) for an expedited bench trial set on September 12, 2022. *See* Order Regarding Rulings Issues During September 10, 2021 Status Conference [Transaction ID 66922721]. The Court further ordered that the parties “meet and confer with Discovery Commissioner Wilkes to resolve any disputes regarding the proposed case management order for these cases.” Together, these cases are referred to as the “State Opioid Pharmacy Proceedings.” Pursuant to Rules 16 and 26 of the West Virginia Rules of Civil Procedure, and the Court’s Order to conduct a non-jury trial on September 12, 2022 [Transaction ID 66922721], the Court hereby **ORDERS** that the following Case Management Order (“Order”) should be entered.

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<sup>1</sup> For purposes of the State Opioid Pharmacy Proceedings, the State is deemed to include all executive branch state agencies of the State of West Virginia other than the West Virginia Board of Pharmacy, which is represented by separate counsel (“State”). State as used herein does not include political subdivisions.

## **I. APPLICABILITY AND SCOPE OF ORDER**

### **A. Scope**

This Order is intended to conserve judicial resources, serve the convenience of the parties and witnesses, and promote the just and efficient conduct of this litigation.

### **B. Amendment and Exceptions**

This Order may be amended by the Court on its own motion and any party may apply at any time to this Court for a modification of or exception to this Order.

Discovery shall be governed by applicable West Virginia Rules of Civil Procedure except as otherwise provided herein, in other stipulations or agreements entered into by the parties, or in a subsequent order from the Panel and/or Discovery Commissioner. The provisions of this Order, and any subsequent pretrial order or case management order issued in the State Opioid Pharmacy Proceedings, shall supersede any inconsistent provisions of the West Virginia (Trial Court Rules).

## **II. TRIAL PROCEEDINGS**

### **A. Form of Discovery and Limitations on Discovery**

1. Time for Response. The parties initially shall have **thirty (30) days** from the date of the receipt of interrogatories, requests for admissions, and requests for production of documents in which to serve a response. Nothing herein shall be construed to prevent the parties from agreeing between themselves to extensions of time, as necessary.

2. Depositions. The parties shall communicate in advance of the scheduling of any deposition in order to try to schedule the deposition at a time and place mutually acceptable to the witnesses and the parties. Depositions may be taken remotely, and the parties are directed to meet and confer about an appropriate remote deposition protocol.

### III. FACT DISCOVERY SCHEDULE

#### A. Document Production and Interrogatories

1. The parties shall meet and confer regarding the proposed use of documents and testimony produced in other opioid litigation, and nothing herein shall be construed to affect in any manner the admissibility at trial or any other court proceeding of any document, testimony, or other evidence. Documents produced by all parties in the proceeding captioned as *In re: Opioid Litigation*, Civil Action No. 19-C-9000 (“MLP Litigation”), are available to the parties in this litigation, subject to all applicable protective orders, including the July 30, 2020 Protective Order in this case [Transaction ID 65810931]. Certain documents from *City of Huntington v. AmerisourceBergen Drug Corporation, et al.* and *Cabell County Commission v. AmerisourceBergen Drug Corporation, et al.*, Case No. 3:17-CV-1362 (“MDL CT2”) are available to the parties as described in the Panel’s September 24, 2020 Third-Party Discovery Protocol [Transaction ID 65963866]. Any documents produced pursuant to this provision are subject to all applicable protective orders, including the July 30, 2020 Protective Order in this case [Transaction ID 65810931]. All documents produced by the State in the MDL CT2 and in any other opioid litigation initiated by the State, including against distributors and pharmacies,<sup>2</sup> as well as documents produced in the State Opioid Manufacturer Proceedings<sup>3</sup> will be produced in the State Opioid Pharmacy Proceedings on a rolling basis as available, subject to all applicable

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<sup>2</sup> *State of West Virginia ex rel. Darrell V. McGraw v. Cardinal Health*, Civil Action No. 12-C-140 (Cir. Ct. Boone County, W. Va.); *State of West Virginia ex rel. Darrell V. McGraw v. AmerisourceBergen Drug Corp.*, Civil Action No. 12-C-141 (Cir. Ct. Boone County, W. Va.); *State of West Virginia ex rel. Patrick Morrissey v. McKesson Corporation*, Civil Action No. 16-C-1 (Cir. Ct. Boone County, W. Va.); *State of West Virginia ex rel. Patrick Morrissey v. Crab Orchard Pharmacy, Inc.*, Civil Action No. 17-C-12-D (Cir. Ct. Raleigh County, W. Va.); *State of West Virginia ex rel. Patrick Morrissey v. Judy’s Drug Store, Inc.*, Civil Action No. 16-C-54 (Cir. Ct. Hardy County, W. Va.); *State of West Virginia ex rel. Patrick Morrissey v. Larry’s Drive-In Pharmacy*, Civil Action No. 16-C-202 (Cir. Ct. Boone County, W. Va.) (hereinafter “Distributor and other pharmacy” cases).

<sup>3</sup> *State Of West Virginia ex rel. Patrick Morrissey v. Teva Pharmaceutical Industries, Ltd., et al.*, Civil Action No. 19-C-104 BNE; *State Of West Virginia ex rel. Patrick Morrissey v. Janssen Pharmaceuticals, Inc., et al.*, Civil Action No. 19-C-105-BNE; *State Of West Virginia ex rel. Patrick Morrissey v. Endo Health Solutions Inc., et al.*, Civil Action No. 19-C-151 BNE.

protective orders. Likewise, documents produced by Pharmacy Defendants in the MDL (*In re: National Prescription Opiate Litigation*, Case No. 1:17-MD-2804 (MDL 2804)), will be reproduced to the State, subject to all applicable protective orders.

2. Absent good cause, no new requests for production or interrogatories may be served after **Friday, February 4, 2022**. However, nothing in this paragraph shall prohibit a party from taking the position at a later date that particular documents that have come to its attention fall within the scope of an earlier-served request and should be produced.

3. If a party contends that documents it is requested to produce are not in its possession, custody, or control and should instead be sought from a third party (such as a vendor or former employee), it shall give prompt notice of that fact, identifying the documents or categories of documents at issue and the third-party source from which they should be sought.

4. If a party contends that documents specific to the State of West Virginia that are responsive to a discovery request were produced by either the State or a Pharmacy Defendant in the MLP Litigation<sup>4</sup> or by a Pharmacy Defendant in the MDL, the producing party must make a good faith effort to clearly and concisely identify such documents by Bates number or Bates range in its discovery responses. This requirement to identify documents by Bates number will not apply to any Request for Production of Documents that seeks “all documents” or “all communications” for a particular subject, unless the request and scope is defined more specifically. Requests for Production of Documents that seek documents regarding a contention by a party are likewise excepted from this provision. The failure to identify a document by Bates number or other comparably specific means in response to any request for production does not

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<sup>4</sup> *In re: Opioid Litigation*, Civil Action No. 19-C-9000.

preclude a party from using or relying on that document for any purpose, including, but not limited to, in motion briefing or at trial.

**B. Depositions**

1. The parties agree that Pharmacy Defendants shall produce to the State the final transcript of all depositions of Pharmacy Defendants' current and former employees deposed in the MDL. The parties further agree that the State will produce to the Pharmacy Defendants the depositions taken of State witnesses, whether as a party or third party, in other opioid matters, including in the State's litigation against Distributors and other pharmacies, as well as State witnesses deposed in CT2.

2. The parties agree that fact witness deposition testimony of parties taken in other opioid matters as described herein, and fact witness deposition testimony of consenting third parties may be used for any purpose at trial of this matter, subject to the West Virginia Rules of Evidence. Depositions may be taken remotely as described in paragraph II.2 of this Order. Before noticing the deposition of a witness who was previously deposed in other opioid litigation, counsel shall review prior deposition testimony of the witness to determine if an additional deposition is necessary and shall inform counsel for the witness of the approximate amount of time needed for the additional deposition. The parties shall meet and confer as necessary regarding the length and/or scope of depositions of witnesses who have previously been deposed. If the parties are unable to agree regarding deposing a previously deposed witness, the party seeking to take the deposition must seek leave of court to depose the witness. If either party seeks to depose a third-party witness who was previously deposed in other opioid litigation, that party must confer with the witness or, if represented, counsel representing the witness regarding the scope and length of the additional deposition. If an agreement is reached with that third-party witness or counsel, the deposition will proceed pursuant to the terms of the

agreement. If an agreement is not reached, the party seeking to depose a previously deposed third-party witness must seek leave of court to depose the witness. This requirement to meet and confer and/or seek leave of court regarding third-party depositions will not apply if the party is cross-noticing a deposition noticed in another jurisdiction, where the deposition is being taken either by agreement or decision of the court in the jurisdiction where the deposition was originally noticed. If the deponent's custodial file is requested by the noticing party, the file must be produced **ten (10) days prior** to the deposition. The parties are urged to prioritize those witness for whom documents are sought so they can proceed expeditiously with depositions.

3. The parties agree that there will be a **seven (7) hour** time limit on all fact depositions, except for 30(b)(7) depositions, for which a designee may appear over multiple **seven (7) hour** days. Should any party believe that additional time is required for any fact deposition, the parties shall meet and confer before approaching the Panel and/or Discovery Commissioner for additional time.

#### **C. Third Party Discovery**

1. All Subpoenas for production of documents must be served on third parties by **Friday, February 4, 2022**.

#### **IV. OTHER DISCOVERY REQUIREMENTS.**

The following additional limitations and requirements shall govern discovery. However, the parties may by agreement make exceptions or otherwise adjust these provisions for particular situations.

##### **A. Communications with Witnesses**

1. Any party that communicates with a former employee or agent of another party shall comply strictly with all applicable ethical rules. Any written communications with such a person

concerning the subject matter of this litigation, or documents obtained from the person, are subject to discovery and shall be produced promptly. A party seeking to schedule the deposition of a current employee of a party shall coordinate with counsel for the witness's employer.

**B. Third Party Discovery**

1. The parties shall comply strictly with the requirement to provide timely notice of any third-party subpoenas served and shall provide the third-party subpoenas served with the notice to all parties.

2. Any party that serves a subpoena for documents on a third party shall make any documents produced in response to that subpoena, whether formally or informally in lieu of formal production, available to all parties on the production site and serve a cover letter identifying the source and Bates range of the documents within **three (3) days** of processing of the documents by that party's e-discovery vendor. Such documents shall be processed expeditiously for this purpose. To avoid disputes about compliance with these requirements, a party receiving documents from a third party pursuant to a subpoena shall provide separate notice of that fact to all other parties within three (3) days of receipt of any such documents. If delay of **more than seven (7) days** is anticipated in the processing of the documents by the party's e-discovery vendor for re-production as provided above, notice shall be given of that fact. If documents are received from a third party whose deposition is to take place less than **ten (10) days** after receipt of the documents, the party in possession of the documents shall make **immediate** production of the documents to all other parties in the format received from the third party.

3. If any party submits a *Touhy* request to the federal government (or a similar request to any state agency) for any discovery sought in Trial Proceedings, it shall serve that request

**contemporaneously** on all parties. Any formal response received in response to such a request shall be served on all parties upon receipt.

**V. ADDITIONAL DEADLINES**

1. Fact discovery shall be complete by **Friday, March 18, 2022**.
2. Plaintiff shall provide a report for each person whom it expects to call as an expert witness by **Friday, April 22, 2022**. The report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; a list of the data, documents, or other information considered by the witness in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; a statement of the compensation to be paid for the study and testimony in the case; and a list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Plaintiff shall provide Pharmacy Defendants with the data or documents relied upon by the expert if such data or documents are not publicly available or produced in the litigation. Plaintiff shall provide Pharmacy Defendants with three (3) proposed deposition dates for each expert when the reports are served.
3. Pharmacy Defendants shall provide a report for each person whom they expect to call as an expert witness by **Friday, June 17, 2022**. The report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; a list of the data, documents, or other information considered by the witness in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; a statement of the compensation to be paid for the study and testimony in the case; and a list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Pharmacy Defendants shall provide Plaintiff with the data or

documents relied upon by the expert if such data or documents are not publicly available or produced in the litigation. Pharmacy Defendants shall provide Plaintiff with three (3) proposed deposition dates for each expert when the reports are served.

4. Consistent with Fed. R. Civ. P. 26(b)(4), no party will seek discovery of any experts' notes, drafts of expert reports, or communications with counsel, provided, however, that counsel may serve discovery or inquire at a deposition about any facts, data, or assumptions provided to the expert by counsel and upon which such expert is relying in expressing the expert's opinions. Each party also agrees to bear its own expert costs.

5. Expert depositions shall begin after Pharmacy Defendants' expert reports are served. The parties will work, to the extent practicable, to schedule depositions of Plaintiff's experts to occur before depositions of Pharmacy Defendants' experts, particularly within logical groupings of experts (*e.g.* marketing experts). The parties will, to the extent practicable, work with counsel in other pending opioid cases to coordinate depositions of common experts for either party in order to minimize multiple depositions of the same experts. In addition, for experts who have previously been deposed in the opioid litigation, the parties will make a good faith effort to limit their deposition questions to matters that were not inquired into or adequately addressed in the expert's prior depositions. Expert depositions shall otherwise be limited to **seven (7) hours**. Should any party believe that additional time is required for an expert deposition, the parties shall meet and confer before approaching the Panel or Discovery Commissioner to seek additional time.

6. All expert discovery shall be concluded by **Friday, July 8, 2022**.

7. Motions for summary judgment and motions challenging the admissibility of expert testimony shall be due **Friday, July 22, 2022**. Oppositions to such motions shall be due by

**Friday, August 12, 2022.** Any replies shall be due by **Friday, August 26, 2022.** Upon the filing of any motion challenging the admissibility of expert testimony, the filing party must identify whether prior motions to limit or exclude the subject expert's testimony in other opioid related matters were granted or denied.

8. Motions in limine shall be filed by **Friday, August 5, 2022.** Oppositions to such motions shall be filed by **Friday, August 19, 2022.** Any reply briefs in support of such motions shall be filed by **Friday, August 26, 2022.**

9. Witness lists will be exchanged no later than **Friday, August 12, 2022.** The parties will develop a process to differentiate their likely-to-call witnesses, and each side will have an opportunity to depose any likely-to-call witnesses not previously deposed.

10. Exhibit lists will be filed no later than **Friday, August 19, 2022.** The parties shall develop a stipulated rolling process for objections to trial exhibits (similar to stipulations entered in other opioid cases).

11. Pretrial memoranda shall be filed on or before **Monday, August 22, 2022.**

12. The Parties shall develop a stipulated rolling process for deposition designations and objections (similar to stipulations entered in other opioid cases).

13. The pretrial conference shall be held at **9:00 a.m. on Friday, September 2, 2022.**

14. The trial in this case shall be set for **at 9:00 a.m. on Monday, September 12, 2022.**

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

**ENTERED:** November 5, 2021.

/s/ Alan D. Moats  
Lead Presiding Judge, Opioid Litigation

/s/ Derek C. Swope  
Presiding Judge, Opioid Litigation