



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

Civil Action No. 19-C-9000

THIS DOCUMENT APPLIES TO ALL CASES

**ORDER AFFIRMING THE DISCOVERY COMMISSIONER'S ORDER
GRANTING PLAINTIFFS' MOTION TO COMPEL CHAIN PHARMACY
DEFENDANTS TO PRODUCE WEST VIRGINIA DISPENSING DATA**

Pending before the Court is *Pharmacy Defendants' Objection to Discovery Commissioner's Order Granting Plaintiffs' Motion to Compel Chain Pharmacy Defendants to Produce West Virginia Dispensing Data* ("Objection") (Transaction ID 66039882). Having reviewed the Discovery Commissioner's Order (Transaction ID 66015062), Pharmacy Defendants' Objection, Plaintiffs' Response (Transaction ID 66055188), and Pharmacy Defendants' Reply (Transaction ID 66078599) the Presiding Judges **AFFIRM** the Discovery Commissioner's Order for the following reasons.

The Discovery Commissioner's findings of fact and conclusions of law are reviewed *de novo* and procedural matters are reviewed for abuse of discretion. *Order Appointing Discovery Commissioner*, p. 3 (Transaction ID 64839031).

Plaintiffs' Request for Production 21 ("RFP"), served on each of the Pharmacy Defendants, sought transactional data sufficient to determine:

- a. The volume of hydrocodone, oxycodone, and/or fentanyl prescriptions written by each prescriber as well as the brand name, dose, frequency and duration;

¹ Pharmacy Defendants are CVS Pharmacy, Inc., CVS Indiana, L.L.C., CVS Rx Services, Inc., CVS TN Distribution, L.L.C., West Virginia CVS Pharmacy, L.L.C., The Kroger Co., Kroger Limited Partnership I, Kroger Limited Partnership II, Walgreen Co., Walmart Inc., Wal-Mart Stores East, LP, Fruth Pharmacy, Inc., Rite Aid of Maryland, Inc. dba Rite Aid Mid-Atlantic Customer Support Center ("Rite Aid of Maryland"), and Rite Aid of West Virginia, Inc. ("Rite Aid of West Virginia"). Rite Aid Corporation ("RAC") is a named defendant in certain cases, but it has pending motions to dismiss for lack of personal jurisdiction (*See, e.g.*, Transaction ID 65665201). RAC's prior motion for protective order (Transaction ID 65666288) has resulted in a stipulation staying discovery while the Court rules on the issue of personal jurisdiction (Transaction ID 65680641).

- b. The ratio of controlled substance prescriptions to non-controlled substances dispensed;
- c. The ratio of controlled substance prescriptions paid for in cash to those paid by a third-party payor; and
- d. Communications with wholesale distributors regarding the purchase of prescription opioids regarding due diligence.

Plaintiffs argue the data they request is key evidence in actions against the Pharmacy Defendants, not only for claims arising out of their alleged lack of effective policies and procedures to guard against diversion at their retail stores, but also for claims against the Pharmacy Defendants and other distributors in their capacity as wholesalers. Plaintiffs assert the data requested is not unduly burdensome to produce, as evidenced by the fact that five chain pharmacies produced state-wide dispensing data for Ohio in the federal multi-district litigation (“MDL”) in a matter of weeks, as well as evidence that the Pharmacy Defendants produce such data to their outside vendors and also sell it to companies known as “data vendors” who collect it and sell it to drug manufacturers.

The Pharmacy Defendants argue that the Court should stay this discovery pending a decision on their motions to dismiss. They further argue that Plaintiffs did not request production of the “expansive statewide dispensing data” in discovery that they are now moving to compel. The Chain Pharmacy Defendants also contend that Plaintiffs’ request would require disclosure of “individuals’ sensitive medical information.” Moreover, certain of the Pharmacy Defendants contend that if their motions to dismiss are denied, their obligation to produce dispensing data should be limited to the specific Plaintiffs’ geographic areas.

“The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue.” Syl. Pt. 1, *Evans v. Mutual Mining*, 199 W.Va. 526, 485 S.E.2d 695 (1997) (citation omitted). “Discovery disputes that

must be resolved by the circuit court are addressed to the circuit court's sound discretion, and the circuit court's order will not be disturbed upon appeal unless there has been an abuse of that discretion." *Id.* Rule 26(b)(1) of the West Virginia Rules of Civil Procedure provides that:

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 trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

W. Va. R. Civ. P. 26(b)(1). The Court agrees with the Discovery Commissioner's finding that the dispensing data sought by Plaintiffs is well within the permissible scope of the West Virginia Rules of Civil Procedure.

The Court further agrees with the Discovery Commissioner's finding that the Pharmacy Defendants and other distributors had access to certain data and used certain data in their Suspicious Order Monitoring ("SOM") programs as wholesalers. The dispensing data reviewed and the dispensing data that could have been reviewed are highly relevant to Plaintiffs' claims against the Pharmacy Defendants arising out of their distribution practices. As the Discovery Commissioner correctly concluded, the dispensing data is also relevant to Plaintiffs' claims against other distributors who augmented the chain pharmacies' drug supply. Denying access to this data would deprive Plaintiffs of information needed to challenge Defendants' defenses.

The Discovery Commissioner also correctly concluded that a statewide geographic scope is appropriate, as the parties are preparing for a Phase I non-jury trial of liability for public nuisance. *Order Denying Certain Defendants' Motions for Reconsideration* (Transaction ID 65792140). As the Panel has observed, "Plaintiffs' allegations of public nuisance are not

confined. They affect the entire State of West Virginia.” *Order Regarding Rulings Issued During March 13, 2020 Status Conference* (Transaction ID 64846125). As such, the dispensing data produced should also be statewide.

The Pharmacy Defendants do not challenge the portion of the Discovery Commissioner’s Order with respect to the fields and data to be produced. For the reasons set forth in the Discovery Commissioner’s Order, the Court agrees that the scope of the transactional dispensing data production ordered in the MDL for Ohio is similarly appropriate in these cases. *See* Discovery Commissioner’s Order (Transaction ID 66015062), pp. 3-5 as well as Exhibit A – List of Data Fields the Pharmacy Defendants Must Produce; and Exhibit B – Agreed Upon Drugs; attached to the Discovery Commissioner’s Order.

For the foregoing reasons, the Presiding Judges **AFFIRM** the Discovery Commissioner’s Order (Transaction ID 66015062) and **DENY** the Objection in its entirety.

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 9, 2020.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation