



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

**IN RE: OPIOID LITIGATION**

**Civil Action No. 19-C-9000**

**THIS DOCUMENT APPLIES TO:**

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

STATE OF WEST VIRGINIA ex rel.  
PATRICK MORRISEY, Attorney General,  
Plaintiff,

v.

PURDUE PHARMA, L.P., a Delaware limited partnership,  
PURDUE PHARMA INC., a New York corporation, and  
RICHARD SACKLER, M.D.  
Defendants.

Civil Action No. 19-C-62  
Judge William S. Thompson

**ORDER**

Pending before the Presiding Judges assigned to *In re: Opioid Litigation*, Civil Action No. 19-C-9000 (“Opioid Litigation”), is *The Purdue Defendants’ Motion for Referral to Mass Litigation Panel*, requesting the above-captioned civil action be transferred to the Mass Litigation Panel to join in the Opioid Litigation. The Presiding Judges have reviewed and maturely considered Defendants’ motion, Plaintiff’s response, Defendants’ reply, the arguments of counsel presented on August 22, 2019, and have conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules.

**FACTUAL AND PROCEDURAL BACKGROUND**

On June 7, 2019, Chief Justice Elizabeth D. Walker entered an Administrative Order granting a motion to refer several civil actions to the Mass Litigation Panel (“Panel”) involving, “claims for damages against manufacturers and distributors of certain prescription opioid pain medications and other defendant parties allegedly involved in the distribution or dissemination of

such medications.”<sup>1</sup> The Chief Justice further ordered that “all civil actions involving the same or similar common questions of law or fact at issue . . . are to be transferred to the Mass Litigation Panel for further proceedings.”

On June 14, 2019, the Mass Litigation Panel transferred the referred civil actions to the Circuit Court of Kanawha County, West Virginia, joining them under the style *In re: Opioid Litigation*, Civil Action No. 19-C-9000. *Order Assigning Judges, Transferring Civil Actions to the Circuit Court of Kanawha County, West Virginia, and Designating Litigation for Electronic Filing and Service*. The Panel also ordered the parties to submit a report setting forth their knowledge of any other pending civil actions involving the same or similar common questions of law or fact at issue that should be transferred to the Panel. *Id.*

The parties filed a *Report on Possible Transfers to the Mass Litigation Panel* (Transaction ID 63507594) on July 3, 2019, identifying certain civil actions involving the same or similar common questions of law or fact at issue that the parties agreed should be transferred to the Panel.<sup>2</sup> The parties also identified certain civil actions where there was disagreement regarding whether the actions should be transferred.<sup>3</sup>

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<sup>1</sup>*Monongalia County Commission, et al. v. Purdue Pharma L.P., et al.*, Marshall County Civil Action Nos. 18-C-222, 18-C-233, 18-C-234, 18-C-235 and 18-C-236; *Brooke County Commission, et al. v. Purdue Pharma L.P., et al.*, Marshall County Civil Action Nos. 17-C-248, 17-C-249, 17-C-250, 17-C-251, 17-C-252, 17-C-253, 17-C-254 and 17-C-255; and *The County Commission of Mason County, et al. v. Purdue Pharma L.P., et al.*, Marshall County Civil Action Nos. 19-C-4, 19-C-5, 19-C-6, 19-C-7, 19-C-8, 19-C-9.

<sup>2</sup>*Roane County Commission, et al. v. Mylan Pharmaceuticals Inc., et al.*, Civil Action Nos. 19-C-96 to 19-C-108, filed in the Circuit Court of Marshall County, West Virginia; and *Mayor Peggy Knotts Barney, on Behalf of City of Grafton, and Mayor Philip Bowers, on Behalf of City of Philippi v. Purdue Pharma, L.P., et al.*, Civil Action Nos. 19-C-151 and 19-C-152, filed in the Circuit Court of Marshall County, West Virginia.

<sup>3</sup>*West Virginia University Hospitals, Inc., et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 19-C-69 to 19-C-88; and 19-C-134 to 19-C-139, filed in the Circuit Court of Marshall County, West Virginia; and *State of West Virginia ex rel. Patrick Morrissey v. Purdue Pharma, L.P., et al.*, Civil Action No. 19-C-62, filed in the Circuit Court of Boone County, West Virginia.

On July 5, 2019, the Panel directed the parties to file and serve proposed, agreed orders transferring the civil actions where the parties are in agreement they involve the same or similar common questions of law or fact as the cases previously transferred to the Mass Litigation Panel and should be transferred to the Mass Litigation Panel. *Order Regarding Report on Possible Transfers to the Mass Litigation Panel* (Transaction ID 63510393). The Panel also directed any party seeking to transfer a civil action where the parties were not in agreement to file a motion to transfer by July 22, 2019. The Panel set a briefing schedule for any motions to transfer, and scheduled a hearing on August 22, 2019. *Id.*

On July 23, 2019, the parties filed a *Supplemental Report on Possible Transfers to the Mass Litigation Panel* (Transaction ID 63618026) reporting that the parties named in *West Virginia University Hospitals, Inc., et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 19-C-69 to 19-C-88; and 19-C-134 to 19-C-139, filed in the Circuit Court of Marshall County, West Virginia, (the “Hospitals Actions”) were now in agreement that the Hospitals Actions involve the same or similar common questions of law or fact as the transferred proceedings and should be transferred to the Mass Litigation Panel.

There being no objection, the following civil actions were transferred to the Mass Litigation on July 26, 2019:

1. *Roane County Commission, et al. v. Mylan Pharmaceuticals Inc., et al.*, Civil Action Nos. 19-C-96 to 19-C-108, filed in the Circuit Court of Marshall County, West Virginia;
2. *Mayor Peggy Knotts Barney, on Behalf of City of Grafton, and Mayor Philip Bowers, on Behalf of City of Philippi v. Purdue Pharma, L.P., et al.*, Civil Action Nos. 19-C-151 and 19-C-152, filed in the Circuit Court of Marshall County, West Virginia (the “Grafton-Philippi” civil actions); and
3. *West Virginia University Hospitals, Inc., et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 19-C-69 to 19-C-88; and 19-C-134 to 19-C-139, filed in the Circuit Court of Marshall County, West Virginia.

*Order of Transfer to the Mass Litigation Panel* (Transaction ID 63631230). The only civil action where the parties are in disagreement regarding transfer to the Mass Litigation Panel is *State of West Virginia ex rel. Patrick Morrissey v. Purdue Pharma, L.P., et al.*, Civil Action No. 19-C-62, filed in the Circuit Court of Boone County, West Virginia.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On July 17, 2019, Defendants' Purdue Pharma, L.P., Purdue Pharma Inc. and Richard Sackler, M.D. (the "Purdue Defendants") filed a *Motion for Referral to Mass Litigation Panel*, seeking to transfer the State's case to the Panel on the ground that the State's case involves the same or similar common questions of law or fact as all the other cases already transferred to the Panel as part of the Opioid Litigation. The Purdue Defendants assert the substantive allegations in the State's complaint mirror the allegations of the various counties and municipalities already before the Panel. Like other Plaintiffs, the State alleges the Purdue Defendants misrepresented the risks and benefits of its opioid medications, resulting in a range of health care, criminal justice, and social costs. Furthermore, the State's case is the only case pending in the Circuit Courts of West Virginia alleging impropriety regarding marketing of opioids that has not been transferred to the Mass Litigation Panel.

The Purdue Defendants also contend discovery has not begun in the actions transferred to the Panel or in the State's case so all of these cases are on the same developmental path. Transferring the State's case to the Panel will avoid the time, effort and expense of litigating substantially similar actions simultaneously in separate forums; conserve judicial and party resources; eliminate duplicative discovery; avoid conflicting pretrial rulings; and promote just and efficient resolution of the litigation.

The State objects to transfer of its case to the Mass Litigation Panel for several reasons. First, the State contends its lawsuit against the Purdue Defendants is not a lawsuit for damages. It is a law enforcement action to enforce the West Virginia Consumer Credit and Protection Act (“WVCCPA”), W.Va. Code §§ 46A-1-101, *et seq.*, and an action to abate a statewide public nuisance pursuant to the Attorney General’s common law police powers. Because the State is pursuing equitable relief, as opposed to legal damages, the State believes transfer of its case to the Panel is not appropriate.

The State also contends the Legislature hasn’t authorized the Attorney General to seek damages when bringing suit to enforce the WVCCPA pursuant to § 46A-6-104 and § 46A-7-108, nor is such relief requested in the State’s complaint. The State expressly disclaims requests for damages attributable to the Medicaid or Medicare programs in paragraphs 239 and 255 of its complaint. Although the Attorney General requests civil penalties of up to \$5,000.00 for each repeated and willful violation of § 46A-6-104, civil penalties are not considered punitive damages, nor is it an award conditioned upon receipt of damages. *Vanderbilt Mortg. and Finance, Inc. v. Cole*, 230 W. Va. 505, 512, 740 S.E.2d 562, 569 (2013). Because the State cannot and does not seek compensatory damages, it believes its suit falls outside the scope of cases considered under Chief Justice Walker’s Administrative Order.

Second, the State contends West Virginia Trial Court Rule 26 doesn’t apply to law enforcement actions. Trial Court Rule 26.04(a) defines Mass Litigation. Although the State concedes the definition of Mass Litigation appears to be intended for the State’s suit, it asserts the reasons behind Trial Court Rule 26 and the historical application of the rule supports the

proposition that it is not intended for suits to enforce the WVCCPA or to abate statewide public nuisance.

Third, the State contends its claims and burden of proof are significantly different from the civil actions in the Opioid Litigation so the State's case lacks the requisite commonality for transfer. Suits by the Plaintiffs in the Opioid Litigation allege several common law causes of action, including negligence, negligent misrepresentation, civil conspiracy and fraud. The State only alleges two causes of action rooted in the Attorney General's power to protect the interests of the sovereign State. A common law fraud by misrepresentation claim has different and far more stringent pleading and proof requirements than any misrepresentation claim by the State.

Fourth, the State contends that transfer of its case into the Opioid Litigation will hinder judicial economy and work a hardship on the State. Although the State concedes some facts developed by the other Plaintiffs may overlap with the State's claims and some legal issues may be similar, it argues many facts admissible for the State would not otherwise be admissible for the other Plaintiffs and the majority of the State's claims are significantly different from the other Plaintiffs. Additionally, the State argues that requiring it to participate in Mass Litigation with dozens of Defendants it hasn't sued and Defendants with whom it has already settled will create needless delay and prevent prosecution of the State's claims.

Finally, the State contends that it will be problematic if the State is included in the Opioid Litigation as both a Plaintiff and a Defendant, in light of the fact that Plaintiff Monongalia County has named the West Virginia Board of Pharmacy and its former Executive Director, David Potters, as a Defendant, and the Attorney General's Office has been assisting the Board of Pharmacy in reviewing suspicious order reports since 2016.

The Panel finds there is considerable factual and legal overlap between the State’s claims and Plaintiffs’ claims in the other civil actions already pending in the Opioid Litigation. The State’s civil action is based on the same set of factual allegations asserted in the Opioid Litigation, i.e., that the Purdue downplayed the risks and overstated the benefits of its opioid medication. Like the other cases before the Panel, the State’s claims depend on allegations that the Purdue’s marketing deceived doctors into prescribing Purdue’s opioid medications and expanded the market for prescription opioids causing harm to West Virginia and its citizens.

The Panel further finds that the State’s civil action involves “the same or similar common questions of law or fact” at issue in the cases already referred to the Panel. The State concedes that certain facts overlap with facts in the cases already transferred to the Mass Litigation Panel, and some legal issues may be similar. Although the State is seeking a statewide injunction to remedy the alleged public nuisance, every other case currently in the Opioid Litigation also brings a public nuisance cause of action against Purdue and other Defendants, and some of those Plaintiffs also seek injunctive relief to abate the alleged public nuisance.

“A common nucleus of operative fact [or law] is usually enough to satisfy the commonality requirement.” *In re: W. Va. Rezulin Litigation v. Hutchison*, 214 W. Va. 52, 67 (2003). The threshold of commonality is not high and requires only that resolution of common questions affect all or a substantial number of plaintiffs. *Id.* See also the Findings of Fact, Conclusions of Law and Recommendation of the Mass Litigation Panel at page 6, *Brotherhood Mut. Ins. Co. v. Central West Virginia Reg. Airport Auth., Inc.*, Civil Action No. 16-C-293 (Dec. 16, 2016) attached as Exhibit A to the Purdue Defendants’ Reply.

The Panel rejects the State’s contention that its action falls outside the scope of Rule 26. The Attorney General’s action asserts injury caused by “alleged nuisances” so it meets the

definition of Trial Court Rule 26.04(a)(5). Likewise, the Panel finds the State's contention that its case should not be transferred because it only seeks equitable relief unpersuasive. The distinction between law and equity has been abolished by Rule 2 of the West Virginia Rules of Civil Procedure, which provides that "[t]here shall be one form of action to be known as 'civil action.'" *Realmark Devs., Inc. v. Ranson*, 214 W.Va. 161, 588 S.E.2d 150 (2003). Furthermore, each and every Plaintiff, including the State, is seeking monetary relief. Although the State is not seeking compensatory or punitive damages like some of the other Plaintiffs in the Opioid Litigation, it is seeking monetary relief in the form of civil penalties, restitution and disgorgement.

Transfer of the State's civil action to the Mass Litigation Panel will prevent inconsistent rulings and duplication of effort, and will provide coordinated, efficient resolution of actions that share common questions of law or fact. It is critical for the State to be "at the same table" with the other Plaintiffs in the Opioid Litigation to resolve these actions in a coordinated and efficient way so as not to unnecessarily tax the resources of the parties and the court system.

Transfer of the State's action will not cause the State hardship. The State isn't required to attend depositions or participate in matters of no interest to it. Transfer will ensure all claims are addressed as efficiently as possible in one coordinated proceeding with other similar actions. Discovery has not begun in any of the actions currently pending in the Opioid Litigation so coordination at this early stage will avoid the time, expense and effort of litigating similar actions simultaneously in separate forums.

The State's claim that it would be improper to be before the MLP as a plaintiff and a quasi-defendant because it is assisting the West Virginia Board of Pharmacy is without merit. Irrespective of the forum, the State's own conduct and the role it played in the opioid crisis will be litigated. Having all cases in one forum creates judicial economy and saves resources. More

importantly, the Mass Litigation Panel has shown it can effectively manage claims where one party is both a plaintiff and a defendant and is uniquely positioned to shepherd all of these complex claims to a final resolution.

For the foregoing reasons, the Presiding Judges unanimously **GRANT** *The Purdue Defendants' Motion for Referral to Mass Litigation Panel* and **ORDER** the above-styled civil action transferred to the MLP and joined with *In re: Opioid Litigation*, Civil Action No. 19-C-9000. As provided in West Virginia Trial Court Rule 15.01, *et seq.*, the Panel designates the above-styled civil action for electronic filing and service, **effective, September 18, 2019.**

Registration and training for e-filing and service is **mandatory.** If a party in the above-styled civil action is not registered and trained by September 18, 2019, the party will not receive e-service of documents in the Opioid Litigation. Any party who has not been registered and trained should contact the **File & ServeXpress Customer Service Department at 1-888-529-7587** prior to September 18, 2019.

The paper court files for the above-styled civil actions shall remain in the Circuit Court of Boone County, West Virginia, until further order of the Panel. All documents filed prior to September 18, 2019, all oversized documents that cannot be electronically filed, and all documents the Court orders to be filed under seal in the court file shall be traditionally filed in the Circuit Court of Boone County, West Virginia.

To facilitate electronic filing and service each civil action number will include the three-letter county identifier where the civil action originated. Thus, the style will now read, *State of West Virginia ex rel. Patrick Morrissey v. Purdue Pharma, L.P., et al.*, Civil Action No. 19-C-62 BNE.

A status conference is scheduled in the Opioid Litigation at **10:00 a.m. on September 20, 2019**, in Courtroom Four, also known as the Ceremonial Courtroom, on the second floor of the Kanawha County Courthouse, located at 409 Virginia Street, East, in Charleston, West Virginia. At least one counsel of record with authority to speak for and fully represent each party in the Opioid Litigation shall attend the status conference in this matter. Any *pro se* litigants are required to attend the status conference, unless excused by the Court upon written request, for good cause shown.

The Court directs the Clerk of the Circuit Court of Kanawha County, West Virginia, to send a certified copy of this Order to the Clerk of the Circuit Court of Boone County, West Virginia, for filing and service on Judge William S. Thompson and all parties in the above-captioned civil action. The Court further directs the Clerk of the Circuit Court of Kanawha County, West Virginia, to serve the *pro se* litigants in the Opioid Litigation with a copy of this Order via U.S. Mail, First Class, at the following addresses:

Amy Lynn Beaver, P.A.  
57 Pleasant View Avenue  
Wheeling, WV 26003

Eugenio Aldea Menez, M.D.  
16 Woodcliff Drive  
Fairmont, WV 26554

Scott James Feathers, D.P.M.  
2621 14<sup>th</sup> Avenue, Apt. A.  
South Parkersburg, WV 26101

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9024 Camden Drive  
Elk Grove, CA 95624-3063

Goodwin Drug Company  
c/o William M. Albers, Sr.  
P.O. Box 6265  
Wheeling, WV 26003-0726

All parties to *In re: Opioid Litigation*, Civil Action No. 19-C-9000, shall be served with this Order electronically.

It is so **ORDERED**.

**ENTER:** September 6, 2019.

/s/ Alan D. Moats

Lead Presiding Judge  
Opioid Litigation