



**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 GRANTING PLAINTIFFS' MOTION TO COMPEL CHAIN PHARMACY DEFENDANTS TO PRODUCE WEST VIRGINIA DISPENSING DATA**

This matter comes before the Discovery Commissioner on *Plaintiffs' Motion to Compel the Chain Pharmacy Defendants to Produce West Virginia Dispensing Data* (Transaction ID 65938024). The Discovery Commissioner has reviewed the Motion, the *Pharmacy Defendants' Opposition to Plaintiffs' Motion to Compel Production of West Virginia Dispensing Data* (Transaction ID 65967040) and Plaintiffs' *Reply* (Transaction ID 65982217).

Plaintiffs' Request for Production 21 ("RFP"), served on each of the Chain 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;<sup>1</sup>
- 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.

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<sup>1</sup> Plaintiffs have discussed during the meet and confer process with the Chain Pharmacy Defendants that the most efficient and least burdensome method of responding to this request is to produce the dispensing data fields ordered by Judge Polster in the MDL Track 3 cases after extensive supervised negotiations between the parties in the MDL. See *In re Nat'l Prescription Opiate Litig.*, No. 17-MDL-2804, Discovery Ruling Regarding Pharmacy Data Production, Doc #: 3106 (the "Dispensing Data Order"), attached as Exhibit A; see also *In re Nat'l Prescription Opiate Litig.*, No. 17-MDL-2804, Order Affirming Discovery Ruling regarding Pharmacy Data, Doc #: 3107 (February 13, 2020); see also Track Three Case Management Order, Doc. #: 3329.

Plaintiffs argue that this data is key evidence actions against the Chain Pharmacy Defendants. This is true not only for those plaintiffs asserting claims arising out of these Defendants' alleged lack of effective policies and procedures to guard against diversion at their retail stores, but also to claims against the Chain Pharmacy Defendants and other distributors in their capacity as wholesalers. The data is not unduly burdensome to produce, they contend, as evidenced by the fact that five chain pharmacies produced state-wide dispensing for Ohio in the federal multi-district litigation ("MDL") in a matter of weeks, as well as evidence that the Chain 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 Chain Pharmacy Defendants, in response, argue that although there is no stay of discovery in place, the Court should stay this discovery pending a decision on their motions to dismiss. That the Plaintiffs' did not request in Discovery the production of the "expansive statewide dispensing data" they are now moving to compel. The Chain Pharmacy Defendants' further contend Plaintiffs' request would if compelled, require disclosure of "individuals' sensitive medical information". Certain of the Chain Pharmacy Defendants also contend that if their motions to dismiss are denied, their obligation to produce dispensing data should be limited to those specific Plaintiffs' geographic areas.

"The scope of discovery in civil cases is broad," *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 725, 421 S.E.2d 264, 266 (1992), and the dispensing data sought here is well within its permissible scope. *See* W.VA. Rule Civ. P. 26(b)(1). It is apparent that the Chain Pharmacy Defendants (and other distributors) had access to certain data and used certain data in their "suspicious order monitoring" or "SOMs" programs as wholesalers. Both the dispensing data actually reviewed and the dispensing data that could have been reviewed is highly relevant to the

MLP Plaintiffs' claims against the Chain Pharmacy Defendants arising out of their distribution practices. It 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.

Further, a statewide geographic scope is appropriate and, given the evidence of "migration" of pills from other states. Notably, in the MDL, the Court directed the production of statewide dispensing data for Ohio in cases comprising two "trial tracks" that included only four counties in Northeastern Ohio. There, the Court explained that it "has always believed that, at a minimum, transactional dispensing data for the entire state of Ohio is relevant and proportional to the needs of Track One-B."<sup>2</sup> The Discovery Commissioner agrees with this analysis and finds a statewide geographic scope even more appropriate here, as the parties in the MLP are preparing for "a statewide trial on 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.

With respect to the fields and data to be produced, the Discovery Commissioner finds that the scope of the transactional dispensing data production ordered in the MDL for Ohio is similarly appropriate in these cases. The Discovery Commissioner is aware that this scope was the product of extensive, supervised discussions that addressed arguments raised by pharmacy defendants. *See*

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<sup>2</sup> Order, *In re: Nat'l Prescription Opiate Litig.*, MDL 2804, Doc. 3341 at 3 (N.D. Ohio June 17, 2020) (citing prior Orders); *see also* Discovery Ruling Regarding Pharmacy Data Production, *In re: Nat'l Prescription Opiate Litig.*, MDL 2804, Doc. 3106 (N.D. Ohio January 27, 2020) (Cohen, S.M.); Order, *In re: Nat'l Prescription Opiate Litig.*, MDL 2804, Doc. 3170 (N.D. Ohio February 13, 2020); Opinion and Order overruling objections to Discovery Ruling Regarding Pharmacy Data Production) (Polster, J.).

Discovery Ruling Regarding Pharmacy Data Production, *In re: Nat'l Prescription Opiate Litig.*, MDL 2804, Doc. 3106 (N.D. Ohio January 27, 2020) (Cohen, S.M.) (hereinafter “MDL Discovery Ruling Regarding Pharmacy Data Production”); Opinion and Order [overruling objections to Discovery Ruling Regarding Pharmacy Data Production), *In re: Nat'l Prescription Opiate Litig.*, MDL 2804, Doc. 3170 (N.D. Ohio February 13, 2020); (Polster, J.); Order Denying Motion for Stay, *In re: Nat'l Prescription Opiate Litig.*, MDL 2804, Doc. 3089 at 3 n.1 (N.D. Ohio Jan. 21, 2020). This process also ensured that, “[t]he end result is that no person who obtains the data will learn what medications any identifiable individual has received.” MDL Discovery Ruling Regarding Pharmacy Data Production at 2-3. Finally, it also has the advantage of familiarity to most of the Chain Pharmacy Defendants.

The required data fields are set forth in Exhibit A to the MDL Special Master’s ruling, attached hereto. These 34 required fields of transactional dispensing data must be produced for the opioid drugs listed on Exhibit B to the MDL Discovery Ruling Regarding Pharmacy Data Production, also attached hereto, and for the 14 benzodiazepines and the 4 muscle relaxers listed thereon. Inclusion of these drugs is necessary given the allegations that prescriptions for “cocktail drugs” and combinations of opioid and non-opioid drugs raised red flags of potential diversion. Internal documents from the Chain Pharmacies’ own files also support inclusion of these drugs, as the MDL Special Master noted. *See* MDL Discovery Ruling Regarding Pharmacy Data Production at 5 & n.7 (citing “Walgreens Pharmacist GFD [Good Faith Dispensing] Review Coaching Opportunities” PowerPoint Presentation at 13 (2013) & *Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 & 5195 Decision and Order*, 77 Fed. Reg. 62,316 at n.102 (DEA Oct. 12, 2012).

Consistent with MDL Discovery Ruling Regarding Pharmacy Data Production, each Chain Pharmacy Defendant may have the flexibility to choose to simply produce the 34 data fields for

all of its data for benzodiazepine and muscle relaxer prescriptions, without limitation; or instead produce only data for such prescriptions where it dispensed a benzodiazepine or muscle relaxer to a patient and also dispensed an opioid to the same patient within 14 days (before or after).

In other words, each Chain Pharmacy Defendant has two choices. It may simply produce data for all of its prescriptions for the listed benzodiazepines and muscle relaxers, and let Plaintiffs figure out which were given to patients who also received recent prescriptions for opioids. Alternatively, a Chain Pharmacy Defendant may instead filter its data and produce only its prescriptions for the listed benzodiazepines and muscle relaxers that it dispensed to a patient who also received from it a prescription for opioids within a 14-day plus-or-minus window. This allows the Chain Pharmacy Defendant “to tailor, in part, its own discovery burden.” *Id.* at 6 n.8. At the same time, if a Chain Pharmacy Defendant chooses to apply a data filter, rather than producing all data the listed benzodiazepines and muscle relaxers, it may not unduly delay its production. The Chain Pharmacy Defendants are to provide this information required by this Order to Plaintiffs on a rolling basis as it becomes available. Production of all dispensing data required under this Order must be provided to Plaintiffs no later than December 12th, 2020.

**IT IS SO ORDERED.**

**ENTERED:** October 13, 2020.

/s/ Christopher C. Wilkes  
Discovery Commissioner

Exhibit A – List of Data Fields the Pharmacy Defendants Must Produce

No.	Data Field
1	Drug name
2	NDC number
3	Date filled
4	Quantity dispensed
5	Dosage form
6	Days' supply
7	Prescriber's name
8	Prescriber's DEA number
9	Dispensing pharmacist
10	Patient Zip Code
11	Patient ID # (Unique ID)
12	Quantity prescribed
13	Number of refills authorized (if any)
14	Diagnostic code
15	Method of payment
16	Patient paid amount
17	Whether prescription covered by third-party payor
18	Control / Non-Control ratio
19	Pharmacy DEA #
20	Pharmacy Store #
21	Pharmacy address (at the zip code level or finer)
22	Prescriber address (at the zip code level or finer)
23	Prescription Date written
24	Refill indicator (whether the Rx is a refill or the original)
25	Prescriber Specialty
26	Rejection indicator (whether the pharmacy rejected to fill)
27	Prescriber's NPI Number
28	Patient DOB Year (or age)
29	DEA Override
30	DEA Schedule (Same as Control/Non-Control)
31	Dispense Hour
32	Dispense Minute
33	Drop Off Hour
34	Drop Off Minute

Exhibit B - List of Drugs Plaintiffs Want for a "Red Flag" analysis

	A	B
1	<b>Drug Category</b>	<b>Base Drug</b>
2	Benzodiazepines	alprazolam
3	Benzodiazepines	chlordiazepoxide
4	Benzodiazepines	clobazam
5	Benzodiazepines	clonazepam
6	Benzodiazepines	clorazepate
7	Benzodiazepines	diazepam
8	Benzodiazepines	estazolam
9	Benzodiazepines	flurazepam
10	Benzodiazepines	lorazepam
11	Benzodiazepines	midazolam
12	Benzodiazepines	oxazepam
13	Benzodiazepines	quazepam
14	Benzodiazepines	temazepam
15	Benzodiazepines	triazolam
16	Muscle relaxers	Carisoprodol
17	Muscle relaxers	Cyclobenzaprine
18	Muscle relaxers	orphenadrine
19	Muscle relaxers	tizanidine
20	Opioid	Codeine
21	Opioid	Dihydrocodeine
22	Opioid	Fentanyl
23	Opioid	Hydrocodone
24	Opioid	Hydromorphone
25	Opioid	Levorphanol
26	Opioid	Meperidine
27	Opioid	Morphine
28	Opioid	Opium
29	Opioid	Oxycodone
30	Opioid	Oxymorphone
31	Opioid	Tapentadol
32	Opioid Treatment	Buprenorphine
33	Opioid Treatment	Methadone
34	Sleep Aid	doxepin
35	Sleep Aid	estazolam
36	Sleep Aid	eszopiclone
37	Sleep Aid	flurazepam hydrochloride
38	Sleep Aid	ramelteon
39	Sleep Aid	suvorexant
40	Sleep Aid	temazepam
41	Sleep Aid	trazodone
42	Sleep Aid	triazolam
43	Sleep Aid	zaleplon
44	Sleep Aid	zolpidem tartrate