



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

**AMENDED RULINGS ORDER AND FINDINGS OF FACT AND CONCLUSIONS
OF LAW REGARDING MOTIONS FOR SUMMARY JUDGMENT, MOTIONS
TO EXCLUDE EXPERT TESTIMONY, AND MOTIONS *IN LIMINE***

On September 8, 2022, the Mass Litigation Panel (the “Panel”) issued rulings on motions for summary judgment, motions to exclude expert testimony, and motions *in limine* by the following parties: Plaintiff, the State of West Virginia ex rel. Patrick Morrisey, Attorney General (“Plaintiff” or the “State”); Defendants CVS Pharmacy, Inc.; CVS Indiana, L.L.C.; CVS Rx Services, Inc.; CVS TN Distribution, L.L.C.; West Virginia CVS Pharmacy (collectively, “CVS”); Walgreens Boots Alliance, Inc.; Walgreen Co.; Walgreen Eastern Co., Inc. (collectively, “Walgreens”); and Walmart, Inc. (“Walmart”) (collectively with CVS and Walgreens, “Defendants” or the “Pharmacy Defendants”) (collectively with Plaintiff, the “Parties”). *Order Regarding Motions for Summary Judgment, Motions to Exclude Expert Testimony, and Motions in Limine* (Transaction ID 68061797). The Panel directed the Parties to meet and confer and to file and serve a detailed joint proposed Amended Rulings Order, including findings of fact and conclusions of law. The Panel hereby amends its September 8, 2022, Order to provide the following additional bases for its rulings.

MOTIONS FOR SUMMARY JUDGMENT

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994)

(quoting Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963)). “The circuit court’s function at the summary judgment stage is not ‘to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). A court must “draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.” *Id.*

1. *The State’s Motion for Partial Summary Judgment Regarding Defendants’ Statutory and Regulatory Duties and Their Failure to Meet Those Duties* (Transaction ID 67948219)

The State’s motion seeks partial judgment on legal questions concerning the content of Defendants’ federal and West Virginia statutory and regulatory duties and factual questions concerning each Defendant’s compliance with these duties. Defendants’ opposition disputes the State’s position as to the scope of Defendants’ duties under the relevant federal and West Virginia statutes and regulations. The Court makes no finding regarding the scope of Defendants’ duties. Even if Defendants have the duties asserted by the State, the State’s motion and Defendants’ opposition present disputed questions of material fact concerning Defendants’ compliance. “Evaluating the defendants’ implementation of the Controlled Substances Act and its connection to State law is a highly-fact specific inquiry that goes to the heart of the matter before the Court; . . .” *Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) (“*Manufacturer Cases Order*”) at 2.

Therefore, the Panel **DENIES** the State’s Motion for Partial Summary Judgment Regarding Defendants’ Statutory and Regulatory Duties and Their Failure to Meet Those Duties.

2. *The State’s Motion for Partial Summary Judgment on Pharmacy Defendants’ Affirmative Defenses* (Transaction ID 67948130)

The State brings claims for public nuisance and violations of the West Virginia Consumer Credit and Protection Act (“WVCCPA”). The State does not seek damages in connection with either claim.

Defendants’ fault-shifting defenses—*contributory negligence, comparative fault, contributory fault, failure to enforce the law, and failure to mitigate*—are inapplicable to the State’s public nuisance claim because comparative fault is not an element of the liability phase (Phase I) of this public nuisance case. *Manufacturer Cases Order* at 3 (citing *City of Huntington v. AmerisourceBergen Drug Corp.*, 2021 WL 1711382, at *2 (S.D. W. Va. Apr. 29, 2021)). Similarly, Defendants’ fault-shifting defenses do not apply to the State’s WVCCPA claims, because the State seeks only civil penalties, injunctive and equitable relief. Under that claim, the fault of the State or anyone else is irrelevant. *Id.* (citing *State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 313, 852 S.E.2d 799, 813 (2020)).

Defendants’ affirmative defenses related to setoff and collateral source payments—*setoff, collateral source, windfall, and double recovery*—are inapplicable to the Phase I liability trial; those defenses are relevant to the issue of abatement but are not relevant to liability. *Id.* (citing *Restatement (Second) of Torts* § 920A cmt. b (“Payments made to or benefits conferred on the injury party from other sources [i.e., those unconnected to the defendant] are not credited against the tortfeasor’s liability, although they cover all or part of the harm for which the tortfeasor is liable.”)).

Defendants’ time-based defenses—*statute of limitations, statute of repose, and laches*—are relevant to the issue of liability and thus are applicable to the Phase I trial. *Id.* Additionally, they involve disputed questions of material fact that preclude summary judgment.

Summary judgment is also inappropriate regarding the Defendants’ equitable defenses—*estoppel, waiver, voluntary payment, unclean hands, in pari delicto, and ratification*— which are not precluded as a matter of law. Whether or not these defenses apply to the State’s public nuisance claim likewise involves disputed questions of material fact that preclude summary judgment.

Finally, Defendants’ defense of reasonable reliance upon national production quotas for controlled substances set by the United States Drug Enforcement Administration (“DEA”) involves disputed questions of material fact that preclude summary judgment.

Therefore, the State’s Motion is **GRANTED in part and DENIED in part**. The Panel **GRANTS** the State’s Motion for Partial Summary Judgment regarding Defendants’ fault-shifting defenses in the Phase 1 liability trial; **GRANTS** the State’s Motion for Partial Summary judgment regarding the defenses of setoff, collateral source, windfall, and double recovery in the Phase I liability trial; and **DENIES** the Motion regarding time-based defenses, equitable defenses, and the DEA quota-related defense.

3. The State’s Motion for Partial Summary Judgment on Existence of Opioid Epidemic and Application of Public Nuisance Law (Transaction ID 67948814)

“West Virginia defines public nuisance as an ‘act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons.’” *Manufacturer Cases Order* at 4 (quoting *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 595-96, 34 S.E.2d 348, 354 (1945)). “The Supreme Court of Appeals of West Virginia has determined that this definition is consistent with the *Restatement (Second) of Torts* § 821B(1) (1979), which defines a public nuisance as ‘unreasonable interference with a right common to the general public.’” *Id.* (quoting *Duff v. Morgantown Energy Assocs.*, 187 W. Va. 712, 716 n.6, 421 S.E.2d 253, 257 n.6 (1992)). And, as this Panel has previously held, “[u]nder either definition, liability for public nuisance, by

necessity, includes a determination of causation because these elements are interrelated.” July 23, 2020, Order Denying Certain Defendants’ Motions for Reconsideration at 8 (Transaction ID 65792140). In West Virginia, “nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations.” *Id.* (quoting *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 483, 334 S.E.2d 616, 621 (1985)). Whether Defendants engaged in wrongful conduct which caused the alleged oversupply and diversion of opioids throughout West Virginia and whether the alleged oversupply and diversion of opioids throughout West Virginia is a public nuisance are questions on which there are genuine issues of disputed material fact between the Parties. Therefore, consistent with West Virginia’s public nuisance jurisprudence, the State’s Motion for Partial Summary Judgment on Existence of Opioid Epidemic and Application of Public Nuisance Law is **DENIED**.

4. Pharmacy Defendants’ Joint Motion for Partial Summary Judgment Regarding the WVCCPA’s Statute of Limitations (Transaction ID 67948536)

“‘[A] cause of action by the Attorney General accrues, and the statute of limitation in West Virginia Code § 46A-7-111(2) begins to run, from the time the Attorney General discovers or reasonably should have discovered the deception, fraud, or other unlawful conduct supporting the action.’” *Manufacturer Cases Order* at 4-5 (quoting Syl. Pt. 8, *State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 852 S.E.2d 799 (2020)). Moreover, “‘[w]henver a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled.’” *3M Co.*, 244 W. Va. at 308, 852 S.E.2d at 808 (quoting *Dunn v. Rockwell*, 225 W. Va. 43, 46, 689 S.E.2d 255, 258 (2009)). “Such determinations generally involve questions of material fact to be resolved by the trier of fact.” *Manufacturer Cases Order* at 5 (citing *3M Co.* with respect to discovery rule).

Therefore, the Pharmacy Defendants' Joint Motion for Partial Summary Judgment Regarding the WVCCPA's Statute of Limitations is **DENIED**.

MOTIONS TO EXCLUDE EXPERT TESTIMONY

West Virginia relies on the *Daubert* analysis for admission of novel scientific expert testimony under West Virginia Rule of Evidence 702. *Wilt v. Buracker*, 191 W. Va. 39, 46, 443 S.E.2d 196, 203 (1993) (adopting expert admissibility standards of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)). Under *Daubert*, scientific expert testimony is admissible where the witness is qualified by "knowledge, skill, experience, training, or education." *Daubert*, 509 U.S. at 588.

Rule 702 of the West Virginia Rules of Evidence provides:

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(b) In addition to the requirements in subsection (a), expert testimony based on a novel scientific theory, principle, methodology, or procedure is admissible only if:

(1) the testimony is based on sufficient facts or data;

(2) the testimony is the product of reliable principles and methods;
and

(3) the expert has reliably applied the principles and methods to the facts of the case.

Pursuant to Rule 702, expert testimony is admissible at trial where (1) the witness is qualified as an expert and (2) the expert's testimony is relevant and reliable. *Harris v. CSX Transp., Inc.*, 232 W. Va. 627, 621, 753 S.E.2d 275, 279 (2013) (citing *San Francisco v. Wendy's Int'l, Inc.*, 221 W. Va. 734, 741, 656 S.E.2d 485, 492 (2007)). The party seeking admission of an expert bears the burden of proof on satisfaction of these requirements. *See, e.g.*,

Wendy's, 221 W. Va. at 743, 656 S.E.2d at 494 (relying on *Gentry v. Mangum*, 195 W. Va. 512, 522, 466 S.E.2d 171, 181 (1995)).

The Panel must assess the “soundness of the expert’s methodology,” not the correctness of his or her opinion. *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (“*Daubert II*”). The expert’s opinion must be based on “‘knowledge,’ not merely ‘subjective belief or unsupported speculation.’” *Daubert*, 509 U.S. at 590.

The Panel applies these principles to the following motions by the Pharmacy Defendants.

1. Pharmacy Defendants’ Motion to Exclude Certain of Dr. David Courtwright and Mr. Carmen Catizone’s Opinions (Transaction ID 67948790)

The Pharmacy Defendants have moved to exclude the opinions of the State’s medical history expert, Dr. David Courtwright, and the State’s pharmacy practice expert, Mr. Carmen Catizone, regarding Defendants’ knowledge, state of mind, or motive, stating legal conclusions, or summarizing documents. The Panel previously decided motions addressing these types of testimony. *See Manufacturer Cases Order* at 18, 20. The Panel also has adopted the “McCormick Rule” and the process utilized by Senior U.S. District Court Judge Charles R. Breyer in *City and County of San Francisco v. Purdue Pharma L.P.*, No. 18-cv-07591 (N.D. Cal.), to “generally allow all evidence to come in subject to a motion to strike at the conclusion of trial.” *Order Regarding Trial Logistics* (Transaction ID 67837970).

Consistent with these prior rulings, the Pharmacy Defendants’ Motion to Exclude Certain of Dr. David Courtwright and Mr. Carmen Catizone’s Opinions is **GRANTED in part and DENIED in part** as follows:

Dr. Courtwright and Mr. Catizone will not be permitted to speculate regarding knowledge, state of mind, or motive of a Defendant. To the extent Dr. Courtwright and Mr. Catizone opine regarding a Defendant’s knowledge, the State must first lay a proper foundation.

Dr. Courtright and Mr. Catizone will not be permitted to simply read documents into the record but will be permitted to summarize voluminous technical documents involving subject matter within their respective areas of expertise.

Dr. Courtwright and Mr. Catizone will not be permitted to give legal opinions.

2. *Pharmacy Defendants’ Motion to Exclude the Causation Opinions of Rahul Gupta* (Transaction ID 67948543)

The Pharmacy Defendants have moved to exclude the opinions of the State’s public health expert, Dr. Rahul Gupta, that an oversupply and the use of prescription opioids contributed to sharp increases in the use of heroin and other illicit opioids in West Virginia, and that diversion of prescription opioids has occurred in West Virginia. Defendants argue that Dr. Gupta’s heroin-causation and diversion opinions are not based on a reliable methodology and therefore are not admissible. The Panel rejects this argument.

Dr. Gupta’s heroin-causation opinion follows the Bradford Hill methodology for determining the existence of a causal relationship between phenomena observed to be correlated, which the Supreme Court of Appeals has found to be “recognized and highly respected in the scientific community.” *Harris v. CSX Transp., Inc.*, 232 W. Va. 617, 648, 753 S.E.2d 275, 306 (2013). The Panel finds that Dr. Gupta’s opinion that an oversupply and the use of prescription opioids contributed to sharp increases in the use of heroin and other illicit opioids in West Virginia is the product of that methodology and, therefore, is admissible into evidence.

Dr. Gupta’s opinion on the occurrence of diversion of prescription opioids in West Virginia is based on his experience and investigations as the State Health Commissioner, including the *2016 West Virginia Overdose Fatality Analysis* (Dec. 30, 2017), which Dr. Gupta commissioned and oversaw, and available records and data demonstrating that in certain years a subset of physicians, many of whom faced disciplinary action for improper opioid prescribing,

wrote a large percentage of all opioid prescriptions in West Virginia. The Panel previously denied a motion by the Distributor Defendants to exclude Dr. Gupta's expert opinion based on these records and data. *See Order Denying Distributors' Motion to Exclude Rahul Gupta's Testimony Relying on Undisclosed Expert Lacey Keller and All Opinions Based on Keller* (Transaction ID 67715087). The Panel finds that Dr. Gupta's opinions regarding the diversion of opioids and the transition between prescription opioids and heroin in West Virginia are admissible because they are based upon sufficient facts and data and the reliable application of a reliable methodology.

Therefore, the Panel **DENIES** the Pharmacy Defendants' Motion to Exclude the Causation Opinions of Rahul Gupta.

3. *Pharmacy Defendants' Motion to Exclude Certain Opinions of State Expert Ruth Carter* (Transaction ID 67948856)

The Pharmacy Defendants have moved to exclude certain opinions of the State's diversion investigations expert, Ruth Carter, providing legal conclusions or testifying as to Defendants' knowledge, state of mind, or motive. The Panel previously decided motions addressing these types of testimony, including specifically with respect to Ms. Carter. *See Manufacturer Cases Order* at 18, 20; *France v. S. Equip. Co.*, 225 W. Va. 1, 14–15, 689 S.E.2d 1, 14–15 (2010). The Panel also has adopted the “McCormick Rule” and the process utilized by Senior U.S. District Court Judge Charles R. Breyer in *City and County of San Francisco v. Purdue Pharma L.P.*, *supra*, to “generally allow all evidence to come in subject to a motion to strike at the conclusion of trial.” *Order Regarding Trial Logistics* (Transaction ID 67837970).

Consistent with these prior rulings, the Pharmacy Defendants' Motion to Exclude Certain Opinions of State Expert Ruth Carter is **GRANTED in part and DENIED in part** as follows:

Ms. Carter will not be permitted to speculate regarding knowledge, state of mind, or motive of a Defendant. To the extent Ms. Carter will opine regarding a Defendant's knowledge, the State must first lay a proper foundation.

Ms. Carter will not be permitted to give legal opinions but may give factual opinions regarding what an adequate suspicious order monitoring system ("SOMS") should contain and what she contends a Defendant's SOMS was lacking.

4. *Pharmacy Defendants' Motion to Exclude Dr. Andrew Kolodny's Opinion* (Transaction ID 67948884)

The Pharmacy Defendants have moved to exclude the opinions of the State's medical and public health expert, Dr. Andrew Kolodny, pertaining to Defendants' relationships with manufacturers of prescription opioids. Defendants argue that Dr. Kolodny is not qualified to offer opinions on their relationships with opioid manufacturers, does not employ a reliable methodology in forming these opinions, and cannot testify by simply summarizing documents. The State argues that Dr. Kolodny formed his opinions by applying his knowledge gained from training, experience, and research in addiction medicine and public health to his review of Defendants' documents.

The Panel previously decided motions addressing these types of testimony, including specifically with respect to Dr. Kolodny. *See Manufacturer Cases Order* at 18. The Panel also has adopted the "McCormick Rule" and the process utilized by Senior U.S. District Court Judge Charles R. Breyer in *City and County of San Francisco v. Purdue Pharma L.P.*, *supra*, to "generally allow all evidence to come in subject to a motion to strike at the conclusion of trial." *Order Regarding Trial Logistics* (Transaction ID 67837970).

Consistent with these prior rulings, the Pharmacy Defendants' Motion to Exclude Dr. Andrew Kolodny's Opinion is **GRANTED in part and DENIED in part** as follows:

Dr. Kolodny will not be permitted to speculate regarding knowledge, state of mind, or motive of a Defendant. To the extent Dr. Kolodny will opine regarding a Defendant's knowledge, the State must first lay a proper foundation.

Dr. Kolodny will not be permitted to simply read documents into the record but will be permitted to summarize voluminous technical documents within his areas of expertise.

MOTIONS IN LIMINE

Under West Virginia law, a motion *in limine* is an appropriate device for saving time at trial by excluding irrelevant evidence. *See, e.g., Smith v. Clark*, 241 W. Va. 838, 856, 828 S.E.2d 900, 918 (2019) (affirming grant of motion *in limine* where “[e]vidence which is irrelevant and immaterial and has no probative value in determining any material issue is inadmissible and should be excluded.”) (quoting *Smith v. Edward M. Rude Carrier Corp.*, 151 W. Va. 322, 331, 151 S.E.2d 738, 743 (1966)); *State ex rel. Tinsman v. Hott*, 188 W. Va. 349, 353, 424 S.E.2d 584, 588 (1992) (affirming grant of motion *in limine* on relevancy grounds). Evidence is relevant if it tends to make a fact at issue in the litigation more or less probable and is “of consequence in determining the action.” W. Va. R. Evid. 401; *State v. Guthrie*, 194 W. Va. 657, 681 (1995). On the other hand, “[i]rrelevant evidence is not admissible.” W. Va. R. Evid. 402; *Wolfe v. Sutphin*, 201 W. Va. 35, 40 (1997). Further, relevant evidence may be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” W. Va. R. Evid. 403. Motions *in limine* are within the sound discretion of the trial court. *McKenzie v. Carrol, Intern. Corp.*, 216 W. Va.

686, 692 (2004). With these principles of West Virginia law in mind, the Court turns to the motions *in limine* filed by the parties.¹

1. Pharmacy Defendants' Motion in Limine to Exclude Evidence or Argument Concerning Defendants' Conduct Outside of and Unrelated to West Virginia (Transaction ID 67977269)

The Pharmacy Defendants argue that evidence concerning their out-of-state conduct is irrelevant, that it violates West Virginia Rule of Evidence 404(b), and that the evidence is unfairly prejudicial and a waste of judicial resources. (Transaction ID 67977269). The State argues that much of the alleged opioid distribution and dispensing misconduct it will prove at trial occurred pursuant to each Defendant's corporate policies, procedures, and practices that were nationwide in their application, and that the opioids distributed and dispensed by Defendants migrated across West Virginia's borders. (Transaction ID 68046063). The Panel previously decided motions addressing these types of evidence. *See Manufacturer Cases Order* at 25-26.

Consistent with this prior ruling, the Pharmacy Defendants' Motion *in Limine* to Exclude Evidence or Argument Concerning Defendants' Conduct Outside of and Unrelated to West Virginia is **DENIED**.

The State will be permitted to introduce evidence that is national in scope which could have an effect in West Virginia. Any evidence related to States and counties contiguous to West Virginia will also be permitted.

¹ Defendant Walmart and the State reached an agreement in principle to resolve this litigation as it relates to Walmart and all proceedings in this case have thus been stayed with respect to Walmart. *Order Staying Proceedings Against Walmart* (Transaction ID 68099861). Accordingly, the Panel issues no further order regarding *Walmart's Motion in Limine to Exclude Evidence of Civil or Criminal Investigations or Other Ongoing Litigation* (Transaction ID 67977532) and the State's *Motion in Limine to Exclude Certain Evidence of Walmart's Prescriber Review Committee and/or in the Alternative to Compel Production of Prescriber Review Committee Documents Being Withheld by Walmart* (Transaction ID 67977898).

2. *State's Motion in Limine to Exclude Evidence or Argument on Contributory Fault as to Opioid Epidemic Harms* (Transaction ID 67976088)

The State argues that evidence concerning alleged fault by the State, other government actors, or opioid supply chain actors other than Defendants is irrelevant to public nuisance or WVCCPA liability. (Transaction ID 67976088). The Pharmacy Defendants counter that action or inaction by government or private actors may be relevant to issues other than fault that are material to the Parties' claims or defenses. (Transaction ID 68052963). The Panel previously ruled that fault-shifting defenses are not applicable to public nuisance or WVCCPA liability in a Phase I trial. *Manufacturer Cases Order* at 3.

Consistent with this prior ruling and the related summary judgment ruling herein, the State's Motion *in Limine* to Exclude Evidence or Argument on Contributory Fault as to Opioid Epidemic Harms is **GRANTED**. Defendants may not argue or offer evidence to establish alleged contributory fault by the State, other government actors, or other opioid supply chain actors in Phase I.

3. *State's Motion in Limine to Exclude Expert Analysis of Medicaid Prescriptions and Prescriptions Appearing in the State Controlled Substances Automated Prescription Program* (Transaction ID 67976122)

The State argues that the statistical analysis of certain prescription evidence it seeks to exclude is irrelevant or is unfairly prejudicial under West Virginia Rule of Evidence 403. (Transaction ID 67976122). The Pharmacy Defendants counter that this evidence is relevant to show that the State's liability evidence on dispensing is unreliable and separately argue that the State's motion is untimely as a challenge to expert testimony. (Transaction ID 68051935).

The State's Motion *in Limine* to Exclude Expert Analysis of Medicaid Prescriptions and Prescriptions Appearing in the State Controlled Substances Automated Prescription Program is **GRANTED in part and DENIED in part**. The Motion is **GRANTED** to the extent Defendants

seek to establish non-party and/or third-party fault. The Motion is **DENIED** to the extent that such evidence is relevant to elements of liability and/or other permissible defenses.

4. *State's Motion in Limine to Exclude Evidence Regarding the State's (A) Licensure and Registration Determinations for Healthcare Professionals and Entities; and (B) Decisions to Investigate, Prosecute, or Discipline Particular Healthcare Professionals or Entities* (Transaction ID 67976140)

The State argues that the propriety of its licensure and investigatory determinations is irrelevant because State or other government actors' alleged fault is not at issue. (Transaction ID 67976140). Defendants counter that this evidence is relevant to their allegedly wrongful conduct and liability. (Transaction ID 68053400). The Panel previously decided a motion addressing these same types of evidence. *See Manufacturer Cases Order* at 22.

The Panel previously ruled that fault-shifting defenses are not applicable to public nuisance or WVCCPA liability in a Phase I trial. *Manufacturer Cases Order* at 3. Consistent with that prior ruling, the Panel granted partial summary judgment with respect to the Defendants' fault-shifting defenses here. *See 3-4 Supra*. Accordingly, Defendants may not argue, or offer evidence to establish, alleged contributory fault of the State or a non-party and/or third-party because such evidence is irrelevant in a Phase I trial. Therefore, the State's Motion in Limine to Exclude Evidence Regarding the State's (A) Licensure and Registration Determinations for Healthcare Professionals and Entities; and (B) Decisions to Investigate, Prosecute, or Discipline Particular Healthcare Professionals or Entities is **GRANTED**.

5. *Pharmacy Defendants' Motion in Limine to Exclude Plaintiff's Undisclosed Individualized and County-Level Evidence* (Transaction ID 67977879)

The Pharmacy Defendants argue that evidence of individual-level or county or city-level harm is inadmissible because the State disavowed relying on such evidence in discovery, refused to produce evidence responsive to numerous discovery requests by the Pharmacy Defendants,

and should not be permitted to use such evidence that it selectively produced. The Pharmacy Defendants also argue that such evidence is barred by West Virginia Rules of Evidence 402 and 403 because it is both irrelevant and highly prejudicial. (Transaction ID 67977879). The State counters that it did produce significant individual-level evidence in discovery and that a blanket exclusion of this type of evidence therefore is not appropriate. (Transaction ID 68052776). The Panel previously granted a motion addressing the same type of individual-level evidence sought to be excluded on similar grounds. *See Manufacturer Cases Order* at 25.

Consistent with this prior ruling, the Pharmacy Defendants' Motion *in Limine* to Exclude Plaintiff's Undisclosed Individualized and County-Level Evidence is **GRANTED**.

Individualized and county-level evidence of opioid diversion, misuse, and associated harms has been excluded from discovery in Phase I and the State has disavowed reliance on such evidence and refused to produce discovery on that basis. The State will be bound by that agreement. The State may not introduce individualized and county-level evidence that it did not produce in discovery or expert reports.

6. *Walgreens' Motion in Limine to Exclude Testimony of Out of State Pharmacists* (Transaction ID 67977322)

Walgreens argues that testimony by pharmacists who work or worked at its pharmacies in states other than West Virginia is irrelevant to the State's claims based on conduct and harms occurring in West Virginia. (Transaction ID 67977322). The State counters that these pharmacists will testify as to their experience of Walgreens' corporate policies, procedures, and practices that were nationwide in their application. (Transaction ID 68051767). The Panel previously decided motions addressing this type of evidence. *See Manufacturer Cases Order* at 25-26.

Consistent with this prior ruling, Walgreens' Motion *in Limine* to Exclude Testimony of Out of State Pharmacists is **GRANTED in part and DENIED in part**.

The Motion is **GRANTED** to the extent out of state pharmacists' testimony addresses state-specific practices in other states. The Motion is **DENIED** to the extent out of state pharmacists' testimony addresses Walgreens' corporate policies, procedures, and practices that were nationwide in their application, and could have an effect in West Virginia.

7. Pharmacy Defendants' Motion in Limine to Preclude Argument and Evidence Regarding Lobbying (Transaction ID 67977751)

The Pharmacy Defendants argue that evidence of their lobbying activity or the lobbying activity of third parties such as the National Association of Chain Drug Stores ("NACDS") is inadmissible because it is irrelevant to liability, is protected by the First Amendment to the United States Constitution and thus prohibited from being considered in connection with liability and would be unfairly prejudicial and/or wasteful under West Virginia Rule of Evidence 403. (Transaction ID 67977751). The State counters that First Amendment protections do not serve as bars to admission of evidence, that lobbying activity is relevant to notice, knowledge, or intent, and that Rule 403 prejudice concerns have little or no application in a bench trial. (Transaction ID 6804605).

The Panel previously denied a motion addressing lobbying evidence in a case about manufacturers' allegedly misleading or deceptive speech. *Manufacturer Cases Order* at 38. The Pharmacy Defendants' Motion *in Limine* to Preclude Argument and Evidence Regarding Lobbying is **GRANTED in part and DENIED in part**. Consistent with the Panel's prior ruling, evidence of false or misleading marketing or speech is not protected by the First Amendment and shall not be excluded. Evidence of lobbying that is not probative of false or misleading marketing or speech shall be excluded.

8. *State's Motion in Limine to Exclude Evidence or Argument Regarding Purported Loss of Access to Prescription Medications (Transaction ID 67976148)*

The State argues that this evidence should be excluded because arguments related to future loss of access to prescription medications are irrelevant to public nuisance liability for past or present conduct or to WVCCPA liability, which focuses solely on Defendants' conduct. (Transaction ID 67976148). Defendants counter that the State's motion would unduly hinder a defense because it is overbroad. Defendants assert that the State's arguments should be addressed at trial in the context of specific evidence presented. (Transaction ID 68052221). The Panel previously decided a motion addressing evidence or argument based on alleged loss of access to prescription medications. *Manufacturer Cases Order* at 23.

Consistent with this prior ruling, the State's Motion *in Limine* to Exclude Evidence or Argument Regarding Purported Loss of Access to Prescription Medications is **GRANTED**.

9. *Pharmacy Defendants' Motion in Limine to Exclude a News Article (Transaction ID 67978007)*

The Pharmacy Defendants argue that a news article—Sam Roe, Ray Long, and Karisa King, *Pharmacies Miss Half of Dangerous Drug Combinations*, Chicago Tribune (Dec. 15, 2016)—is inadmissible hearsay under West Virginia Rule of Evidence 802, irrelevant under West Virginia Rules of Evidence 401 and 402, and unfairly prejudicial and a waste of time under West Virginia Rule of Evidence 403. (Transaction ID 67978007). The State counters that the news article is a non-hearsay party admission under West Virginia Rule of Evidence 801(d)(2)(B), is admissible for non-hearsay purposes such as to show knowledge or notice, is relevant to State's allegations that Defendants created working conditions for their pharmacists that contributed to Defendants' alleged opioid dispensing failures, and cannot be found unfairly prejudicial in a bench trial where it is relevant. (Transaction ID 68051139).

The Pharmacy Defendants' Motion *in Limine* to Exclude a News Article is **GRANTED**. The article and statements contained therein are inadmissible hearsay and shall therefore be excluded. To the extent the State wishes to introduce evidence of the subject matter of the articles, it may attempt to do so by introducing evidence of Defendants' own responses to and characterizations of the article, which is not hearsay. In other words, the State may attempt to introduce evidence of what Defendants did and said in response to the article without introducing the article itself.

10. Pharmacy Defendants' Omnibus Motion in Limine (Transaction ID 67979221)

10.1 Introducing Evidence or Making References to Pharmacy Defendants as a Group

The Pharmacy Defendants argue that the State and its witnesses should be prohibited from using the term "Defendants" when they are not referring to *all* Defendants, and that in such instances the State or its witness must specify as to which Defendant or Defendants it is referring. (Transaction ID 67979221). The State responds that a blanket order on this issue is not warranted and that the Panel should rule no more broadly here than it previously has with other groups of Defendants. (Transaction ID 68052144). As the State referenced, the Panel previously decided a motion addressing and granting relief on this issue. *Manufacturer Cases Order* at 26.

Consistent with this prior ruling, the Pharmacy Defendants' Motion *in Limine* to Exclude References to Pharmacy Defendants as a Group is **GRANTED**. If a witness uses the term "defendants" and is not referring to all Defendants, the witness must specify which Defendant the testimony covers.

10.2 *Introducing Evidence or Argument About DEA Settlements*

The Pharmacy Defendants argue that evidence of settlement agreements they have entered into with the DEA involving their distribution or dispensing of opioids are inadmissible under West Virginia Rule of Evidence 408, are irrelevant under West Virginia Rule of Evidence 402, and are unfairly prejudicial under West Virginia Rule of Evidence 403. (Transaction ID 67979221). The State counters that Defendants' opioid-related settlements with DEA are admissible under Rule 408 for purposes of showing knowledge or notice, are relevant under Rules 401 and 402 to the extent the DEA settlements address a Defendant's policies or practices that apply in West Virginia and are not unfairly prejudicial under Rule 403 to the extent they are relevant in this bench trial. (Transaction ID 68052144). The Panel previously decided motions addressing a defendant's opioid-related settlement with federal government authorities. *Manufacturer Cases Order* at 30.

Consistent with this prior ruling, the Pharmacy Defendants' Motion *in Limine* to Exclude Evidence or Argument about DEA Settlements is **GRANTED in part and DENIED in part**. The Motion is **GRANTED** as this evidence relates to liability. The Motion is **DENIED** as this evidence relates to knowledge and notice.

10.3 *Introducing Evidence or Argument About Non-DEA Settlements*

The Pharmacy Defendants argue that evidence of settlement agreements they have entered into in civil litigation with entities other than the DEA involving their distribution or dispensing of opioids are inadmissible under West Virginia Rule of Evidence 408, are irrelevant under West Virginia Rule of Evidence 402, and are unfairly prejudicial under West Virginia Rule of Evidence 403. (Transaction ID 67979221). The State responds that it does not intend to offer evidence of opioid-related settlements between Defendants and other jurisdictions,

although it will introduce testimony and evidence from those proceedings at trial. (Transaction ID 68052144). The Panel previously decided motions addressing a defendant's opioid-related settlements. *Manufacturer Cases Order* at 30.

Consistent with this prior ruling, the Pharmacy Defendants' Motion *in Limine* to Exclude Evidence or Argument about Non-DEA Settlements is **GRANTED in part and DENIED in part**. The Motion is **GRANTED** as this evidence relates to liability. The Motion is **DENIED** as this evidence relates to knowledge and notice.

10.4 *Introducing Lay Opinion Testimony That Prescription Opioids are a "Gateway" Drug*

The Pharmacy Defendants argue that "lay witness" testimony offering opinions related to the causal connection between use of prescription opioids and abuse of illegal opioids such as heroin is inadmissible under West Virginia Rule of Evidence 701 and as based on hearsay precluded under West Virginia Rule of Evidence 802. (Transaction ID 67979221). The State counters that this evidence is admissible under Rule 701 to the extent a lay or fact witness provides opinion testimony based on his or her perception that is relevant and is not scientific, technical, or specialized in nature, and that such perception-based opinion testimony is not based on inadmissible hearsay. (Transaction ID 68052144). The Panel previously decided a motion addressing this exact type of evidence. *Manufacturer Cases Order* at 28-29.

Consistent with this prior ruling, the Pharmacy Defendants' Motion *in Limine* to Exclude Lay Opinion Testimony That Prescription Opioids are a "Gateway" Drug is **DENIED**. The State will be permitted to introduce the identified testimony, but there must be a sufficient foundation for any opinion asserted.

10.5 *Introducing Expert Testimony That Opines on Pharmacy Defendants' Alleged State of Mind and Corporate Conduct, Reiterates Corporate Documents, Opines on Corporate Ethics and Morality, and Provides Legal Opinions*

The Pharmacy Defendants argue that expert testimony that opines on their alleged state of mind, simply reads documents into the record, opines on corporate ethics or duties, or provides legal opinions or an application of law to facts is inadmissible under West Virginia Rule of Evidence 702. (Transaction ID 67979221). The State counters that expert opinion testimony on a Defendant's knowledge is permissible where a factual foundation is laid; that expert testimony summarizing technical or voluminous documents within the expert's areas of expertise is permissible; that expert testimony addressing corporate ethics or duties is permissible where a factual or legal foundation is laid; and that experts may give opinions on factual matters within their areas of expertise that relate to legal questions presented in the case. (Transaction ID 68052144). The Panel previously decided motions addressing some of these types of testimony. *See Manufacturer Cases Order* at 18, 20.

Consistent with these prior rulings, the Pharmacy Defendants' Motion *in Limine* to Exclude Expert Testimony that Opines on Pharmacy Defendants' Alleged State of Mind and Corporate Conduct, Reiterates Corporate Documents, Opines on Corporate Ethics and Morality, and Provides Legal Opinions is **GRANTED in part and DENIED in part** as follows:

The State's expert witnesses will not be permitted to speculate regarding knowledge, state of mind, or motive of a Defendant. To the extent an expert witness opines regarding a Defendant's knowledge, the State must first lay a proper foundation.

The State's expert witnesses will not be permitted to simply read documents into the record but will be permitted to summarize voluminous technical documents involving subject matter within their areas of expertise.

The State's expert witnesses will not be permitted to give unsubstantiated opinions about a Defendant's corporate ethics or duties unless the State first demonstrates that the expert's scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence regarding such duties or to determine a fact at issue.

The State's expert witnesses will not be permitted to give legal opinions.

10.6 *Introducing and Relying on Evidence from Its Selectively Matched Data*

The Pharmacy Defendants argue that the State should be precluded from relying on summaries and analyses of data the State did not produce in discovery. (Transaction ID 67979221). The State argues in response that it is not using any data or information in this trial that it did not produce to Defendants. (Transaction ID 68052144). The Panel previously has ruled on objections related to the dispute between the Parties pertaining to the scope of data that the State has produced. *See Order Affirming Discovery Commissioner's August 4, 2022 Order* (Transaction ID 67959934).

Consistent with its prior ruling, the Pharmacy Defendants' Motion *in Limine* to Preclude the State or Its Experts from Relying on Evidence from Its Selectively Matched Data is **GRANTED in part and DENIED in part**. The State's expert witnesses shall not testify to matters wherein the basis for their opinions was not produced or identified during the discovery phase of this trial.

10.7 *Introducing Evidence That Individual Prescribers Were Misled and Individual Prescribers Engaged in the Unlawful Prescribing of Opioid Medications*

The Pharmacy Defendants argue that the State should be precluded from introducing evidence or making argument that any individual prescriber was misled by Defendants, that any individual prescription for an opioid medication was medically unnecessary, or that any

individual prescriber engaged in the unlawful prescribing of opioid medications. (Transaction ID 67979221). The State responds that it does not intend to present evidence that individual prescribers were misled or that individual prescriptions were medically unnecessary, but that evidence of unlawful opioid prescribing is identified in the State's expert reports produced during discovery and in the State's written discovery responses. (Transaction ID 68052144). The Panel previously addressed a motion to exclude individualized evidence that the State disavowed in discovery. *See Manufacturer Cases Order* at 25.

Consistent with this prior ruling, the Pharmacy Defendants' Motion *in Limine* to Exclude Evidence That Individual Prescribers Were Misled and Individual Prescribers Engaged in the Unlawful Prescribing of Opioid Medications is **GRANTED**.

The State agreed it would not rely on evidence that any individual prescriber was misled by Defendants or that any individual prescription for an opioid medication was medically unnecessary. The State also agreed that to the extent it intends to use evidence of improper conduct by a prescriber and a Defendant employee in West Virginia or of persons who wrote improper prescriptions in West Virginia, it would disclose such evidence in fact and/or expert discovery. *See* (Transaction ID 67900613) at 7 (Ruling 14) and 10 (Ruling 31). The State will be bound by those agreements. The State shall not introduce evidence that any individual prescriber was misled by Defendants or that any individual prescription for an opioid medication was medically unnecessary. In seeking to establish that prescribers should have been subject to due diligence or else blocked, the State shall not introduce evidence that any individual prescriber's prescribing of opioids was unlawful except to the extent that information was identified or produced by the State in written discovery and/or expert discovery.

A copy of this Order has been electronically served on all counsel of record via File & ServeXpress.

It is so **ORDERED**.

ENTERED: October 1, 2022.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation