



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE OPIOID LITIGATION **Civil Action No. 21-C-9000 MFR**

THIS DOCUMENT APPLIES TO ALL MANUFACTURER CASES

**ORDER REGARDING RULINGS ISSUED DURING
MARCH 25, 2022, PRETRIAL CONFERENCE**

On March 25, 2022, Presiding Judge Derek C. Swope, conducted a status conference and issued the following rulings on motions for summary judgment, motions to exclude expert testimony, and motions *in limine*.

Motions for Summary Judgment:

1. Plaintiff's Motion for Partial Summary Judgment on Defendants' Statutory and Regulatory Duties and Memorandum of Law in Support (Transaction ID 67347633).

Denied.

2. The State's Motion for Summary Judgment on Defendants' Affirmative Defenses and Memorandum of Law in Support (Transaction ID 67347633).

Granted in Part, Denied in Part. Granted as to the fault shifting, offset and related affirmative defenses. Denied as to time related affirmative defenses.

3. Manufacturers' Joint Motion for Summary Judgment on the State's Public Nuisance Claim and Memorandum of Law in Support (Transaction ID 67359984).

Denied.

4. Manufacturers' Joint Motion for Partial Summary Judgment on the State's West Virginia Consumer Credit Protection Act Claim (Transaction ID 67359676) and Memorandum in Support (Transaction ID 67359747).

Denied.

5. Renewed Motion of Specially-Appearing Defendant Teva Pharmaceuticals Industries Ltd. to Dismiss All Claims Against It for Lack of Personal Jurisdiction, Or, In the Alternative, for Summary Judgment (Transaction ID 67346726) and Memorandum of Law in Support (Transaction ID 67367412).

Denied.

6. Teva Pharmaceuticals USA Inc.'s Motion for Summary Judgment (Transaction ID 67347144) and Memorandum of Law in Support (Transaction ID 67367542).

Denied.

7. Cephalon, Inc.'s Motion for Summary Judgment (Transaction ID 67348500) and Memorandum of Law in Support (Transaction ID 67367216).

Denied.

8. Defendants Actavis Generic Entities' Motion for Summary Judgment (Transaction ID 67348201) and Memorandum of Law in Support (Transaction ID 67367109).

Denied.

9. Allergan Defendants' Motion for Partial Summary Judgment (Transaction ID 67348216) and Memorandum of Law in Support (Transaction ID 67379957).

Denied.

10. Janssen's Motion for Partial Summary Judgment on the Marketing of Duragesic as a Basis for Liability (Transaction ID 67339302) and Memorandum of Law in Support (Transaction ID 67339453).

Granted.

11. Janssen's Motion for Partial Summary Judgment on the State's Claims Targeting Un-joined Former Subsidiaries and Memorandum of Law in Support (Transaction ID 67336546).

Denied.

Motions to Exclude Expert Testimony

1. State's Motion to Exclude Certain Testimony of M. Laurentius Marais, Ph.D. on State Expert Maureen Gorman's Marketing Opinions and Memorandum of Law in Support (Transaction ID 67387135).

Denied.

2. State's Motion to Exclude Specific Testimony of Edward Michna, M.D. on Numbers of Actiq and Fentora Prescriptions in West Virginia and Memorandum of Law in Support (Transaction ID 67373014).

Denied.

3. State's Motion to Exclude Testimony of Jonathan Ketcham, Ph.D. as Not Relevant and Unqualified and Memorandum of Law in Support (Transaction ID 67373067).

Granted.

4. Manufacturers' Motion to Exclude the Marketing Causation Opinions of Andrew Kolodny, Danesh Mazloomdoost, David Courtwright, Katherine Keyes, Matthew Perri, and Aaron Kesseleim (Transaction ID 67359428) and Memorandum of Law in Support (Transaction ID 67359563).

Andrew Kolodny: **Taken Under Advisement.**

Danesh Mazloomdoost: **Denied.**

David Courtwright: **Denied.**

Katherine Keyes: **Denied.**

Matthew Perri: **Denied.**

Aaron Kesselheim: **Denied.**

5. Motion to Exclude Opinions and Testimony of Plaintiff's Expert Alec Fahey (Transaction ID 67347559) and Memorandum of Law in Support (Transaction ID 67367486).

Denied.

6. Manufacturers' Motion to Exclude the Opinions of Maureen Gorman and Memorandum of Law in Support (Transaction ID 67347942).

Denied.

7. Defendants' Motion to Exclude Dr. Andrew Kolodny, Dr. Matthew Perri III, and Dr. David Courtwright Concerning Manufacturers' Corporate Knowledge, Intent, and Conduct and Extra-Legal Issues and Memorandum of Law in Support (Transaction ID 67347840).

Granted in Part, Denied in Part. Expert witnesses are allowed to summarize voluminous technical documents. Expert witnesses are not allowed to speculate regarding knowledge, state of mind or motive. Plaintiff must lay a proper foundation regarding a Defendant's knowledge.

8. Manufacturers' Partial Motion to Exclude Dr. Andrew Kolodny's "Simulation" and All Opinions Based on It and Memorandum of Law in Support (Transaction ID 67348117).

Taken Under Advisement.

9. Defendants' Motion to Exclude Opinions of Plaintiff's Expert Witness, Ruth Carter and Memorandum of Law in Support (Transaction ID 67348556).

Granted in Part, Denied in Part. Plaintiff's expert can say what a proper SOMS should have. Plaintiff's expert cannot give legal opinions.

10. Janssen's Motion to Exclude Expert Opinion of Matthew Perri and Memorandum of Law in Support (Transaction ID 67346179).

Granted. Plaintiff's expert cannot discuss conduct regarding Duragesic prior to December 23, 2010.

Motions in Limine

1. Plaintiff's Motion *in Limine* to Exclude Evidence or Argument Claiming or Suggesting a Defendant Has a Small Market Share by Focusing on Brand Name Opioids and Memorandum of Law in Support (Transaction ID 67379488).

Denied.

2. The State's Motion *in Limine* Regarding the Propriety of 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 67379900).

Granted.

3. The State's Motion *in Limine* Regarding the "Inaction" of the DEA and FDA and the State's, FDA's, and DEA's Performance of Duties (Transaction ID 67379900).

Granted in Part, Denied in Part. Defendants can say they were not sanctioned by the DEA and/or FDA, inferring compliance. Defendants cannot use such testimony or evidence as a backdoor way to introduce third party or nonparty fault.

4. State's Motion *in Limine* to Exclude Evidence or Argument Regarding Purported Loss of Access to Prescription Medications (Transaction ID 67380213).

Granted.

5. State's Motion *in Limine* to Exclude Evidence and Argument Concerning any Purported Absence of Evidence Showing Reliance (Transaction ID 67380456).

Denied.

6. The State's Motion *in Limine* to Preclude the Defendants from Discussing FDA Approval of Their Opioid Medications Without Discussion of Their Specific Indications (Transaction ID 67381389).

Denied.

7. State's Motion *in Limine* to Preclude Defendants' Experts from Offering Legal Opinions or Opinions Applying Fact to Law (Transaction ID 67381516).

Granted. This ruling applies to all parties.

8. Plaintiff's Motion *in Limine* to Exclude Evidence or Argument that Documents Produced by the Defendants are not Authentic or Business Records (Transaction ID 67380905).

Granted. The parties shall meet and confer in order to agree upon stipulations to authenticity.

9. Manufacturers' Joint Motion *in Limine* to Exclude Evidence that the State Disavowed in Discovery and Memorandum of Law in Support (Transaction ID 67379507).

Granted. The State is bound by the Panel's February 10, 2022, Order (Transaction ID 67305440). Beyond that, the Court will need to hear what the State wants to introduce into evidence.

10. Manufacturers' Joint Motion *in Limine* to Preclude Evidence Concerning Manufacturers' Conduct Outside of, and Unrelated to, West Virginia (Transaction ID 67380387).

Denied. Any evidence that is national in scope which could have an effect in West Virginia will be allowed. Any evidence related to states and counties contiguous to West Virginia will also be allowed.

11. Manufacturers' Motion *in Limine* to Exclude Generic References to Defendants as a Group and Memorandum of Law in Support (Transaction ID 67380629).

Granted in Part, Denied in Part. If a party or witness uses the term "defendants" and they are not referring to all defendants, the party or witness must be specific as to which defendant or defendants they are referring.

12. Manufacturers' Joint Motion *in Limine* to Preclude the State from Presenting Evidence on Restitution or Disgorgement (Transaction ID 67380514).

Denied.

13. Manufacturers Joint Motion *in Limine* to Exclude Testimony of Undisclosed Expert Dr. David Kessler and Memorandum of Law in Support (Transaction ID 67381271).

Denied.

14. Manufacturers' Motion *in Limine* to Exclude Evidence of Individual Purported Suspicious Orders and Memorandum of Law in Support (Transaction ID 67391002).

Denied.

15. Defendants' Motion *in Limine* to Exclude Purported Sample of Autopsy Reports and Memorandum of Law in Support (Transaction ID 67390554).

Denied.

16. Manufacturers' Motion *in Limine* to Exclude FDA Warning and Untitled Letters and Memorandum of Law in Support (Transaction ID 67391297).

Granted in Part, Denied in Part. Granted as to letters regarding Duragesic. Denied as to all other letters that are the subject of the motion.

17. Manufacturers' Motion *in Limine* to Exclude Evidence Regarding Prescription Opioids Being a "Gateway" to Illicit Drug Use and Memorandum of Law in Support (Transaction ID 67390415).

Denied.

18. Omnibus Motion *in Limine* by Cephalon, Inc., Teva Pharmaceuticals USA, Inc., and the Actavis Generic Entities and Memorandum of Law in Support (Transaction ID 67380829).

- A. MIL #1: The Court Should Exclude Reference to the Cephalon Misdemeanor Plea.

Granted in Part, Denied in Part. Granted as to liability. Denied as to notice or knowledge.

- B. MIL #2: The Court Should Exclude Reference to the "Off-Label" Promotion by Cephalon or Teva USA of Their Branded Medicines (Actiq or Fentora).

Denied.

- C. MIL #3: The Court Should Exclude Any Reference to the 2008 Civil Settlement Between Cephalon and the Federal Government and the Opioid-Related Civil Settlements from Other Jurisdictions Involving Defendants.

Granted in Part, Denied in Part. Granted as to liability. Denied as to notice or knowledge.

- D. MIL #4: The Court Should Exclude Evidence and Argument Regarding Conduct Protected by the First Amendment.

Denied.

- E. MIL #5: The Court Should Exclude Alec Burkaloff's Deposition Testimony.

Granted. The Court will allow Plaintiff to vouch the record.

- F. MIL #6: The State Should Be Precluded from Arguing That The Actavis Generic Defendants Should Have Made Additional Warnings Regarding Their Generic Medicines or Should Have Stopped Selling Them.

Granted in Part, Denied in Part. Granted as to additional warnings regarding generic medicines or that The Actavis Generic Defendants should have stopped selling generic medicines. Denied as to the State's ability to show false or misleading marketing.

- G. MIL #7: The Court Should Exclude Reference to The Purchase Price Paid by Teva Pharmaceutical Industries Ltd. for The Actavis Generic Entities.

Granted.

- H. MIL #8: The Court Should Exclude Reference to The Settlement Agreement Between Allergan plc and Teva Ltd.

The parties agree this evidence should be excluded.

- I. MIL #9: The State Should be Precluded from Arguing That a Defendant is Liable Based Upon the Past Actions of Its Current Affiliate.

Held in Abeyance.

- J. MIL #10: The Court Should Preclude the State from Introducing Any Evidence of Call Notes from Teva USA or Cephalon.

Denied. Any evidence that is national in scope which could have an effect in West Virginia will be allowed. Any evidence related to states and counties contiguous to West Virginia will also be allowed.

- K. MIL #11: The Court Should Preclude the State from Referring to a Non-Existent Duty to Police All Downstream Diversion in the Supply Chain.

Denied.

- L. MIL #12: The Court Should Preclude the State from Displaying Certain Videos from Cephalon's 2006 Sales Conference.

Denied.

- M. MIL #13: The Court Should Preclude the State from Introducing Irrelevant Emails Sent by Someone Who Was Not an Employee of And Had No Connection to Defendants at the Time.

Denied.

- N. MIL #14: The Court Should Exclude Reference to Pharmaceuticals Manufactured by Defendants that are not Expressly Named in the Operative Complaint.

Denied.

19. Allergan Defendants' Omnibus Motion in Limine (Transaction ID 67381445).

- A. MIL #1: The Court Should Preclude All Evidence and Argument Concerning MoxDuo.

Denied.

- B. MIL #2: The Court Should Preclude All Evidence And Argument That Industry-Funded Medical Education Required or Encouraged by the FDA Was Improper.

Denied.

- C. MIL #3: The Court Should Preclude Plaintiff from Raising or Pursuing any Veil-Piercing or Analogous Theories at Trial.

Denied.

20. Janssen's Motion in Limine No. 1 to Exclude Evidence of Unjoined Former Subsidiaries and Memorandum of Law in Support (Transaction ID 67378505).

Denied.

21. Janssen's Motion in Limine No. 2 to Exclude Evidence of Conduct Related to Duragesic and Memorandum of Law in Support (Transaction ID 67391516).

Granted.

22. Janssen's Motion in Limine No. 3 to Exclude Evidence of Call Notes and Memorandum of Law in Support (Transaction ID 67378580).

Denied.

23. Janssen's Motion in Limine No. 4 to Exclude Evidence of Lobbying and Memorandum of Law in Support (Transaction ID 67378290).

Denied.

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

It is so **ORDERED**.

ENTERED: March 29, 2022.

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation