



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
IN RE: OPIOID LITIGATION **CIVIL ACTION NO. 21-C-9000 PHARM**

THIS DOCUMENT APPLIES TO:

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

Plaintiff,

v.

Civil Action No. 22-C-111 PNM

THE KROGER CO., et al.,

Defendants.

ORDER REGARDING TRIAL LOGISTICS

Admissibility of Evidence

The Panel adopts the following process as set forth in one of the leading commentaries on evidence:

In practice, considerations of waste of time, predictability and consistency lead most trial judges to apply the rules of evidence in a nonjury trial to exclude evidence that “is clearly inadmissible, privileged, or too time consuming in order to guard against reversal.” However, where the admissibility of evidence proffered at a bench trial is debatable, many experienced, cautious judges follow a practice calculated to minimize the risk of reversal. That practice is to provisionally admit all arguably admissible evidence, even if objected to, with the announcement that all admissibility questions are reserved until all the evidence is in. In considering any objections renewed by motion to strike at the end of the case, the judge leans toward admission rather than exclusion but seeks to find clearly admissible testimony on which to base her findings of fact. To minimize the risk of appellate reversal, a prudent trial judge makes it a practice to explicitly identify on the record the admissible evidence that she is basing her factual findings on. The practice lessens the time spent in arguing objections and helps ensure that appellate courts have in the record the evidence that was rejected as well as that which was admitted. A more complete trial record sometimes enables the appellate court to dispose of the case by entering a final judgment rather than merely remanding to the trial court for further proceedings.

McCORMICK ON EVIDENCE § 60 (8th ed.). Adoption of the “**McCORMICK Rule**” is consistent with the inherent authority given to the Panel to adopt any procedures deemed appropriate to fairly

and efficiently manage and resolve Mass Litigation. W. Va. Tr. Court R. 26.08(d). The Panel also adopts the process utilized in CT4 by Senior District Judge Charles R. Breyer presiding in the U.S. District Court for the Northern District of California, San Francisco Division, to generally allow all evidence to come in subject to a motion to strike at the conclusion of trial.

Pretrial Conference

The pretrial conference in this matter shall be held at **9:00 a.m. on Friday, May 26, 2023**. *See Case Management Order* (Transaction ID 68269611), paragraph 16.

Designated Number of Trial Days, Estimated Length of Trial, and Trial Schedule

The trial of this matter shall begin at **8:30 a.m. on Monday, June 5, 2023**. *See Case Management Order*, paragraph 17. Trial will be conducted Monday through Friday from 8:30 a.m. to 4:30 p.m. There will be a 30-minute break mid-morning; an hour lunch break; and a 30-minute break mid-afternoon. The Presiding Judges are allocating 18 days for trial of this matter up to and including Friday, June 30, 2023, because of the intervening Juneteenth and West Virginia Day Holidays.

Time Keeping

The parties shall file and serve a joint proposed time keeping order for the Court's review **no later than 12:00 p.m. on Thursday, April 13, 2023**. Each side shall have 48 hours to present their case, not including 1 hour per side for opening statements, and 1 ½ hours per side for closing arguments.

Trial Testimony Presented by Video Deposition and Objections to Deposition Designations

The Presiding Judges and the parties will watch trial testimony presented by video deposition during the trial. The parties shall meet and confer to resolve objections to deposition designations and exhibits **no later than Friday, May 5, 2023**. Deposition designations and

objections shall be completed and delivered to the Presiding Judges and Counsel to the Mass Litigation Panel **no later than 12:00 p.m. on Friday, May 12, 2023**. *See Case Management Order*, paragraph 15. All objections to deposition designations shall be listed on a chart in page order regardless of who interposed the objection.

The parties are expected to modify, edit, simplify, and limit their proposed video deposition testimony to only the witnesses and testimony needed to present their cases concisely. The parties shall limit their witnesses and the witnesses' testimony to avoid duplicative presentation of evidence. Video deposition testimony will count against the parties' hours.

The Court further advises the parties that most objections to deposition designations will be overruled. See the “**MCCORMICK Rule.**” The Court further **ORDERS** the parties to provide the Court with a list identifying the order in which all video depositions will be played **no later than 12:00 p.m. on Monday, May 22, 2023**, so the Court can prioritize rulings on deposition designations on a rolling basis, as needed by the parties.

Pretrial Memoranda

All parties shall file and serve their pretrial memoranda **no later than 12:00 p.m. on Friday, May 19, 2023**. Paragraph 14 of the *Case Management Order* is hereby amended accordingly.

The pretrial memoranda shall contain the following:

- a. Statement of the Case
- b. Issues of Fact
- c. Issues of Law
- d. Proposed Stipulations

e. A Pre-Marked Exhibit List (NO reservations authorized) which shall consist of:

- Joint Agreed Exhibit List
- Plaintiff's List of Contested Exhibits
- Defendants' List of Contested Exhibits

f. Witness List (NO reservations authorized) which shall consist of:

- **The parties are expected to modify, edit, simplify, and limit their witness lists to include only witnesses who will be called at trial. The parties are further expected to limit all witness testimony to present their cases concisely. The parties shall also limit their witnesses and the witnesses' testimony to avoid duplicative presentation of evidence.**
- The schedule of witnesses expected to be called the week of June 5, 2023, through June 9, 2023, shall be provided to the Presiding Judges and Counsel to the Mass Litigation Panel at the pretrial conference on May 26, 2023.
- At the conclusion of the evidence each Friday the schedule of witnesses for the following week shall be provided to the Presiding Judges and Counsel to the Mass Litigation Panel.

Proposed Findings of Fact and Conclusions of Law

The parties shall provide their proposed findings of fact and conclusion of law in Word Format to Counsel to the Mass Litigation Panel no later than five (5) business days after closing arguments are concluded.

Technology Issues

The parties shall meet, confer, and provide one detailed list of questions regarding technology use in the courtroom to Counsel to the Mass Litigation Panel via electronic mail message at kim.fields@courtswv.gov **no later than 12:00 p.m. on Friday, May 19, 2023.**

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: March 30, 2023.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation