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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

AMENDED 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 rulings on motions for summary judgment, motions to exclude expert testimony, and motions *in limine* filed by the following parties: State of West Virginia ex rel. Patrick Morrisey, Attorney General (the "State"); Teva Pharmaceuticals USA, Inc. ("Teva USA"), specially-appearing Teva Pharmaceuticals Industries Ltd. ("Teva Ltd."); Cephalon, Inc. ("Cephalon"); Defendants Watson Laboratories, Inc., Warner Chilcott Company LLC, Actavis Pharma, Inc. (f/k/a Watson Pharma, Inc.), Actavis South Atlantic LLC, Actavis Elizabeth LLC, Actavis Mid Atlantic LLC, Actavis Totowa LLC, Actavis LLC, Actavis Kadian LLC, Actavis Laboratories UT, Inc. (f/k/a Watson Laboratories, Inc.-Salt Lake City), and Actavis Laboratories FL, Inc. (f/k/a Watson Laboratories, Inc.-Florida) (collectively the "Actavis Generic Entities"); Allergan Finance, LLC (f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc.), Allergan USA, Inc., and Allergan Sales, LLC (collectively "Allergan"); Defendants Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., and Johnson & Johnson (collectively "Janssen"). *Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67434309, entered on March 29, 2022). The Court amends its March 29, 2022, Order to provide the following additional bases for its rulings.

MOTIONS FOR SUMMARY JUDGMENT

Summary judgment "shall be granted" if there is no "genuine" dispute of material fact and the movant is entitled to judgment as a matter of law. *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801, 809 (1996). "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, 768 (1994). Avoiding summary judgment requires a party to present sufficient evidence for a reasonable trier of fact to find in its favor. Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). If the nonmoving party fails "to make sufficient showing on an essential element" of its claim, the movant is entitled to judgment as a matter of law. Syl. Pt. 3, *Jochum v. Waste Mgmt. of W. Virginia, Inc.*, 224 W. Va. 44, 680 S.E.2d 59 (2009). With this standard in mind, the Court rules as follows on the Motions for Summary Judgment filed by the parties.

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

West Virginia law prohibits courts from issuing advisory opinions, dictating that courts "not … adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies." *Farley v. Graney*, 146 W. Va. 22, 119 S.E.2d 833, 838 (1960). Summary judgment is "not appropriate … as a vehicle for fragmented adjudication of non-determinative issues." *S.E.C. v. Thrasher*, 152 F. Supp. 2d 291, 295 (S.D.N.Y. 2001). Because the State's Motion seeks judgment divorced from the facts of this litigation, it seeks an advisory opinion. 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; resolution of this issue based entirely on hypotheticals is not beneficial. Therefore, the Court **DENIES** this motion.

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

The State brings claims for public nuisance and for violations of the West Virginia Consumer Credit and Protection Act. The State is not seeking damages in connection with either claim.

Defendants' fault-shifting defenses 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. *See 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 West Virginia Consumer Credit Protection Act ("WVCCPA") claims, because the State seeks only civil penalties and other appropriate relief. Under that claim, the fault of the State or anyone else is irrelevant. *See State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 852 S.E.2d 799, 813 (2020).

Further, Defendants' affirmative defenses related to offset and collateral source payments are also inapplicable to the Phase I liability trial; those defenses are relevant to the issue of abatement but are not relevant to liability. *See, e.g.*, Restatement (Second) of Torts § 920A cmt. (b) ("Payments made to or benefits conferred on the injured party from other sources [i.e., those unconnected to the defendant] are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.").

However, the same reasoning does not apply with regard to the Defendants' time-based defenses centered on the statute of limitations and laches.

Therefore, this Motion is **GRANTED IN PART, DENIED IN PART.** The Court **GRANTS** the State's Motion for Partial Summary Judgment with regard to the Defendants' fault-shifting, offset, and other similar affirmative defenses, but **DENIES** the Motion with regard to statute of limitations and laches 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).

West Virginia defines public nuisance as an "an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *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 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." *Duff v. Morgantown Energy Ass'n*, 187 W. Va. 712, 716 n.6, 421 S.E.2d 253, 257 n.6 (1992). In West Virginia, "nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations." *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 483, 334 S.E.2d 616, 621 (1985). This is a fact-specific determination. The Court further notes that at least 22 states have found public nuisance claims based on the marketing of prescription opioids to be viable.

The Court is not persuaded to follow the ruling from Oklahoma, *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021). In Oklahoma's opioid litigation, the court dismissed Oklahoma's public nuisance claim because in Oklahoma, public nuisance is statutory and West Virginia has no statute equivalent to the Oklahoma Supreme Court's interpretation of the Oklahoma statute.

Based on West Virginia's public nuisance jurisprudence Manufacturers' Joint Motion on the State's Public Nuisance Claim is **DENIED**.

4. Manufacturers' Joint Motion for Partial Summary Judgment on the State's West Virginia Consumer Credit and Protection Act Claim (Transaction ID 67359676) and Memorandum of Law in Support (Transaction ID 67367412).

"[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." Syl. Pt. 8, *State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 852 S.E.2d 799 (2020). Such determinations generally involve questions of material fact to be resolved by the trier of fact. *Id.*

To the extent Manufacturers rely on *White v. Wyeth*, 227 W. Va. 131, 141 (2010), that case is distinguishable. *White v. Wyeth* involved a private consumer's claim, not an action brought by the Attorney General, as is the case here.

Nor is the Court persuaded that the WVCCPA does not apply to third-party statements. "[R]ecruiting and paying affiliates" who engaged in false and deceptive advertising practices, "managing those affiliates," "suggesting substantive edits" to the content disseminated by those affiliates, and "purchasing banner space" to run the content of its affiliates can sufficiently demonstrate the defendant's direct participation in the affiliates' conduct. *Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 171–72 (2d Cir. 2016).

Finally, to the extent Defendants argue the State's WVCCPA claim implicates the First Amendment to the United States Constitution, the Court notes misleading commercial speech is not constitutionally protected. *See State ex rel. McGraw v. Imperial Mktg.*, 196 W. Va. 346, 361, 472 S.E.2d 792, 807 (1996) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

Therefore, Manufacturers' Motion for Partial Summary Judgment on the State's West Virginia Consumer Credit and Protection Act Claim is **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).**

Teva Ltd. is a foreign Israeli company with its headquarters in Israel. Teva Ltd. argues that it does not manufacturer, market, promote, or sell opioids in West Virginia or in the United

States, and it has no office, property, employees, or registered agent in the United States. As a result, Teva Ltd. requests dismissal or summary judgment for lack of personal jurisdiction. The State argues that Teva Ltd. itself engaged in the alleged misconduct via its subsidiaries and is concerned about the financial wherewithal of its US-based subsidiaries, Teva USA and Cephalon, and has included Teva Ltd. in the action because it believes there is a valid jurisdiction claim and because of the potential necessity of piercing the corporate veil. Under West Virginia law, "[t]he propriety of piercing the corporate veil should rarely be determined upon a motion for summary judgment. Instead, the propriety of piercing the corporate veil usually involves numerous questions of fact for the trier of the facts to determine upon all of the evidence." Syl. Pt. 6, *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 352 S.E.2d 93 (1986)." *Dailey v. Ayers Land Dev., LLC*, 241 W. Va. 404, 825 S.E.2d 351, 353 (2019). The Court finds this reasoning and the reasoning of Judge Polster in the federal MDL persuasive, as well as that cases of corporate identity, such as this, should rarely be determined upon a motion for summary judgment, and therefore **DENIES** Teva Ltd.'s Motion.

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

Teva USA argues that summary judgment should be granted in its favor for several reasons. First, the State's claims against Teva USA fail because there is no evidence that its conduct constitutes a public nuisance. Teva USA claims there is no evidence of misleading statements from Teva USA in West Virginia, and that there is no evidence Teva USA failed to monitor for and report suspicious orders. Second, Teva USA argues there is no evidence of causation to support a public nuisance claim. Third and finally, Teva USA argues the State's WVCCPA claims are untimely.

In opposition, the State argues that Teva USA engaged in misleading marketing in West Virginia, including, but not limited to, the marketing of Actiq and Fentora, which were only approved for opioid tolerant cancer patients. State Resp. to Teva USA and Cephalon at 5–9. In support, the State identified several documents produced in discovery regarding these allegations. *Id.* Further, the State points to deposition testimony regarding alleged off-label promotion and misrepresentations about the efficacy of opioids as a class. *Id.* at 9–14.

Therefore, as in *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2019 WL 4178617 (N.D. Ohio Sept. 3, 2019), the State here has provided adequate evidence to demonstrate that a genuine issue of material fact exists in relation to the arguments raised in Teva USA's Motion for Summary Judgment. Therefore, the Court **DENIES** Teva USA's Motion.

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

Cephalon argues that the State's claims against it fail because there is no evidence of false or misleading marketing by Cephalon in West Virginia after September 13, 2013. Further, there is no evidence that Cephalon violated the Controlled Substances Act by failing to identify or report suspicious orders. Finally, Cephalon argues that the State's public nuisance claim fails for a lack of causation.

The State's opposition to Cephalon's Motion was combined with its response to Teva USA's Motion due, in part, to the similarity of the arguments between the two Motions for Summary Judgment. State Resp. to Mot. at 2. The Court adopts the reasoning set forth in its ruling denying Teva USA's Motion for Summary Judgment and finds that there is adequate evidence to create a genuine issue of material fact concerning the arguments raised by Cephalon, and therefore the Court **DENIES** Cephalon's Motion.

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

The Actavis Generic Entities identify several reasons why the State's claims against them fail. First, both claims fail to the extent they are based upon false marketing because there is no evidence of false or misleading marketing by any Actavis Generic Entity in West Virginia, and because any "failure to disclose" theory is preempted by federal law. Second, both claims fail to the extent they are based upon suspicious order monitoring because the State has no evidence that any Actavis Generic Entity failed to report suspicious orders. Third, the Actavis Generic Entities assert the State's public nuisance claim fails due to lack of causation. Fourth and finally, the Actavis Generic Entities argue that the WVCCPA claim fails due to the statute of limitation period.

In response, the State points to evidence that it claims demonstrates that the Actavis Generic Entities engaged in misleading marketing of their branded and generic opioids. State Resp. to Actavis Mot. at 15–16. The State similarly argues there is evidence supporting its claims based on SOM conduct. *Id.* at 17–18. Further, the State argues the marketing claims are not preempted because their claims are not predicated on FDA-approved language. *Id.* at 17. Also, the State argues it has established causation for the alleged public nuisance, and that West Virginia law does not require the State to prove medically inappropriate prescribing and does not require the State to prove its claims through individualized proof of harm. *Id.* at 18–19. Finally, the State argues that its WVCCPA claims are not barred by the statute of limitations because it was tolled by the discovery rule and fraudulent concealment doctrine. *Id.* The State also points out that there is evidence of WVCCPA violations after September 2013. *Id.* at 20.

The Court believes the State has provided adequate evidence to demonstrate that a genuine issue of material fact exists in relation to the arguments raised in the Actavis Generic Entities' Motion for Summary Judgment and that the State's allegations do not concern the nature of the

Actavis Generic Entities' warning labels, but misleading marketing. Therefore, the Court **DENIES** Actavis Generic Entities' Motion.

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

Allergan Defendants have moved for partial summary judgment. In support, they argue that the State has made no claims against the Allergan Defendants for drugs other than Kadian. They also argue that the State does not dispute that Alpharma retained sole liability for pre-2009 marketing of Kadian and cannot rely on that conduct in its claims against the Allergan Defendants. As such, the State's claims against Allergan Defendants should be limited to conduct related to Kadian after 2009.

The State contends that it's Complaint alleges that Allergan "helped cause the opioid epidemic by engaging in strategic campaigns of misrepresentations about the risks and benefits of *opioid* use." Am. Compl. ¶ 17. The State points to several other allegations in the Complaint that allege conduct of all Defendants, including the Allergan Defendants, that allege conduct related broadly to opioids. The State further points to discovery that was conducted that it claims put Allergan on notice that all opioids were being referenced, including both written discovery and expert discovery. Finally, the State argues that it can rely on Alpharma marketing materials because after Kadian was acquired by Actavis Elizabeth, LLC in December 2008, Alpharma marketing materials continued to be used to market Kadian for at least some period of time.

The Court finds the State has pleaded sufficient allegations to allow claims other than Kadian post-2009 claims to proceed to trial and be adjudicated on the merits of the evidence at trial. Therefore, the Court **DENIES** the Allergan Defendants' Motion.

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 67379957).

Janssen moves for partial summary judgment on the marketing of Duragesic, arguing that the State released it from such claims in 2010. A release "is the giving up or abandoning of a claim or right to the person against whom the claim exists or the right is to be exercised and enforce." *McDaniel v. Kleiss*, 202 W. Va. 272, 503 S.E.2d 840, 847 (1998). In West Virginia, "settlements are highly regarded and scrupulously enforced, so long as they are legally sound." *DeVane v. Kennedy*, 205 W. Va. 519, 519 S.E.2d 622, 637 (1999). The 2010 Release the State entered into with Janssen states that "Johnson & Johnson and Janssen … are hereby released forever and discharged from all manner of claims, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, [by] the State of West Virginia … arising out of or relating in any way to any conduct of any Released Party regarding the prescription drug Duragesic prior to dismissal of this action." Therefore, the Court **GRANTS** Janssen's Motion on the basis of the prior release entered into with the State as it relates to claims against Janssen involving Duragesic-related conduct through the December 23, 2010, dismissal date. The State may prove claims involving Janssen's other opioids and claims regarding Janssen's conduct in promoting opioids in general through unbranded marketing or third-party promotion.

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

This Motion for Partial Summary Judgment seeks summary judgment on claims related to Tasmanian Alkaloids and Normaco, two former subsidiaries of Janssen not parties to this litigation. In response, the State argues that it is not attempting to impose liability on either Tasmanian Alkaloids or Noramco. Instead, the State merely seeks to introduce evidence related to those two

former subsidiaries to show motive, knowledge, and notice. (Trans. ID 67397285), at 8. As the State is not seeking to impose liability on either Tasmanian Alkaoids or Noramco, the Court **DENIES** Janssen's Motion for Partial Summary Judgment on Unjoined Former Subsidiaries.

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, 443 S.E.2d 196 (W. Va. 1993) (adopting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993)). Under *Daubert*, 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. 617, 621 (2013) (citing *San Francisco v. Wendy's Int'l, Inc.*, 221 W. Va. 734, 741, 656 S.E.2d 485, 494 (2007)). The party seeking admission of an expert bears the burden of

proof on satisfaction of these requirements. *See, e.g.*, *San Francisco v. Wendy's Int'l, Inc.*, 221 W. Va. at 743 (relying on *Gentry v. Mangum*, 195 W. Va. 512 522, 466 S.E.2d 171, 181 (1995)).

The Court 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.

With these legal principles in mind, the Court turns to the Motions to Exclude various expert testimony filed by the parties.

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).**

As stated above, Rule 702 allows "a circuit court to qualify an expert by virtue of education or experience or by some combination of those attributes." *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171, 188 (1995). There is no "best expert" rule in West Virginia, and "the issue of whether the witness is the best expert witness on the specific subject is a matter that goes to weight of testimony," not to admissibility. *W. Va. Dep't of Transp. v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 697, 671 S.E.2d 693, 702 (2008).

The State seeks to bar Dr. Marais's testimony with respect to Maureen Gorman by arguing that he is not a "media consultant" like Ms. Gorman. However, as Janssen argues, Dr. Marais is a statistician and is not attacking Ms. Gorman's marketing opinions. Instead, he attacks the statistical basis and methodology for Ms. Gorman's opinions. Per *Gentry v. Mangum*, whether Dr. Marais is the best expert witness to counter Ms. Gorman's testimony goes to the weight, rather than the admissibility, of his testimony. Therefore, the State's Motion to Exclude Testimony of Dr. Laurentius Marais with Regard to Maureen Gorman is **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).**

The arguments raised by the State in regard to Dr. Edward Michna's testimony are unpersuasive for the same reasons the Court noted in its denial of the State's Motion to Exclude certain testimony of Dr. Laurentius Marais; those arguments go to the weight of Dr. Michna's testimony, not its admissibility. *See W. Va. Dep't of Transp. v. Parkersburg Inn, Inc.*, 222 W. Va. at 697, 671 S.E.2d at 702. To the extent the State argues the evidence relied upon by Dr. Michna is inadmissible, West Virginia law allows experts to rely on inadmissible evidence. *See* W. Va. R. Evid. 703. Therefore, the State's Motion to Exclude Specific Testimony of Edward Michna, M.D., on Numbers of Actiq and Fentora Prescriptions in West Virginia is **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).**

In its Motion to Exclude the Testimony of Johnathan Ketcham, Ph.D., the State argues that Dr. Ketcham's opinions are irrelevant as he is, in part, offering testimony related to the misconduct of entities other than the Defendants. In support of this argument, the State cites a prior order of this Court striking Defendants' Notices of Nonparty Fault, (Trans. ID 65820504), in which the Court stated that the West Virginia Modified Comparative Fault statute did not apply, as no damages are being sought in this matter. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591. The Court agrees and finds Dr. Ketchum's testimony is a back door attempt to raise third-party defenses such as non-party fault. Such fault-shifting testimony is not relevant based on this Court's prior ruling, as well as the above ruling regarding the State's Motion for Summary Judgment on Defendants' Affirmative Defenses (Transaction ID 67347633). Therefore, the Court **GRANTS** the State's Motion to Exclude the Testimony of Johnathan Ketcham, Ph.D.

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

Manufacturers jointly move to exclude the marketing causation opinions of Andrew Kolodny, Danesh Mazloomdoost, David Courtright, Katherine Keyes, Matthew Perri, and Andrew Kesselheim. Under West Virginia law, in order to qualify as an expert on the topic, the expert's "area of expertise" must "cover[] the particular opinion as to which the expert seeks to testify." *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171, 174 (1995). However, "[n]either a degree nor a title is essential, and a person with knowledge or skill borne of practical experience may qualify as an expert." *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999) (citing *Gentry*). In light of these principles, and those stated above, the Court issues the following rulings on this matter:

- **Andrew Kolodny**

Dr. Kolodny currently serves as the Medical Director of the Opioid Policy Research Collaborative at the Heller School for Social Policy and Management at Brandeis University, but he has no particular expertise in marketing. The Court notes that, based on the lack of this specific qualification, other jurisdictions have been split regarding admission of Dr. Kolodny's marketing causation opinions. Oklahoma and Rhode Island permitted those opinions, while New Hampshire excluded them. Similarly, in *City of Huntington v. AmerisourceBergen Drug Corp*., Judge Faber excluded the marketing causation opinions of Dr. Kolodny.

Based on the concerns raised by the Manufacturers that Dr. Kolodny is unqualified to opine on marketing causation, Manufacturers' Motion to Exclude Marketing Causation Opinions, as it relates to Dr. Andrew Kolodny, is hereby **TAKEN UNDER ADVISEMENT**. Dr. Kolodny will be permitted to testify, and Defendants should object as appropriate.

- **Danesh Mazloomdoost**

Dr. Danesh Mazloomdoost is an anesthesiologist and pain specialist. He is currently board-certified in anesthesiology. The State offers Dr. Mazloomdoost to opine on his first-hand observation of the impact of Defendants' marketing practices. The Court notes that a similar motion to exclude Dr. Mazloomdoost's marketing causation testimony was denied in *Oklahoma ex rel. Hunter v. Purdue Pharma LP et al.*, No. CJ-2017-816, and the rationale for that decision was sound. Based on Dr. Mazloomdoost's experience and his expected testimony, as well as the ruling in the Oklahoma litigation, the Court **DENIES** the Manufacturers' Motion with regard to the marketing causation opinions of Dr. Mazloomdoost.

- **David Courtwright**

David Courtwright, Ph.D., is an Emeritus Professor of History and has written about the history of drug use and drug policy in the United States. His work as a medical historian has led him to review historical marketing materials, and the State argues that the marketing materials reviewed by Dr. Courtwright for this litigation are similar to those he has reviewed and analyzed as part of his historical research. The Court also notes that similar motions seeking to exclude Dr. Courtwright's testimony, filed in the Rhode Island and Oklahoma litigation, were both denied. Based on Dr. Courtwright's experience, his expected testimony, and the rulings of other jurisdictions on similar motions, the Court **DENIES** the Manufacturers' Motion with regard to the marketing causation opinions of Dr. Courtwright.

- **Katherine Keyes**

Dr. Katherine Keyes is an epidemiologist at Columbia University where she specializes in substance use and substance use disorder epidemiology. Part of her work has included researching factors that influence opioid prescribing, use, and misuse. The Court notes that although Judge

Polster initially excluded Dr. Keyes' marketing causation testimony, Judge Polster revisited the issue on September 13, 2021. In that September 2021 Order, Judge Polster noted that additional expertise developed by Dr. Keyes following her initial exclusion qualified her to provide marketing causation opinions. *See In re Nat'l Prescription Opiate Litig.*, MDL 2804, 2021 WL 4146245, at *3 (N.D. Ohio Sept. 13, 2021). The Court finds Judge Polster's reasoning persuasive. Manufacturers' Motion to Exclude Marketing Causation Opinions with regard to Dr. Katherine Keyes is **DENIED**.

- **Matthew Perri**

Dr. Matthew Perri is a Professor Emeritus at the University of Georgia, and holds a Ph.D. with a dual concentration in Pharmacy and Marketing. Dr. Perri has authored books and academic articles on pharmaceutical marketing. The State asserts that Dr. Perri will provide testimony regarding the aggressive marketing of the Defendants. The Court Notes that California, New Hampshire, and Rhode Island have all permitted Dr. Perri to testify. Those jurisdictions, like West Virginia, follow a similar form of the Federal Rules of Evidence. As such, the Manufacturers' Motion is **DENIED** with regard to the marketing causation opinions of Dr. Perri.

- **Aaron Kesselheim**

Dr. Aaron Kesslheim is a Professor of Medicine at the Harvard School of Medicine. He has conducted a number of studies on drug labeling, use, and marketing, including the range of strategies and practices used to promote prescribing. The State asserts he will provide testimony on how pharmaceutical promotion drives physician prescribing practices, and that there is limited active FDA oversight of promotion of approved prescription drugs. Based on his expected testimony, the Court **DENIES** Manufacturers' Motion with regard to the marketing causation opinions of Dr. Kesselheim.

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).**

Teva Ltd., Teva USA, Cephalon, and the Actavis Generic Entities moved this Court to exclude the expert opinions and testimony of Plaintiff's expert Alec Fahey. (Transaction ID 67347559). Mr. Fahey is a Certified Public Accountant and Certified Fraud Examiner with a Certification in Financial Forensics. The State has offered Mr. Fahey to opine on the extent of control exercised by Teva Ltd., an Israeli company, of its United States-based subsidiaries. As stated above in this Court's ruling on Teva Ltd.'s Motion to Dismiss or Motion for Summary Judgment, "[t]he propriety of piercing the corporate veil should rarely be determined upon a motion for summary judgment. Instead, the propriety of piercing the corporate veil usually involves numerous questions of fact for the trier of the facts to determine upon all of the evidence." Syl. Pt. 6, *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 352 S.E.2d 93 (1986). Teva Ltd., Teva USA, Cephalon, and Actavis Generic Entities' arguments against Mr. Fahey go to the weight, not the admissibility, of that testimony. As such, their Motion to Exclude Opinions and Testimony of Plaintiff's Expert Alec Fahey is **DENIED**.

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

The State offers Maureen Gorman as an expert in the field of marketing and advertising, specifically relating to audience measurement, media audience analysis, media buying, and media planning, as well as an expert in class action notification. Manufacturers have moved to exclude Ms. Gorman's testimony on the basis that her opinions will not assist the trier of fact in understanding the effects of allegedly misleading statements because Ms. Gorman's opinions do not distinguish between lawful and unlawful marketing. However, because of the "liberal thrust" of the rules pertaining to experts, West Virginia courts should err on the side of admissibility. *See*

In re Flood Litig. Coal River Watershed, 222 W. Va. 574, 582, 668 S.E.2d 203, 211 (2008) (citing *Gentry*, 195 W. Va. at 525–27, 466 S.E.2d at 184–86). The Court does so here. The Court further notes that Ms. Gorman was permitted to offer expert opinions in both New Hampshire and California. Manufacturers' Motion to Exclude the Opinions of Maureen Gorman is **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).**

Defendants have moved the Court to exclude the opinions of Dr. Kolodny, Dr. Perri, and Dr. Courtwright concerning Manufacturers' corporate knowledge, intent, conduct, and extra-legal issues. Specifically, Manufacturers take issue with the possibility of speculative testimony regarding their knowledge or state of mind, or will otherwise be improperly reading Manufacturers' documents into the record. The Manufacturers' concerns are well-taken. Further, in *City of Huntington*, 2021 WL 1320716, at *3, Judge Faber excluded similar testimony on the basis that inferences from Defendants' documents should be drawn by the trier of fact, not opined upon by an expert witness. The Court finds this reasoning persuasive. Manufacturers' Motion is **GRANTED IN PART, DENIED IN PART**. The State's experts will not be permitted to speculate regarding knowledge, state of mind, or motive of the Defendants. Nor can experts simply read documents into the record. However, experts will be permitted to summarize voluminous technical documents. To the extent an expert will opine regarding any Defendants' knowledge, the State must first lay a proper foundation.

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).**

Manufacturers move the Court to exclude Dr. Kolodny's "simulation" and opinions based on it, arguing that the simulation is irrelevant and unhelpful to the trier of fact because Dr.

Kolodny's overly narrow view of "appropriate" prescribing and because it lacks all indicia of reliability. The reliability of expert testimony is "based on the use of knowledge and procedures that have been arrived at using the methods of science—rather than being on irrational and intuitive feelings, guesses, or speculation." *Harris v. CSX Transp., Inc.*, 232 W. Va. 617, 753 S.E.2d 275, 279–80 (2013). If a theory is novel, it is admissible only if it is reliable. W. Va. R. Evid. 702. In conducting that inquiry, West Virginia courts rely on the *Daubert* factors: "(a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community." *Wilt v. Buracker*, 191 W. Va. 39, 46, 443 S.E.2d 196, 203 (1993). Courts also look at whether the method was developed "independent of litigation." *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 886 (10th Cir. 2005). Manufacturers' Partial Motion to Exclude Andrew Kolodny's "Simulation" and All Opinions Based On It is hereby **TAKEN UNDER ADVISEMENT**. The State will be permitted to present Dr. Kolodny's simulation but must lay proper foundation for the numbers used.

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

Defendants move this Court to exclude opinions of Plaintiff's expert witness Ruth Carter. The State offered Ms. Carter to opine on the quality of the Defendants' suspicious order monitoring systems ("SOMS"). Defendants argue that certain of her opinions are improper because they concern questions of law, such as the principle laws applicable to the case, the interpretation of a statute, the meaning of terms in a statute, the interpretation of case law, or the legality of conduct. *See France v. S. Equip. Co.*, 225 W. Va. 1, 14–15, 689 S.E.2d 1, 14–15 (2010). Further, Defendants argue that Ms. Carter's "made-for-litigation list of 'elements'" was created solely for the purpose

of this litigation and is therefore unhelpful to the Court. Certain of the Defendants' concerns are well-taken. Defendants' Motion to Exclude Opinions of Plaintiff's Expert Ruth Carter is **GRANTED IN PART, DENIED IN PART**. The Motion is granted to the extent Ms. Carter is intending to give legal opinions. However, the Motion is denied to the extent that Ms. Carter is qualified to testify regarding what an adequate SOMS should have and what Defendants' SOMS were lacking.

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

Janssen individually moves to exclude the expert opinion of Matthew Perri on the grounds that his opinions are based substantially on Janssen's marketing of Duragesic. Under West Virginia law, expert testimony is inadmissible if it lacks relevance. *Gentry v. Mangum*, 196 W. Va. 512, 466 S.E.2d 171, 174 (1995). "Relevance means determining whether the testimony logically advances a consequential aspect of the movant's case." *Id.* at 182 n.13; *accord* W. Va. R. Evid. 401. By virtue of the 2010 release between the State and Janssen related to Duragesic, Dr. Perri's opinions, to the extent he offers testimony against Janssen about Duragesic, are irrelevant. Therefore, the Court **GRANTS** Janssen's Motion to the extent Dr. Perri would offer testimony against Janssen about Duragesic that pre-dates the December 23, 2010, settlement. However, Dr. Perri will be permitted to otherwise testify.

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 determing 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. **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).**

Plaintiff argues, in its motion, that arguments related to market share are irrelevant to its public nuisance claim because they need only prove a Defendant's actions were a proximate cause, not the sole proximate cause. (Transaction ID 67379488), at 3. Plaintiff also argues that the WVCCPA does not have a numerical threshold for determining if a commercial practice was unfair or deceptive. *Id.* at 4. Defendants argue, in part, that Plaintiff is also offering its own market share testimony through its experts. (Transaction ID 67407728), at 4; (Transaction ID 67407605), at 4. Defendants also argue that market share is directly relevant to whether an individual Defendant's conduct unreasonably interfered with a right common to the general public by causing an oversupply of opioids and related harms in West Virginia. The Court finds persuasive the decisions by courts in other states denying the same motion against the same defendants. Therefore, the

Court **DENIES** Plaintiff's Motion *in Limine* to Exclude Evidence or Argument Claiming or Suggesting Defendant Has a Small Market Share by Focusing on Brand Name Opioids.

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).**

The State argues that the propriety of its licensure and registration determinations, as well as its decision to investigate, prosecute, or discipline particular healthcare providers, is irrelevant for the reasons articulated in its Motion for Summary Judgment on Defendants' Affirmative Defenses (Transaction ID 67347633). Defendants argue that the evidence is relevant to causation. (Transaction ID 67405351). The Court was persuaded by the State's reasoning in its Motion for Summary Judgment on Defendants' Affirmative Defenses, and agrees that the same reasoning applies here. This is not a damages case, and summary judgment was granted above with respect to the Defendants' fault-shifting defenses. Therefore, the Court **GRANTS** this motion.

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).**

In support of this Motion, the State argues that the evidence it seeks to exclude is irrelevant, or would otherwise run afoul of West Virginia Rule of Evidence 403. (Transaction ID 67379900). Manufacturers' counter that the evidence tends to show Manufacturers did not violate applicable law, and that West Virginia's Rules of Evidence do not exclude everything short of conclusive proof. (Transaction IDs 67407292 and 67407367). Both the State and Manufacturers have valid points. As such, this Motion is **GRANTED IN PART, DENIED IN PART**. It is granted to the extent Manufacturers would use this evidence to bring in improper third-party or nonparty fault arguments. However, it is denied to the extent Manufacturers argue that a lack of sanction implies compliance with applicable law.

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

The State argues this evidence should be excluded because the action brought is to remedy the harms caused by Defendants' allegedly aggressive and misleading marketing. (Transaction ID 67380213). As such, arguments related to loss of access to prescription medications are irrelevant and will confuse the issues. *Id.* Manufacturers respond by arguing that the State's request is overbroad and as such would unduly hinder the Manufacturers' defense, and that the order is unnecessary. (Transaction IDs 67407149 and 67405536). The Court is persuaded by the State. This litigation does not seek to enjoin medically necessary prescriptions. Therefore, this Motion is **GRANTED**.

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

The State asserts that, because reliance is not an element to either public nuisance or WVCCPA claims, the information is irrelevant. (Transaction ID 67380456). Manufacturers argue such evidence and argument is relevant, as it goes to causation. (Transaction IDs 67406715 and 67406347). Similar motions to exclude were denied in opioid litigation in both California and New Hampshire. *Id.* The Court finds Manufacturers' arguments persuasive. This Motion is **DENIED**.

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

The State argues Defendants should be precluded from discussing FDA approval absent discussion of specific indications to avoid confusion. (Transaction ID 67381389). Further, the State argues that allowing such argument would put an undue burden on the State to correct the record. *Id.* Defendants respond by arguing the requested relief is unneeded as the State is welcome to present indications for Defendants' medicines in its case and in its examination of witnesses.

(Transaction IDs 67407292 and 67407562). Defendants also argue that this Motion improperly seeks to control the presentation of their defense. *Id.* The Court agrees with Defendants. To the extent it wishes to do so, the State can present said indications to the Court and cross-examine Defendants' witnesses on the same. This Motion is **DENIED**

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

The State moves this Court to preclude Defendants' experts from offering legal opinions or opinions applying fact to law on the basis that West Virginia law prohibits expert witnesses from offering legal opinions. (Transaction ID 67381516) (citing *Jackson v. State Farm Mutual Auto Insurance Co.*, 215 W. Va. 634, 644, 600 S.E.2d 346, 356 (2004)). Manufacturers agree that expert and fact witnesses should not offer such testimony, including the State's own expert and fact witnesses. Manufacturers also respond by arguing that the State is untimely seeking to challenge expert testimony and that it mischaracterizes said expert testimony. (Transaction ID 67407630). The Court **GRANTS** this Motion to the extent any witness seeks to offer legal opinions or opinions applying fact to law. Moreover, 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).**

In this Motion, the State argues that Defendants should not be permitted to argue that the voluminous documents produced in discovery are not authentic or are not business records. (Transaction ID 67380905). Defendants should be precluded from doing so, the State argues, because it will waste time and resources and prevent the efficient presentation of witnesses. *Id.* The Defendants argue that merely producing a document does not render it authentic nor does it render it a business record. (Transaction IDs 6740740 and 67407383). The Court **GRANTS** this

Motion. The parties are also directed to meet and confer to come to an agreement upon stipulations to the authenticity of documents.

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

Manufacturers argue that the State should be prevented from introducing individualized evidence because the State successfully evaded discovery on those topics by pledging to rely exclusively on aggregate proof. (Transaction ID 67379507). Manufacturers also point to the Panel's February 10, 2022, Order directing the State to affirm its disclaimers in supplemental responses, which it did. (Transaction ID 67305440). The State responds by asserting that Manufacturers' Motion is premature, and that they are trying to block more evidence than what was covered in the order and that the evidence is relevant. (Transaction ID 67407834). The Court finds Manufacturers' arguments more persuasive. The State agreed it would not assert, either in expert opinions or factual presentation, that any individual prescriber was misled by any manufacturer by its marketing, or that any individual prescription for an opioid medication was medically unnecessary. The State will be bound by that agreement. This Motion is **GRANTED**.

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

Manufacturers 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 67380387). The State counters by arguing that much of the alleged misconduct it will prove at trial occurred on a national level and that the opioids marketed and shipped by Manufacturers migrated beyond West Virginia's borders. (Transaction ID 67413379). This Motion 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.

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

Manufacturers argue that the State should be prevented from collectively referencing the Manufacturers at trial because the State bears the burden of proving its claims against each manufacturer individually. (Transaction ID 67380629). The State argues that there will be times where it appropriate to refer to Defendants collectively, that the Manufacturers failed to identify any prejudice, and that Manufacturers have changed names multiple times over the years. (Transaction ID 67407457). The Court believes both parties raise valid points. As such, this Motion is **GRANTED IN PART, DENIED IN PART**. If a witness uses the term "defendants" and is not referring to all Defendants, the witness must specify which Defendant their testimony covers.

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

Manufacturers assert that the State should be precluded from offering evidence on restitution or disgorgement because the State refused to participate in discovery on those issues until after the close of discovery when the State served responses identifying disgorgement documents. (Transaction ID 67380514). The Manufacturers also argue that the State provided no expert testimony to support its claims for restitution and disgorgement. (*Id.*) In response, the State argues disgorgement is an equitable remedy available under the WVCCPA, and that the State sought documents from Manufacturers related to disgorgement during discovery. (Transaction ID 67408183). This Motion is **DENIED**. The State is not seeking restitution, only disgorgement. The

State will be permitted to introduce disgorgement evidence but must prove it, which may include separating illegal or illicit prescriptions from those that were legitimate.

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

Manufacturers move for the exclusion of Dr. David Kessler's testimony because the State failed to disclose Dr. Kessler as an expert witness prior to the deadline for disclosure of expert witnesses. (Transaction ID 67381271). Manufacturers argue Dr. Kessler cannot simply be recast as a lay witness. *Id.* The State responds by asserting that Dr. Kessler is being offered for fact testimony based on Dr. Kessler's personal observations and experience as FDA Commissioner. (Transaction ID 67408287). The Court agrees with the State. This Motion is **DENIED**.

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

Manufacturers argue that the State should not be permitted to introduce evidence of individual purported suspicious orders because it has not identified any such orders. (Transaction ID 67391002). Further, the chargeback data identified by the State relate only to distributors requesting reimbursement for selling medication for a lower price than the distributor paid to acquire that medical from the manufacturer. *Id.* In opposition, the State claims it does not intend to rely on evidence of individual suspicious orders and contends one of its experts, Ruth Carter, has opined that chargeback data would have enabled Manufacturers to identify large orders. (Transaction ID 67407942). This Motion is **DENIED**.

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

Defendants argue sample autopsy reports produced in MDL Track Two should be excluded here because those reports conflict with the State's aggregate theory of proof and are not the result of any valid sampling methodology. (Transaction ID 67390554). As such, the reports are

misleading and unduly prejudicial. *Id.* The State opposes by arguing that the autopsy reports are relevant and were produced in response to a discovery request by Defendants. (Transaction ID 67410983). This Motion is **DENIED**. Defendants are permitted to cross-examine the State's witnesses on the reports.

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

Manufacturers argue FDA Warning and Untitled Letters should be excluded because those letters are irrelevant and are inadmissible hearsay as the letters are informal and therefore do not qualify for the public records exception to the rule against hearsay. (Transaction ID 67391297). Janssen is further concerned about introduction of letters related to Duragesic. *Id.* The State argues that the documents are not inadmissible hearsay as they qualify for the public records exception. (Transaction ID 67414205). Additionally, several of the letters would qualify as "ancient documents." *Id.* Finally, the State says that the letters can be introduced for purposes other than showing the truth of the matter asserted. *Id.* This Motion will be **GRANTED IN PART, DENIED IN PART**. The Motion is granted in relation to any letters to Janssen about Duragesic, as the State has entered a settlement regarding that medication. With respect to all other letters subject to the Motion, they are admissible only to show notice and not admissible for the truth of the matter asserted.

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).

The Manufacturers seek to have lay opinion evidence regarding the "gateway" between prescription opioid use and misuse and later abuse of illegal drugs excluded because the gateway theory is an area for expert witness testimony. (Transaction ID 67390415). Manufacturers specifically point to potential testimony of Kathy Paxton, Diana Shepard, Michael Smith, Carrie

Summers, and Linda Watts. *Id.* The State counters by saying that all witnesses identified by Manufacturers have made personal observations, though their work, that would support gateway theory. (Transaction ID 67411340). This Motion is **DENIED**. There needs to be a factual basis for any opinion asserted, but the State will be permitted to introduce the identified testimony.

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).

i. MIL #1: The Court should Exclude Reference to the Cephalon Misdemeanor Plea.

Teva USA, Cephalon, and the Actavis Generic Entities argue reference to Cephalon's misdemeanor plea should be excluded because it constitutes improper and irrelevant character evidence, does not address false or misleading marketing, has no connection to West Virginia, and is unduly prejudicial propensity evidence. (Transaction ID 67380829). They also note that this evidence has been excluded elsewhere. *Id.* The State responds by arguing the evidence is relevant, as it was a plea related to the off-label marketing of Actiq, an opioid at issue in this litigation. (Transaction ID 67408258). The Court finds both parties raise valid concerns. MIL #1 is **GRANTED IN PART, DENIED IN PART**. It is granted as to liability but denied as to notice or knowledge.

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

Teva USA, Cephalon, and the Actavis Generic Entities assert reference to off-label promotion should be excluded because "off-label marketing" is a specific violation of FDA regulations that does not imply false or misleading marketing as a matter of law. (Transaction ID 67380829). As such, "off-label marketing" is irrelevant, and the term is misleading and should be excluded under West Virginia Rule of Evidence 403. *Id.* The State argues that Teva USA,

Cephalon, and the Activas Generic Entities conflate off-label prescribing with off-label marketing, and that off-label marketing is relevant to demonstrate intentionality, scope, and the systemic nature of Teva Defendants' allegedly deceptive conduct over time. (Transaction ID 67408258). MIL #2 is **DENIED**.

iii. 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.

Teva USA, Cephalon, and the Actavis Generic Entities argue that reference to 2008 civil settlements between Cephalon and the federal government, and to civil settlements involving Teva Defendants in other jurisdictions would violate West Virginia Rule of Evidence 408. (Transaction ID 67380829). They also argue that the settlements are irrelevant and prejudicial. (*Id*.) The State responds by arguing that such evidence is admissible for purposes other than establishing liability, specifically notice and knowledge. (Transaction ID 67408258). Teva USA, Cephalon, and the Actavis Generic Entities and the State have valid arguments. MIL #3 is **GRANTED IN PART, DENIED IN PART**. The State cannot use these settlements to establish liability but can use them to establish notice and knowledge.

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

Teva USA, Cephalon, and the Actavis Generic Entities point to financial contributions to third parties and truthful marketing are speech protected by the First Amendment to the United States Constitution. (Transaction ID 67380829). They argue this Court should not allow any suggestions that this First Amendment activity can form the basis for civil liability. *Id.* The State counters by arguing it should not be precluded from offering evidence of financial support and marketing to demonstrate that Teva USA, Cephalon, and the Actavis Generic Entities are not entitled to First Amendment protection. (Transaction ID 67408258). The Court agrees with the

State. The First Amendment does not protect false marketing or false or misleading speech. MIL #4 is **DENIED**.

v. MIL #5: The Court Should Exclude Alec Burlakoff's Deposition Testimony.

Teva USA, Cephalon, and the Actavis Generic Entities argue Alec Burlakoff's deposition testimony should be excluded because Mr. Burlakoff only asserted his Fifth Amendment privilege and therefore offered no relevant testimony. (Transaction ID 67380829). They believe the State will attempt to use this testimony to attribute the conduct of Insys Therapeutics, Inc.—where Mr. Burlakoff went to work after he left Cephalon—to Cephalon, which would be improper and unduly prejudicial. *Id.* The State argues in opposition that Mr. Burlakoff had offered interviews to CBS's *60 Minutes*, and that the Supreme Court of the United States has made clear that the Fifth Amendment does not forbid adverse inferences against parties in civil actions. (Transaction ID 67408258) (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). The Court respects Mr. Burlakoff's Fifth Amendment rights, and as such MIL #5 is **GRANTED**. However, the State will be permitted to vouch the record.

vi. 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.

The basis for this Motion is that federal law precludes the State from making such arguments. (Transaction ID 67380829). Specifically, the Food Drug & Cosmetic Act prohibits manufacturers of generic medicines from providing warnings or communications beyond the FDA approved labels for their generic medicines – label which must be the same as those of their branded equivalents under the FDCA. The State responds by arguing that this litigation is not about warning labels; it is about misleading marketing. (Transaction ID 67408258). MIL #6 is **GRANTED IN PART, DENIED IN PART**. It is granted as to arguments related to additional

warnings regarding generic medicines or that the Actavis Generic Entities should have stopped selling generics. However, this is not a case about the accuracy of the warning labels on Defendants' drugs and the motion is denied as to the State's ability to show false or misleading marketing.

vii. MIL #7: The Court Should Exclude Reference to the Purchase Price Paid by Teva Pharmaceutical Industries Ltd. for the Actavis Generic Defendants.

Teva USA, Cephalon, and the Actavis Generic Entities argue that the purchase price paid is irrelevant to this action. (Transaction ID 67380829). Further, such references may result in inferences regarding the financial health of Teva Ltd., the Actavis Generic Entities, Cephalon, and Teva USA which are unduly prejudicial and not the proper basis for a verdict. *Id.* The State argues that the purchase price is relevant because generic drugs are subject to intense competition. (Transaction ID 67408258). Further, the State claims that the evidence would not mislead the Court regarding the current financial health of these companies. *Id.* MIL #7 is **GRANTED**.

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

Teva USA, Cephalon, and the Actavis Generic Entities' MIL #8 is hereby **GRANTED** because the Parties agree such evidence should be excluded.

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

Teva USA, Cephalon, and the Actavis Generic Entities assert that the argument that one Defendant is liable based on the actions of an affiliate is legally improper and prejudicial; most of the facts relied upon by the State occurred when these companies were unaffiliated, and their separate actions cannot now be conflated. (Transaction ID 67380829). Further, there is no claim for piercing the corporate veil under the circumstances of this litigation. *Id.* The State responds by arguing that it seeks to hold each of these companies accountable for their own action and that the

evidence will be presented carefully at trial. (Transaction ID 67408258). The State also argues there are facts that support piercing the corporate veil; specifically, that if piercing the veil becomes necessary, it will be because of the way these companies operated their business. *Id.* MIL #9 is **HELD IN ABEYANCE**.

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

Teva USA, Cephalon, and the Actavis Generic Entities believe evidence of call notes from Teva USA and Cephalon should be excluded because they are unwieldy, impossible to decipher without a sponsoring witness to lay foundation for how to read them, contain large amounts of data exclusively related to matters outside of West Virginia, contradict the State's reliance on "aggregate proof," and contain large amounts of data from outside the statute of limitations and pertaining to non-opioid products. (Transaction ID 67380829). Further, the call notes are all hearsay, and some contain hearsay-within-hearsay. *Id.* The State argues the call logs are relevant, as they show marketing activity. (Transaction ID 67408258). As such they are crucial to the State's WVCCPA claims. *Id.* MIL #10 is **DENIED**. The State will be permitted to introduce call logs related to West Virginia, national scope evidence that could affect West Virginia, and evidence related to states and counties contiguous with West Virginia.

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

Teva USA, Cephalon, and the Actavis Generic Entities argue reference to this duty should be excluded because no such duty exists under West Virginia law. (Transaction ID 67380829). Further, it is contrary to the requirements of W. Va. Code St. R. § 15-2-5 and to common sense. *Id.* The State argues that federal law imposes such a duty, and as such it should be allowed to make such arguments. (Transaction ID 67408258). MIL #11 is **DENIED**. Though the Court does not

rule on whether such duties exist, the State will be permitted to introduce evidence and argument on that issue at trial.

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

Teva USA, Cephalon, and the Actavis Generic Entities argue that these videos are irrelevant, entirely hearsay, and would waste time and resources. (Transaction ID 67380829). The State argues the videos are relevant because they were played at a national meeting of their sales force. (Transaction ID 67408258). Further, the videos are not hearsay under W. Va. R. Evid. 801(d)(2)(a) as they were produced by Teva USA, Cephalon, and the Actavis Generic Entities. *Id.* MIL #12 is **DENIED**.

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

Teva USA, Cephalon, and the Actavis Generic Entities argue these emails from Joseph Tomkiewicz should be excluded because they were unconnected to his work for Teva USA, and as such are irrelevant, are hearsay, and would be unduly prejudicial. (Transaction ID 67380829). The State argues these emails show the grave indifference to the harms caused by opioids in West Virginia, and that the emails go to Mr. Tomkiewicz's character and should be permitted for impeachment purposes. (Transaction ID 67408258). The Court will allow such evidence to come in if Teva USA, Cephalon, and the Actavis Generic Entities call Mr. Tomkiewicz to testify live at trial because Cephalon hired Mr. Tomkiewicz to handle their diversion program and agrees that those emails can be properly used for impeachment. MIL #13 is **DENIED**.

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

Teva USA, Cephalon, and the Actavis Generic Entities believe evidence or reference to pharmaceutical medications manufactured by Defendants, but not named in the operative complaint, are irrelevant. (Transaction ID 67380829). Further, Teva Defendants argue this was confirmed by the State's 30(b)(7) representative, Christina Mullins, at deposition. *Id.* In opposition, the State argues that Ms. Mullins' testimony does not limit the State to the medications listed in the Complaint, which is pled to cover opioids not specifically identified. (Transaction ID 67408258). The Court agrees with the State. MIL #14 is **DENIED**.

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

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

The Allergan Defendants argue evidence and argument concerning MoxDuo is irrelevant, as MoxDuo is an opioid that was never commercially manufactured, marketed, distributed, or sold. (Transaction ID 67398646). Further, even if it is relevant, it would be unduly prejudicial. *Id.* The State responds by arguing evidence related to MoxDuo is admissible to demonstrate the Allergan Defendants' knowledge of opioid-related harms and their pervasive marketing techniques, and that there would be no undue prejudice. (Transaction ID 67408264). MIL #1 is **DENIED.** MoxDuo may not have been sold, but evidence related to it can be used to show the nature of Allergan Defendants' ground-up marketing plan.

ii. MIL #2: The Court Should Preclude All Evidence and Argument that Industry-Funded Medical Education Required or Encouraged by the FDA was Improper.

Allergan Defendants assert that, because the continuing medical education they funded was required by the FDA, that federal law preempts the State's state-law based claims. (Transaction

ID 67398646). The State asserts Allergan Defendants' Motion in Limine 2 is an improper motion for partial summary judgment masquerading as an evidentiary motion. (Transaction ID 67408264). Further, the State argues that FDA requiring continuing medical education does not excuse the Allergan Defendants' misinformation campaign. *Id.* MIL #2 is **DENIED**. The allegations in this lawsuit are that the Allergan Defendants did what the FDA permitted them to do in a false or misleading way.

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

The Allergan Defendants argue the State should be precluded from raising veil-piercing and similar theories at trial because the State has not alleged any basis for doing so in the Complaint. (Transaction ID 67398646). Further, no discovery has been conducted on this issue. *Id.* The State responds that it did plead bases for piercing the corporate veil, and that adequate discovery has taken place, as the Allergan Defendants' 30(b)(6) representative testified concerning the corporate structure of Allergan PLC. (Transaction ID 67408264). The Court will allow the State to attempt to prove its theory at trial, in part because, as stated in *Dailey v. Ayers Land Development*, the propriety of piercing the corporate veil is heavily fact dependent. Therefore, MIL #3 is **DENIED**.

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

Janssen argues evidence related to Noramco and Tasmanian Alkaloids should be excluded because it has no probative value. (Transaction ID 67378505). Further, the State failed to allege fact supporting piercing the corporate veil. *Id.* Moreover, federal preemption and state safe-harbor principles preclude the State from premising liability on Noramco's sale of active pharmaceutical ingredients to other opioid manufacturers or Tasmanian Alkaloids' sales of raw materials to

Noramco. *Id.* As such, introduction of such evidence would waste judicial resources and unnecessarily complicate trial. *Id.* The State responds by claiming that the evidence is relevant to helping explain Janssen's unbranded marketing campaigns, to demonstrating Janssen's knowledge of the supply and strength of prescription opioids, and that the evidence will rebut Janssen's anticipated defenses at trial. (Transaction ID 67405751). The Court agrees with the State. Janssen's MIL No. 1 is **DENIED**.

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

Janssen argues that evidence of conduct related to Duragesic should be excluded on the basis of the 2010 Settlement between Janssen and the State. (Transaction ID 67391516). According to Janssen, the 2010 Settlement renders this evidence irrelevant. *Id.* The State argues this evidence is relevant to the State's unreleased claims to the extent it is based on post-settlement sales of opioids in West Virginia. (Transaction ID 67405632). Janssen's Motion in Limine No. 2 is **GRANTED**. The State settled its claims related to the marketing of Duragesic in 2010. As such, the State cannot present evidence against Janssen related to the marketing of Duragesic covered by the Settlement.

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

Janssen argues its call notes should be excluded because the State has made a commitment to refrain from using individualized evidence at trial. (Transaction ID 67378580). Further, Janssen points to the lack of discovery on the issue. *Id.* The State argues the call notes are relevant to showing Janssen's conduct, and notes that Janssen could have engaged in third-party discovery if it wished to do so. (Transaction ID 67405632). The Court is persuaded by the State. Consistent with similar motions from the other Defendants, Janssen's Motion in Limine No. 3 is **DENIED**.

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

Janssen argues that the First Amendment shields it from liability in connection with Janssen's lobbying activities. (Transaction ID 67378290). Janssen claims both its legislative and administrative lobbying efforts are protected. *Id.* The State responds by arguing that it is not attempting to hold Janssen liable for its protected First Amendment activity. (Transaction ID 67408095). Rather, the State is attempting to hold Janssen liable for its misleading or deceptive marketing, which enjoys no First Amendment protection. *Id.* The Court agrees with the State. This case concerns misleading marketing, or false or misleading speech, which is not protected by the First Amendment. Therefore, Janssen's Motion in Limine No. 4 is **DENIED**.

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

It is so **ORDERED.**

ENTERED: May 23, 2022.

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation