



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

Civil Action No. 21-C-9000 DISTRIBUTOR

THIS DOCUMENT APPLIES TO ALL DISTRIBUTOR CASES

**ORDER DENYING DISTRIBUTORS' MOTION TO EXCLUDE
RAHUL GUPTA'S TESTIMONY RELYING ON UNDISCLOSED EXPERT
LACEY KELLER AND ALL OPINIONS BASED ON KELLER**

Pending before the Panel is *Distributor's Motion to Exclude Rahul Gupta's Testimony Relying on Undisclosed Expert Lacey Keller and All Opinions Based on Keller* (Transaction ID 67622000). Having reviewed and considered the arguments raised in the Motion and the City/County Plaintiffs' Response in Opposition to the Motion (Transaction ID 67673067), the Panel finds that oral argument will not aid in the decisional process. Therefore, the Panel makes the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The City/County Plaintiffs have designed Dr. Rahul Gupta, current director of the White House Office of National Drug Control Policy and former health commissioner of West Virginia, as an expert witness in public health in Phase 1b of this litigation. The City/County Plaintiffs produced a written report authored by Dr. Gupta on August 26, 2021, and produced Dr. Gupta for an evidentiary deposition, taken September 23 and 24, 2021, for use at trial.
2. One of the opinions held by Dr. Gupta in this litigation is that a substantial portion of the opioid prescription pills distributed by Distributor Defendants into West Virginia from 1997 through 2016 were subject to diversion.
3. As set forth in his written report and deposition testimony, one of the more than thirty sources relied upon by Dr. Gupta in formulating his opinions—in addition to his knowledge, education, training, and personal experience in West Virginia—are three summary data charts

prepared by Lacey Keller depicting: (1) The Twenty Highest Opioid Prescribers in the State, (2) Share of Total Prescribing Held by 150 Highest Prescribers in the State, and (3) Share of Total Prescribing Held by 300 Highest Prescribers in the State. These charts consist of IQVIA Xponent¹ data that Lacey Keller sorted and summarized into organized charts. The charts are attached to Dr. Gupta's report. He also testified concerning the data contained in these charts in his trial deposition.

4. According to Dr. Gupta, this data reveals that in West Virginia a discreet subset of physicians was responsible for a substantial portion of the volume of prescription opioids, which led to diversion.

5. In the pending motion, the Distributor Defendants argue that Dr. Gupta's testimony should be excluded because the charts were prepared by Lacey Keller who has not been designated as a witness or expert witness in this case.²

¹ IQVIA Xponent is a dataset that contains detailed prescriber level information that reflects prescribing histories of individual physicians. IQVIA Exponent Fact Sheet (Jan. 20, 2022) available at: <https://www.iqvia.com/locations/united-states/library/fact-sheets/xponent>. IQVIA Exponent, which is not reported through a government agency but is proprietary and purchased by financial and pharmaceutical companies, "is the industry standard for measuring the retail outflow of prescriptions through the 'front door' into the hands of consumers." "National Sales Perspectives & National Prescription Audit Overview." *IQVIA*, 2017.

² Although Lacey Keller was not designated as an expert by Plaintiffs in this trial, Ms. Keller was designated as an expert by Plaintiffs in *The City of Huntington v. AmerisourceBergen Drug Corp., et al.*, C.A. No. 3:17-01362 and *Cabell Co. Comm'n. v. AmerisourceBergen Drug Corp., et al.*, C.A. No. 3:17-01665 (U.S.D.C. S.D. W. Va.) ("CT2") where she produced a report to Distributor Defendants discussing in detail her methodology and procedure of how she summarized, sorted, and displayed IQVIA data and where she was cross-examined at length by Distributor Defendants on these areas at both her deposition and trial. She was also designated as an expert witness by the State of West Virginia in the Phase 1a Manufacturer Trial, In Re: Opioid Litigation, Civil Action No. 21-C-9000 MFR, and testified at trial. In addition, Lacey Keller was cross-examined by Distributor Defendants concerning her methodologies and processes by which she tabulated, sorted, and summarized the IQVIA and other similar datasets in both a deposition and at trial in *State of Washington v. McKesson Corporation, Cardinal Health Inc., and AmerisourceBergen Drug Corporation*, Case #19-2-06975-9 SEA and in depositions on: (1) June 13, 2019, after filing an expert analysis with the multidistrict litigation on April 15, 2019; (2) January 23, 2020, after filing an expert analysis for the Opioid Litigation, 400000/2017 Relating to Case Nos. County of Suffolk, 400001/2017; County of Nassau, 400008/2017; and New York State, 400016/2018; (3) March 6, 2020, after filing an expert analysis for the Tennessee Opioid Litigation; and (4) August 31, 2021, after filing an expert analysis for *Re: Texas Opioid Litigation, No. 2018-63587*.

6. Defendants' argument is contrary Rule 703 of the West Virginia Rules of Evidence, which expressly states:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, ***they need not be admissible for the opinion to be admitted.***

W.V.R.E. 703 (emphasis added).

7. Rule 703 “allows an expert to base his opinion on (1) personal observations; (2) facts or data, admissible in evidence, and presented to the expert at or before trial; and (3) information otherwise inadmissible in evidence, if this type of information is reasonably relied upon by experts in the witness' field.” Syl. Pt. 2, *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 43-44, 454 S.E.2d 87, 88-89 (1994).

8. As noted by the Supreme Court of Appeals of West Virginia:

Courts have interpreted Rule 703 to allow experts to rely on the reports and observations of others even though this might mean the expert is basing his opinion on hearsay. 3 Jack B. Weinstein et al., *Weinstein's Evidence* § 703[01] at 703–11 (1994)). The purpose of Rule 703 is to enable experts to give opinions in a manner consistent with how they make decisions without having to go through the time-consuming process of introducing the mass of information that forms the basis of an expert's opinion. After all, it is “[t]he expert's opinion, rather than the underlying unadmitted hearsay, [which] constitutes the primary evidence, [and] which the jury can evaluate only on the basis of the expert's credentials and the usual credibility factors.” Cleckley, *supra* § 7-3(B)(2) at 51.

Id., 193 W. Va. 42, 46, 454 S.E.2d 87, 91.

9. Applying Rule 703, the Panel finds the IQVIA data summary charts prepared by Lacey Keller are proper bases upon which Dr. Gupta may formulate his opinions under West

Virginia law. The charts are the type and kind of information reasonably relied upon by experts like Dr. Gupta in the public health field. Specifically, Dr. Gupta testified in his evidentiary deposition that he understood and knew what IQVIA data was prior to receiving the summary charts prepared by Lacey Keller, that he utilized IQVIA or similar data previously during his practice and work as a public health expert, and that IQVIA data and prescriber data is the kind of information that experts in his field rely upon. Notably, Distributor Defendants do not challenge whether this is the type of information reasonably relied by public health experts such as Dr. Gupta in their field.

10. Moreover, the IQVIA data charts provided by Lacey Keller are admissible, at a minimum, to show a foundation and explanation of Dr. Gupta's opinions. 2 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 7-3(B)(3) at 7-69 (4th ed. 2000); *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 676, 558 S.E.2d 663, 675 (2001), *overruled on other grounds by State ex rel. Mar.-Westin Co., Inc. v. Gaujot*, No. 21-0577, 2022 WL 831523, at *1 (W. Va. Mar. 21, 2022) (answering question of whether an expert may testify to presumably inadmissible facts that helped form the basis of his legal opinion and holding that "an expert witness may testify about facts he/she reasonably relied upon to form his/her opinion even though such facts would otherwise be inadmissible as hearsay"). Because this is a bench trial, the Panel can appropriately determine what weight to give Dr. Gupta's opinion after it is informed of the basis of those opinions. *Id.*

11. Importantly, the Panel has already addressed similar issues concerning Dr. Gupta and has admitted his opinions and reliance materials. In the Phase 1a Manufacturer Trial which has recently concluded, the Manufacturer Defendants objected to Dr. Gupta's testimony based upon the Lacey Keller's charts as well as the introduction of the charts through Dr. Gupta's

testimony on similar foundational grounds. The Panel overruled the objections, allowed Dr. Gupta's deposition testimony concerning Lacey Keller's charts, and the charts were introduced into evidence. The reasoning behind the Panel's decision in the Phase 1a Manufacturer Trial applies equally here. The foundation was laid because Dr. Gupta has used IQVIA data, is aware of what the data represents, and relies upon it in his report.

12. Because Lacey Keller's summary charts are the type of information reasonably relied upon by experts in Dr. Gupta's field as evidenced by Dr. Gupta's unrefuted deposition testimony, they are a proper foundation upon which Dr. Gupta may render his opinions. Dr. Gupta is permitted to testify as to his opinions which were formed in reliance upon Lacey Keller's charts, which are further admissible, at a minimum, to show the bases of Dr. Gupta's opinions.

13. The Panel **DENIES** *Distributor's Motion to Exclude Rahul Gupta's Testimony Relying on Undisclosed Expert Lacey Keller and all opinions Based on Keller* (Transaction ID 67622000). Distributor Defendants' objections are noted for the record.

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

It is so **ORDERED**.

ENTERED: June 10, 2022

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation