



**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**

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**ORDER REGARDING PRE-TRIAL ADMISSION  
OF EVIDENCE AND MOTIONS *IN LIMINE***

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Pending before the Panel are numerous motions for pre-trial ruling on admissibility of evidence, as well as motions *in limine*, many of which are duplicative.<sup>1</sup> The Presiding Judges have adopted the “McCormick Rule” regarding admissibility of evidence consistent with their authority “to adopt any procedures deemed appropriate to fairly and efficiently manage and resolve Mass Litigation.” *See* Rule 26.08(d) of the West Virginia Trial Court Rules, and *Order Regarding Trial Logistics* (Transaction ID 67651716). The Presiding Judges also adopt 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. With those general rules in mind, the Panel makes the following rulings regarding pre-trial admissibility of evidence and motions *in limine*:

**Motions Regarding Pre-Trial Admission of Evidence**

Having reviewed the *Discovery Commissioner’s Recommendations Regarding Pre-Trial Admission of Evidence* (Transaction ID 67703826)<sup>2</sup> as well as the parties’ briefing of the pending motions, the Panel makes the following rulings regarding pre-trial admission of evidence:

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<sup>1</sup> *See, Distributors’ Notice Regarding McCormick Rule Exceptions* (Transaction ID 67678275).

<sup>2</sup> The Panel authorized the Discovery Commissioner to hear argument on motions for pretrial rulings on the admissibility of evidence and to make recommended rulings to the Panel. *See Order Referring Admissibility Disputes to Discovery Commissioner* (Transaction ID 67577033) (reconsideration denied) (Transaction ID 67628218).

1. *Plaintiffs' Motion for Pre-Trial Ruling on Admissibility of House Energy & Commerce Committee Report and Related Documents* (Transaction ID 67483046) and Distributors' Opposition (Transaction ID 67674723).

**GRANTED.**

2. *Plaintiffs' Second Motion for Pre-Trial Admission (PTA No. 2): Deposition Testimony and Exhibits Related to Healthcare Distribution Alliance* (Transaction ID 67493192) and Distributor's Opposition (Transaction ID 67673014).

**GRANTED.**

3. *Plaintiffs' Third Motion for Pre-Trial Admission (PTA No. 3): Admissibility of Documents Related to Defendants' Prior DEA Actions* (Transaction ID 67606608) and Distributors' Response in Partial Opposition (Transaction ID 67672381).

**GRANTED in part, DENIED in part.** Plaintiffs cannot use documents related to Defendants' Prior DEA Actions to establish liability but can use them to establish notice and knowledge. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) p. 28, entered in Phase I of the Manufacturers' cases.

4. *Plaintiffs Fourth Motion for Pre-Trial Admission (PTA No. 4): Cardinal Health's Discovery Responses, Transactional Data, Standard Operating Procedures, Suspicious Order Reports, and Due Diligence Files* (Transaction ID 67611173) and Cardinal Health's Response in Partial Opposition (Transaction ID 67676269).

**GRANTED.**

5. *Plaintiffs' Fifth Motion for Pre-Trial Admission (PTA No. 5): McKesson Corporation's Discovery Responses, Transactional Data, Standard Operating Procedures, Suspicious Order Reports, and Due Diligence Files* (Transaction ID 67617566) and McKesson's Response in Partial Opposition (Transaction ID 67673061).

**GRANTED.**

6. *Plaintiffs' Sixth Motion for Pre-Trial Admission (PTA No. 6): AmerisourceBergen Drug Corporation's Discovery Responses, Transactional Data, Standard Operating Procedures, Suspicious Order Reports, and Due Diligence Files* (Transaction ID 67617566) and AmerisourceBergen Drug Corporation's Response in Partial Opposition (Transaction ID 67675847).

**GRANTED.**

7. ***Plaintiffs' Seventh Motion for Pre-Trial Admission (PTA No. 7): Cardinal Health Documents*** (Transaction ID 67625367) and Cardinal Health's Response (Transaction ID 67676006).

**GRANTED.**

8. ***Plaintiffs' Eighth Motion for Pre-Trial Admission (PTA No. 8): AmerisourceBergen Drug Corporation Documents*** (Transaction ID 67625377) and Response (Transaction ID 67675290).

**GRANTED.**

9. ***Plaintiffs' Ninth Motion for Pre-Trial Admission (PTA No. 9): McKesson Corporation Documents*** (Transaction ID 67625386) and McKesson's Response in Partial Opposition (Transaction ID 67673061).

**GRANTED in part, DENIED in part.** Plaintiffs cannot use documents related to McKesson's settlement agreements and related communications to establish liability but can use them to establish notice and knowledge. Otherwise, the motion is **GRANTED.**

10. ***McKesson Corporation's Motion for Pre-Trial Admission of Business Records*** (Transaction ID 67623632) and City/County Plaintiffs' Omnibus Response to Pretrial Motions to Admit/Exclude Evidence (Transaction ID 67634905).<sup>3</sup>

**GRANTED.** Documents admitted without objection.

11. ***AmerisourceBergen Drug Corporation's Motion for Pre-Trial Admission of Public Records and Business Records*** (Transaction ID 67625027).

**GRANTED.** Documents admitted without objection.

12. ***Distributors' Motion for Pre-Trial Admission of Public Records*** (Transaction ID 67623976).

**GRANTED.** Documents admitted without objection.

### **Motions *In Limine***

The Panel reviewed the following motions *in limine* filed by the Distributors, as well as the *City/County Plaintiffs' Omnibus Response to Pretrial Motions to Admit/Exclude Evidence* (Transaction ID 67634905). The Panel makes the following rulings regarding these motions:

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<sup>3</sup> The City/County Plaintiffs have no objection to the admissibility of the documents referenced in the Distributors' motions for pre-trial admission (Transaction IDs 67623632, 67625027, and 67623976).

- ***Distributors’ Motion in Limine to Exclude the House Energy & Commerce Committee Majority Staff Report*** (Transaction ID 67623675).

Consistent with its ruling regarding *Plaintiffs’ Motion for Pre-Trial Ruling on Admissibility of House Energy & Commerce Committee Report and Related Documents* (Transaction ID 67483046), the Panel **DENIES** the Distributors’ Motion.

- ***Distributors’ Motion in Limine to Exclude*** (Transaction ID 67622051).

### **1. Individual Opioid Diversion and Misuse.**

**GRANTED.** Individualized evidence of opioid diversion and misuse has been excluded from discovery in Phase I and the City/County Plaintiffs have disavowed reliance on individualized evidence. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) p. 25, entered in Phase I of the Manufacturers’ cases.

### **2. Lay Testimony That Prescription Opioids Are A “Gateway.”**

**DENIED.** There needs to be a factual basis for any opinion asserted, but City/County Plaintiffs will be permitted to introduce the identified testimony. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) pp. 28-29, entered in Phase I of the Manufacturers’ cases.

### **3. Distributors’ Shipments to States Other Than West Virginia.**

**DENIED.** City/County Plaintiffs will be permitted to introduce evidence that is national in scope which would have an effect in West Virginia. Evidence related to states and counties contiguous to West Virginia will also be permitted. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) p. 25, entered in Phase I of the Manufacturers’ cases.

### **4. Prior Settlements and Related Communications.**

**GRANTED in part, DENIED in part.** Plaintiffs cannot use documents related to prior settlements and related communications to establish liability but can use them to establish notice and knowledge. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) p. 30, entered in Phase I of the Manufacturers’ cases.

## 5. Expert Testimony of Purported Corporate Conduct.

**GRANTED in part, DENIED in part.** City/County Plaintiffs' 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 Defendant's knowledge, City/County Plaintiffs must first lay a proper foundation. *See Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* (Transaction ID 67650385) p. 18, entered in Phase I of the Manufacturers' cases.

- *Cardinal Health's Motion to Exclude Cegedim Dendrite Report* (Transaction ID 67622342).

**GRANTED in part, DENIED in part.** Plaintiffs cannot use the report to establish liability but can use it to establish notice and knowledge.

- *McKesson Corporation's Motion in Limine to Exclude Evidence or Argument About Hearsay Allegations in Correspondence with The Department of Justice* (Transaction ID 67623663).

Consistent with its ruling regarding *Plaintiffs' Third Motion for Pre-Trial Admission (PTA No. 3): Admissibility of Documents Related to Defendants' Prior DEA Actions* (Transaction ID 67606608), and *Plaintiffs' Ninth Motion for Pre-Trial Admission (PTA No. 9): McKesson Corporation Documents* (Transaction ID 67625386) the motion is **GRANTED in part, DENIED in part**. Plaintiffs cannot use correspondence with the DOJ to establish liability but can use it to establish notice and knowledge.

Any objections are noted for the record.

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

It is so **ORDERED**.

**ENTERED:** June 14, 2022.

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

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation