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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

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE "FACTUAL ISSUE #1"

The Mass Litigation Panel ("MLP" or "Panel") has previously denied the Distributor Defendants' Motion for Summary Judgment Re "Factual Issue #1" as set forth in the Panel's June 9, 2022, Order (Transaction ID 67707669). The Panel now makes the following findings of fact and conclusions of law in support of its decision, viewing the evidence in the light most favorable to Plaintiffs throughout:

In their motion, Defendants make two arguments in support of summary judgment. First, Defendants argue that there is no evidence they engaged in wrongful conduct in West Virginia. Distributors' Memorandum in Support of Motion for Summary Judgment Re "Factual Issue #1" (Transaction ID 67622007) ("Memo") at 10. Second, Defendants argue that there is no evidence that their conduct was a legal cause of any diversion in West Virginia. Memo at 26. The Panel rejects both of these arguments.

The evidence in the record establishes that questions of material fact exist as to whether Defendants engaged in wrongful conduct which contributed to the alleged oversupply and diversion of opioids throughout West Virginia.

Plaintiffs present several categories of proof, each separately sufficient to establish questions of material fact as to causation. In such circumstances, issues of causation are left to the trier-of-fact – this Panel.

Defendants' legal arguments have been rejected by courts in West Virginia, including this Panel's rejection of similar causation arguments raised by the manufacturers in the State's case.[1] The Defendants' causation arguments have been rejected by the MDL court and the vast majority of courts hearing governmental opioid cases.[2] They fare no better here.

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[1] *See, In Re Opioid Litigation,* Civil Action No. 21-C-9000 MFR Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference (Transaction ID 67434309 (denying Manufacturers' Joint Motion for Summary Judgment on the State's Public Nuisance Claim (Transaction ID 67359984); *see also State ex rel. Morrisey v. AmerisourceBergen Drug Corp.,* No. 12-C-1412014, 2014 WL 12814021 (W.Va. Boone Co. Cir. Ct. Dec. 12, 2014), *writ denied, State ex. rel. AmerisourceBergen Drug Corp v. Thompson,* No. 15-1026 (W.Va. January 5, 2016) (APP 0001); *County Commission v. Purdue Pharma, L.P.,* No. 17-C-248, p. 11 (W.Va. Marshall Co. Cir. Ct. Dec. 28, 2018), *writ denied, State ex rel. Cardinal Health v. Hummel,* No. 19-0210 (W.Va. June 4, 2019) (APP 0003); *Monongalia County, et al. v. Purdue Pharma L.P*., *et al*., Nos. 18-C-222-236 (W.Va. Mass. Lit. Panel Oct 9, 2019), *writ denied, State ex rel. AmerisourceBergen Drug Corp. v. Moats,* No. 19-1051 (W.Va. January 30, 2020) (APP 0005).

[2] *In re: Nat'l Prescription Opiate Litig.*, 1:17-md-02804, 2019 WL 4178617, at 3 (Sept. 3, 2019) (rejecting distributor defendants' arguments with regard to failure to maintain effective controls against diversion); *City And County Of San Francisco, et al., v. Purdue Pharma L.P., et al*., 491 F.Supp.3d 610 (N.D. Cal. 2020) (denying motions to dismiss finding "genuine disputes of material fact preclude summary judgment") (APP 0006); *City of Huntington and Cabell County v. AmerisourceBergen Drug Corporation, et al*., 17-cv- 01362, Dkt. 1291 (S.D.W. Va. Apr. 28, 2021) (Judge Faber denied summary judgment motions brought by Distributor Defendants in MDL Case Track Two which raised similar causation arguments) (APP 0106); *In Re: National Prescription Opiate Litigation*, Case No. 1:17-md-2804, March 7, 2022 Opinion and Order at 25 (N.D. Ohio) (denying Pharmacy Defendants' Rule 50(b) Motions for Judgment as a Matter of Law which included similar causation arguments) (APP 0108); *See State of Washington v. McKesson Corp*., 2021 WL 6297481, at *1 (Wash. Super. Sep. 01, 2021) (rejecting similar causation arguments with respect to distribution misconduct); *In re Opioid Litigation*, No. 4000002017, Dkt. 5662 at 3 (N.Y. Sup. Ct. Apr. 16, 2020) (APP 0173); And the jury in that case recently found that Manufacturer Defendants Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Actavis LLC; Actavis Pharma, Inc.; Watson Laboratories, Inc.; and Distributor Defendant Anda, Inc. all "caused, contributed to, or maintained a substantial and unreasonable interference with a public right that amounts to a public nuisance" in Suffolk County, New York; Nassau County, New York; and in the State of New York generally. *See* Suffolk County Completed Verdict Sheet, (APP 0179) (Nassau County and State of New York verdict sheets had identical liability findings). *See, e.g., Commonwealth v. Purdue Pharma, L.P.*, 2019 WL 6497887, at *3 (Mass. Super. Nov. 6, 2019); *City of Chicago v. Purdue Pharma L.P.*, 211 F. Supp. 3d 1058, 1081 (N.D. Ill. 2016); *Grewal v. Purdue Pharma L.P.*, 2018 WL 4829660, at *23 (N.J.Super.Ch. Oct. 02, 2018); *Com. v. Endo Health Solutions Inc.*, 2018 WL 3635765, at *4 (Ky. Cir. Ct. July 10, 2018); *State v. Purdue Pharma L.P.*, 2019 WL 2331282, at *5 (Tenn. Cir. Ct. Feb. 22, 2019); *State v. Purdue Pharma L.P.*, 2018 WL 4468439, at *8 (Alaska Super. July 12, 2018); *State, ex rel. Dewine v. Purdue*

For the reasons set forth below, the Panel finds and concludes that Plaintiffs have raised triable issues of fact with respect to whether the Defendants engaged in wrongful conduct which caused the alleged oversupply and diversion of opioids throughout West Virginia

I. Questions of Material Fact Exist as to Whether Defendants Engaged in Wrongful Conduct by Failing to Maintain Effective Control Against the Diversion of Prescription Opioids

Distributors of opioids, at all relevant times, have been required by the CSA, WVCSA, DEA, and Board of Pharmacy regulations to maintain effective controls against diversion. *See* 21 U.S.C. §§ 801 et seq.; 21 C.F.R. 1301 et seq.; W. Va. C.S.R. § 15-2-5.1.1, § 15-2-3; Order Granting City/County Plaintiffs' Motion for Partial Summary Judgment Regarding Duties Arising Out of the Controlled Substances Act (Transaction ID 67706109).

The Court finds that Plaintiffs presented evidence that creates material questions of fact regarding Defendants' failure to meet their duties to prevent diversion. Plaintiffs' expert James Rafalski opines, Defendants "each failed to develop and implement a SOMS that would ensure the maintenance of effective controls against diversion."[3]

Defendants claim that the settlement agreements between Distributors and the DEA are irrelevant and inadmissible. Def. Br. at 2, n.3, 24-25. The Panel has already determined that it would admit references to similar settlements between the manufacturers and federal government to establish notice and knowledge.[4]

Pharma L.P., 2018 WL 4080052, at *3 (Ohio Com.Pl. Aug. 22, 2018); *State v. Purdue Pharma Inc.*, 2018 WL 4566129, at *11 (N.H. Super. Sep. 18, 2018); *State v. Purdue Pharma, L.P.*, Case No. PC-2018-4555, at *41-51 (R.I. Sup. Ct., Feb. 18, 2022) (APP 0228).

[3] *See* APP 0435, 0528-0541 (Cardinal); (McKesson) APP 0558-0560, and (ABDC) APP 0580-0581).

[4] *In Re: Opioid Litigation,* Civil Action No. 21-C-9000 MFR, *Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* at 30 (Transaction ID 67650385). And, with

A. Material Questions of Fact Exist as to Whether Defendants' Failures Significantly Contributed to an Oversupply of Opioids

Plaintiffs offer expert testimony, circumstantial evidence, and admissions that establish genuine questions of material fact.[5]

Plaintiffs offered evidence that the influx of suspicious opioid orders into West Virginia as a result of the Defendants' failure to utilize their own anti-diversion policies is exactly the result Congress intended to avoid when enacting the CSA and the result DEA intended to avoid when it adopted its implementing regulations. As a 2007 letter from DEA to Defendants states: "***even just one distributor that uses its DEA registration to facilitate diversion can cause enormous harm***." APP 0868-0869 (citing 21 U.S.C. § 801(2)) (emphasis added).

Plaintiffs also proffered evidence suggesting that Defendants were aware that unlawful shipments of opioids led to diversion in West Virginia.[6]

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respect to this trial, the Court will provisionally admit all arguably admissible evidence, even if objected to, reserving admissibility questions until all the evidence is in. *In Re: Opioid Litigation,* Civil Action No. 21-C-9000 MFR, *Order Regarding Trial Logistics* at 1 (Transaction ID 67651716).

[5] *See* APP 0434-0435, 0520-0541 (Cardinal); APP 0543-0560 (McKesson); APP 0562-0580 (ABDC); APP 0474-0477 (methodology); APP 0541-0542 (Cardinal failure to halt orders); APP 0560-0561 (McKesson failure to halt orders); APP 0581 (ABDC failure to halt orders); APP 0585-0596 (Cardinal failure to conduct due diligence); APP 0596-0605 (McKesson failure to conduct due diligence); and APP 0605-0611 (ABDC failure to conduct due diligence); APP 0585-0596 (Cardinal distribution of excessive amounts of opioids without adequate documented due diligence); APP 0596-0605 (McKesson distribution of excessive amounts of opioids without adequate documented due diligence); APP 0605-0611 ABDC distribution of excessive amounts of opioids without adequate documented due diligence); and APP 0583 (Rafalski opinion that there was insufficient evidence in Defendants' customer files to dispel the suspicions raised by these orders and permit their shipment; *see also* Plaintiffs' Brief at 11 setting forth evidence relating to Dr. Craig McCann's application of seven suspicious order methodologies to the ARCOS data to identify suspicious orders that should not have shipped unless the distributors' due diligence eliminated the suspicion of diversion, including illustrative charts demonstrating how each method would have identified a significant volume of orders of opiates to West Virginia which should have been flagged as suspicious.

This evidence is more than sufficient to raise a triable issue of fact. *See In re Neurontin Mktg. & Sales Practices Litig. (Harden),* 712 F.3d 60, 68 (1st Cir. 2013) (combination of expert evidence with circumstantial evidence is enough to create a jury question on causation.).

B. Material Questions of Fact Exist as to Whether the Defendants' Wrongful Conduct Caused Diversion in West Virginia.

Defendants claim that they are entitled to summary judgment because their conduct was not the legal cause of any "oversupply" or diversion in West Virginia. Def. Br. at 26. Genuine questions of material fact exist on that issue. Factual Issue # 1 seeks the answer to the following question: "Whether the Defendants engaged in wrongful conduct which caused the alleged oversupply and diversion of opioids throughout West Virginia?" (Transaction ID 67442870 at 2). At this stage of the litigation, the causation question is one of "general causation" or "whether Defendants' conduct caused the oversupply and diversion of opioids in West Virginia." *Id.* at 1.

Under West Virginia law, an actionable harm may and often will have more than one factual cause.[7] In cases involving concurrent negligence, when multiple wrongdoers each contribute to a combined harm, all that is required to show factual cause is that the action of a tortfeasor "contributes in any degree to the injury."[8]

Where a harm has multiple causes, the "'plaintiff's burden of proof is to show that a [defendant's] breach of a particular duty of care was ***a*** proximate cause of the plaintiff's injury, ***not the sole*** proximate cause.'"[9]

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[7] *See*, *e.g.*, *Wehner v. Weinstein*, 191 W. Va. 149, 155, 444 S.E.2d 27, 33 (1994) ("We long have recognized the doctrine of concurrent negligence . . . .").

[8] *Wehner v. Weinstein*, 191 W. Va. 149, 155 (1994); *see also Perry v. Melton*, 171 W. Va. 397, 400 (1982) ("negligence must be a proximate or *contributing cause* before liability is established") (emphasis added).

[9] *Stephens v. Rakes*, 235 W. Va. 555, 565, 775 S.E.2d 107, 117 (2015) (quoting *Mays v. Chang*, 213 W. Va. 220, 224, 579 S.E.2d 561, 565 (2003)) (emphasis added); *see also MacDonald v. City*

One component of proximate causation is foreseeability. Under the foreseeability standard, "[i]f, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists."[10] "The violation of the statute is rightly considered the proximate cause of any injury which is a natural, probable, and anticipated consequence of the nonobservance."[11]

Ultimately, however, proximate cause is a question of fact.[12] Plaintiffs present several categories of proof, each sufficient to establish a material question of fact as to whether Defendants' failures were a foreseeable, contributing, and substantial factor in causing opioid over-supply in Plaintiffs' communities, which in turn led to opioid-related harms. This is sufficient evidence to raise a disputed issue of material fact to be resolved at a trial.

Judge Polster analyzed substantially similar evidence under a substantially similar legal standard and found that Plaintiffs had established genuine dispute of material fact with respect to causation.[13]

Hosp., Inc., 227 W. Va. 707, 725, 715 S.E.2d 405, 423 (2011) (same) (quoting *Mays*); and *Everly v. Columbia Gas of W. Virginia, Inc*., 171 W. Va. 534, 536 (1982).

[10] *Id.; see also Huskey v. Ethicon*, 2015 WL 4944339, at *6 (S.D.W. Va. Aug. 19, 2015), aff'd, 848 F.3d 151 (4th Cir. 2017) (same).

[11] *See*, *e.g.*, *Gillingham v. Stephenson*, 209 W. Va. 741, 749, 551 S.E.2d 663, 671 (2001) (quoting *Noman v. Virginia Pocahontas Coal Co.*, Syl. pt. 2, 68 W. Va. 405, 69 S.E. 857 (1910)). Judge Polster has found similarly. *In re: Nat'l Prescription Opiate Litig*., 2019 WL 4178617 at *2.

[12] *See Qura v. D.R. McClain & Son*, 97 F.3d 1448 (4th Cir. 1996); *see also Aikens v. Debow*, 541 S.E.2d 576, 580 (W.Va. 2001) (same).

[13] *In re: Nat'l Prescription Opiate Litig*., 2019 WL 4178617 at *4.

1. Material Questions of Fact Exist as to Whether Defendants' Failure to Maintain Effective Controls Against Diversion Resulted in Diversion

Plaintiffs have presented substantial evidence to raise material questions of fact as to whether Defendants' failure to maintain effective controls against diversion in fact resulted in the occurrence of diversion.[14]

To the extent Defendants argue that this diversion is irrelevant because it takes place when the opioid pills are not in their possession, Def. Br. at 28-29, genuine questions of material fact preclude the argument on summary judgment. *See*, *e.g.*, *City and County of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 683-84 (N.D. Cal. 2020) ("Distributors' role in the supply chain may end after it delivers prescriptions to pharmacies, but this does not mean that its causal conduct in the transactions ceases to be operative. Because Distributors' alleged failure to stop suspicious orders remains active in producing the City's injury, their conduct falls within the definition of operative.") (internal quotation marks and citation omitted).

[14] APP 0937 (Courtwright testimony); APP 0939, APP 0940-0941 (Rannazzisi testimony); APP 0944-0945, 0947 (Strait DEA Rule 30(b)(6) testimony); APP 0949-0950, 4/18/19 (Prevoznik 30(b)(6)); APP 0952 (CT2 trial testimony of Dr. Smith); APP 0954-0955 (CT2 trial testimony of Dr. Keyes); APP 0957 (CT2 trial testimony of Rafalski); APP 0930-933 (McKesson 30(b)(6) testimony of Nathan Hartle); APP 0959 (CT2 trial testimony of Defendants' expert Dr. Deer).

2. Material Questions of Fact Exist as to Whether Defendants' Failure to Conduct Due Diligence Resulted in Diversion

Defendants attempt to characterize Plaintiffs' criticisms of the Distributors' due diligence efforts as "abstract" (Def Br. at 24) based on their claims that "the DEA did not (and does not) require distributors to maintain records documenting their pharmacy-level diligence efforts – let alone for a decade or more" (*id.* at 23) and that such opinions are irrelevant "[u]nless and until the alleged absence of adequate due diligence leads to the improper shipment of a suspicious order to a West Virginia pharmacy, no conduct – let alone any wrongful conduct – occurs ***in*** West Virginia." *Id.* (emphasis in original).

However, Plaintiffs presented evidence from Mr. Prevoznik, who testified that the DEA agreed with Defendants' own industry compliance guidelines (published by HDMA) which recommended that due diligence documentation related to a customer review should be created and retained.[15] This evidence creates a material question of fact on this issue that should not be resolved at summary judgment.

3. Plaintiffs Can Use Aggregate Evidence to Prove Oversupply

Defendants claim that there is no evidence that they shipped more pills to any West Virginia pharmacy than were ordered by a licensed pharmacy to fill prescriptions written by doctors licensed in West Virginia who allegedly prescribed in good faith. Further, they suggest that Mr. Rafalski could not identify a single order shipped by any distributor that meets the regulatory definition of a "suspicious order" was shipped. (Def. Br. at 2, 20-23). However,

[15] APP 0961-0965, Prevoznik 5/17, 2019 Deposition. He also agreed that in the DEA's experience, the absence of documentation is a fairly good indication that something did not happen in a registrant's compliance program. *Id.* at APP 0966.

Plaintiffs have presented evidence that the volume of pills into West Virginia was excessive and disproportionally greater than the needs of the population.

This same argument has been rejected by Judge Polster as it "ignores the aggregate nature of the evidence" to be presented at trial and "the natural inferences allowed therefrom." *In Re: National Prescription Opiate Litigation*, Case No. 1:17-md-2804, March 7, 2022, Opinion and Order at 25 (N.D. Ohio) (denying Pharmacy Defendants' Rule 50(b) Motions for Judgment as a Matter of Law) (APP 0991). Judge Polster noted that he had previously found "aggregate evidence of massive increases in the supply of prescription opioids, combined with evidence demonstrating failures by each [Pharmacy] Defendant to maintain effective controls against diversion, supported a reasonable inference that [Pharmacy] Defendants' conduct was a substantial factor in creating the alleged nuisance." *Id.* (citing *In Re: National Prescription Opiate Litigation*, 2019 WL 4178617, at *8 (N.D. Ohio Sept. 3, 2019)). Judge Polster held that "[u]nder this evidentiary model, proof of specific prescriptions is not necessary" and that "the trial evidence demonstrated each [Pharmacy] Defendant failed to maintain effective controls against diversion"; "showed each [Pharmacy] Defendant dispensed increasingly large quantities of prescription opioids in the Counties, which corresponded with huge increases in addiction and other health and safety issues in their communities" which "amply supports the jury's finding that the dispensing conduct of each [Pharmacy] Defendant contributed to creating the nuisance." *Id. See also, City and County of San Francisco, et al. v. Purdue Pharma L.P., et al.*, Case No. 18-cv-07591-CRB, Dkt. 1239 (N.D. Cal. April 7, 2022) (Order Denying Motions for Summary Judgment) (rejecting similar arguments as raised by these Defendants, finding "genuine disputes of material fact preclude summary judgment") (APP 1030).

Plaintiffs here proceed on the theory that details of individual shipments are not relevant; rather, they will rely principally on experts and circumstantial evidence to connect SOM deficiencies to the public nuisance. The Panel finds and concludes that Plaintiffs have presented sufficient evidence to create a genuine dispute of material fact.

4. Defendants Cannot Avoid Culpability Based on the Actions of Non-Parties.

Defendants also argue that the actions of others contributed to the opioid crisis. Def. Br. at 13-16, 27 (increase in legitimate prescribing due to changing standards of care for treating pain), *id.* at 28-29 ("medicine cabinet diversion"); *id.* at 30-31 (intervening criminal acts of 3rd parties, who transfer the medicines to illicit use, and then 4th parties, who use the pills in absence of a prescription). This evidence is insufficient at the summary judgment stage to establish the absence of genuine disputes of material fact.

a. Plaintiffs allege the opioid crisis is a single unified harm.

Plaintiffs allege the public nuisance is the opioids crisis—a single, unified harm—to which defendants are each substantial contributing factors. As Prosser and Keeton explain:

> Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. ***The question is primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes***.

Prosser and Keeton, § 52, p. 345 (emphasis added); *see also People v. ConAgra Grocery Products Co*., 17 Cal.App.5th 51, 108 (Cal. App. 2017) (same). Apportionment is, of course, not an issue for the upcoming Phase 1b trial.

b. The impact of prescribing standards on Defendants' liability is a question of fact to be resolved by the Panel after hearing the evidence at trial.

Furthermore, whether Defendants are immune from liability as a result of prescribing standards at the time of their conduct are a fact question. In denying this exact same argument Judge Polster found:

> The Distributors . . . assert Plaintiffs have not shown their alleged injury resulted from the diversion of suspicious orders, as opposed to an increase in good faith prescriptions based on the Manufacturers' alleged fraudulent marketing practices . . . ***This argument overlooks the fact that whether the alleged harm was caused by fraudulent marketing or ineffective controls, or a combination of both, involves questions of disputed facts for the jury to resolve***.

In re: Nat'l Prescription Opiate Litig., 2019 WL 4178617 at *4. (emphasis added). Judge Breyer rejected similar arguments holding: "both parties' [Manufacturers and Distributors] conduct allegedly caused the City's injuries." *City and County of San Francisco*, 491 F.Supp.3d at 683.

c. Intervening acts do not sever causation if foreseeable.

Defendants argue that Plaintiffs' claims are insufficiently direct because of intervening events or actions by third parties, including rogue criminal actors. (Def. Br. at 3, 30-31). An allegedly "intervening act," even an illegal act, does not sever causation if it is foreseeable. (*See supra* §1.A). An intervening cause must "operate independently of any other act" to break the chain of causation. *Id.* To the extent Defendants argued that the actions of third parties were intervening causes, the Panel finds that genuine questions of material fact preclude resolving that argument on summary judgment.[16]In denying a motion to dismiss, Judge Breyer stated that: "just as Manufacturers' alleged false promotion could foreseeably result in increased opioid addiction, abuse, and overdoses, Distributors' alleged failure to maintain effect controls against diversion

[16] A 2007 letter from DEA to Defendants states that "[their] responsibility is critical, as Congress has expressly declared that the illegal distribution of controlled substances has a substantial and detrimental effect on the health and general welfare of the American people . . .." APP 0868-0869.

could foreseeably result in the same harms. … ("That's why they're 'controlled' in the first place ….")."*City and County of San Francisco*, 491 F.Supp.3d at 683. (internal citations omitted).

Likewise, the Supreme Court stated in *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943), that the "difference between sugar, cans, and other articles . . . on the one hand, and narcotic drugs . . . on the other, aris[es] from the latters' inherent capacity for harm and from the very fact they are restricted . . .."). *See also United States v. Moore*, 423 U.S. 122, 135 (1975) (when enacting the CSA, "Congress was particularly concerned with the diversion of drugs from legitimate channels to illegitimate channels."); *Gonzales v. Raich*, 545 U.S. 1, 12–13, (2005) (same).

West Virginia state courts handling similar opioid litigation claims have rejected the arguments Defendants make here. The Panel rejected similar arguments brought by the manufacturers in Phase 1a. (Transaction ID 67650385 at 4, 6-7, 9). Similarly, in *Morrisey*, 2014 WL 12814021 (2014) (APP 1032), Judge Thompson found that any alleged intervening acts were forseeable to Defendants, and therefore insufficient to cut off the chain of liability as a matter of law. *Id.* at *11-12.

d. Defendants' conduct was not too remote from the opioid epidemic to support a finding of proximate cause.

In *Brooke County*, No. 17-C-248 (2018) (APP 1051) Judge Hummel rejected these defendants proximate cause arguments at the pleadings stage, finding that: "Defendants' conduct was not too remote from the opioid epidemic—even considering that third party conduct may have also contributed to the opioid epidemic—and that the acts of third parties (even criminals) were foreseeable and did not create a new effective cause or operative independently." *Id.* at 12. (citing *Morrisey*). The Panel has previously determined that these rulings are law of the case here. *Monongalia Cnty. Commission v. Purdue Pharma L.P.,* No. 18-C-222 MSH, Trans. *Id.* 64374611

at p. 3 (W.Va. MLP October 31, 2019), *writ denied, State of West Virginia ex rel. ABDC, et al. v. Moats,* No. 19-1051 (W.Va. Jan. 30, 2020).

And, as discussed above, Judge Polster rejected Defendants' arguments concerning a too-attenuated causal chain on summary judgment, observing, "the relationship between Plaintiffs' injury and Defendants' alleged conduct . . . is not too remote to support a finding of proximate cause here." *In re: Nat'l Prescription Opiate Litig*., 1:17-md-02804, 2018 WL 6628898 at *5 (N.D. Ohio 2018). Most recently, Judge Breyer rejected similar causation arguments at the pleadings stage. (APP 0074-0085). The vast majority of opioid litigation courts around the country are in accord. *See supra*, fn. 3.

Defendants instead argue that any connection between Defendants' shipments and any harm flowing from diversion is too remote as a matter of law. Def. Br. at 30-31. In support of their argument, they cite *City of Charleston, W. Virginia v. Joint Comm'n*, 473 F.Supp. 3d 596, 628 (S. D. W. Va. 2020) (Copenhaver, J.). In *City of Charleston*, the Court determined that an accreditation commission's conduct—issuing false "pain management standards"—is "too attenuated from the resulting harms and influenced by too many intervening causes." *Id.* at *26. However, Judge Copenhaver distinguished Judge Polster's contrary MDL bellwether rulings from the case brought by *City of Charleston* because the Joint Commission, the *City of Charleston* defendant, "had no role in . . .manufacturing, distributing . . .or marketing opioids." *Id.* at *25. Here, as was the case in the federal court opioid nuisance decisions cited above, the Defendants *are* distributors of opioids. For this reason, the Court concludes that *City of Charleston* is distinguishable.

* * * *

The Panel cannot ignore the many different pretrial decisions (of this Panel and other courts) rejecting similar motions for summary judgement. Nothing in Defendants' motion provides

any basis for reconsidering the Panel's prior decisions or ignoring the substantial precedent supporting Plaintiffs' claims or the evidence presented which creates material issues of fact to be decided by the Panel after hearing all the evidence.

For the foregoing reasons, Defendants' Motion for Summary Judgment Re "Factual Issue #1" is **DENIED**.

The Panel notes Defendants' objection and exception to this Order.

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

It is so **ORDERED.**

ENTERED: July 1, 2022.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation