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**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**IN RE: OPIOID LITIGATION** **Civil Action No. 19-C-9000**

**THIS DOCUMENT APPLIES TO ALL CASES**

**ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL CERTAIN DISCOVERY FROM CHAIN PHARMACY DEFENDANTS FROM 1996 TO PRESENT**

This motion comes before the Court on *Plaintiffs' Motion to Compel Certain Discovery from Chain Pharmacy Defendants from 1996 to Present* (Transaction No. 65994674). The Discovery Commissioner has reviewed the Motion, the Chain Pharmacy Defendants' *Opposition to Plaintiffs' Motion to Compel Certain Discovery from Chain Pharmacy Defendants from 1996 to Present* (Transaction No. 66029618), and Plaintiffs' *Reply Memorandum of Law in Support of their Motion to Compel Certain Discovery from Chain Pharmacy Defendants from 1996 to Present* (Transaction No. 66047722).

Plaintiffs seek discovery back to January 1, 1996 concerning three categories of information:

- Defendants' distribution of opioids into West Virginia;
- Defendants' relationships with manufacturers, distributors, front groups, and trade associations; and
- Defendants' documents relating to risk of abuse and diversion.

Each of the Chain Pharmacy Defendants responded to and objected to producing the requested discovery back to 1996. Instead, two of the Chain Pharmacy Defendants—Kroger and Rite Aid—stated that they would adhere to the temporal scope applied to discovery in the federal multi-district litigation, *In re National Opiate Litigation*, No. 17-MD-2804 (N.D. Ohio) (the "MDL"), January 1, 2006 to April 25, 2018. The other two—Walgreens and Walmart—threatened that they would impose an even more restrictive temporal scope on certain

of their discovery responses, but neither specified what that scope was, or to which requests they would apply that restricted scope.

Plaintiffs argue that the three categories of discovery it seeks here are highly relevant to proving the Chain Pharmacy Defendants' liability for public nuisance in West Virginia. Specifically, they argue that the requested discovery goes to the heart of their public nuisance claim, and implicates the Chain Pharmacy Defendants' conduct in creating, fueling, and maintaining the opioid addiction crisis within the state of West Virginia beginning in the 1990s. Plaintiffs further argue that the production of the requested discovery back to 1996 will not impose undue burden on the Chain Pharmacy Defendants because it is limited to three discreet categories of discovery, or nine individual requests, and most of the requested discovery involves centrally-located information that has likely already been gathered and produced to some extent in other litigation. Further, Plaintiffs argue that the importance of the requested discovery far outweighs any burden associated with its production, particularly in light of the grave reality of the opioid addiction crisis in West Virginia and nationally, the continuing harm resulting from the opioid addiction crisis and the need for abatement of that crisis, and the vast resources of the Chain Pharmacy Defendants.

In their Opposition, the Chain Pharmacy Defendants raise two principal arguments. First, they argue that these documents from 15 to 25 years ago are irrelevant and immaterial to Plaintiffs' claims, which they characterize as involving only their "opioids-related policies and procedures," "conduct as self-distributors," and "suspicious order monitoring systems." Second, they argue that the production of these documents would be unduly burdensome.

The Court has ordered that a "non-jury trial on the issue of liability for public nuisance will be conducted as soon as practicable, after a reasonable period of discovery on this issue is

conducted." *Order Regarding Trial of Liability for Public Nuisance* (Transaction No. 64739341). "The scope of discovery in civil cases is broad[.]" *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 725, 421 S.E.2d 264, 266 (1992). "Rule 26(b)(1) of the West Virginia Rules of Civil Procedure . . . provides, in pertinent part, that the '[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . ." *Id.*

The Discovery Commissioner first rejects the Chain Pharmacy Defendants' narrow characterization of Plaintiffs' claims in this litigation. The only claim currently set to be tried is for public nuisance under West Virginia law, and the issue that is the subject of the instant motion is whether the discovery sought is relevant to proving or disproving the existence of that public nuisance. West Virginia law defines public nuisance as "an unreasonable interference with a right common to the general public." *Duff v. Morgantown Energy Assocs. (M.E.A.)*, 187 W.Va. 712, 715, 421 S.E.2d 253, 256 (1992) (citing *Hendricks v. Stalnaker*, 181 W. Va. 31, 33, 380 S.E.2d 198, 200 (1989)). Thus, one of the key issues to be tried is whether any or all of the Chain Pharmacy Defendants substantially contributed to the alleged public nuisance in West Virginia, through the conduct that Plaintiffs have alleged, beginning as early as the 1990s. The discovery sought here goes to the heart of that inquiry.

In the first category of requested discovery, Plaintiffs seek discovery regarding Defendants' distribution of opioids into West Virginia. Specifically, in Plaintiffs' First Interrogatory No. 3 and First Request for Production No. 2, Plaintiffs request the identification of certain information and documents regarding its distribution centers which delivered opioids to customers in West Virginia. In Plaintiffs' First Request for Production No. 3, Plaintiffs seek documents reflecting Defendants' distribution of opioids into West Virginia, including

distribution data.

The Discovery Commissioner agrees with Plaintiffs that this category of discovery is highly relevant for the purpose of proving whether the Chain Pharmacy Defendants are liable for public nuisance under West Virginia law. Plaintiffs allege that the opioid addiction crisis plaguing West Virginia was the result of decades-long conduct of the Chain Pharmacy Defendants and others, which began in the mid-1990s. The discovery requested may go to proving the allegations that the Chain Pharmacy Defendants helped create and fuel the alleged public nuisance in West Virginia through their distribution of opioids into the state. The Discovery Commissioner also agrees with Plaintiffs that this discovery is relevant to show if the Chain Pharmacy Defendants may have been aware, since the beginning of the alleged wrongful conduct, of the oversupply of prescription opioids into West Virginia.

The Chain Pharmacy Defendants argue that any dispute as to this category of discovery is moot because they will produce dispensing data and suspicious order reports back to 1996, as they were ordered to do in the MDL. This dispute may not be moot, however, to the extent that the Chain Pharmacy Defendants fail to specify whether they also intend to produce discovery responsive to Plaintiffs' First Interrogatory No. 3 and First Request for Production No. 2. If the Chain Pharmacy Defendants do not intend to produce discovery fully responsive to these requests, the Discovery Commissioner rules that they must do so consistent with this Order.

In the second category of discovery, Plaintiffs seek discovery regarding the Chain Pharmacy Defendants' relationships with manufacturers and distributors of opioids, front groups, and trade associations. Specifically, in Plaintiffs' Second Request for Production No. 7, Plaintiffs seek the production of documents reflecting the Chain Pharmacy Defendants' interactions with manufacturers of opioids concerning subjects such as theft of opioids, the

medical efficacy of opioids, and continuing medical and/or pharmacy education programs. In Plaintiffs' Second Request for Production No. 8, Plaintiffs seek documents concerning continuing medical education or presentations for opioids they dispensed or sold in West Virginia. In Plaintiffs' Second Request for Production No. 9, Plaintiffs request information regarding the Chain Pharmacy Defendants' involvement with a number of advocacy groups focused on pain management. Similarly, in Plaintiffs' Second Request for Production No. 16, Plaintiffs seek documents concerning the Chain Pharmacy Defendants' membership and participation in front groups.

This category of discovery is likewise highly relevant to Plaintiffs' public nuisance claim. Plaintiffs allege that the opioid manufacturers helped create the market for chronic use of prescription opioids in the mid-1990s by, among other things, aggressively and deceptively marketing their prescription opioids, misrepresenting the risk of addiction, overstating the benefits of opioids for chronic plain, promoting the use of opioids in higher doses, and failing to report suspicious prescribers in West Virginia. The Chain Pharmacy Defendants distributed and dispensed these opioids in West Virginia prior to 2006, and Plaintiffs have cited and attached publicly-available documents from the MDL that Plaintiffs' claim demonstrate that the Chain Pharmacy Defendants worked together with the opioid manufacturers to market and promote their prescription opioids going back to the 1990s. Plaintiffs also contend that they have learned from the discovery of the manufacturers, (which were required in the MDL to produce discovery back to 1996), that the Chain Pharmacy Defendants also utilized the manufacturers to train their pharmacy staff on the dispensing of pain medications, and promoted access to pain medicines through participation in various pain groups, which helped to change the medical and societal consensus regarding the safety and efficacy of prescription opioids and to normalize the

use of prescription opioids. The Discovery Commissioner finds that limiting discovery to no further back than 2006 would deprive Plaintiffs of obtaining documents that may be related to the Chain Pharmacy Defendants' alleged role at the inception of the epidemic. Plaintiffs are entitled to discover the full scope of the Chain Pharmacy Defendants' involvement in this conduct going back to the first acts that set the stage for the opioid addiction crisis in the mid-1990s, as well as how this conduct developed over time.

The third category of discovery includes only Plaintiffs' Second Request for Production No. 2, in which Plaintiffs seek Defendants' internal documents related to the risk of abuse and diversion of opioids. This discovery is relevant to show the Chain Pharmacy Defendants' knowledge and understanding concerning the potential for abuse, misuse, and overdose of opioids—a central issue in this case—as well as the Chain Pharmacy Defendants' understanding of their duties to stop diversion and to comply with the law from the beginning of the alleged wrongful conduct. "The fact that (a) defendant may have gained this knowledge long ago does not make the evidence irrelevant or prejudicial." *Cooley v. Lincoln Elec. Co*., 693 F. Supp. 2d 767, 785 (N.D Ohio 2011).

The Chain Pharmacy Defendants' final objection is that the production of the materials requested would be unduly burdensome. The party objecting to discovery on the grounds that the information sought is not relevant has the burden of proof in establishing that its objection is proper. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Stephens*, 188 W. Va. 622, 630, 425 S.E.2d 577, 585 (1992). As the party asserting burden as an objection, the Chain Pharmacy Defendants "must do more than make unsubstantiated or conclusory statements that a discovery request is overly broad and burdensome." *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 120 640 S.E.2d 176, 183 (2006) (citing *Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667,

672 (D. Kan. 2005), and *Carlson v. Freightliner LLC*, 226 F.R.D. 343, 370 (D. Neb. 2004) ("An objection that discovery is overly broad and unduly burdensome must be supported by affidavits or evidence revealing the nature of the burden and why the discovery is objectionable.")).

The Discovery Commissioner agrees with Plaintiffs that the Chain Pharmacy Defendants have failed to present any evidence of burden. The Chain Pharmacy Defendants have made only unsubstantiated assertions of burden. They have not supported their claim of burden with affidavits or evidence revealing the nature of that burden. To the extent that the Chain Pharmacy Defendants have not done so because they assert that the requested discovery is "oppressive on its face," the Discovery Commissioner rejects that assertion. In short, the Chain Pharmacy Defendants have not met their burden to show burden. Furthermore, the Discovery Commissioner agrees with Plaintiffs that their need for this highly relevant and material discovery outweighs any burden to the Chain Pharmacy Defendants. This objection is overruled.

Having considered the motion, responses, and the arguments of counsel, the Court hereby **GRANTS** the motion and **OVERRULES** the Chain Pharmacy Defendants' objections to the temporal scope of these categories of discovery. The Chain Pharmacy Defendants are hereby **ORDERED** to provide the requested discovery from January 1, 1996 to present on a rolling basis as it becomes available, said production to be completed no later than December 31, 2020.

**IT IS SO ORDERED.**

**ENTERED:** October 29, 2020.

/s/ Christopher C. Wilkes
Discovery Commissioner