

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

**AMERISOURCEBERGEN DRUG
CORPORATION and BELLCO DRUG
CORPORATION,**

Plaintiffs,

CIVIL ACTION NO. 17-C-36

v.

JUDGE HOKE

**ACE AMERICAN INSURANCE
COMPANY, ACE PROPERTY AND
CASUALTY INSURANCE COMPANY,
AMERICAN GUARANTEE &
LIABILITY INSURANCE COMPANY,
ENDURANCE AMERICAN INSURANCE
COMPANY, and ST. PAUL FIRE AND
MARINE INSURANCE COMPANY,**

Defendants.

**PRE-TRIAL PROCEDURAL ORDER:
Granting Plaintiffs' Motion for WVRCP Rule 65 Injunctive Relief**

Procedural Posture

In this matter, this Court previously entered an Anti-Suit Injunction in this case, with the Defendants St. Paul and ACE appealing that Injunction. Upon the appellate review, the West Virginia Supreme Court of Appeals affirmed the issuance of the Injunction, but reversed the Injunction, with further directives that the case be remanded to the Circuit Court of Boone County, West Virginia, "for clarification of the Order or such other proceedings as were necessary."

WHEREUPON this Court notes that the Plaintiffs filed a Renewed Motion for Anti-Suit Injunction which was supported by the Affidavit of Woody Hope, attached to which were multiple additional exhibits that clarified Plaintiffs' position and evidence in support of the scope of the Injunction. The Insurer Defendants filed a Response in Opposition to which Plaintiffs

filed a Reply in Support; and ultimately the matter came on for hearing by agreement of the parties on April 29, 2022, at which time the Court accepted the argument of counsel.

THEREUPON, based on all of the same, and as more fully set forth in the Findings of Fact and Conclusions of Law below, this Court hereby **GRANTS** the Renewed Motion for Anti-Suit Injunction, with the Court taking judicial notice, in accordance with the applicable provisions of Rules 2.01 and 2.02 of the West Virginia Rules of Evidence of all of its prior Procedural Orders granting such injunctive relief, and with the following significant limitations designed to narrowly tailor the scope of the Injunction to properly address the equitable circumstances presented:

- a. The Injunction shall be a temporary rather than permanent injunction and shall only enjoin the parties from pursuing collateral litigation while this action remains pending.
- b. The Injunction will only apply where each the following conditions are met:
 - i. The collateral suit must concern insurance policies issued to ABDC or its predecessors and affiliates.
 - ii. The collateral suit must concern insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates.
 - iii. The collateral suit must concern insurance policies that are either expressly at issue in this case, that are implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the cases that make up Phase 2 of this case, which include all of defendants' policies back to at least January 1, 1996, and/or that are written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies; and
 - iv. The collateral suit must concern insurance coverage for prescription opioid liability lawsuits of the same types that have been included in the National Opioid MDL or the West Virginia Opioid MLP.
- c. The Injunction is modified to clarify that nothing in the Injunction will preclude any party from seeking a compromise resolution of any claims, whether through settlement or otherwise.

- d. Finally, the Court further modifies the Injunction to confirm that the Court will hold a hearing at the conclusion of Phase 1 of this dispute, which is currently scheduled for trial on October 4, 2022, at which time the Court will hear argument on whether changed circumstances equitably require modification of the Injunction to effectuate the purposes identified by the West Virginia Supreme Court or whether further modifications in the interests of justice are required.

Background of the Case or Controversy

The Plaintiff AmerisourceBergen Drug Corporation (“ABDC”), a wholesale pharmaceutical distributor, has been named as a defendant in hundreds of prescription opioid liability lawsuits filed by government entities, Native American Tribes, individuals, and third-party payors, which seek to hold ABDC liable for damages related to the opioid crisis.¹

In this action, ABDC seeks breach of contract damages and declaratory relief against the following insurers that issued primary and first layer excess insurance policies to AmerisourceBergen Corporation (“ABC”), which is ABDC’s parent company, for the period from May 1, 2006 to May 1, 2013: St. Paul Fire and Marine Insurance Company, ACE American Insurance Company, ACE Property and Casualty Insurance Company, American Guarantee & Liability Insurance Company, and Endurance American Insurance Company

¹ Those prescription opioid liability lawsuits filed in, or removed to, federal court in West Virginia have been consolidated in a federal multidistrict litigation styled *In Re: National Prescription Opioid Litigation*, No. 1:17-md-02804 (N.D. Ohio) (the “National Opioid MDL”). *See generally* Docket, National Opioid MDL (listing prescription opioid liability lawsuits assigned to National Opioid MDL). Various prescription opioid liability lawsuits filed in the State of West Virginia that were not transferred to the National Opioid MDL were consolidated in the West Virginia Mass Litigation Panel (“West Virginia MLP”).

(collectively, “Insurer Defendants”).² See Doc. ID 768-1, Complaint; Doc. ID 885-1, Amended Complaint.³

This action has now been pending in this Court for over five years and will ultimately decide the issue of whether ABDC is entitled to insurance coverage to contribute to a resolution of the prescription opioid liability lawsuits, which collectively have been referred to as “the most complex and important group of cases ever filed.” *In re Nat’l Prescription Opiate Litig.*, 2019 U.S. Dist. LEXIS 165494, at *54 (N.D. Ohio Sep. 26, 2019).

The West Virginia Supreme Court of Appeals concluded, “[b]ecause of the extent of the opioid epidemic in West Virginia, the courts of this state have a compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court.” Op. at 21.

In this suit ABDC alleges the Insurer Defendants breached their duty to defend and indemnify ABDC against prescription opioid liability lawsuits originally filed in state or federal courts in West Virginia, including those prescription opioid liability lawsuits that have been transferred to the federal National Opioid MDL and the West Virginia MLP. *Id.*

ABDC filed its Complaint in this action on March 16, 2017. See Doc. ID 768-1, Complaint. On July 18, 2018, pursuant to the Case Management Order then in effect, ABDC filed an Amended Complaint, which added an ABDC subsidiary, Bellco Drug Corporation

² The Court refers to the Insurer Defendants in this action as follows: (i) St. Paul Fire and Marine Insurance Company is referred to as “St. Paul,” (ii) ACE American Insurance Company and ACE Property and Casualty Insurance Company will collectively be referred to as “ACE,” (iii) American Guarantee & Liability Insurance Company will be referred to as “American Guarantee,” and (iv) Endurance American Insurance Company will be referred to as “Endurance.”

³ All documents referred to by “Doc. ID” numbers refer to documents filed in this action, *AmerisourceBergen Drug Corp., et al. v. ACE Am. Ins. Co., et al.*, No. 17-C-36 (W. Va. Cir. Ct., Boone Cnty.).

(“Bellco”), as a plaintiff and identified additional West Virginia prescription opioid liability lawsuits that had been filed against ABDC since March 2017, for which ABDC sought coverage, including prescription opioid liability lawsuits that had been consolidated in the National Opioid MDL. *See* Doc. ID 885-1, Amended Complaint. The Amended Complaint also stated that ABDC’s coverage claims extend to all later-filed West Virginia opioid cases. *Id.*

According to the United States Judicial Panel on Multidistrict Litigation’s December 12, 2017 Transfer Order, the reason for the “consolidation” of the thousands of prescription opioid lawsuits in the National Opioid MDL is that all of those cases “involve common factual questions” and broadly make the same allegations, namely that “distributors failed to monitor, detect, investigate, refuse, and report suspicious orders of prescription opiates.” *See* ECF No. 1, Transfer Order at 3, Dec. 12, 2017, filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio).

This coverage action therefore encompasses coverage for the common defense of the National Opioid MDL, as well as the prescription opioid liability lawsuits filed against ABDC in West Virginia state and federal courts. As a result, resolution of the coverage issues in this action before the Court will resolve – or at least significantly inform – the issue of whether insurance coverage is available to contribute to a resolution of the thousands of prescription opioid lawsuits currently pending against ABC in both the National Opioid MDL and the West Virginia MLP.

On February 22, 2018, for the purpose of efficiently addressing core coverage issues common to all prescription opioid liability lawsuits and at the request of all parties, the Court entered an agreed order bifurcating proceedings in this coverage action into two (2) phases

and staying litigation with regard to phase two pending further rulings from this Court. *See* Doc. ID 862-1, Stay Order. The Stay Order contemplates a first phase of litigation regarding ABDC's claim for insurance coverage for the West Virginia Attorney General's prescription opioid lawsuit against ABDC, in which the Court would resolve key legal issues common to all prescription opioid liability lawsuits. *See id.*

In essence, ABDC's claim for coverage for the West Virginia Attorney General's prescription opioid liability lawsuit against ABDC will act as a bellwether on core coverage issues. In the second phase of this litigation, the Court will apply its rulings from phase one to resolve coverage for all remaining prescription opioid liability lawsuits. On November 5, 2020, St. Paul, one of the Insurer Defendants in this action, filed a collateral coverage lawsuit in the Superior Court of the State of California for the County of Orange (the "California Coverage Action"). *See St. Paul Fire & Marine Ins. Co., et al. v. AmerisourceBergen Corp., et al.*, No. 30-2020-01168930-CU-IC-CXC (Cal. Super. Ct., Orange Cnty.) ("California Coverage Action Docket"), November 5, 2020, Complaint (Dkt. No. 2).

In St. Paul's Complaint in the California Coverage Action (the "California Complaint"), St. Paul names all parties to this suit as defendants, including: ABDC, Bellico Drug Corporation, ACE American Insurance Company and ACE Property and Casualty Insurance Company (collectively, "ACE"), American Guarantee & Liability Insurance Company ("American Guarantee"), and Endurance American Insurance Company ("Endurance"). In its California Complaint, St. Paul seeks a declaration that ABDC is not entitled to coverage for any prescription opioid liability lawsuits under any general liability insurance policies – including the same primary and excess general liability insurance policies and policy forms at issue in this lawsuit – effectively appealing this Court's prior

rulings on the scope of coverage to a foreign trial court. *See id.* In that respect, St. Paul’s California Coverage Action seeks rulings regarding the same issues and cases that have been pending before this Court since March 16, 2017, including issues and cases that are currently the subject of this Court’s February 22, 2018 Stay Order. *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp. et al.*, No. 21-0036 (W. Va.), November 15, 2021 Op. (the “Opinion”) at 22.

In light of the above, on November 25, 2020, Plaintiffs filed a Motion for Injunction asking this Court to enjoin St. Paul and all other defendants from pursuing collateral coverage litigation relating to Plaintiffs’ entitlement to insurance coverage for the prescription opioid liabilities during the pendency of this first-filed coverage litigation. *See* Doc. ID 1320-1, Motion for Injunction.

On January 6, 2021, this Court granted Plaintiffs’ Motion for Injunction concluding that St. Paul’s California Complaint was motivated by “improper purposes,” namely, “forum shopping and the disruption of the orderly resolution of th[is] West Virginia suit.” *See* Doc. ID 1497-1, Order Granting Plaintiffs’ Motion for Injunction (the “Injunction Order”) ¶ 141. Thereafter, St. Paul appealed the Injunction to the West Virginia Supreme Court of Appeals and ACE joined in St. Paul’s appeal. *See* St. Paul Notice of Appeal, No. 21-0036 (Jan. 19, 2021) (W. Va.); ACE Motion to Intervene, No. 21-0036 (Feb. 9, 2021) (W. Va.).

On November 15, 2021, the Supreme Court of Appeals “affirm[ed] the circuit court’s decision to enter an injunction,” finding that “[t]he circuit court’s order demonstrates the existence of exceptional circumstances [warranting the entry of an injunction], and the court did not abuse its discretion in finding equity compelled an order.” Op. at 22, 25 In its decision, the Supreme Court of Appeals acknowledged that “the underlying allegations

against ABDC in the [WVAG Lawsuit] were materially identical in all other suits, in West Virginia and nationwide.” Op. at 21. In that respect, the Supreme Court of Appeals agreed with this Court that an Injunction was proper because St. Paul’s parallel California suit was filed for “improper purposes,” and that the California Complaint “clearly subsumes and seeks rulings on the exact issues that are to be decided (or have already been decided) in West Virginia.” Op. at 22. Moreover, the Supreme Court of Appeals concluded that “an injunction was needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.” Op. at 22.

However, the Supreme Court of Appeals remanded the matter to the Boone County Circuit Court, with express directions for this Court to conduct “such other proceedings as are necessary” to clarify the scope of the Injunction and provide additional facts regarding the scope of the Injunction as applied to St. Paul’s California Coverage Action. *Id.* at 25. The Supreme Court particularly remanded for clarification targeted at two (2) issues: (a) “why the circuit court precluded the litigation of *any* issues between the parties, if those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action”; and (b) whether “the circuit court’s order effectively precluded the parties from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or a dismissal.” *Id.* at 24 (emphasis in original). The Plaintiffs thereafter filed a Renewed Motion for Anti-Suit Injunction on March 21, 2022 to address these additional issues (“Renewed Motion”). Doc. ID 2564-1. In response, the Insurer Defendants filed their Memorandum of Law in Opposition to Plaintiffs’ Renewed Motion for Anti-Suit Injunction on April 20, 2022. Doc. ID 2614-2.

Given the positions articulated by the Defendant(s), the Plaintiffs filed their Reply in Support of the Renewed Motion on April 26, 2022. Doc. ID 2631-1. With the pleadings thus far submitted, the parties presented their respective arguments on the Renewed Motion at a Hearing on April 29, 2022, and with all parties submitting proposed Orders, with proposed findings of fact and conclusions of law thereafter.

UPON MAUTRE CONSIDERATION OF ALL OF WHICH, this Court has considered the arguments and additional evidence the parties submitted in connection with their briefing on Plaintiffs' Renewed Motion, the Supreme Court of Appeals' directive(s), and the arguments made during the April 29, 2022 Hearing, in light of all of the proposed Orders submitted in this matter. As a result of all of the above, the Court has synoptically determined that it is just and reasonable to **GRANT** the Plaintiffs' Renewed Motion for relief, in accordance with the applicable provisions of Rule 65 of the West Virginia Rules of Civil Procedure, in the limited form of this more defined Anti-Suit Injunction, based upon the reasons and reasoning stated more fully hereinafter. Within that same context, and to ensure the scope of this injunctive relief does not sweep more broadly than necessary to accomplish those purposes identified by the Supreme Court of Appeals, this Court further believes that it is necessary and proper to modify the relief, as originally granted, by the following:

- a. The Injunction shall be a temporary rather than permanent injunction and shall only enjoin the parties from pursuing collateral litigation while this action remains pending.
- b. The Injunction will only apply where each the following conditions are met:
 - i. The collateral suit must concern insurance policies issued to ABDC or its predecessors and affiliates.
 - ii. The collateral suit must concern insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates.

- iii. The collateral suit must concern insurance policies that are either expressly at issue in this case, that are implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the cases that make up Phase 2 of this case, which include all of defendants' policies back to at least January 1, 1996, and/or that are written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies; and
 - iv. The collateral suit must concern insurance coverage for prescription opioid liability lawsuits of the same types that have been included in the National Opioid MDL or the West Virginia Opioid MLP.
- c. The Injunction is modified to clarify that nothing in the Injunction will preclude any party from seeking a compromise resolution of any claims, whether through settlement or otherwise.
 - d. Finally, the Court further modifies the Injunction to confirm that the Court will hold a hearing at the conclusion of Phase 1 of this dispute, which is currently scheduled for trial on October 4, 2022, at which time the Court will hear argument on whether changed circumstances equitably require modification of the Injunction to effectuate the purposes identified by the West Virginia Supreme Court or whether further modifications in the interests of justice are required.

Findings and Conclusions⁴

[1] That based upon all of the matters set out in the record thus far, this Court continues to have statutory and Rule-based jurisdiction and venue over the subject matter, as well as the

⁴ In addition to the evidence submitted in connection with the parties' briefing, the Court is entitled to take judicial notice of any fact that is not subject to reasonable dispute, including the dockets of other courts and public filings. See WVRE 201(b); *Arnold Agency v. W. Va. Lottery Comm'n*, 206 W. Va. 583, 596 (1999) ("a court may take judicial notice of the orders of another court"); *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 881 (4th Cir. 2014) (taking judicial notice "of the content of relevant SEC filings and other publicly available documents included in the record"); *Acord v. Colane Co.*, No. 04-C-151-0, 2009 W.V. Cir. LEXIS 58 (W.V. Cir. Ct. – Logan Cty. Aug. 27, 2010) (taking judicial notice of corporate history based on a form 10-K-405 filing); *Formulak v. Bank of Charles Town*, No. 15-0643, 2016 W. Va. LEXIS 343, at *4 n.2 (May 20, 2016) ("We take judicial notice of the docket sheet, the September 15, 2008, order of dismissal, and the answer filed by petitioner on April 13, 2010 in No. 07-C-392."); *State v. Hobbs*, 168 W. Va. 13, 41 (1981) ("After appellant Hobbs objected, the trial court took judicial notice of newspaper stories in question and allowed them to be introduced into the record.").

The Court further notes that certain facts have been established for purposes of this case in the course of the Court's November 23, 2020 Findings of Fact and Conclusions of Law in connection with St. Paul's Motion for Summary Judgment. The Court refers to those prior findings as warranted as "Order Denying Summary Judgment."

respective parties hereto, in accordance with the applicable provisions of West Virginia Code S53-5-3; Rule 65 of the West Virginia Rules of Civil Procedure; Supreme Court of Appeals of West Virginia (Case No. 21-0036) filed November 15, 2021; and the other points and authorities set out herein; and,

A. The Underlying Prescription opioid liability lawsuits

[2] That on June 26, 2012, the West Virginia Attorney General filed the WVAG Lawsuit in this Court against ABDC, alleging that ABDC negligently distributed prescription opioid medications, causing bodily injury and death to West Virginia residents and creating a public nuisance. *See State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. AmerisourceBergen Drug Corporation, et al.*, Civil Action No. 12-C-141 (W. Va. Cir. Ct., Boone Cnty.); and,

[3] That the State of West Virginia sought damages against ABDC to reimburse it for costs that the state allegedly paid to address bodily injuries and deaths as a result of opioid addiction and disease, including for alleged costs of providing medical care, treatment, and services to West Virginians. *Id.*; *see also* Doc. ID 1325-1, Order Denying Summary Judgment; and,

[4] This Court presided over the West Virginia Attorney General's lawsuit against ABDC until its final resolution. *See generally State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. AmerisourceBergen Drug Corporation, et al.*, Civil Action No. 12-C-141 (W. Va. Cir. Ct., Boone Cnty.).⁵ ; and,

⁵ This Court also presided over the Attorney General's lawsuit against Cardinal Health for approximately five years and the Attorney General's lawsuit against McKesson Corporation for approximately three years. *See State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. Cardinal Health, Inc.*, Civil Action No. 12-C-140 (Circuit Court, Boone County, West Virginia); *State of West Virginia ex rel. Patrick Morrissey, Attorney General v. McKesson Corp.*, Civil Action No. 16-C-1 (Circuit Court, Boone County, West Virginia).

[5] That on December 1, 2016, ABDC and the State of West Virginia reached an agreement in principle on the material terms of a settlement to resolve the WVAG Lawsuit during a mediation ordered by this Court. *See* Doc. ID 1325-1, Order Denying Summary Judgment ¶ 8.; and,

[6] That on January 9, 2017, ABDC and the State of West Virginia executed a Settlement Agreement and Release confirming the terms of the settlement of the WVAG Lawsuit and providing that “all settlement monies” are to be deposited in a West Virginia Department of Health and Human Resources account “dedicated to drug abuse prevention, treatment, programming, and enforcement.” *See id.* ¶¶ 9–12.; and,

[7] That by statute the State was required to transfer the ABDC settlement payment into the “Ryan Brown Addiction Prevention and Recovery Fund” to be used for the purpose of funding “facilities to provide substance use disorder treatment services” or “facilities to provide recovery services.” *See id.* ¶ 13.; and,

[8] That the Court takes judicial notice that beginning after the December 1, 2016 mediation of the WVAG Lawsuit, West Virginia political subdivisions and other plaintiffs began filing prescription opioid liability lawsuits against Plaintiffs similar to the WVAG Lawsuit.⁶ ; and,

[9] That the Court takes further judicial notice that all West Virginia prescription opioid liability lawsuits pending in federal court for which Plaintiffs seek insurance coverage in this action are, or were, consolidated in the National Opioid MDL. *Compare In re*

⁶ For ease of reference, the Court lists these cases at the conclusion of these Findings of Fact and Conclusions of Law in Appendix A.

National Prescription Opiate Litigation, 1:17-md-2804 (N.D. Ohio) with Doc. ID 768-1, Complaint and Doc. ID 885-1, Amended Complaint.⁷; and,

[10] That the Court takes further judicial notice that, in addition to these West Virginia prescription opioid liability lawsuits, after the resolution of the WVAG Lawsuit, thousands of state and local government entities, third party payors, individual and putative class action plaintiffs, and Native American Tribes filed prescription opioid liability lawsuits against ABDC, including hundreds of prescription opioid liability lawsuits that are currently consolidated in the National Opioid MDL. *E.g.*, *In re Nat'l Prescription Opiate Litigation*, 956 F.3d 838, 841 (6th Cir. 2020) (noting the number of cases then-filed against manufacturers and distributors of prescription opioid medications); *see also In re National Prescription Opiate Litigation*, 1:17-md-2804 (N.D. Ohio) (docketing cases); and,

[11] That the Court takes further judicial notice that there are various types of bellwether cases in the National Opioid MDL, including: (i) lawsuits by government entities; (ii) lawsuits by Native American Tribes; (iii) lawsuits by individuals and putative class actions; and (iv) lawsuits by third party payors, providers, and hospitals.⁸ ; and,

[12] That the Court takes judicial notice that, with the exception of the lawsuits brought by Native American Tribes, for each of the bellwether cases in the National Opioid

⁷ For ease of reference, the Court lists those cases and the corresponding National Opioid MDL case number at the conclusion of these Findings of Fact and Conclusions of Law in Appendix B.

⁸ *See, e.g., The City of Fargo v. Purdue Pharma L.P., et al.*, No. 1:19-op-45675 (N.D. Ohio) (government entity case pending in the National Opioid MDL); *Coeur D'Alene Tribe v. Purdue Pharma L.P., et al.*, No. 1:19-op-45115 (N.D. Ohio) (Native American Tribe case pending in the National Opioid MDL); *Regina Hapgood, Individually and on behalf of the Estate of Richard Coelho v. Purdue Pharma L.P., et al.*, No. 1:19-op-45110 (N.D. Ohio) (individual case pending in the National Opioid MDL); *Arizona Municipal Risk Retention Pool v. Purdue Pharma L.P., et al.*, No. 1:19-op-45178 (N.D. Ohio) (third party payor case pending in the National Opioid MDL); *Touchette Regional Hospital v. Purdue Pharma L.P., et al.*, No. 1:19-op-45457 (N.D. Ohio) (hospital case pending in the National Opioid MDL).

MDL, there is at least one corresponding and equivalent West Virginia prescription opioid lawsuit.⁹ ; and,

[13] That the Court takes further judicial notice that the prescription opioid liability lawsuits filed against ABDC in West Virginia state courts that were not removed to federal court and transferred to the National Opioid MDL have been consolidated before the West Virginia MLP for pretrial proceedings. The West Virginia MLP is set to try all political subdivision cases against ABDC – all of which were filed years after ABDC filed this lawsuit – in July 2022. *See* Sept. 30, 2021 Order, West Virginia MLP.; and,

B. This Coverage Action

[14] That on July 28, 2016, ABDC provided notice of the WVAG Lawsuit to the Insurer Defendants and sought insurance coverage for the defense and indemnification of the WVAG Lawsuit from those insurers. *See* Doc. ID 1325-1, Order Denying Summary Judgment ¶ 15.; and,

[15] That on December 2, 2016, after ABDC and the State of West Virginia reached an agreement in principle on the material terms of settlement, ABDC sought confirmation from the Insurer Defendants that they consented to that settlement. *See id.* ¶ 18.; and,

[16] That correspondingly, on December 2, 2016, St. Paul specifically denied ABDC’s request for insurance coverage for the WVAG Lawsuit. *See id.* ¶ 19.; and,

⁹ *See, e.g., Wyoming County v. AmerisourceBergen Drug Corp., et al.*, No. 17-cv-02311 (S.D. W. Va.), No. 17-op-45051 (N.D. Ohio) (government entity case pending in the National Opioid MDL, coverage for which is at issue in this case and which is subject to this Court’s Stay Order); *Mary Tilley, as next friend of K.B. Tilley, a minor child under the age of 18*, No. 19-cv-00566 (S.D. W. Va.) (the “Tilley Action”), No. 19-op-46166 (N.D. Ohio) (an individual or class action lawsuit pending in the National Opioid MDL, coverage for which is at issue in this case and which is the subject of this Court’s Stay Order); *West Virginia Univ. Hosps., Inc., et al. v. Purdue Pharma, L.P., et al.*, No 19-C-69 (W. Va. Cir. Ct. – Marshall Cnty.) (hospital case pending before the West Virginia MLP, coverage for which is at issue in this case and which is subject of this Court’s Stay Order).

[17] That on March 16, 2017, ABDC filed its complaint for breach of contract and declaratory judgment against the Insurer Defendants in this Court seeking insurance coverage for the defense and indemnification of the WVAG Lawsuit and all other then-pending prescription opioid liability lawsuits. *See* Doc. ID 768-1, Complaint.

[18] That on July 18, 2018, Plaintiffs filed an amended complaint for breach of contract and declaratory judgment in this action. *See* Doc. ID 885-1, Amended Complaint.; and,

[19] That in the Amended Complaint, ABDC identified additional West Virginia prescription opioid liability lawsuits that had been filed against ABDC since the March 16, 2017 Complaint, confirmed that certain of the prescription opioid liability lawsuits for which ABDC was seeking insurance coverage had been consolidated in the National Opioid MDL, and confirmed that it would be seeking coverage for all subsequently filed West Virginia prescription opioid liability lawsuits. *See generally id.*; *see also id.* at ¶¶ 90–91.; and,

[20] That all Insurer Defendants have denied coverage for both the WVAG Lawsuit and all other prescription opioid liability lawsuits in this action. *See* Doc. ID 894-1, St. Paul Answer; Doc. ID 896-1, ACE Answer; Doc. ID 895-1, American Guarantee Answer; Doc. ID 893-1, Endurance Answer.; and,

[21] That this breach of contract and declaratory judgment action has now been pending in this Court for over five years and will ultimately decide the issue of whether ABDC is entitled to insurance coverage to contribute to a resolution of the prescription opioid liability lawsuits, which have collectively been referred to as “the most complex and important group of cases ever filed.” *In re Nat’l Prescription Opiate Litig.*, 2019 U.S. Dist. LEXIS 165494, at *54 (N.D. Ohio Sep. 26, 2019).; and,

[22] That the West Virginia Supreme Court of Appeals concluded, “[b]ecause of the extent of the opioid epidemic in West Virginia, the courts of this state have a compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court.” Op. at 21.; and,

C. The Bifurcation and Stay Order

[23] That at the request of all parties to this dispute, on February 22, 2018, this Court issued a Bifurcation and Stay Order, which provides that litigation regarding ABDC’s entitlement to insurance coverage for prescription opioid lawsuit will proceed in two phases. See Doc. ID 862-1, Stay Order; and,

[24] That in the first phase, the parties are to address ABDC’s claim for insurance coverage for the prescription opioid lawsuit brought by the West Virginia Attorney General against ABDC in 2012. See *id.*; see *State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. AmerisourceBergen Drug Corp. et al.*, No. 12-C-141 (W. Va. Cir. Ct., Boone Cnty.). During that first phase, which is ongoing, litigation regarding the remaining prescription opioid liability lawsuits is stayed. Doc. ID 862-1, Stay Order.; and,

[25] That this Court issued the Stay Order in an effort to sensibly and efficiently address the core coverage issues applicable to all prescription opioid liability lawsuits. See *id.*; and,

[26] That in light of the substantial overlap in the underlying prescription opioid liability lawsuits and the standard form nature of the insurance policies at issue in this case, the resolution of the core coverage issues for the WVAG Lawsuit can be broadly applied to all other prescription opioid liability lawsuits.; and,

[27] That the core coverage issues to be decided in Phase 1, which are common to all prescription opioid liability lawsuits, include: (a) whether the prescription opioid liability lawsuits seek damages for, or because of, bodily injury; (b) whether the duty to defend provision is triggered; and (c) whether the Insurer Defendants’ “expected or intended” defense bars coverage.; and,

[28] That given all of the above, the Court has determined that it is just and necessary to direct that the STAY ORDER should, and does hereby, REMAIN IN EFFECT, unless or until further order of the Court. *See id.* and,

Phase 1 of this Coverage Action is Nearing Completion

[29] That consistent with the Stay Order, ABDC and the Insurer Defendants have apparently been actively litigating the core legal coverage issues in the context of the WVAG Lawsuit for the last five years.¹⁰; and,

(i) St. Paul’s Motion for Summary Judgment

[30] That on July 22, 2019, St. Paul filed a Motion for Summary Judgment, arguing that the claims against St. Paul should be dismissed based on St. Paul’s argument that the State of West Virginia did not seek damages for “bodily injury” in the WVAG Lawsuit. *See* Doc. ID 1061-1, Motion for Summary Judgment.; and,

[31] That St. Paul described the question of whether the WVAG Lawsuit sought damages for “bodily injury” as a “threshold” issue that would address whether St. Paul would have responsibility for ABDC’s “opioid-related costs.” Doc. ID 1064-1, Memorandum of Law at 3.; and,

¹⁰ Bellco was not a defendant in the WVAG Lawsuit; however, it is a party to certain suits that are at issue in Phase 2 of this action.

[32] That the Defendant, American Guarantee, joined the St. Paul's Motion for Summary Judgment on August 12, 2019. *See* Doc. ID 1074-1, American Guarantee's Joinder.

[33] That this Court heard argument on St. Paul's WVRCP Rule 56c Motion for Summary Judgment on January 23, 2020.; and,

[34] That on November 23, 2020, this Court issued an Order Denying St. Paul's Motion for Summary Judgment, holding that "insurance coverage is available under the general liability insurance coverage section of the St. Paul Policy for lawsuits by government entities seeking damages for injuries suffered by their citizens." *See* Doc. ID 1325-1, Order Denying Summary Judgment ¶ 82.; and,

Phase 1 Discovery is Nearly Complete

[35] That all discovery has already exceeded the entire life of the underlying WVAG Lawsuit, and far exceeds the size and scope of discovery in that case. *Compare AmerisourceBergen Drug Corp., et al. v. ACE Am. Ins. Co., et al.*, No. 17-C-36 (W. Va. Cir. Ct., Boone Cnty.); *with State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. AmerisourceBergen Drug Corp. et al.*, No. 12-C-141 (W. Va. Cir. Ct., Boone Cnty.); and,

[36] That the Discovery Commissioner spent ten (10) months addressing the parties' motions to compel and motions for protective order following the conclusion of written discovery. *See* Doc. ID 1597-2, December 14, 2020 Reply in Support of Injunction, Exhibit 2.; and,

[37] That this Court spent an additional nine (9) months resolving complicated, multi-faceted discovery motions as well as the objections to all of the Discovery Commissioner's recommended orders. *See id.*; and,

[38] That on September 28, 2020, the Court adopted the Recommendations and Proposed Orders of the Discovery Commissioner with certain modifications, addressed the

scope of “other insured” discovery, and ordered St. Paul to execute the Protective Order in the National Opioid MDL. *See* Doc. ID 1269-1, Order Adopting Discovery Commissioner’s Proposed Orders; Doc. ID. 1270-1, Order Regarding Other Policyholder Discovery; Doc. ID 1268-1, Order Regarding use of Confidential MDL Documents.; and,

[39] That in accordance with the terms and conditions of the Court’s August 2, 2019 Order on Procedure Regarding Discovery Commissioner Reports and Setting Status Conference, the parties were required to serve all final productions of documents and supplemental discovery responses within thirty days of the Court’s September 28, 2020 Order. *See* Doc. ID 1071-1, Order on Procedure.; and,

[40] That in total, the Plaintiff, ABDC, has thus far made thirty (30) productions of documents to the Insurer Defendants, totaling over 10.5 million pages, including production of all the documents produced in the National Opioid MDL through September 28, 2020. *See* Doc. ID 2564-1, Renewed Motion ¶ 48.

[41] That In addition to document discovery, Insurer Defendants have deposed twenty-four (24) current or former ABDC employee or consultant witnesses and 4 of ABDC’s insurance broker witnesses. *See id.* ¶ 51.; and,

[42] That the Plaintiff, ABDC, has also produced eighty-three (83) fact witness transcripts to the Insurer Defendants from various prescription opioid liability lawsuits, together with twenty-six (26) expert witness transcripts of depositions taken in the prescription opioid liability lawsuits, and forty (40) volumes of trial transcripts from other prescription opioid liability lawsuits. *Id.*; and,

[43] That on August 18, 2021, former Judge Thompson entered a Third Amended Scheduling Order, setting an October 29, 2021 fact discovery deadline, and further ordering

that “[u]nless authorized by the Court, the . . . dates and requirements of this Order are FINAL.” Doc. ID 2393-1, Third Amended Scheduling Order ¶¶ 2, 18 (emphasis supplied by Judge Thompson).; and,

[44] That in accordance with said Order, “Fact Discovery “closed on October 29, 2021, per the terms of Judge Thompson’s Order. *Id.* ¶ 2.; and,

[45] That further in accordance with said Order, “Expert Discovery” was set to close on May 27, 2022, with the parties already having exchanged their expert reports and commenced expert depositions, subject to the further Order(s) of this Court. *Id.* ¶ 9.; and,

[46] That at this time, the Trial on Phase 1 issues is currently scheduled to begin on October 4, 2022. *Id.* ¶ 17.; and,

D. St. Paul’s Collateral California Coverage Action

[47] That on November 5, 2020, St. Paul filed the California Coverage Action seeking a declaration that ABDC is not entitled to insurance coverage for any prescription opioid liability lawsuits under any general liability insurance policies. *See* California Complaint ¶¶ 1, 3, 42–56.; and,

[48] That the Defendant, St. Paul, apparently served the California Coverage Action on the same day that this Court entered its ruling against St. Paul on the question of whether the WVAG Lawsuit was a suit seeking damages for bodily injury. *St. Paul Fire & Marine Ins. Co., et al. v. AmerisourceBergen Corp., et al.*, No. 30-2020-01168930-CU-IC-CXC (Cal. Super. Ct., Orange Cnty.), Doc. 116 (Proof of Service of Summons).; and,

[49] That the Defendant, St. Paul’s, California Coverage Action names every party to this lawsuit, including: ABDC, Bellco Drug Corporation, ACE, American Guarantee, and Endurance. *See* California Complaint ¶¶ 15, 18, 22.; and,

[50] That the Defendant, St. Paul's, California Coverage Action seeks a declaration as to its rights and obligations under the same standard form general liability insurance policies and policy forms at issue in this dispute, including those insurance policies issued by St. Paul, ACE, American Guarantee, and Endurance. *See id.* ¶ 22.; and,

[51] That in light of all of the above, and as the West Virginia Supreme Court of Appeals found, whether ABDC or any affiliated entity is “entitled to coverage for the prescription opioid liability lawsuits” is the exact issue before this Court. *See Op.* at 2-3 (“The [West Virginia Coverage Action] derives from ABDC” s efforts to establish that these prescription opioid liability lawsuits, nationwide and in West Virginia, are covered under primary, umbrella, and excess commercial general liability policies purchased by ABDC (or its predecessors or affiliates).”); and,

[52] That based upon the parallel filings, the West Virginia Supreme Court of Appeals further concluded that St. Paul's “California complaint clearly subsumes and seeks rulings on the exact issues that are to be decided (or have already been decided) in West Virginia.” *Op.* at 22.; and,

[53] That In addition to its declaratory judgment claims against ABDC, St. Paul's California Complaint also asserts declaratory judgment claims for contribution against various other insurers. *See California Complaint* ¶¶ 55 (Count V), 59 (Count VI), 61 (Count VII); and,

[54] That in particular, the Defendant herein, St. Paul, expressly seeks a ruling that if it is liable to ABDC for the defense or indemnification of the prescription opioid liability lawsuits, then it is entitled to seek contribution from other parties for those same costs and liabilities. *California Complaint*, ¶¶ 55, 58, 61.; and,

[55] That the Defendant herein, St. Paul’s, contribution claims are articulated as

follows:

- a. Count V: “If the St. Paul Insurers have obligations to provide coverage for any of the Opioid Lawsuits that are the subject of this case, the St. Paul Insurers seek a declaration as to the scope and amount of coverage required to be provided by each insurer under the respective terms, conditions, and exclusions of each of those policies.” *Id.* ¶ 55.
- b. Count VI: “To the extent that the St. Paul Insurers are called upon to pay any sums for defense and indemnity costs incurred in respect of the Opioid Lawsuits in excess of their equitable share of defense and indemnity costs, and taking into consideration the obligations of [the CA Non-Party Defendants], the St. Paul Insurers would be entitled to reimbursement of defense and indemnity costs incurred in respect of the Opioid Lawsuits in excess of their allocated shares.” *Id.* ¶ 58.
- c. Count VII: “To the extent that the St. Paul Insurers are called upon to pay any sums for defense and indemnity costs incurred in respect of the Opioid Lawsuits in excess of their equitable share of defense and indemnity costs, and taking into consideration the obligations of [the CA Non-Party Defendants], the St. Paul Insurers would be entitled to reimbursement of defense and indemnity costs incurred in respect of the Opioid Lawsuits in excess of their allocated shares.” *Id.* ¶ 61.

E. Comparison of Parties and Insurance Policies in this Action and St. Paul’s California Coverage Action

[56] That the Defendant herein, St. Paul, names as a Defendant in its California Coverage Action every party to this lawsuit, including ABDC (the Plaintiff, herein) and all Insurer Defendants. *Compare* Doc. ID 885-1, Amended Complaint *with* the California Complaint.; and,

[57] That in the California Coverage Action, St. Paul seeks a judicial declaration regarding ABDC’s right to insurance coverage for prescription opioid liability lawsuits under every insurance policy at issue in this lawsuit. *See* California Complaint ¶ 39; Doc. ID 885-1, Amended Complaint, Exhibit A.; and,

[58] That in addition, the Defendant, St. Paul, purportedly seeks a declaration as to the rights and obligations owed under various other insurance policies issued to ABDC between 1995 and 2018. *See* California Complaint ¶ 39.; and,

[59] That from a review of the policies at issue in the California Complaint proceeding, it appears that such demonstrate that all of the policies contain language in the bodily injury liability coverage section that is substantially, if not completely, identical to the sixteen (16) insurance policies at issue in Phase 1 of this case, as will be described in further detail in the following paragraphs.¹¹ ; and,

(i) St. Paul's Policies

[60] That from the records, it appears that from 1995 to 2018, the Defendants, St. Paul, and ACE, were the only insurers that issued primary layer insurance to ABDC (from 2001 to 2018) or Bergen Brunswig Corporation (from 1995 to 2001). *See* California Complaint ¶¶ 23(a) & (e); Doc. ID 2564-20, Hope Affidavit ¶¶ 10-11.; and,

[61] That during the period of 1995 – 2005, the Defendant, St. Paul's, policies on which St. Paul seeks a declaration appears to be written on identical standard policy forms, revised slightly prior to the 2002 policy period, but which appear to be without distinction as to relevant coverage grants or exclusions. Doc. ID 2564-20, Hope Affidavit ¶¶ 12.; and,

[62] That during the period of 1995-97 policy periods, the general liability coverage part of each of the St. Paul policies, which is the coverage part that is at issue in this suit, were issued on St. Paul Form No. 47150 Ed. 4-91. Doc. ID 2565-25, Hope Affidavit Ex. KK at Technology Commercial General Liability Protection Coverage Section; Doc. ID 2565-26-

¹¹ Attached as Appendix C are excerpts of the excess policies at issue in California Complaint. Full copies of the policies are attached as Exhibits AA to FFFF of the Hope Affidavit.

28, Hope Affidavit Ex. LL at Technology Commercial General Liability Protection Coverage Section.; and,

[63] That for the period of 1997-2002 policy periods, the general liability coverage part of each of the St. Paul Policies, which is the coverage part that is at issue in this suit, were issued on St. Paul Form No. G0151 Ed. 1-96. Doc. ID 2565-9 to 2565-24, Hope Affidavit Exs. FF, GG, HH, II, and JJ at Technology Medical and Biotechnology Commercial General Liability Protection Coverage Section.; and,

[64] That during the 2002-2007 policy periods, the general liability coverage part of each of the St. Paul Policies, which is the coverage part that is at issue in this suit, were issued on St. Paul Form No. G0151 Ed. 7-91. Doc. ID 2565-1 to 2565-8, Hope Affidavit Exs. AA, BB, CC, DD, and EE at Technology Medical and Biotechnology Commercial General Liability Protection Coverage Section.; and,

[65] That the St. Paul Policy at issue in Phase 1 of this dispute is the 2006-07 St. Paul Policy issued on St. Paul Form No. G0151 Ed. 7-91.; and,

[66] That given these circumstances, the Court has reviewed the relevant policy forms and confirms that the relevant policy language for the bodily injury liability coverage section is either identical, or nearly identical in substance, in each of these forms. In that respect, no party has identified any material difference between the terms and conditions of those policy forms. Indeed, the 1995 – 2007 St. Paul policies even use the identical policy numbers. Doc. ID 2564-20, Hope Affidavit ¶ 20.; and,

[67] That by way of example, the key policy language from the St. Paul insuring agreements are reproduced in full below:

St. Paul Policies Insuring Agreement (2002-2007)	St. Paul Policies Insuring Agreement (1996-2002)
<p><u>What This Agreement Covers</u></p> <p>Bodily injury and property damage liability. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:</p> <ul style="list-style-type: none"> • happens while this agreement is in effect; and • is caused by an event. <p><i>Protected person</i> means any person or organization that qualifies as a protected person under the Who Is Protected Under This Agreement section.</p> <p><i>Bodily injury</i> means any physical harm, including sickness or disease, to the physical health of other persons.</p> <p>We'll consider any of the following that happens at any time to be part of such physical harm, sickness, or disease, if it results in or from such physical harm, sickness, or disease:</p> <ul style="list-style-type: none"> • Mental anguish, injury, or illness. • Emotional distress. • Care, loss of services, or death. 	<p><u>What This Agreement Covers</u></p> <p>Bodily injury and property damage liability. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury, property damage, or premises damage that:</p> <ul style="list-style-type: none"> • happens while this agreement is in effect; and • is caused by an event. <p><i>Protected person</i> means any person or organization who qualifies as a protected person under the Who Is Protected Under This Agreement section.</p> <p><i>Bodily injury</i> means any physical harm, including sickness or disease, to the physical health of other persons. It includes any of the following that results at any time from such physical harm, sickness, or disease:</p> <ul style="list-style-type: none"> • Mental anguish, injury, or illness. • Emotional distress. • Care, loss of services, or death.

[68] That as a result of the foregoing, the Court concludes that the St. Paul policies at issue in the California Coverage Action contain substantially and materially identical terms and conditions to the St. Paul policy at issue in this action. *See* Appendix D, 1-5.¹²; and,

[69] That this Court's eventual interpretation of the 2006-07 St. Paul Policy will certainly dispose of the issues regarding the interpretation of the identically worded 1996-2006 St. Paul Policies at issue in the California Coverage Action; and.

[70] That given such, this Court concludes that the resolution of this action would resolve many of the coverage issues relevant to all St. Paul Policies both in this action and

¹² Attached as Appendix D are the demonstratives introduced by ABDC at the April 29, 2022 Hearing on ABDC's Renewed Motion for Anti-Suit Injunction.

the California Coverage Action. *See* Opinion at 20. Therefore, the Court holds that the resolution of the insurance coverage issues in this dispute is directly related to and overlapping with the resolution of those same coverage issues as to all of the St. Paul Policies in the California Coverage Action. *Compare* Opinion at 24; and,

(ii) The ACE Policies

[71] That with the Court's current procedural understanding of these matters, Phase 1 of this action should determine whether the ACE policies covering the period from May 1, 2007 to May 1, 2013 provide coverage for the WVAG Lawsuit. Doc. ID 768-1, Complaint; Doc. ID 885-1, Amended Complaint; Doc. ID 862-1, Stay Order; and,

[72] That In the California Coverage Action, St. Paul seeks contribution from the ACE policies covering the period from May 1, 2007 to May 1, 2018 in the event it owes coverage to ABC for prescription opioid liability lawsuits. California Complaint, ¶¶ 55, 58, 61.; and,

[73] That for the 2007-2011 policy periods the general liability coverage part, which is the coverage part that is at issue in this suit, each of the primary layer ACE Policies were issued on ACE Form No. XS-6U91c (07/02). Doc. ID 2565-35 to 2565-38, Hope Affidavit Exs. SS through-VV at Excess Commercial General Liability Policy Section; and,

[74] That for the 2011-2018 policy periods the general liability coverage part, which is the coverage part that is at issue in this suit, each of the primary layer ACE Policies were issued on ACE Form No. XS-20835 (08/06). Doc. ID 2565-29-to 2565-34, Hope Affidavit Exs. MM through-RR at Commercial Umbrella Liability Policy Section.; and,

[75] That the primary layer ACE Policies at issue in Phase 1 of this dispute are the 2007-13 ACE Policies issued on ACE Form No. XS-6U91c (07/02) and ACE Form No. XS-20835 (08/06); and,

[76] That as a result, every primary layer ACE Policy at issue in California is written on the identical policy form as an ACE Policy at issue in Phase 1 of this case or is the exact same policy as a policy at issue in Phase 1 of this case. No party has identified any material difference between the terms and conditions of the primary layer ACE Policies at issue in California and the primary layer ACE Policies in this case. Doc. ID 2564-20, Hope Affidavit ¶ 20.; and,

By way of example, the key policy language from the ACE insuring agreements is reproduced in full below:

2011-2018 ACE Insuring Agreement (included in West Virginia Action)	2007-2011 ACE Insuring Agreement (included in West Virginia Action)
<p>I. INSURING AGREEMENT</p> <p>A. We will pay on behalf of the “insured” those sums in excess of the “retained limit” that the “insured” becomes legally obligated to pay as damages for “bodily injury,” . . . to which this insurance applies.</p> <p>***</p> <p>D. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury.”</p> <p>***</p> <p>IV. DEFINITIONS</p> <p>***</p> <p>C. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. “Bodily injury” includes mental anguish or mental injury resulting from bodily injury.</p>	<p>1. INSURING AGREEMENT</p> <p>a. We will pay the insured for the “ultimate net loss” in excess of the “retained limit” shown in the Declarations that the insured becomes legally obligated to pay as damages for “bodily injury” . . . to which this insurance applies.</p> <p>***</p> <p>e. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury.”</p> <p>***</p> <p>IV. DEFINITIONS</p> <p>***</p> <p>3. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.</p>

[77] That the ACE Policies at issue in this action (from 2007 to 2013) and the California Coverage Action (from 2007 to 2018) are materially identical. See Appendix D, 6-9.; and,

[78] That given such, the Court’s eventual interpretation of the 2007 to 2013 ACE Policies should certainly dispose of the issues regarding the interpretation of the identically-worded 2013 – 2018 ACE Policies at issue in the California Coverage Action: and,

[79] That as a result, the Court has determined that it is reasonable to conclude that the resolution of this action would resolve many of the coverage issues relevant to all ACE Policies both in this action and the California Coverage Action. *See* Opinion at 20.

Therefore, the Court holds that the resolution of the insurance coverage issues in this dispute is directly related to and overlapping with the resolution of those same coverage issues as to all of the ACE Policies in the California Coverage Action. *Compare* Opinion at 24.; and,

(iii) The American Guarantee and Endurance Policies

[80] That the excess policies at issue in both cases provide “follow form” coverage, adopting the exact same terms and conditions of the followed primary layer coverage – in this case, the St. Paul and ACE policies. Doc. ID 2564-20, Hope Affidavit ¶ 14.; and,

[81] That based upon the Court’s review, the insurance policy sold by American Guarantee for the period of May 1, 2006 to May 1, 2007 (which is at issue in this suit and the California Coverage Action), provides coverage as follows: “This insurance applies only to damages covered by the Controlling Underlying Policy as shown in Item 6.A of the Declarations. Except as otherwise provided by this policy, the coverage follows the definitions, terms, conditions, limitations, and exclusions of the Controlling Underlying Policy in effect at the inception of this policy.” *See* Doc. ID 2564-6 Renewed Motion, Ex. D, American Guarantee Policy at AGLIC-01284. The policy defines the “Controlling Underlying Policy” as the May 1, 2006 to May 1, 2007 St. Paul primary policy at issue in both cases. *Id.* at AGLIC-01267.; and,

[82] That the insurance policy sold by Endurance for the period of May 1, 2007 to May 1, 2008 (which is at issue in both this suit and the California Coverage Action), provides coverage as follows: “This policy will follow form to the terms, conditions, definitions and exclusions of the ‘underlying insurance,’ except to the extent that the terms, conditions, definitions, and exclusions of this policy differ from the ‘first underlying insurance.’” *See* Doc. ID 2564-7 Renewed Motion, Ex. E, Endurance Policy at ENDURANCE DOCUMENTS 006876. The policy defines the “first underlying insurance” as the May 1, 2007 to May 1, 2008 ACE primary policy at issue in both cases. *Id.* at ENDURANCE DOCUMENTS 006852.; and,

(iv) Other California Insurer Defendants’ policies

[83] That from the Court’s clear understanding, in the California Coverage Action, St. Paul seeks a judicial declaration regarding ABDC’s right to insurance coverage for prescription opioid liability lawsuits under various other insurance policies issued between 1995 – 2018 containing identical, materially identical, or substantively indistinguishable policy terms and conditions. California Complaint ¶¶ 22–25; Appendix C.; and,

[84] That as illustrated in Appendix C, the additional insurance policies at issue in California provide coverage to ABDC subject to the same terms and conditions as the applicable underlying St. Paul or ACE primary policy. *See also* Doc. ID 2564-20, Hope Affidavit ¶ 20 (attaching policies); and,

[85] That from such review, it appears that there are no materially different insurance policy terms, conditions, or exclusions at issue in the California Coverage Action to those at issue in this case; and,

F. **There is a Substantial Overlap in Parties in this Action and St. Paul's California Coverage Action**

[86] That the Defendant herein, St. Paul, did name as a Defendant in the California Coverage Action every party to this lawsuit, including ABDC and all other Insurer Defendants. *Compare* Doc. ID 885-1, Amended Complaint *with* the California Complaint.

[87] That St. Paul asserted contribution claims against various additional insurers which issued excess policies to ABC and ABC affiliates between 1995 and 2018. California Complaint ¶¶ 55, 58, 61.; and,

[88] That the Court takes judicial notice of what appears to be twenty (20) of the insurer entities that St. Paul has included in the California Coverage Action are, in actuality, affiliates (to a greater or lesser degree) of the Insurer Defendants in the present case; and,

[89] That in light of the above, the Court takes further judicial notice that all five (5) Plaintiffs in the California Coverage Action, including St. Paul, are subsidiaries of The Travelers Companies, Inc, including: (i) St. Paul Fire and Marine Insurance Company; (ii) St. Paul Mercury Insurance Company; (iii) Travelers Casualty and Surety Company; (iv) Travelers Property Casualty Company of America; and (v) The Travelers Indemnity Company. *See* Doc. ID 2564-13, Ex. K, The Travelers Companies, Inc., February 13, 2020 SEC Form 10-K, Exhibit 21.1.; and,

[90] That the Court takes further judicial notice that nine (9) Defendants in the California Coverage Action, including ACE, are subsidiaries of Chubb Limited, including: (i) ACE American Insurance Company; (ii) ACE Property and Casualty Insurance Company; (iii) ACE Bermuda Insurance Company Limited; (iv) ACE Excess Casualty; (v) ACE INA Insurance Company of Canada; (vi) Chubb Atlantic Indemnity, Limited; (vii) Chubb Bermuda Insurance Limited; (viii) CIGNA Property & Casualty; and (ix) Federal Insurance

Company. *See* Doc. ID 2564-14, Ex. L, Chubb Limited, February 27, 2020 SEC Form 10-K, Exhibit 21.1.; and,

[91] That the Court takes further judicial notice that three (3) Defendants in the California Coverage Action, including American Guarantee, are subsidiaries of Zurich Insurance Group, including: (i) American Guarantee & Liability Insurance Company; (ii) Zurich American Insurance Company; and (iii) Zurich Insurance Company Limited. *See* Doc. ID 2564-15, Ex. M, Corporate Structures, 2018 Best's Insurance Reports – Property/Casualty, at 39.; and,

[92] That the Court takes further judicial notice that three (3) Defendants in the California Coverage Action, including Endurance, are subsidiaries of the Sompo Holdings Inc. Group, including: (i) Endurance American Insurance Company; (ii) Endurance American Specialty Insurance Company; and (iii) Endurance Specialty Insurance Limited. *See id.* at 34.; and,

[93] That the remaining insurers named as Defendants in the California Coverage Action issued policies that sit excess over the St. Paul and ACE policies and are subject to the exact same terms and conditions of the St. Paul or ACE primary policy corresponding to their coverage period. *See* Appendix C; Doc. ID 2564-20, Hope Affidavit ¶ 14.; and,

[94] That the Defendant herein, St. Paul, also names certain additional entities affiliated with ABDC in its California Coverage Action, which St. Paul identifies as “Bergen Brunswig Affiliates,” referring to a California corporation named Bergen Brunswig Corporation. *See* California Complaint ¶ 2.; and,

[95] That the entity, Bergen Brunswig Corporation, however, is not a party to St. Paul's California Coverage Action. *See generally id.*; and,

[96] That from the Court's review of the record, the Court notes that during the December 14, 2020 Hearing on Plaintiffs' first Motion for Injunction, counsel for St. Paul stressed that Bergen Brunswig Corporation is not addressed in the Complaint or Amended Complaint in this action; and,

[97] That the Court takes judicial notice, however, that in August 2001, Bergen Brunswig Corporation merged with and into AmeriSource Health Corporation, a Delaware corporation with its principal place of business in Pennsylvania. *See* Doc. ID 2564-8, Ex. F, ABC's December 28, 2001 SEC Form 10-K; and,

[98] That the Court moreover takes judicial notice that AmeriSource Health Corporation was the surviving entity of the merger, and that Bergen Brunswig Corporation ceased to exist upon the completion of the merger in August 2001. *See id.*; and,

[99] That the Court takes judicial notice that following the merger, AmeriSource Health Corporation changed its name to AmerisourceBergen Corporation ("ABC"). *See id.*

[100] That from the record thus far, the Court notes that it appears that ABC has always been incorporated under the laws of Delaware with its principal place of business in Pennsylvania. *See id.*; Doc. ID 2564-9, Ex. G, ABC's November 19, 2020 SEC Form 10-K.

[101] That the Court takes judicial notice that the entities that St. Paul refers to as "Bergen Brunswig Affiliates" in its California Complaint, including the ABDC and Bellco Drug Corporation Plaintiffs in this action, are actually the current or former subsidiaries of ABC. *See* Doc. ID 2564-9- 13, Ex. G, ABC's November 19, 2020 SEC Form 10-K; Ex. H, Exhibit 21 to ABC's November 19, 2020 SEC Form 10-K; Ex. I, ABC's July 18, 2012 SEC Form S-3; Ex. J, ABC's November 27, 2007 SEC Form 10-K; *see also* Op. at 5 n.6

(addressing Insurer Defendants' misleading labeling and changing mentions of Bergen-Brunswick Affiliates to ABDC for clarity).

G. Comparison of Underlying Liabilities in this Action and St. Paul's California Coverage Action

[102] That in St. Paul's California Complaint, the Defendant herein, St. Paul, is seeking a declaration regarding ABDC's rights to coverage for all "Opioid Lawsuits," which St. Paul defines to include the National Opioid MDL and "hundreds" of prescription opioid liability lawsuits filed against ABDC on a nationwide basis. *See* California Complaint ¶¶ 3, 42–56.

[103] That the Court takes judicial notice of the United States Judicial Panel on Multidistrict Litigation's December 12, 2017 Transfer Order, which states that the reason for the "consolidation" of the thousands of prescription opioid liability lawsuits in the National Opioid MDL is that all of those cases "involve common factual questions" and broadly make the same allegations, namely that "distributors failed to monitor, detect, investigate, refuse, and report suspicious orders of prescription opiates," as set forth below:

After considering the argument of counsel, we find that the actions in this litigation involve common questions of fact, and that centralization in the Northern District of Ohio will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Plaintiffs in the actions before us are cities, counties and states that allege that: (1) manufacturers of prescription opioid medications overstated the benefits and downplayed the risks of the use of their opioids and aggressively marketed (directly and through key opinion leaders) these drugs to physicians, and/or (2) distributors failed to monitor, detect, investigate, refuse, and report suspicious orders of prescription opiates. All actions involve common factual questions about, inter alia, the manufacturing and distributor defendants' knowledge of and conduct regarding the alleged diversion of these prescription opiates, as well as the manufacturers' alleged improper marketing of such drugs.

See ECF No. 1, Transfer Order at 3, Dec. 12, 2017, filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio).

[104] That the Judicial Panel on Multidistrict Litigation referred to the subsequently filed prescription opioid liability lawsuits as “tag-along actions,” in the course of transferring those actions to the National Opioid MDL. *See id.*; *see also* ECF No. 113, Transfer Order, February 2, 2018 filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio).

[105] That the Court takes judicial notice of the United States Judicial Panel on Multidistrict Litigation’s February 2, 2018 Transfer Order, in which the panel began transferring those “tag-along actions” to the National Opioid MDL. *See* ECF No. 113, February 2, 2018 Transfer Order, filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio).

[106] That the Court takes judicial notice that the MDL Court selected as bellwether trials two of the West Virginia cases ABDC identified in its March 16, 2017 Complaint and its July 18, 2018 Amended Complaint before this Court as prescription opioid liability lawsuits for which it was seeking insurance coverage in this action. *See City of Huntington v. AmerisourceBergen Drug Corp. et al.*, No. 3:17-cv-01362 (S.D.W. Va.); *Cabell Cnty. Comm’n v. AmerisourceBergen Corp. et al.*, No. 3:17-cv-01665 (S.D.W. Va.).

[107] Moreover, it is well-established that transfer of cases to a multi-district litigation permits “centralization” of discovery in the court in which those cases are consolidated, such that “depositions can be noticed in all related cases,” “discovery can be used in other actions,” and “judges can direct the parties to coordinate pretrial discovery.” *See* Multidistrict Lit. Man. § 5:26 (Thompson Reuters 2020 update).

[108] That the Court takes judicial notice of orders issued in the National Opioid MDL that confirm this “centralization” of discovery is occurring in the National Opioid MDL and that the Joint Panel on Multidistrict Litigation has concluded the prescription opioid liability lawsuits “involve common questions of fact.” *See, e.g.*, ECF No. 1, Transfer Order at 3, Dec. 12, 2017, filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio).

[109] That the Court takes judicial notice of the September 6, 2019 Discovery Ruling No. 22, issued in the National Opioid MDL, which states that the Court “agreed with the general principal that the MDL should serve as a central repository for all opioid-related discovery” and that the purpose “of having all opioid-related discovery produced in this MDL is a *decreased* burden for all parties, including Defendants, who can simply point any future Plaintiffs (including Plaintiffs in additional MDL Track cases, remanded cases, and even State court cases) to the MDL repositories.” *See* ECF No. 2576, Sept. 6, 2019 Discovery Ruling No. 22 at 1-2, filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio).

[110] That the Court takes judicial notice of the September 6, 2019 Discovery Ruling No. 22, issued in the National Opioid MDL, which orders that “Defendants shall produce in discovery in this MDL copies of all sworn statements, testimony, video-taped testimony, written responses and discovery, expert reports, and other documents and discovery that they produce in any court case, government investigation, or government hearing, regarding the marketing, sales, distribution, or dispensing of Opioids or Opioid Products, including any exhibits referred to in that testimony, on an ongoing basis.” *See id.* at 4.

[111] That the Court takes judicial notice of the September 29, 2019 Amendments to Case Management Order No. 2 Regarding Confidentiality and Protective Order in the National Opioid MDL, in which the MDL Court revised the protective order to permit disclosure of confidential and highly confidential information in the National Opioid MDL to allow production to:

Counsel for claimants in litigation pending outside this Litigation and arising from one or more Defendants' manufacture, marketing, sale, distribution, or dispensing of opioid products for use in this or such other action in which the Producing Party is a Defendant in that litigation, provided that the proposed recipient agrees to be bound by this Protective Order and completed the certification contained in Exhibit A, Acknowledgment and Agreement to Be Bound. Plaintiffs' Liaison Counsel shall disclose to all Defendants at the end of each month a cumulative list providing the identity of the counsel who have executed such acknowledgments and will receive Confidential and Highly Confidential Information pursuant to this Order and a list of the case name(s), number(s), and jurisdiction(s) in which that counsel represents other claimants.

See ECF No. 2688, Sept. 29, 2019 Amendments to CMO No. 2 at 5-8, filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio).

[112] That St. Paul defines the thousands of prescription opioid liability lawsuits filed on a nationwide basis simply as "Opioid Lawsuits," and seeks a declaration of no coverage for all of those suits. *See* California Complaint ¶¶ 3, 7.

[113] That St. Paul states in a footnote that the prescription opioid liability lawsuits that are the subject of this West Virginia insurance coverage action are "not intended to be the subject of" the California Coverage Action. *Id.* ¶ 41 n.11.

[114] However, in St. Paul's California Coverage Action, St. Paul seeks a declaration regarding the "scope of obligations to defend and indemnify [ABC and its subsidiaries] against [the National] Opioid MDL." *See id.*, Count V.

[115] That all of the federal court actions for which Plaintiffs seek insurance coverage in this action are, or were, consolidated in the National Opioid MDL. *See supra* ¶ 38.

[116] That the Supreme Court of Appeals already rejected St. Paul's attempted "carve-out" footnote in its California Complaint. Specifically, the Supreme Court of Appeals concluded:

Like the circuit court, we too are unpersuaded by St. Paul's "carve-out" footnote in its California complaint claiming some portion of the West Virginia action "is not intended to be" the subject of the California action. ***The broad language of the California complaint clearly subsumes and seeks rulings on the exact issues that are to be decided (or have already been decided) in West Virginia.*** Hence, an injunction was needed to prevent a threat to the court's jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense, and inconsistent judgments.

Op. at 22 (emphasis added).

[117] That the Supreme Court of Appeals acknowledged that "the underlying allegations against ABDC in the [WVAG Lawsuit] were materially identical in all other suits, in West Virginia and nationwide." Op. at 21.

[118] That this Court takes judicial notice that the underlying plaintiffs' claims against distributors including ABDC in the National Opioid MDL have been found to potentially reach back to January 1, 1996 as statutes of limitations may be tolled. *See* ECF No. 693, June 30, 2018 Discovery Ruling No. 2 Regarding Scope, filed in *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio); *see also* ECF No. 1247, March 31, 2021 Order Denying Summary Judgment on Statute of Limitations Grounds filed in *City of Huntington v. AmerisourceBergen, et al.*, No. 3:17-01362 (S.D. W. Va.).

[119] That accordingly, because all or at least some of the West Virginia opioid cases that are bifurcated and stayed in Phase 2 of this case (including all West Virginia suits included in the National Opioid MDL) involve claims potentially dating back to January 1, 1996, all of

the Insurer Defendants' policies dating back to January 1, 1996 are directly at issue in this case.

[120] That the 16 policies that are specifically listed in ABDC's Amended Complaint are the policies that are directly at issue in Phase 1 of this case, as determined by the temporal scope of the claims and legal rulings of this Court in the WVAG matter. However, all of Insurer Defendants' other policies, dating back to January 1, 1996, are also directly at issue in Phase 2 of this case, as determined by the temporal scope of the claims and legal rulings of the federal courts in the Track 2 National Opioid MDL as well as the temporal scope of the claims and legal rulings of the West Virginia Mass Litigation Panel.

H. **The Injunction**

[121] That on January 6, 2021, this Court ruled that "an anti-suit injunction is warranted in these unique, limited circumstances," and granted ABDC's motion for anti-suit injunction, preventing all parties from "instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid liability lawsuits against ABC, ABDC, or any other affiliated entity." Doc. ID 1497-1 Injunction Order ¶¶ 157, 164.

[122] That this Court specifically found "that St. Paul ha[d] filed the California Coverage Action for improper purposes, namely, delay and forum shopping" and that "permitting St. Paul to pursue a collateral action would cause irreparable harm to ABDC and would undermine the important governmental and judicial interests of West Virginia and this Court." *Id.* ¶ 157.

[123] That on January 19, 2021, St. Paul appealed the Injunction, and ACE filed a motion to intervene and join. *See* St. Paul Notice of Appeal, No. 21-0036 (Jan. 19, 2021) (W. Va.); ACE Motion to Intervene, No. 21-0036 (Feb. 9, 2021) (W. Va.).

[124] That St. Paul and ACE argued that this Court erred in issuing the anti-suit injunction and asserted that the West Virginia and California actions were not “‘parallel proceedings’ because there is no overlap between the claims at issue in the West Virginia action and the claims in the California Action.” Op. at 10.

I. **The Supreme Court of Appeals’ Order on the Injunction**

[125] That the Supreme Court of Appeals issued its ruling on St. Paul’s appeal of the Injunction on November 15, 2021. *See* Op.

[126] That the Supreme Court of Appeals acknowledged the need for an injunction and concluded that:

- d. “[T]he courts of [West Virginia] have a compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court.” *Id.* at 21.
- e. “[T]he underlying allegations against ABDC in the Attorney General’s lawsuit were materially identical in all other suits, in West Virginia and nationwide.” *Id.*
- f. “St. Paul’s California [Coverage Action] violated the terms and spirit of the circuit court’s [Stay Order] and was effectively a means of litigating the coverage questions stayed by the circuit court.” *Id.*
- g. “The circuit court fairly concluded that St. Paul’s parallel suit in California was filed for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia suit.” *Id.* at 22.
- h. “The broad language of the California complaint clearly subsumes and seeks rulings on the exact issues that are to be decided (or have already been decided) in West Virginia.” *Id.*
- i. “[A]n injunction was needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.” *Id.*
- j. “On this record, we find no error by the circuit court in its decision to enter an anti-suit injunction. The circuit court’s order demonstrates the existence

of exceptional circumstances, and the court did not abuse its discretion in finding equity compelled an order.” *Id.*

- k. “Hence, we affirm the circuit court’s decision to enter an injunction.” *Id.* at 25.

[127] That the Supreme Court of Appeals held that all elements for entry of an anti-suit injunction are met in this case, and that an anti-suit injunction is warranted. *Op.* at 22.

[128] That first, the Supreme Court of Appeals agreed with this Court’s conclusion that the California Coverage Action was a competing, parallel litigation that is properly the subject of an anti-suit injunction. *Op.* at 19-20. The court concluded that the parties were identical, the issues were similar, and the West Virginia Coverage Action would dispose of, at a minimum, a portion of the California Coverage Action.

[129] That second, the Supreme Court of Appeals concluded that equity supports the entry of an Injunction as all four equitable factors are met. *Op.* at 22 (“[T]he court did not abuse its discretion in finding equity compelled an [injunction] order.”).

- l. *Threat to the Court’s Jurisdiction.* The Supreme Court of Appeals concluded that “an injunction was needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit[.]” *Id.* Specifically, the court was concerned that St. Paul’s California Coverage Action “violated the terms and spirit” of the West Virginia Stay Order and was “effectively a means of litigating the coverage questions stayed by the circuit court.” *Id.* at 21.
- m. *Public Policy.* The Supreme Court of Appeals further concluded that the Injunction was needed because West Virginia courts “have a compelling interest in determining whether the policies at issue in ABDC’s West Virginia suit provide coverage for the underlying claims brought by West Virginia entities, without competing rulings from a foreign court.” *Id.*; Injunction Order ¶ 157 (“[P]ermitting St. Paul to pursue a collateral action would cause irreparable harm to ABDC and would undermine the important governmental and judicial interests of West Virginia and this Court.”). Accordingly, the Injunction is further warranted because St. Paul’s California Coverage Action was filed in an attempt to evade West Virginia’s important public policy considerations favoring resolution of the dispute in West Virginia.

- n. *Multiplicity of Suits.* The Supreme Court of Appeals further concluded that the Injunction was needed to “prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.” Op. at 22. Specifically, the Supreme Court of Appeals found that the California Coverage Action sought rulings on “the exact issues that are to be decided (or have already been decided) in West Virginia.” *Id.*
- o. *Vexatious, Inequitable, or Harassing Litigation.* The California Coverage Action is vexatious, inequitable, and harassing – for many of the same reasons articulated above – and based on the Supreme Court of Appeals’ agreement with this Court that the California Coverage Action was filed “for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia [Coverage Action].” *Id.*

[130] That the Supreme Court of Appeals concluded that “an injunction was needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.” *Id.* at 22.

[131] That the Supreme Court of Appeals, however, remanded the Injunction “for clarification of the order or such other proceedings as are necessary,” and requested further fact finding from this Court as to two issues: (1) “why the circuit court precluded litigation of *any* issues between the parties, *if* those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action”; and (2) whether the circuit court’s Injunction “effectively precluded the parties from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or dismissal.” *Id.* at 24-25 (emphasis in original).

[132] That the Supreme Court of Appeals further explained that, on remand, the injunction order should “clearly and finely tailor a connection between the relief sought in ABDC’s West Virginia action and the prohibition of the parties’ actions in California.” *Id.* at 24-25.

J. The California Stay Order

[133] That following this Court’s issuance of the Injunction on January 6, 2021,¹³ St. Paul violated the Injunction by continuing to affirmatively pursue its collateral California Coverage Action. *See* California Coverage Action, Dkt. No. 241, St. Paul’s Meet and Confer Statement (Jan. 15, 2021); Dkt. No. 243, Plaintiffs’ Answer to Defendant and Cross-Complainant National Union Fire Cross-Complaint (Jan. 15, 2021).

[134] That the Court takes judicial notice that on February 19, 2021, the California court independently issued a stay order, applying California law, and prohibiting St. Paul’s California Complaint from proceeding in California “pending resolution of the West Virginia action.” Doc. Id 2564-17, Ex. O, California Coverage Action, Feb. 19, 2021 Minute Order (the “California Stay Order”).

[135] That the Court takes judicial notice that the California Stay Order noted that “at least some of the same insurance policies are at issue in both cases, and the West Virginia court will be interpreting at least one of St. Paul’s policies to determine whether they cover opioid litigation, an answer that presumably will be the same whether the underlying litigation is in West Virginia or some other state.” *Id.*

[136] That the Court takes judicial notice that the California Stay Order arrived at its conclusion “in the interests of comity and the conservation of judicial resources to avoid potential conflicting rulings and allow the earlier-filed case to proceed first, eliminating the risk of multiple and inconsistent judgments in different cases.” *Id.*

¹³ The Court issued a Corrected Order Granting Plaintiffs’ Motion for Injunction on January 7, 2021. Doc. ID 1498-1.

[137] That the Court takes judicial notice that St. Paul appealed the California Stay Order on March 1, 2021. California Coverage Action, Dkt. No. 627, Notice of Appeal by St. Paul Fire & Marine Ins. Co., et al. (Mar. 1, 2021).

[138] That since the issuance of the California Stay Order, all California-named defendants who had issued cross-complaints against ABDC have filed motions to voluntarily dismiss their cross-complaints against ABDC. Doc. ID 2564-2, Horrigan Affidavit ¶ 5.

K. Standard for Issuance of an Anti-Suit Injunction

[139] That “Every judge of a circuit court shall have general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be in or out of his circuit, or the party against who’s proceeding the injunction be asked reside in or out of the same.” *See* W. Va. Code Section 53-54 (cited in Op. at 11).

[140] That “The granting or refusal of an injunction, whether mandatory or preventative, calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.” Syl. Pt. 2. Op. at i.

[141] That “[A] court has a duty, as well as power, to protect its jurisdiction over a controversy in order to decree complete and final justice between the parties and may issue an injunction for that purpose.” Op. at 12.

[142] That an anti-suit injunction is an order barring parties to an action in this state from instituting or prosecuting substantially similar litigation in another state. Whether the foreign state action is substantially similar involves assessing (1) the similarity of the parties; (2) the similarity of the issues; and (3) the capacity of the action in this state to dispose of the foreign state action. Syl. Pt. 6, *id.* at ii.

[143] That an anti-suit injunction is “appropriate when equity compels the circuit court: (1) to address a threat to the court’s jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent a multiplicity of suits that result in delay, inconvenience; expense, inconsistency, or will be a ‘race to judgment’; or (4) to protect a party from vexatious, inequitable or harassing litigation.” Syl. Pt. 8, *id.* at iii.

[144] That the Supreme Court of Appeals has already concluded that the standard for entry of an Anti-Suit Injunction is met in this case. *See* Op., at 22 (“[A]n injunction was needed to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit, and to prevent a multiplicity of suits filed with the intent of causing delay, expense and inconsistent judgments.”); *id.* (“On this record, we find no error by the circuit court in its decision to enter an anti-suit injunction. The circuit court’s order demonstrates the existence of exceptional circumstances, and the court did not abuse its discretion in finding equity compelled an order.”); *id.* at 25 (“[W]e affirm the circuit court’s decision to enter an injunction.”).

[145] That this Court is bound by the rulings of the Supreme Court of Appeals affirming this Court’s decision to enter an injunction, and thus the Court’s analysis is limited to addressing the specific points articulated by the Supreme Court of Appeals in its Order, specifically: (1) “why the circuit court precluded litigation of *any* issues between the parties, *if* those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action”; and (2) whether the circuit court’s Injunction “effectively precluded the parties from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or dismissal.” Op. at 24-25 (emphasis in original).

[146] That for the reasons stated below, this Court concludes that the thousands of pages of supplemental evidence presented with ABDC's Renewed Motion along with the record presented with the original filings, and the parties' arguments to the Court, requires that Plaintiffs' Renewed Motion for Anti-Suit Injunction be granted. However, to ensure the scope of the Injunction does not sweep more broadly than necessary to accomplish the purposes identified by the Supreme Court of Appeals, this Court modifies its original Injunction as follows:

- a. The Injunction shall be a temporary rather than permanent injunction and shall only enjoin the parties from pursuing collateral litigation while this action remains pending.
- b. The Injunction will only apply where each the following conditions are met:
 - i. The collateral suit must concern insurance policies issued to ABDC or its predecessors and affiliates.
 - ii. The collateral suit must concern insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates.
 - iii. The collateral suit must concern insurance policies that are either expressly at issue in this case, that are implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the cases that make up Phase 2 of this case, which include all of defendants' policies back to at least January 1, 1996, and/or that are written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies; and
 - iv. The collateral suit must concern insurance coverage for prescription opioid liability lawsuits of the same types that have been included in the National Opioid MDL or the West Virginia Opioid MLP.
- c. The Injunction is modified to clarify that nothing in the Injunction will preclude any party from seeking a compromise resolution of any claims, whether through settlement or otherwise.
- d. Finally, the Court further modifies the Injunction to confirm that the Court will hold a hearing at the conclusion of Phase 1 of this dispute, which is currently scheduled for trial on October 4, 2022, at which time the Court will hear argument on whether changed circumstances equitably require modification of the

Injunction to effectuate the purposes identified by the West Virginia Supreme Court or whether further modifications in the interests of justice are required.

L. Additional Findings and Modifications to the Injunction Addressing Question 1 Presented by the Supreme Court of Appeals.

[147] That the first question presented by the Supreme Court is “why the circuit court precluded litigation of *any* issues between the parties, *if* those issues were unrelated to the interpretation of the sixteen insurance policies at issue in the West Virginia action.” Op. at 24.

[148] That this Court agrees that the Injunction should not broadly extend to “*any* issues” between the parties. However, as described below and as found in the Supreme Court of Appeals ruling on the Injunction itself (as well as the California Court’s own Stay Order of St. Paul’s collateral California Coverage Action), an overly restrictive Injunction would fail to capture the reality of the litigation among the parties and would undermine the legitimate purposes to be served by the Injunction.

[149] That similarly, the Court agrees that the Injunction should not extend to insurance policies that are unrelated to the insurance policies at issue in the West Virginia action. However, a comparison of the insurance policies that the Insurer Defendants issued in this case to the insurance policies that the Insurers placed at issue in California, reveals that those policies are not at all unrelated. First, many of the policies at issue in California are the same policies as are at issue in this action, as the Supreme Court of Appeals previously recognized. Second, the remaining policies issued by these parties were issued on the same standard forms, that is, they contain the same exact terms and conditions, as the policies at issue in this case, or incorporate those same terms by reference. Third, all of these policies are directly at issue in Phase 2 of this action.

[150] That importantly, this Court further finds that the sixteen policies listed in the Amended Complaint and referenced in the Supreme Court's opinion directly relate to the underlying WVAG action that is the subject of Phase 1 of this coverage case; however, most if not all of the cases that are the subject of Phase 2 of this coverage case directly relate to all of the policies issued by the Insurer Defendants from January 1, 1996 to the present, not just the 16 policies specifically listed in the Amended Complaint.

[151] That accordingly, the Injunction must extend beyond coverage for a subset of prescription opioid liability lawsuits or just the sixteen insurance policies at issue in Phase 1 of this suit; it must extend to all policies related to all the West Virginia opioid cases.

[152] However, to ensure the scope of the Injunction does not sweep more broadly than necessary to accomplish the purposes identified by the Supreme Court of Appeals, this Court limits the scope of the Injunction to litigation regarding: (a) those insurance policies issued to ABDC or its predecessors and affiliates; (b) by the insurers in this case; (c) that are either expressly at issue in this case or written on forms that are substantially similar to the forms at issue in this case; (d) for lawsuits regarding insurance coverage for prescription opioid liabilities of the type that have been included in the National Opioid MDL or the West Virginia Opioid MLP, both of which are at issue in this West Virginia Coverage Action; and (e) only so long as the West Virginia Coverage Action has not reached final judgment or settlement. Further, the Court will hold a hearing at the conclusion of the Phase 1 of this dispute, at which time the Court will hear argument on whether any modifications to this injunction are equitably required based on any changed circumstances.

[153] That in support of these modifications to the Injunction, the Court finds as follows:

- (i) St. Paul’s California Coverage Action is contingent on the resolution of the exact same issues that have been the subject of litigation in this Court since March 2017.

[154] That as explained by the Supreme Court of Appeals, the issue before this Court is whether “prescription opioid liability lawsuits, nationwide and in West Virginia, are covered under primary, umbrella, and excess commercial general liability policies purchased by ABDC (or its predecessors or affiliates).” Op. at 2-3.

[155] That in St. Paul’s own words, the California Coverage Action “is an insurance coverage dispute in which the St. Paul Insurers . . . seek a declaratory judgment that they have no duty to defend or indemnify [ABDC and its affiliated entities] against lawsuits brought by various individuals, companies, and governmental entities seeking to hold them responsible for contributing to the nation’s opioid crisis.” California Complaint ¶ 1.

[156] That because ABDC first presented that question to this Court in March 2017, the Supreme Court of Appeals concluded that this Court is entitled to decide the threshold question of whether ABDC is entitled to coverage from St. Paul in the first instance. Op. at 18-22.

[157] Accordingly, the Supreme Court of Appeals already concluded that the Injunction was “certainly” warranted to protect this Court’s jurisdiction over the interpretation of the sixteen insurance policies specifically identified in the West Virginia complaint with respect to the underlying prescription opioid liability lawsuits. Op. at 20.

[158] That the question left open by the Supreme Court of Appeals’ order is whether the Injunction could extend to the additional claims St. Paul asserted in the California Coverage Action.

[159] That this Court concludes that the Injunction must extend to these additional claims as well because St. Paul’s additional declaratory judgment claims for contribution in

California are ultimately dependent upon, and derivative of, the threshold coverage issues being litigated in this action.

[160] That according to St. Paul's California Complaint, St. Paul seeks contribution only if there is a determination that St. Paul is liable to ABDC for the underlying prescription opioid liability lawsuits and if St. Paul is ordered to pay some amount of money to ABDC for the defense and indemnification of those lawsuits.

[161] That St. Paul's liability to ABDC is the exact issue before this Court, and the exact issue the Supreme Court of Appeals held was the proper subject of an Injunction.

[162] That specifically, whether St. Paul is obligated to "pay any sums for defense and indemnity costs" associated with prescription opioid liability lawsuits to ABDC is exactly the issue being litigated in this Court in accordance with this Court's scheduling orders (as to the WVAG Lawsuit in Phase 1) and Stay Order (as to the remaining prescription opioid liability lawsuits). *See Op.* at 2-3.

[163] Thus, all of St. Paul's "contribution" claims – as presented by St. Paul in the California Complaint and as a matter of law – are contingent upon an initial determination that St. Paul owes coverage to ABDC for prescription opioid liability lawsuits.

[164] That this Court's conclusion is buttressed by a side-by-side comparison of the Supreme Court of Appeals' characterization of this suit and St. Paul's characterization of its contribution claims in the California complaint.

[165] That the Supreme Court of Appeals explained that "The instant case derives from ABDC's efforts to establish that these prescription opioid liability lawsuits, nationwide and in West Virginia, are covered under primary, umbrella, and excess commercial general liability policies purchased by ABDC (or its predecessors or affiliates)." *Op.* at 2-3.

[166] That St. Paul’s claims in California are all contingent on that same threshold issue, that is, St. Paul premises all of its claims as follows: “If the St. Paul Insurers have obligations to provide coverage for any of the Opioid Lawsuits,” “To the extent that the St. Paul Insurers are called upon to pay any sums for defense and indemnity costs incurred in respect of the Opioid Lawsuits,” and “To the extent that the St. Paul Insurers are called upon to pay any sums for defense and indemnity costs incurred in respect of the Opioid Lawsuits” California Complaint ¶¶ 55, 58, 61.

[167] That this Court concludes that the claims in St. Paul’s California Coverage Action, including: (1) those involving excess policies that “follow form” to the St. Paul and ACE primary policy language at issue here; and (2) hypothetical contribution claims against the California Non-Party Insurers, are *not* “unrelated to the interpretation of the sixteen insurance policies at issue” in this action.

[168] That all claims in St. Paul’s California Coverage Action – or any other hypothetical action the Insurer Defendants might bring in another jurisdiction against ABDC and other carriers in ABDC’s 1996 to 2018 commercial general liability insurance program – could only be addressed after a court rules that the Insurer Defendants owe coverage to ABDC for those underlying prescription opioid liability lawsuits. That is the question the Supreme Court of Appeals determined that this Court is entitled to decide in the first instance, and those suits are, therefore, properly within the scope of this Court’s Injunction.

- (ii) All of the standard form policies sold to ABDC between 1996 and 2018, including those at issue in this action and those at issue in St. Paul’s California Coverage Action, are materially identical.

[169] That not only are St. Paul’s contribution claims derivative of the threshold issues before this Court, but the policies St. Paul placed at issue in the California Coverage Action contain identical coverage grants and exclusions to the sixteen policies at issue in Phase 1 of

this action. Further, the policies St. Paul placed at issue in the California Coverage Action are directly at issue in Phase 2 of this action.

[170] That the question of insurance coverage for prescription opioid liabilities under those policies is not unrelated to the resolution of that same question under the other policies issued by the Insurer Defendants in this case.

[171] That the primary policies St. Paul and ACE sold to ABDC, which are at issue in this litigation, are standard form policies. Standard form policies are designed to be used by many different insurers and have identical or materially identical provisions, regardless of the insurer selling the policy. *See e.g.*, Masters, Stanzler, and Anderson, *Insurance Coverage Litigation* § 1.02 (explaining the standardization of general liability insurance policies); Second Report of Discovery Commissioner, at 11-12 (“It is also important to note and recognize that CGL policies are in large part standard ISO policies with common language and definitions for terms such as ‘bodily injury’ and ‘occurrence.’”).

[172] That as this Court correctly found, and the Supreme Court of Appeals did not disturb on appeal, “from 1995 to 2018, St. Paul and ACE were the only insurers that issued primary layer insurance to ABC (from 2001 to 2018) or Bergen Brunswig Corporation (from 1995 to 2001)” and “[d]uring that period the St. Paul and ACE policies’ insuring agreements ***were identical in all material respects.***” Doc. ID 1497-1 Injunction Order ¶¶ 68, 71 (emphasis added).

[173] That this Court has had the opportunity to review the supplemental record of insurance policies – which includes the relevant insurance policies for all of the St. Paul and ACE primary policies and all policies excess of those policies – making up the full universe of insurance policies at issue in this action and the California Action.

[174] That based on this Court’s review of the record, contrary to St. Paul’s representations to both this Court and the Supreme Court of Appeals, the overwhelming majority of the policies at issue were issued to ABC in Pennsylvania, just as the policies at issue in this suit.

[175] That the applicable coverage provisions from the St. Paul and ACE primary policies are already before this Court because the policies St. Paul and ACE issued to ABDC (from 2001 to 2018), and Bergen Brunswig Corporation (from 1996 to 2001) contain materially identical terms and conditions. *See supra* ¶¶ 88-109. The Court notes that Insurer Defendants did not dispute this conclusion during the April 29, 2022 hearing.

[176] That with respect to ACE, the Court finds that the ACE primary layer policies were issued on standard forms, that had the same terms and conditions across the entire period, as reflected below:

<p align="center">2011-2018 ACE Insuring Agreement (included in West Virginia Action and California Action)</p>	<p align="center">2007-2011 ACE Insuring Agreement (included in West Virginia Action and California Action)</p>
<p>II. INSURING AGREEMENT</p> <p>B. We will pay on behalf of the “insured” those sums in excess of the “retained limit” that the “insured” becomes legally obligated to pay as damages for “bodily injury,” . . . to which this insurance applies.</p> <p align="center">* * *</p> <p>E. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury.”</p> <p align="center">* * *</p> <p>V. DEFINITIONS</p> <p align="center">* * *</p> <p>D. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.</p>	<p>2. INSURING AGREEMENT</p> <p>b. We will pay the insured for the “ultimate net loss” in excess of the “retained limit” shown in the Declarations that the insured becomes legally obligated to pay as damages for “bodily injury” . . . to which this insurance applies.</p> <p align="center">* * *</p> <p>f. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury.”</p> <p align="center">* * *</p> <p>V. DEFINITIONS</p> <p align="center">* * *</p> <p>4. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.</p>

2011-2018 ACE Insuring Agreement (included in West Virginia Action and California Action)	2007-2011 ACE Insuring Agreement (included in West Virginia Action and California Action)
<p>“Bodily injury” includes mental anguish or mental injury resulting from bodily injury.</p>	

See Appendix D, 6-9.

[177] That because the identical ACE policies (or policy forms) are at issue in both this case and St. Paul’s California Coverage Action, the Court finds that the ACE policies are exactly the same in both actions. *See id.*

[178] That with respect to St. Paul, the Court finds that between 1995 and 2007, St. Paul issued coverage on standard policy forms that were materially indistinguishable (or word-for-word identical) in each year, including having the same policy number for every year between 1995 and 2007, as reflected in the chart below:

<p align="center">2002-2007 St. Paul Insuring Agreement (included in West Virginia Action and California Action)</p>	<p align="center">1995-2002 St. Paul Insuring Agreement (included in California Action)</p>
<p><u>What This Agreement Covers</u></p> <p>Bodily injury and property damage liability. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:</p> <ul style="list-style-type: none"> • happens while this agreement is in effect; and • is caused by an event. <p><i>Protected person</i> means any person or organization that qualifies as a protected person under the Who Is Protected Under This Agreement section.</p> <p><i>Bodily Injury</i> means any physical harm, including sickness or disease, to the physical health of other persons.</p> <p>We'll consider any of the following that happens at any time to be part of such physical harm, sickness, or disease, if it results in or from such physical harm, sickness, or disease:</p> <ul style="list-style-type: none"> • Mental anguish, injury, or illness. • Emotional distress. • Care, loss of services, or death. 	<p><u>What This Agreement Covers</u></p> <p>Bodily injury and property damage liability. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury, property damage, or premises damage that:</p> <ul style="list-style-type: none"> • happens while this agreement is in effect; and • is caused by an event. <p><i>Protected person</i> means any person or organization who qualifies as a protected person under the Who Is Protected Under This Agreement section.</p> <p><i>Bodily Injury</i> means any physical harm, including sickness or disease, to the physical health of other persons. It includes any of the following that results at any time from such physical harm, sickness, or disease:</p> <ul style="list-style-type: none"> • Mental anguish, injury, or illness. • Emotional distress. • Care, loss of services, or death.

See Appendix D, 1-5.

[179] That the Court finds that the St. Paul policies (or policy forms) in the California Coverage Action are either already in this case or identical in all material respects. *See id.*

[180] That this Court's existing and forthcoming findings as to the applicability of the St. Paul and ACE primary policy language to prescription opioid liability lawsuits will govern all of the St. Paul and ACE policies at issue in the California action because the policy language is materially identical. The California court recognized this fact when it issued the California Stay Order, and so too does this Court.

[181] Further, the excess insurance policies placed at issue in the California Coverage Action are “follow form” policies that provide coverage subject to the same terms and conditions as the primary policies. *See supra* ¶¶ 113-115.

[182] Accordingly, the exact same policy forms and language are at issue in this action and the California Coverage Action. Any interpretation of ABDC’s policies or primary policy language by the California court – or any other court Insurer Defendants might seek to file a collateral coverage action in – presents the threat of inconsistent rulings identified by this Court and acknowledged by the Supreme Court of Appeals and the California Superior Court. *See Op.* at 22; Injunction Order ¶ 135 (describing “St. Paul’s pursuit of contradictory rulings from a California court”); California Stay Order, at 4 (“It is therefore in the interests of comity and the conservation of judicial resources to avoid potential conflicting rulings and allow the earlier-filed case to proceed first, eliminating the risk of multiple and inconsistent judgments in different cases.”). This is especially so as all of the Insurer Defendants’ policies – not just the sixteen at issue in Phase 1 – are directly at issue in Phase 2 of this case.

[183] That an Injunction encompassing all policies issued by the Insurer Defendants to ABDC or its predecessors or affiliates on the same or substantially similar terms is, therefore, consistent with the needs of this nationwide litigation. It permits this Court, which has already ruled on certain threshold coverage legal issues, to address these issues and render a ruling without the threat of conflicting rulings or interference from later-filed cases or courts in other states.

[184] That this Court already applied the same logic in ordering the phased approach to this coverage action, and the National Opioid MDL court took the same approach in naming bellwether cases rather than attempting to resolve multiple cases simultaneously.

[185] That it is unnecessary, inefficient, and duplicative to permit parallel suits to proceed concurrently, risking inconsistent rulings and undermining the jurisdiction of West Virginia courts. This Court’s conclusion is further supported by the fact that the California court reached essentially the same conclusion in issuing the California Stay Order.

M. **Additional Findings and Modifications to the Injunction Addressing Question 2 Presented by the Supreme Court of Appeals.**

[186] That the Supreme Court of Appeals also expressed concern that the Injunction “prevent[ed] any litigation activity between the parties,” and thus “effectively precluded the parties from pursuing some agreed-upon resolution of the California action, or a resolution from the California court such as a stay or dismissal.” Op. at 24.

[187] That this Court agrees that an Injunction should not impede the parties from reaching an agreed-upon resolution of their disputes. For the avoidance of doubt, the Court will amend the Injunction to clarify that it does not prevent any party from settling any claim in any other forum or voluntarily dismissing their own claim in any forum or otherwise attempting to reach a compromise resolution of these disputes.

[188] That the Court further notes that these concerns are largely moot given the current litigation posture of the California Coverage Action.

[189] That the California court itself issued a Stay Order preventing those claims from proceeding in California “pending resolution of the West Virginia action.” California Stay Order at 4. The California Stay Order prevents *all* parties to the California action from litigating St. Paul’s complaint.

[190] That the California court held in its Stay Order that it was “in the interests of comity and the conservation of judicial resources to avoid potential conflicting rulings and

allow the earlier-filed case to proceed first, eliminating the risk of multiple inconsistent judgments in different cases.” Doc. Id 2564-17, Ex. O, California Stay Order.

[191] Further, the handful of insurers in the California Coverage Action who had filed cross-complaints have since abandoned their claims. As of the time of the issuance of this Injunction, all cross-complainants in the California Coverage Action have filed motions to voluntarily dismiss their cross-complaints against ABDC. *See* Doc. ID 2564-2, Horrigan Affidavit ¶ 5.

[192] That no party can suffer harm as a result of this Injunction because no party to this dispute is litigating the substance of any claims against any of the parties to this suit.

N. Further Findings Supporting the Issuance of an Injunction.

- (i) The Insurer Defendants’ intent to file even more collateral lawsuits in other jurisdictions necessitates issuance of an Injunction to protect the compelling state interests identified by the Supreme Court of Appeals.

[193] That this Court concludes that, notwithstanding that the California Coverage Action is not currently proceeding, an Injunction remains necessary to prevent the Insurer Defendants from instituting new collateral actions in other jurisdictions.

[194] That St. Paul has admitted its intent to pursue other claims in other jurisdictions if the Injunction is lifted or narrowed. *See* Doc. ID 1584-1, St. Paul Reply in Support of Motion to Stay Enforcement of Injunction, at 5.

[195] That this Court concludes that the threat that Insurer Defendants will initiate new collateral coverage actions in one or more jurisdictions necessitates the entry of the Injunction to preserve this Court’s jurisdiction over the issues in this case and ensure that the overall resolution of this case is not delayed or impeded by the issuance of contradictory rulings from other courts.

[196] That this Court acknowledges that various insurers who had filed crossclaims against ABDC in St. Paul's California Coverage Action have now initiated claims against ABDC in the State of Delaware. Doc. ID 2564-20, Hope Affidavit ¶ 18.

[197] That the Supreme Court of Appeals already concluded that injunctive relief is appropriate to prevent the filing of collateral suits for improper purposes, specifically here to include St. Paul's attempt at forum shopping and disruption of the orderly resolution of this dispute by the courts of West Virginia.

[198] That this Court concludes that if the Injunction is lifted or narrowed, the jurisdiction of this Court would be imperiled by still more forum shopping by the Insurer Defendants, which would undermine the State of West Virginia's "compelling" interest in the resolution of this suit.

(ii) The Injunction Does Not Prejudice the Insurer Defendants.

[199] That the Court further holds that the Insurer Defendants will not suffer any prejudice from the Injunction.

[200] That the Court's finding is reinforced by the recent oral argument St. Paul made to the California Court of Appeal during argument regarding St. Paul's appeal of the California Stay Order, where St. Paul conceded that because it (along with all the other insurers) denied ABDC's claim and have refused to pay any funds toward those claim, it will suffer no real, tangible prejudice by not being permitted to litigate in California:

Justice Goethals: How are you prejudiced if we wait here in California to see what happens in West Virginia for a year or two?

How are you prejudiced?

St. Paul/Travelers: Because the ABDC defendants in the last year have entered into billions, billions with an "s" dollars of settlements.

Justice Goethals: Right. And you've denied coverage, and you've denied a defense. You've got the money still. You haven't paid anybody anything, right? You're still making money off of that money.

St. Paul/Travelers: You – you – you want to know as an insurer what do you owe, if anything, when do you owe it. But I want to – I want to talk about a case for a second, and it's – and it's one where –

Justice Goethals: So just answer the question before you go on.

St. Paul/Travelers: Okay.

Justice Goethals: That's the prejudice that you want to know who you owe what to and when you owe it? That's the prejudice?

St. Paul/Travelers: Yeah. I think that's – I think that's major prejudice.

See Doc. ID 2614-2 at Ex. 30, Cal Ct. App. Hr'g Tr. 20:22-22:2 (emphasis added).

[201] That if the Insurer Defendants are interested in “know[ing] as an insurer what do you owe, if anything, [and] when do you owe it,” the best way to quickly achieve that outcome is to focus on moving this Phase 1 bellwether coverage action efficiently to trial as soon as possible.

[202] That a decision in this West Virginia Coverage Action will make any subsequent actions to resolve outstanding questions quicker, easier, and more efficient for the parties and the courts, as the California Court of Appeal explained during questioning during the same argument cited above. *Id.* 17:22-18:5 (noting that the Judge who issued the California Stay Order was “saying I don't know what's going to happen. I'm not denying your client's due process because I'm not dismissing it. I'm just staying it. Let's learn from what happens in West Virginia and then come back and we'll see where we are, kind of analogizing to the bellwether situation.”).

(iii) No Bond Is Needed for this Anti-Suit Injunction, and the Insurer Defendants Already Waived Any Argument to the Contrary.

[203] That insurer Defendants, citing W. Va. R.C.P. 65(c), argue that any anti-suit injunction must be conditioned on ABDC posting bond. Doc. ID 2614-2 at 20.

[204] That the Court disagrees for three reasons.

[205] That the Supreme Court of Appeals has held that whether an injunctive bond is required pursuant to Rule 65(c) is a matter left to the discretion of the trial courts:

Despite the strict statutory requirement of an injunctive bond, for all intents and purposes the final determination of whether an injunction bond will be required of a certain party in a specific case is dependent upon the prerogative of the enjoining court. Our judicial interpretation of that standard recognizes that there will occasionally be cases in which the facts and circumstances simply do not compel the posting of an injunctive bond, *i.e.*, where “good cause” has been shown.

Kessel v. Leavitt, 204 W. Va. 95, 160 (1998).

[206] That “The purpose of an injunction bond in all cases is to protect the defendant against loss or damage by reason of the injunction in case the court finally decides that the plaintiff was not entitled to it.” *Id.*

[207] That in *Kessel*, the trial court determined that the defendant would not be harmed by the issuance of a temporary injunction, “and thus presumably concluded that if she was not harmed by the injunction’s issuance, she likewise would suffer no damages if the injunction ultimately would be found to have been improperly granted.” *Id.*

[208] That here there is no need for an injunctive bond because the Insurer Defendants cannot possibly be damaged by this temporary antisuit injunction. The antisuit injunction merely ensures that all parties get their day in court in West Virginia as soon as possible without the threat of “delay, expense and inconsistent judgments” caused by duplicative lawsuits filed in other jurisdictions. *See Op.* at 22; *see also* Doc. ID 2585-1 TRO at ¶ 6.

[209] That second, in the context of anti-suit injunctions, courts hold that “if the injunction is designed ‘to aid and preserve the court’s jurisdiction over the subject matter involved,’ security is not required.” *ProBatter Sports, LLC v. Joyner Techs., Inc.*, 463 F. Supp. 2d 949, 958 (N.D. Iowa 2006) (citing Fed. R. Civ. P. 65(c)).¹⁴

[210] That “This exception recognizes that ‘the party enjoined is the party that created any risk of damages for delay or duplication by filing the second, mirror-image suit . . . after . . . consenting to the jurisdiction of the forum in which the injunction is granted.’” *Id.* (quoting *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 n.20 (5th Cir. 1996)).

[211] That because anti-suit injunctions are “designed to aid and preserve the court’s jurisdiction over the various claims . . . no bond is required.” *Id.*

[212] That the Supreme Court of Appeals found that “St. Paul’s parallel suit in California was filed for improper purposes, namely forum shopping and the disruption of the orderly resolution of the West Virginia [Coverage Action].” Op. at 22. Accordingly, both the Supreme Court of Appeals and this Court recognized that the Injunction was needed “to prevent a threat to the court’s jurisdiction and ability to resolve the West Virginia coverage suit[.]” Op. at 22; *see also* Doc. ID 1497-1, Order Granting Injunction ¶¶ 157-64.

[213] That because the antisuit injunction is designed to protect the Court’s jurisdiction over this coverage action, ABDC is not required to post an injunctive bond.

[214] That the Supreme Court of Appeals has held that defendants can waive their right challenge the absence of an injunctive bond. *See Kessel*, 204 W. Va. at 161.

¹⁴ West Virginia state courts “often look to federal law in interpreting [West Virginia’s] rules of civil procedure, because [West Virginia’s] rules are nearly identical to the Federal Rules of Civil Procedure.” *Bowers v. Wurzburg*, 207 W. Va. 28, 42 n.6 (1999) (Davis, J., dissenting on other grounds).

[215] That the Insurer Defendants failed to request an injunctive bond until April 20, 2022 – over a year after this Court first issued the Injunction, and after the case had been heard and decided on appeal.

[216] That the Insurer Defendants did not move for the imposition of an injunctive bond at the time the original injunction was entered or otherwise object to the original injunction based on the lack of a bond injunctive bond. Nor did they challenge the original injunction before the Supreme Court of Appeals based on the absence of an injunctive bond.

[217] That by not timely raising the injunctive bond issue before either this Court or the Supreme Court of Appeals, the Insurer Defendants have waived their ability to seek an injunctive bond now. *See Kessel*, 204 W. Va. at 161-62.

ORDER

1. For the reasons set forth above, this Court hereby **GRANTS** Plaintiffs' Renewed Motion for Anti-Suit Injunction pursuant to West Virginia Code § 53-5-1 *et seq.* and Rule 65 of the West Virginia Rules of Civil Procedure. To ensure the scope of the Injunction does not sweep more broadly than necessary to accomplish the purposes identified by the Supreme Court of Appeals, this Court **MODIFIES** its original Injunction as follows:

- a. The Injunction shall be a temporary rather than permanent injunction and shall only enjoin the parties from pursuing collateral litigation while this action remains pending.

- b. The Injunction will only apply where each the following conditions are met:

- i. The collateral suit must concern insurance policies issued to ABDC or its predecessors and affiliates.

- ii. The collateral suit must concern insurance policies issued by the Insurer Defendants in this case or their predecessors and affiliates.

iii. The collateral suit must concern insurance policies that are either expressly at issue in this case, that are implicitly at issue in this case by virtue of the temporal scope of the claims asserted in the cases that make up Phase 2 of this case, which include all of defendants' policies back to at least January 1, 1996, and/or that are written on forms that are substantially similar to the forms at issue in this case, or that follow form to such insurance policies; and

iv. The collateral suit must concern insurance coverage for prescription opioid liability lawsuits of the same types that have been included in the National Opioid MDL or the West Virginia Opioid MLP.

c. The Injunction is modified to clarify that nothing in the Injunction will preclude any party from seeking a compromise resolution of any claims, whether through settlement or otherwise.

d. Finally, the Court further modifies the Injunction to confirm that the Court will hold a hearing at the conclusion of Phase 1 of this dispute, which is currently scheduled for trial on October 4, 2022, at which time the Court will hear argument on whether changed circumstances equitably require modification of the Injunction to effectuate the purposes identified by the West Virginia Supreme Court or whether further modifications in the interests of justice are required.

2. This Court is satisfied that the Injunction, as amended, is appropriately and narrowly tailored to protect West Virginia's compelling state interests in the outcome of this case.
3. All parties are hereby enjoined from instituting or prosecuting any collateral litigation or other proceeding against one another relating to insurance coverage for the prescription opioid liability lawsuits against ABC, ABDC, or any other affiliated entity subject to the limitations set forth in this Order.
4. This Injunction shall remain in effect until the conclusion of Phase 1 of this dispute, at which time the Court will hear argument on whether any changed circumstances alter the equities involved or require further modification.

The Honorable Jay M. Hoke

APPENDIX A