IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	
Plaintiff,	
vs.	**Case No. CJ-2017-816** **Judge Thad Balkman**
(1) PURDUE PHARMA L.P.; **(2) PURDUE PHARMA, INC.;** **(3) THE PURDUE FREDERICK COMPANY;** **(4) TEVA PHARMACEUTICALS USA, INC.;** **(5) CEPHALON, INC.;** **(6) JOHNSON & JOHNSON;** **(7) JANSSEN PHARMACEUTICALS, INC;** **(8) ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS;** **(9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;** **(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.;** **(11) WATSON LABORATORIES, INC.;** **(12) ACTAVIS LLC; and** **(13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,**	STATE OF OKLAHOMA } S.S. CLEVELAND COUNTY } **FILED** AUG 23 2018 In the office of the Court Clerk MARILYN WILLIAMS
Defendants.	

THE STATE'S REPLY IN SUPPORT OF EMERGENCY MOTION TO SHOW CAUSE FOR PURDUE'S INTENTIONAL DISREGARD OF TWO COURT ORDERS AND FAILURE TO PROVIDE WITNESS AS ORDERED BY THE COURT

Purdue's Response to the State's Emergency Motion is misleading. It is disingenuous. And it further proves that Purdue has very little respect for this Court and this case. But, what would one expect from a Company that pled guilty to criminal misbranding, yet kept on doing it, directly caused the worst public health crisis in United States history, siphoned the blood money off to a family who spent it on lavish lifestyles so it could avoid paying judgments, hired a new

Chairman with a history of using bankruptcy and restructuring in a Draconian manner to avoid responsibility for corporate malfeasance and is right in the middle of a scheme to move its resources and game overseas so it can profit off of the same deadly dangerous business model it can no longer operate in the United States? Purdue has gotten away with this type of conduct so long, even after its criminal pleas, that it truly believes it is above the law.

First, Purdue claims it informed the Court at the hearing it would ***"try"*** to schedule the deposition before the 30th. *See* Response at 5, 7. That is not what the Court ordered at the hearing The depositions were properly noticed to occur on the 30th. The Court ordered that all depositions noticed before the 30th were to take place on or before the 30th. The Court did not order that compliance was optional. Nor did it say that Purdue should "try" to comply. To the contrary, the order was clear. And it is clear that Purdue has no intent to comply unless it is ordered to do so.

Second, Purdue's conduct demonstrates Purdue did not "try." Purdue's Response does not deny that the State served this deposition notice on August 6. Purdue showed up to the hearing on August 10 fully aware of the schedule, and the fact that the responsive witness was identified in April. Purdue should have known the witness' schedule at the hearing and, if it did not, that is Purdue's failure to own. Purdue's Response also does not deny that it wholly ignored the State's multiple emails regarding the deposition until August 18th, when it summarily rejected the noticed date and claimed the witness would not be available for another month. At no point did Purdue "try" to schedule the deposition prior to August 30th.

Third, Purdue's claim that the witness is available on September 13th is an intentional misleading statement. Putting aside that offering a witness (1) two weeks after the Court ordered the deposition to take place and (2) only after the State filed its Motion, Purdue omitted a very important fact. The Court-appointed Special Settlement Judge has ordered all Parties to go to New

York on September 13 and 14 for mandatory, Court ordered settlement meetings. Purdue knows September 13th is not available.

And, to be clear, this was not some honest mistake where Purdue forgot about the September 13th meetings. Purdue's counsel is hosting these meetings at its New York City offices.

Fourth, Purdue's entire explanation for why the witness apparently cannot appear for the deposition on the 30th (having had 24 days' notice) is a red herring. Purdue claims the witness has a pre-planned vacation that does not start until the 31st. The 30th is not the 31st. The witness can appear for the deposition on the 30th, be done and go on her vacation. **Or, the State is ready and willing to take this deposition on the 29th, which would give the witness an entire extra day to travel and prepare for her trip.** There are several options that would accommodate the witness's travel plans ***and still comply with the Court's Order***. Purdue offers none of those because they do not fit its delay strategy. And, of course, Purdue and its high-level employees never asked the State, or any of Purdue's thousands of victims if it was convenient for them if Purdue got them hooked on drugs that would destroy their lives, families, and businesses. To be sure, there are thousands of families in Oklahoma who will never get to go on a day-long, much less week-long vacation because of what Purdue has done.

Fifth, Purdue downplays its "proposal" to try to force this Court to play second fiddle to the MDL. Response at 3. This is particularly disingenuous in light of Purdue's recent failed removal effort. Coordinating with the MDL is not required, not efficient, not just, and not feasible. This Court is not in charge of the MDL. This Court is not presiding over irrelevant city and county and class action cases. This Court is presiding over this case. And it is moving at a deliberate pace. While this Court has decided motions to dismiss, the MDL court is still resolving motions

to dismiss and, even so, only in a few bellwether cases. While this Court has determined that the case will proceed to trial in May, the MDL court recently extended the schedule related to its "Track One" cases and most depositions will not even begin until October 25. *See* Exhibit A. When they do eventually proceed, they are subject to a cumbersome and inapplicable deposition protocol, which the MDL court acknowledges has no application to this action. *See* Exhibit B at 4 ("Nothing in this Order applies to or limits in any way or sets requirements within any attorney general investigation or attorney general action pending in state court."). Even the MDL Court has acknowledged the inefficiencies and problems with over-lawyering and over-papering issues in the MDL. *See* Exhibit C at 5-6. While this Court is moving discovery with a deliberate pace, the MDL court has not even been able to get a deposition to take place. While this Court is presiding over a case with three corporate families and one State, the MDL court is presiding over a case with dozens and dozens of defendants and hundreds and hundreds of plaintiffs, with thousands of lawyers with disparate interests. And, while this Court is in Cleveland County, the MDL court is in Cleveland, Ohio.

There is no reason or basis for subjecting the State to that process. Nor is the any jurisdiction that would allow the Court to subject the State to that process. Judge Miles-LaGrange's Remand Order made that clear.

Sixth, Purdue seeks to justify its delay in producing a witness as ordered by pointing to "[t]wo depositions of former Purdue employees" that are taking place this week. Response at 3, 9. This is, again, misleading and disingenuous. ***Purdue does not represent these witnesses and was not involved in scheduling their depositions.*** They are non-parties to whom the State issued subpoenas and they are represented by separate counsel. That is not compliance by Purdue.

This is simple. The Court ordered these depositions to proceed. The only way a deposition

proceeds is upon a proper notice. There is no dispute that the State properly served the notice. The Court has not quashed the notice, nor has Purdue requested it do so. The Court has not granted a protective order, nor has Purdue requested it do so. Thus, the deposition proceeds as noticed. Surely Purdue does not contend that it can comply with a deposition notice by showing up whenever it feels like it. That is why sanctions exist for not appearing at a deposition at the noticed time, or, in this situation, at the ordered time.

Purdue's protestations and cries to avoid sanctions are too little, too late. The Court should order Purdue to appear for this deposition on the 30th. Alternatively, the Court should order the deposition to occur on the 29th. And, the Court should strike Purdue's defenses for its discovery abuses.

Dated: August 23, 2018.

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	**CASE NO. 1:17-MD-2804**
	)	**JUDGE POLSTER**
	)	**CASE MANAGEMENT ORDER NO. 7 SETTING NEW DEADLINES FOR TRACK ONE CASES**

This Court earlier set case management deadlines in connection with the "Track One Cases." *See* CMO-1 at 6-8 (docket no. 232). The parties unanimously requested extension of those deadlines and submitted various proposed schedules. Having reviewed those proposals, the Court now enters the following amended case management schedule.

August 31, 2018 – The parties shall exchange lists of initial fact witness depositions. If the parties agree, depositions may proceed immediately. As much as possible, however, depositions shall be taken of witnesses only after relevant documents have been produced. Thus, the majority of depositions shall occur between October 25, 2018 and January 25, 2019.

October 25, 2018 – For all parties *except* retail pharmacy defendants: (1) production of documents shall be substantially complete; and (2) traditional 30(b)(6) depositions shall be substantially complete (i.e., 30(b)(6) depositions concerning discovery-related issues, such as types and location of documents and databases).

November 9, 2018 – For retail pharmacy defendants: (1) production of documents shall be substantially complete; and (2) traditional 30(b)(6) depositions shall be substantially complete (i.e.,

30(b)(6) depositions concerning discovery-related issues, such as types and location of documents and databases).

January 25, 2019 – all 30(b)(6) and fact depositions shall be completed.

February 8, 2019 – Plaintiffs shall serve expert reports and, for each expert, provide two proposed deposition dates between **February 18 and March 15, 2019**.

March 26, 2019 – Defendants shall serve expert reports and, for each expert, provide two proposed deposition dates between **April 8 and May 3, 2019**.

May 13, 2019, 4:00 p.m. – Deadline for *Daubert* and dispositive motions.

June 10, 2019, 4:00 p.m. – Deadline for responses to *Daubert* and dispositive motions.

July 1, 2019, 4:00 p.m. – Deadline for replies in support of *Daubert* and dispositive motions.

July 16, 2019 – Hearings on *Daubert* and dispositive motions, or as otherwise set by the Court, if necessary.

August 22, 2019, 12:00 noon – Final Pretrial Hearing.

September 3, 2019 – Trial.

In a separate order, the Court will set deadlines for motions in limine, deposition designations, jury instructions, jury questionnaire, and other pretrial submissions.

IT IS SO ORDERED.

/s/ Dan Aaron Polster
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

Dated: August 13, 2018

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION ***APPLIES TO ALL CASES***	**Case No. 1:17-MD-2804** **Hon. Dan A. Polster**

ORDER ESTABLISHING DEPOSITION PROTOCOL

This Order shall govern the conduct of depositions in all of the following cases: (1) those actions transferred to this Court by the Judicial Panel on Multidistrict Litigation ("JPML") pursuant to its order entered on December 5, 2017, (2) any tag-along actions transferred to this Court by the JPML pursuant to Rules 7.1 and 7.2 of the Rules of Procedure of the Panel, after the filing of the final transfer order by the Clerk of the Court, and (3) all related actions originally filed in this Court or transferred or removed to this Court and assigned thereto as part of *In re: National Prescription Litigation*, MDL No. 2804 ("MDL 2804"). These cases will be referred to as the "MDL Proceedings."

I. General Provisions

a. Noticing Depositions

1. *Notice of Deposition Procedures.* All deposition notices shall comply with the requirements of Federal Rule of Civil Procedure 30(b). If a deposition is cross-noticed, the notice shall comply with the rules of the relevant jurisdiction. A party that cross-notices a deposition in one or more cases outside the MDL Proceedings is responsible for service of both the original notice and cross-notice on all parties entitled to receive such notice, both in this MDL and the other action(s). All depositions noticed or properly cross noticed in this MDL are subject to this deposition protocol. All deposition notices shall be served to email addresses

provided by the parties.

2. *Third-Party Depositions.* All third-party subpoenas seeking deposition testimony shall comply with Federal Rule of Civil Procedure 45. A copy of this Protocol shall be attached to each third-party subpoena issued or served in the MDL Proceedings requesting deposition testimony. All third-party subpoenas requesting deposition testimony shall be served as provided in section I.a.1.

b. Scheduling

Absent extraordinary circumstances, counsel for the noticing party should consult in advance with counsel for the deponent in an effort to schedule depositions at mutually convenient times and locations. After counsel have agreed on a mutually acceptable date and location for a deposition, all parties shall be notified of the scheduled deposition pursuant to section I.a.1. If the parties cannot agree on a date, time, or location for the deposition after undertaking good faith efforts to reach agreement, the deposition may still be noticed, subject to appropriate motions to quash.

The noticing party shall provide a call-in number and any other information necessary to attend a deposition by phone. Once a deposition has been scheduled, except upon agreement of counsel for the noticing party and the deponent, or upon leave of the Court, it shall not be taken off the calendar, postponed, or rescheduled fewer than three (3) calendar days in advance of the date upon which the deposition has been scheduled to occur.

c. Location for Depositions

Unless the parties agree otherwise, depositions of the parties and their current or former officers and employees will take place within seventy-five (75) miles of the location where the deponent resides, is employed, or regularly transacts business in person, or, where agreed by both the noticing party and the deponent, at the offices of counsel for that party, the federal

courthouse in the witness's home federal jurisdiction, or the courthouse in the Northern District of Ohio Eastern Division. Counsel will make reasonable efforts to obtain the agreement of former employees to appear at designated locations. Unless otherwise agreed, the deposition of an expert witness will take place in the expert witness's home federal jurisdiction or, where agreed, at the offices of counsel for the party who has retained the expert witness. Federal Rule of Civil Procedure 45(c) shall govern the location of third-party depositions.

d. Cooperation

Counsel are expected to cooperate with and be courteous to each other and deponents in both scheduling and conducting depositions.

e. Attendance

1. *Who May Be Present.* Unless otherwise ordered under Federal Rule of Civil Procedure 26(c) and subject to the terms of the Protective Order entered in the MDL Proceedings, only the following individuals may attend depositions: counsel of record or attorneys and employees of their firms; attorneys specially engaged by a party for purposes of the deposition; parties or in-house attorneys of a party; court reporters; videographers; the deponent; and counsel for the deponent. An expert or non-testifying consultant for a party may attend if the party employing that expert or non-testifying consultant provides: (a) advance notice of their attendance, per section e.3; and (b) confirmation that the expert or consultant has signed attestations confirming adherence to all applicable protective orders. Any party that objects to the attendance of such expert or consultant may seek relief from the Court in advance of the deposition. Under no circumstances shall a person attend any part of a deposition in person, or by any remote means such as telephone, internet link-up, videoconference, or any other kind of remote-access communication, without being identified on the record.

2. *Unnecessary Attendance.* Unnecessary attendance by counsel is discouraged.

Counsel who have only marginal connection with a deposition or who expect their interests to be adequately represented by other counsel should not attend.

3. *Notice of Intent to Attend a Deposition.* In order for counsel to make arrangements for adequate deposition space, representatives from the Plaintiffs' group and Defendants' group shall share the number of expected attendees with each other no fewer than two (2) business days prior to the deposition, whenever feasible. Nothing in this section shall prevent a party or counsel hosting a deposition from requiring, for security purposes, the names of all attendees appearing at the deposition. If requested, this information must be provided at least two (2) business days in advance of the deposition.

f. Coordination of Depositions

1. *Coordination with State Court Proceedings.* Pursuant to CMO 1, paragraph 7, the parties to this MDL shall use their best efforts to communicate, cooperate, and coordinate with State court litigants to schedule and take depositions, including working on agreements for the cross-noticing of depositions. The Court recognizes that the State courts are independent jurisdictions; the parties to this MDL, with the assistance of the special masters, shall facilitate communication with State courts to efficiently conduct discovery. In a coordinated deposition, this Court expects counsel for plaintiffs in the MDL Proceedings and counsel for plaintiffs in the State Court Proceedings to cooperate in selecting the primary examiners described below in section II.a. Nothing in this Order applies to or limits in any way or sets requirements within any attorney general investigation or attorney general action pending in state court.

2. *Limitation on Repeated Depositions.* Depositions taken in this MDL pursuant to this Order shall not be retaken in this MDL without further order of the court upon good cause shown or an agreement of the parties. Depositions taken pursuant to an attorney general investigation or attorney general action pending in State court shall not be the subject of

this limitation. Counsel for any witness, and, in the case of former employees, for a party affiliated with that witness, shall use best efforts to minimize the necessity for the continued or further deposition of any witness by ensuring that deposing counsel have the complete production of information relevant to the witness sufficiently in advance of the deposition to permit proper and comprehensive examination of the witness on the dates scheduled. The Court may enter additional provisions regarding repeated depositions in subsequent Orders.

3. *Cross-Noticing of Depositions.* Any deposition notice pursuant to this Order in the MDL proceedings may be cross-noticed by any party in any State court in which a filed action is pending. Each cross-notice shall comply with Fed. R. Civ. P. 30(b) or applicable state rules. Nothing herein shall be deemed to waive or limit the right of a party to object to or otherwise move to quash a cross-notice on such grounds as may be appropriate under applicable law.

4. *Use of Depositions.* All depositions noticed in this MDL or appropriately cross-noticed pursuant to this Protocol are deemed noticed and taken in the MDL Proceedings, subject to appropriate evidentiary objections to the admission of deposition testimony or exhibits on summary judgment or at trial.

II. Conduct of Depositions

a. Examination

Absent extraordinary circumstances, questioning related to the MDL deposition notice or cross-notice should be conducted by no more than two MDL examiners for all MDL plaintiffs in the case of depositions noticed by plaintiffs.[2] Likewise, for depositions noticed by defendants, questioning should be conducted by no more than two attorneys for each defendant

[2] This Order does not address the permitted number of examiners by parties in State Court Proceedings. The Court expects this issue will be subject to a separate agreement involving those parties, *see* section I f.1, *Coordination with State Court Proceedings*.

group (i.e., manufacturers, pharmacies, distributors). Additional questioners may be permitted only to follow up concerning testimony that specifically addressed their client. Nothing in this protocol requires parties to waive their rights to question a witness. Counsel shall confer prior to the deposition concerning allocation of time to question a deponent. Counsel's failure to allocate time among themselves or to enforce that allocation of time among themselves during a deposition shall not constitute grounds to extend a deposition. Counsel should cooperate in the allocation of time to ensure efficiency for witnesses, and to comply with the time limits set by the Court.

1. *Sequence of Questioning.* The questioning of current or former employees of parties will be conducted in the following presumptive sequence: (1) examination by the opposing party, followed by questioning by similarly-aligned State court counsel; (2) counsel for the witness and the witness's employer; (3) questioning by other parties; (4) any reexamination by the counsel listed above. In the event that a party contends that the presumptive examination sequence should not apply to a particular deposition, the affected parties shall, upon receipt of the notice, promptly meet and confer in an attempt to resolve the matter; if the matter cannot be resolved by agreement of counsel, it shall be submitted to the Court so that the deposition can proceed without delay. Counsel designated to conduct the examinations shall coordinate with each other to conduct as thorough and non-duplicative and non-repetitive an examination as is practicable and to ensure that the needs of all examining parties are reasonably accommodated.

2. *Production of Documents by Third-Party Witnesses.* If a third-party witness subpoenaed to produce documents does not provide documents within ten (10) calendar days before the date of a scheduled deposition, the noticing party shall have the right to reschedule the deposition to allow time for inspection of the documents before the examination

commences.

3. *Copies*. Counsel conducting an examination should have at least four (4) copies of all exhibits utilized with the witness available for use by witness (1 copy), the witness's counsel (1 copy) and other counsel (2 copies).

4. *Objections to Documents*. Objections to the relevance or admissibility of documents used as deposition exhibits are not waived, and are preserved pending a later ruling by the Court or by the trial judge. All parties shall cooperate as necessary so that the Court may issue a ruling on any objection to a document prior to trial or prior to any remand of cases for trial in the transferor courts.

5. *Adherence to the Protective Order*. All parties shall adhere to all Protective Orders entered in this matter and shall take steps to ensure deponents adhere to Protective Orders as applicable. Nothing in this Protocol modifies the terms of any Protective Order entered by the Court in the MDL Proceedings.

b. Duration

Absent agreement of the Parties or a Court order allowing additional time, pursuant to the Court's Order of May 31, 2018 (docket no. 544), the time limit for fact witness depositions is seven (7) hours of examination by the MDL Plaintiff examiners (7 hours for the combined examination of both MDL Plaintiff examiners) or by the MDL Defendant examiners (7 hours for the combined examination of all MDL Defendant examiners), in each case depending on whether an MDL Plaintiff or MDL Defendant noticed the deposition.[3] If a deposition is cross-noticed in State Court Proceedings, a party may request of the party defending the deposition an

[3] This Order does not address the duration of examination permitted by attorneys in State Court Proceedings. The Court expects this issue will be subject to a separate agreement involving those parties, *see* section I.f.1, *Coordination with State Court Proceedings*.

extension of the presumptive 7-hour limit. The seven (7) hours of examination shall not include questioning by the party defending the deposition or other opposing counsel. The noticing party shall be entitled to a minute-for-minute re-cross following any examination conducted by the defending party or other opposing counsel. To the extent that the party defending the deposition or other opposing counsel conducts a further re-direct examination following the noticing party's re-cross, the noticing party shall be entitled to a minute-for-minute re-recross. To the extent the party defending the deposition or other opposing counsel anticipates that its questioning will exceed ninety (90) minutes, it will provide notice at least two (2) calendar days before the scheduled deposition.

c. *Objections and Directions Not to Answer*

Counsel shall comply with the Federal Rules of Civil Procedure and the local rules of the U.S. District Court for the Northern District of Ohio. Any objection by a Defendant at a deposition shall be deemed to have been made on behalf of all other Defendants. Any objection by a Plaintiff shall be deemed to have been made on behalf of all other Plaintiffs. All objections, except those as to form and privilege, are reserved until trial or other use of the depositions.

Counsel shall refrain from engaging in colloquy during a deposition. No speaking objections are allowed and professionalism is to be maintained by all counsel at all times. Counsel shall not make objections or statements that might suggest an answer to a witness.

d. Disputes During Depositions

Disputes between the parties shall be addressed to this Court rather than the District Court in the District in which the deposition is being conducted. However, if the dispute arises during the examination of a State Court examiner who is not a member of a PEC firm then the dispute between the parties shall be addressed to the applicable State Court.

Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to conduct a supplemental deposition, shall be presented to Special Master Cohen or, if he is unavailable, to the Court by telephone at (216) 357-7190.

In the event the Court and Special Master Cohen are unavailable by telephone to resolve disputes arising during the course of the deposition, the deposition shall nevertheless continue to be taken as to matters not in dispute. Nothing in this Order shall deny counsel the right to (1) suspend a deposition pursuant to Fed. R. Civ. P. 30(d)(3); (2) file an appropriate motion with Special Master Cohen after the deposition, and appear personally before Special Master Cohen, or (3) file a motion to prevent any decision or recommendation of Special Master Cohen from taking effect as may be otherwise permitted.

e. Video Depositions

By so indicating in its notice of a deposition, a party, at its expense, may record a deposition by videotape or digitally-recorded video pursuant to Fed. R. Civ. P. 30(b)(3) subject to the following rules:

1. *Real-Time Feed.* All video depositions will be stenographically recorded by a court reporter with real-time feed capabilities.

2. *Video Operator.* The operator(s) of the video recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

3. *Attendance.* Each witness, attorney, and other person attending the deposition shall be identified on the record at the commencement of the deposition. Under no circumstances may a person attend the deposition remotely in any manner without being

identified, pursuant to section I.e above.

4. *Standards*. Unless physically incapacitated, the deponent and examiner shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be videotaped against a solid background with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting and field of view shall be nonobtrusive to the deponent, and will be changed only as necessary to record accurately the natural body movements of the deponent. All parties may inspect the image to be recorded, including the framing of the witness as it will appear on camera. Exhibits or demonstrative aids used in the examination may be video recorded by separate video recording equipment at the expense of the party wishing to do so. Any demonstrative aids used in the examination will be marked as exhibits for future determination by the Court as to whether inclusion on screen is appropriate._Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent.

5. *Filing*. The video operator(s) shall preserve custody of the original video medium (tape or DVD) in its original condition until further order of the Court.

6. *Interruptions*. No attorney or party shall direct instructions to the video operator as to the method of operating the equipment. The video camera operation will be suspended during the deposition only upon stipulation by counsel.

7. *Other Recording*. No one shall use any form of recording device to record the deposition during the course of a deposition other than the designated videographer or court reporter. This shall include recording using any form of remote transmitting device, computer recording device, laptops, camera, and personal device, including smart phones, tablets, iPads, Androids, iPhones, Blackberries, or other PDAs. Any person who violates this provision shall

be immediately identified and reported to the Court for the possible imposition of sanctions. Nothing in this provision prevents or limits the taking of notes by those identified on the record.

8. *Stenographic Record*: A written transcript by the Court reporter shall constitute the official record of the deposition for purposes of Federal Rules of Civil Procedure 30(e) and 30(f).

f. Correction and Signing of Depositions

Unless waived by the deponent, the transcript of a deposition shall be submitted to the deponent for correction and signature within thirty calendar days after the end of the deposition. The deposition may be signed by the deponent before any notary within thirty calendar days after the transcript is submitted to the deponent. If no corrections are made during this time, the transcript will be presumed accurate.

g. Cost of Deposition

The noticing party shall bear the initial expense of both videotaping and stenographic recording. The parties shall pay for their own copies of transcripts and videotapes of depositions.

III. Limits on Fact Witness Depositions in Track One Cases

Plaintiffs may take up to 420 depositions. Plaintiffs may decide how they want to allocate those depositions among the Defendant Families.

Defendants may take 120 depositions. That is 40 per Defendant Group (i.e., manufacturers, distributors, and retail pharmacies). The Defendants can allocate the 120 depositions any way they want among themselves. If defendants cannot agree, each Defendant Group will be allotted 40 depositions. Defendants may allocate the 120 depositions any way they wish among the plaintiffs.

The time limit for depositions is seven (7) hours. If any deposition exceeds seven (7) hours, the aggregate number will reduce pro rata. For example, if a deposition takes 14 hours, that counts as two depositions.

The foregoing limitations do not apply to the depositions of third-parties or place a limit on the number of depositions the parties may take of third-parties. Nothing in this provision shall limit the parties from seeking agreement for a party to notice and take additional depositions in excess of the above limits or seeking leave of Court to notice and take additional depositions.

IV. Rule 30(b)(6) Depositions

1. *Combination Fact and Rule 30(b)(6) Depositions.* A party who elects to produce a witness pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and also as a fact witness shall provide written notice of that intention, within ten (10) calendar days of service of the Notice of 30(b)(6) Deposition, identifying the topic or topics on which the witness will be designated for purposes of the portion of the deposition covered by Rule 30(b)(6). Where the parties cannot agree on a single deposition of a deponent who is both a corporate designee and a fact witness, the dispute shall be submitted promptly to Special Master Cohen for resolution in advance of the scheduled deposition.

2. Each side (plaintiff and defense) may serve no more than two 30(b)(6) deposition notices to any party, and must do so by July 1, 2018. If a party designates one individual across both notices, a seven (7) hour time limit is imposed. If a party designates two or more individuals across both notices, a fourteen (14) hour time limit is imposed. There shall be no more than fifty (50) topics noticed. The parties are encouraged to state each subject matter with particularity to ensure fair notice and ensure responsive answers. Participation by non-MDL

parties shall not diminish the limitations set forth above, but such participation may be the subject of further limitations set by the Special Masters. Nor shall 30(b)(6) depositions count towards any limitation on the number of party deponent fact witness depositions set forth earlier in the Court's Order Regarding Deposition Protocol (docket no. 544). Nothing herein shall prohibit either side from seeking leave for additional 30(b)(6) deposition notices, extended time, and/or expanded subject matters for good cause shown.

V. Federal Rules of Civil Procedure Applicable

Unless specifically modified herein, nothing in this order shall be construed to abrogate the Federal Rules of Civil Procedure or the Local Rules of this Court.

IT IS SO ORDERED.

/s/ Dan Aaron Polster
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

Dated: June 20, 2018

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	**MDL No. 2804**
	)	**Case No. 1:17 MD 2804**
THIS DOCUMENT RELATES TO:	)	**Judge Dan Aaron Polster**
West Boca Medical Center, Inc. v. AmerisourceBergen Drug Corp., et al., Case No. 1:18-op-45330	)	

Before the Court are the following two motions:

1. Mississippi Hospital Association's ("MHA") Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff West Boca Medical Center, Inc.'s Opposition to Defendants' Motion to Dismiss, **Doc #: 847**, ("MHA's Motion"); and

2. Motion of 44 Hospital Amici for Leave to File an Amicus Curiae Brief in Support of Plaintiff West Boca Medical Center, Inc.'s Opposition to Defendants' Motion to Dismiss **Doc #: 848** ("44 Hospitals' Motion").

The Court has reviewed these Motions and the Distributors' Opposition to the Motions (Doc #: 852), and **DENIES** the Motions for the following reasons.

I.

Plaintiffs in this Multidistrict Litigation ("MDL") are a combination of government entities, Indian tribes, hospitals, third-party payors and individuals from across the nation who have sued the manufacturers, distributors and retailers of prescription opiate drugs, alleging they are liable for the costs Plaintiffs have incurred, and will continue to incur, in addressing the opioid public health crisis. There are now over 1100 cases in this MDL – 64 of which were filed

by hospitals and third-party payors. In order to achieve the Court's goal of settling the cases in this MDL, it directed the various groups of parties to identify negotiating teams to discuss settlement. *See, e.g.,* Doc ##: 124, 186, 228. Later, the Court noted that the parties were making progress in pursuing settlement discussions, but that defendants believed settlement would be more likely if the Court created a ligitation track with the ability of defendants to tee up some threshold legal issues on common claims. Thus, the Court issued Case Management Order No. 1 which, among other things, identified bellwether cases for dispositive motions and trial. Doc #: 232. Therein, the Court directed the Hospital Representative of the Plaintiffs' Executive Committee to identify a single MDL case filed by a hospital, the claims of which were governed by the laws of either Ohio, Illinois, West Virginia, Michigan or Florida. *Id.* at 2-3. Attorney Don Barrett, the Hospital Representative of the PEC, chose this case. Doc #: 384. On May 22, 2018, the Court issued Case Management Order No. 4 which set forth deadlines and page limitations (totalling 1040 pages) for briefing defendants' anticipated motions to dismiss. Doc #: 485.

On June 29, 2018, the Defendants filed their motions to dismiss. Doc #: 27, Main Case Doc #: 684 (Distributor Defendants), Doc #: 28, Main Case Doc #: 686 (Pharmacy Defendants), Doc #: 32, Main Case Doc #: 691 (Manufacturer Defendants). On July 27, 2018, West Boca filed its opposition to the motions. Doc #: 806. One week later, the putative Amici filed the pending Motions, asking for leave to file amicus curiae briefs in support of West Boca's opposition to the defendants' motions to dismiss.

In its motion, the MHA states that it "is a trade association of hospitals and healthcare providers in the State of Mississippi that are dedicated to effectively serving the health care needs of Mississippi." Doc #: 847 at 1. Further, the MHA "can speak to the impact of the

[opioid] crisis on MHA's hospital members, which are similarly situated to Plaintiff West Boca Medical Center . . . and thereby provide the Court with additional perspective on hospital claims in this litigation." *Id.* Finally, the MHA "seeks to supplement and support the arguments of West Boca with particular focus on Defendants' arguments regarding the ability of hospitals to prove *proximate cause and damages*." *Id.* at 2 (emphasis added).

In its motion, 44 Hospitals state that they are urban and rural hospitals located throughout the United States. Doc #: 848 at 1. Although they are not represented in this MDL, they "have unique information and perspective to offer the Court in deciding *whether and how to apply the tobacco-litigation case law relied upon by the defendants in their motion to dismiss*." *Id.* at 1-2 (emphasis added). They expect to show how the exclusion of the medical community from the tobacco litigation resulted in a fundamental failure of the recoveries in those cases from ever actually reaching those on the frontlines of tobacco healthcare treatment and prevention." *Id.* at 2.

II.

In *United States v. State of Michigan*, 940 F.2d 143 (6th Cir. 1991) ("*Michigan*"), the Sixth Circuit addressed amicus briefs. The Sixth Circuit explained that, "[h]istorically, 'amicus curiae' was defined as one who interposes 'in a judicial proceeding to assist the court by giving information, or otherwise, or who conduct[s] an investigation or other proceeding on request or appointment therefor by the court.'" *Id.*, 940 F.2d at 164 (citing 4 AM. Jur.2d Am. Cur. §1, at 109 (1962)). "Its purpose was to provide *impartial* information on matters of law about which there was doubt, especially in matters of public interest." *Id.* (citations omitted). "The orthodox view of amicus curiae was, and is, that of an *impartial* friend of the court – *not an adversary party in interest in the litigation*." *Id.* at 164-65. "Classical participation as an amicus to brief

and argue as a friend of the court was, and continues to be, a privilege within the sound discretion of the courts, . . ., depending upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice. . . ." *Id.* at 165 (inner quotation marks and citations omitted).

In *Ryan v. Commodity Future Trading Comm'n*, then-Seventh Circuit Chief Judge Posner expounded upon the subject of amicus briefs discussed in *Michigan*. 125 F.3d 1062 (7th Cir. 1997). There, Judge Posner discussed the tendency of many judges to grant motions for leave to file amicus curiae briefs "without careful consideration of 'the reasons why a brief of an amicus curiae is desirable.'" *Id.* at 1063 (quoting Fed. R. App. P. 29, Notes of Advisory Committee on 1998 Amendments, Note to Subdivision (b)). Judge Posner explained,

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term "amicus curiae" means friend of the court, not friend of a party. *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991). We are beyond the original meaning now; an adversary role of an amicus curiae has become accepted. *Id.* at 165. But there are, or at least there should be, limits. *Cf. New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. *See, e.g., Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203 (9th Cir. 1982) (per curiam). Otherwise, leave to file an amicus curiae brief should be denied. *Northern Securities Co. v. United States*, 191 U.S. 555, 556, 24 S.Ct. 119, 119, 48 L.Ed. 299 (1903) (Chief Justice Fuller, in chambers); *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644 (3d Cir. 1983) (per curiam); *Rucker v Great Scott Supermarkets*, 528 F.2d 393 n.2 (6th Cir. 1976); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970); *United States v. Gotti*, 755 F.Supp. 1157 (.E.D.N.Y. 1991); *Fluor Corp. v. United States*, 35 Fed. Cl. 284 (1996).

Id.

III.

The Court has reviewed West Boca's memorandum opposing the defendants' motions to dismiss. West Boca's brief covers the issues MHA desires to supplement and support in its amicus brief, i.e., proximate cause and damages. West Boca's brief devotes an entire section to the issue 44 Hospitals desires to elucidate in its amicus brief, i.e., whether and how to apply the tobacco-litigation case law relied upon by the defendants in their motions to dismiss. In short, the putative Amici seek permission to file amicus briefs that essentially duplicate West Boca's arguments. Other court have denied permission to file amicus briefs for this reason alone. *See, e.g., Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544 (2003); *Yates v. Ortho-McNeil Pharmaceutical Inc.*, 76 F.Supp.3d 680, 690-91 (N.D. Ohio 2015).

Moreover, the putative Amici are not impartial since they are similarly situated to West Boca and seek to assist West Boca in its arguments. But there is no suggestion, let alone indication, that West Boca's representation, experienced MDL counsel, are incompetent to address the task.

There are good policy reasons for a court to give very careful consideration to the prospect of allowing amicus briefs. Judges have heavy caseloads and need to minimize extraneous reading. *Voices for Choices*, 339 F.3d at 544. Amicus briefs may be used to make an end run around court-imposed limitations on the length of parties' briefs. *Id.* And the time and resources used to draft, file and respond to amicus briefs drive up the cost of litigation. *Id.*

Based on the case law and policy considerations, the Court exercises its discretion to deny leave to file the Amici Motions. The putative Amici are partial movants who seek to supplement and support West Boca's arguments. There are over 1100 cases pending in this MDL filed by hundreds of attorneys, most of whom would probably like to chime in on

dispositive motions in other cases as well. The parties in this case are allotted a total of 1040 pages to brief just these three motions to dismiss. It is the Court's responsibility to streamline the issues in this MDL, and to conserve the parties' litigation costs and the Court's resources. Allowing more briefs that duplicate a parties' arguments would needlessly overtax the Court's current workload and the resources of the parties and the movants.

IV.

Accordingly, the Court **DENIES** the Amici Motions (**Doc ##: 847, 848.**)

IT IS SO ORDERED.

/s/ Dan A. Polster August 16, 2018
Dan Aaron Polster
United States District Judge