# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

THE CITY OF HUNTINGTON,

Plaintiff,

v.

Civil Action No. 3:17-01362 Hon. David A. Faber

AMERISOURCEBERGEN DRUG CORPORATION, et al.,

Defendants.

CABELL COUNTY COMMISSION,

Plaintiff,

v.

AMERISOURCEBERGEN DRUG CORPORATION, et al.,

Defendants.

Civil Action No. 3:17-01665 Hon. David A. Faber

## DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR A TRIAL CONTINUANCE DUE TO THE COVID-19 PANDEMIC

This afternoon, shortly after Defendants filed their motion for a continuance due to Covid-19 (Dkt. 1071), Judge Polster postponed indefinitely the Track One-B opioid trial that was set to begin November 9, "[d]ue to the ongoing COVID-19 pandemic and the General Orders of the Court." He instead will proceed with the previously scheduled May 2021 Track 3 trial against

<sup>&</sup>lt;sup>1</sup> See In Re: National Prescription Opiate Litigation, Case No. 1:17-md-2804 (N.D. Ohio Oct. 5, 2020) (minute order). The Northern District of Ohio has entered a general order, to which Judge Polster referred, precluding jury trials of longer than a week without the parties' consent, and the Track One-B defendants did not consent to a lengthy trial during the pandemic.

the same national-pharmacy defendants who were involved in the now-postponed November trial.

No other federal opioid trial is yet scheduled. Notably, the trial that Judge Polster postponed was

to be held in Cuyahoga County, Ohio, where the average daily rate of new Covid cases is

approximately one-fourth that in Kanawha County and has not risen above 6 per 100,000 residents

(firmly in the yellow category) since September 8.<sup>2</sup>

Defendants also note that the federal Centers for Disease Control and Prevention today

issued updated guidance regarding indoor airborne spread of Covid. According to the new

guidance, "Some infections can be spread by exposure to virus in small droplets and particles that

can linger in the air for minutes to hours. These viruses may be able to infect people who are

further than 6 feet away from the person who is infected or after that person has left the space."3

This new CDC statement underscores the danger of a trial whose participants would be required

to spend many hours each day together in the same indoor space—in a high-risk county—for

weeks on end.

Dated: October 5, 2020

See In Re: Coronavirus (Covid-19) Phased-In Recovery Plan, Order No. 2020-08-2 (N.D. Ohio Aug. 25, 2020).

<sup>&</sup>lt;sup>2</sup> See Harvard Global Health Institute, Risk Levels Downloadable Data (Microsoft Excel spreadsheet), https://globalepidemics.org/key-metrics-for-covid-suppression (last accessed Oct. 5, 2020).

Centers for Disease Control & Prevention, How COVID-19 Spreads, last updated Oct. 5, 2020, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covidspreads.html (emphases added).

#### Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that on this 5th day of October, 2020, the foregoing *Defendants' Supplemental Memorandum in Support of Motion for a Trial Continuance*Due to the Covid-19 Pandemic and Request for Expedited Consideration was served upon counsel of record electronically.

/s/ Steven R. Ruby
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