

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

IN RE: NATIONAL PRESCRIPTION
OPIATE LITIGATION

THIS DOCUMENT RELATES TO:

Track One-B

MDL No. 2804
Case No. 17-md-2804
Judge Dan Aaron Polster

**PHARMACY DEFENDANTS' MOTION TO EXTEND ALL TRACK 1B DEADLINES
BY 60 DAYS IN LIGHT OF THE COVID-19 PUBLIC HEALTH EMERGENCY**

Pursuant to Federal Rule of Civil Procedure 6(b), Pharmacy Defendants¹ hereby request that all Track One-B deadlines be extended by a minimum of 60 days in light of the ongoing Novel Coronavirus Disease (COVID-19) public health emergency.² Significant Track One-B deadlines that were set before the widespread outbreak of COVID-19 will be reached in the next several weeks. *See infra* pp. 3-4. Good cause for this relief is evident from the federal government's declaration of a national state of emergency concerning the COVID-19 outbreak, as well as the magnitude of regulations and restrictions enacted by various state and local governments—including a “stay at home” order issued by this Court's own home jurisdiction of Ohio.³ These restrictions have quarantined individuals in their homes, closed schools, forbidden

¹ “Pharmacy Defendants” are CVS Pharmacy, Inc. and Ohio CVS Stores L.L.C. (“CVS”), Rite Aid of Maryland, Inc. d/b/a Mid-Atlantic Customer Support Center, Rite Aid of Ohio, Inc., and Rite Aid Hdqtrs. Corp. (“Rite Aid”), Walgreen Co. and Walgreen Eastern Co. (“Walgreens”), HBC Service Company and Giant Eagle, Inc. (“Giant Eagle”), Discount Drug Mart, Inc. (“DDM”), and Walmart Inc. (“Walmart”).

² Significant uncertainty remains about the trajectory of the COVID-19 pandemic in the United States over the next weeks and months. Pharmacy Defendants therefore reserve the right to seek further relief as circumstances warrant.

³ *See* Press Release, Mike DeWine, Governor of Ohio, *Ohio Issues “Stay at Home” Order*, Mar. 22, 2020, <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/ohio-issues-stay-at-home-order-and-new-restrictions-placed-on-day-cares-for-children>.

nonessential travel, closed nonessential businesses, and required social distancing. The circumstances have already prompted this Court to extend one set of deadlines in this litigation by 60 days, and good cause for a similar extension exists here. *See* Mar. 16, 2020 Minute Order (granting Joint Motion for 60 Day Stay of All Remaining Class Certification Briefing Deadlines, Doc. 3226). On top of this, Pharmacy Defendants are essential businesses that play a primary role in the American health-care system and are devoting full resources to the national effort to address the pandemic in cooperation with government agencies across the country.

The President declared a national emergency on March 13, 2020, and as of March 19, all fifty states as well as many Tribes and local governments (including Track One-B Plaintiff Cuyahoga County) have declared COVID-19 an emergency, disaster, or public-health emergency.⁴ Within the last ten days, in an effort to slow the spread of new cases, governments, institutions, businesses, and individuals all over the country have undertaken unprecedented quarantine and mitigation measures. On March 19, 2020, the Governor of California issued a statewide stay-at-home order—effective immediately, with no set end date—prohibiting all California residents from leaving their homes for anything other than essential activities or to do critical jobs.⁵ The Governor acknowledged that the stay-at-home order could last eight weeks or

⁴ *See* Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/; Network for Public Health Law, *COVID-19 Emergency Legal Preparedness Primer* at 20 (Mar. 19, 2020), www.networkforphl.org/wp-content/uploads/2020/03/Western-Region-Primer-COVID-3-19-2020.pdf.

⁵ Executive Department, State of California, Executive Order N-33-20 (Mar. 19, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

more.⁶ On March 20, the Governors of New York and Illinois issued similar orders; on March 22, the Governors of Ohio and Louisiana did the same; and other jurisdictions will soon follow suit.⁷ Across the United States, 46 states have entirely closed all schools, likely for the remainder of the academic year.⁸ And CDC has encouraged all adults aged 65 or older as well as those with underlying medical conditions to “stay home as much as possible.”⁹

On March 19, 2020, this Court entered a Case Management Order for Track One-B that adhered to the schedule that was set before the COVID-19 pandemic’s full implications for activity and travel in the United States were widely understood. Doc. 3234 (supplementing Special Master Cohen’s February 17, 2020 Order, Doc. 3175). That schedule provided for, among other things: (1) full document production by all parties to be substantially completed by April 24, 2020; (2) full document production by all parties to be totally completed by May 25, 2020; (3) close of fact discovery by June 15, 2020; and (4) expert depositions being completed

⁶ Peter Arcuni & Polly Stryker, *California Gov. Gavin Newsom Issues Statewide Shelter-in-Place Order*, KQED (Mar. 19, 2020), www.kqed.org/science/1959566/california-gov-gavin-newsom-orders-state-to-shelter-in-place.

⁷ Dave Goldiner & Denis Slattery, *NY Gov. Cuomo Presses ‘Pause’ by Imposing Tough New Controls as Coronavirus Spirals to 7,100 Cases and 35 Deaths*, N.Y. Daily News (Mar. 20, 2020), www.nydailynews.com/coronavirus/ny-coronavirus-cuomo-20200320-qrsrtcp3grfyvj5llf47cj6xoa-story.html; Dan Petrella et al., *Gov. J.B. Pritzker Issues Order Requiring Residents to ‘Stay at Home’ Starting Saturday*, Chicago Tribune (Mar. 20, 2020), www.chicagotribune.com/coronavirus/ct-coronavirus-illinois-shelter-in-place-lockdown-order-20200320-teedakbfw5gvdgmnaxle154hau-story.html; Christina Zhao, *Ohio and Louisiana Issue Statewide Stay-At-Home Orders Amid Coronavirus Pandemic*, Newsweek (Mar. 22, 2020), <https://www.newsweek.com/ohio-louisiana-issue-statewide-stay-home-orders-amid-coronavirus-pandemic-1493659>.

⁸ *Map: Coronavirus and School Closures*, Education Week (Mar. 23, 2020), www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html; Madeline Holcombe, *Some Schools Closed for Coronavirus in US are Not Going Back For the Rest of the Academic Year*, CNN (Mar. 18, 2020), www.cnn.com/2020/03/18/us/coronavirus-schools-not-going-back-year/index.html.

⁹ CDC, *Coronavirus Disease 2019 (COVID-19): Are You at Higher Risk for Severe Illness?*, www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html.

over summer 2020. Doc. 3175 at 2-3. The restrictions resulting from COVID-19 make it impossible to meet these deadlines.¹⁰

An extension of deadlines is particularly warranted given Pharmacy Defendants' own involvement in the emergency responses to this unprecedented public health crisis. Retail pharmacies are essential businesses, working at full tilt to safely maintain pharmacy services for patients and ensure uninterrupted supply chains despite unprecedented challenges, all while maintaining the health and safety of their pharmacists and other employees.¹¹ And among new measures undertaken by each of the Pharmacy Defendants in response to the crisis, Walmart, Walgreens, CVS, and Rite Aid are piloting the conversion of their parking lots into COVID-19 testing sites for medical workers and first responders.¹² In addition, some of the Pharmacy

¹⁰ Among other things, depositions present a particular challenge in view of stay-at-home orders and the imperative of social distancing. Even if the attorney taking the deposition appears remotely, at the very least the videographer and deponent must be in proximity with one another.

¹¹ See, e.g., David Salazar, *Rite Aid Offers Expanded Services Amid COVID-19 Pandemic*, Drugstore News (Mar. 18, 2020), <https://drugstorenews.com/rite-aid-offers-expanded-services-amid-covid-19-pandemic>; Anne Nickoloff, *Discount Drug Mart Hiring Temporary Employees at All 76 Ohio Store Locations*, Cleveland.com (Mar. 19, 2020); Peter Krouse, *Giant Eagle Answers Questions About Staying Open, Stocking Shelves and Combating Spread of the Coronavirus*, Cleveland.com (Mar. 18, 2020), www.cleveland.com/news/2020/03/giant-eagle-answers-questions-about-staying-open-stocking-shelves-and-combating-spread-of-the-coronavirus.html. Some Pharmacy Defendants have diverted corporate executives and other personnel to their stores to ensure smooth operations despite increased demand and staffing challenges associated with the response to COVID-19. Various Pharmacy Defendants have waived charges for home delivery of prescription medications and everyday essentials and have expanded drive-through services, allowing people to follow social-distancing directives while receiving their medications and other necessary products without disruption.

¹² *COVID-19 Testing Sites Open In Two Chicago Area Walmart Parking Lots*, CBS Chicago (Mar. 22, 2020), <https://chicago.cbslocal.com/2020/03/22/covid-19-testing-sites-open-in-two-chicago-area-walmart-parking-lots-will-only-test-first-responders-health-care-workers/>; Bruce Japsen, *Walgreens To Begin First Drive-Thru Coronavirus Testing This Weekend For First Responders*, Forbes (Mar. 20, 2020), www.forbes.com/sites/brucejapsen/2020/03/20/walgreens-to-begin-first-drive-thru-coronavirus-test-this-weekend/; Bruce Japsen, *CVS Opens First Coronavirus Parking Lot Model Testing Site*, Forbes (Mar. 19, 2020), www.forbes.com/sites/

Defendants are full-scale grocers that have also been designated as essential businesses that must remain open, and even the non-grocer Pharmacy Defendants supply foodstuff as well as essential cleaning and paper supplies—all of which are essential services that Pharmacy Defendants are diligently working to fully maintain.

The Pharmacy Defendants are continuing to vigorously engage in discovery and move this litigation forward despite the sudden and universal impact of COVID-19 mitigation measures. Indeed, in the last week Pharmacy Defendants have made document and data productions and have continued to move forward with written discovery. The Pharmacy Defendants, however, face a particular difficulty: To defend against Plaintiffs' claims, the Pharmacy Defendants need third-party discovery from federal government agencies, physicians, and other individuals and entities in the health-care system. Pharmacy Defendants intended to serve subpoenas and accompanying *Touhy* notices on several of those parties last week. But those parties—including CDC, FDA, and HHS—understandably and necessarily are occupied with responding to a rapidly developing crisis in which time is genuinely of the essence. At this critical time of national mobilization, compelling federal agencies, state and local agencies (such as the Ohio Board of Pharmacy or Summit and Cuyahoga agencies providing essential social services), or physicians, pharmacies, pharmacists, and other health-care workers who are currently on the front lines fighting this unprecedented health crisis to respond to discovery requests in time to meet the deadlines currently operative in this litigation would be contrary to public policy and public health.

brucejapsen/2020/03/19/cvs-opens-first-coronavirus-parking-lot-testing-site/. Giant Eagle is also working with health insurers to coordinate COVID-19 testing operations.

Finally, the offices of several of the law firms representing Pharmacy Defendants—and their vendors—are closed.¹³ Attorneys, paralegals, law firm staff, document reviewers, and discovery vendors are under orders to work from home, with fewer resources and with family to care for, including children whose schools are closed and for whom childcare is not available.

CONCLUSION

Pharmacy Defendants respectfully request that the Court extend all Track One-B deadlines by a minimum of 60 days in view of the COVID-19 public health emergency consistent with the extension granted by this Court in the Neonatal Abstinence Syndrome bellwether class action cases.¹⁴

Dated: March 23, 2020

Respectfully submitted,

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¹³ To name just one example, the Governor of Pennsylvania has ordered the closure of most law offices, requiring lawyers to work from home. *See* Commonwealth of Pennsylvania, *Non-Life-Sustaining Businesses*, <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-Life-Sustaining-Business.pdf> (specifying that legal services are generally not life-sustaining businesses that may continue physical operations).

¹⁴ Although this request to adjust the schedule by 60 days is driven by the COVID-19 public health emergency, the full implications of COVID-19 are not yet known and additional adjustments may be needed. Separately, although this motion is based only on the circumstances created by the COVID-19 health crisis, Pharmacy Defendants continue to object to the Track One-B case management schedule as unreasonably condensed and impeding the ability of the Pharmacy Defendants to defend against Plaintiffs' claims in the absence of this unprecedented crisis. Doc. 3215; see also Doc. 3175 at 1 (noting Pharmacy Defendants' "existing objections to deadlines contained in earlier-entered discovery orders"). Motions based on the insufficient time frames allotted for fact and expert discovery and for trial even in the absence of COVID-19 are for another day.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing document was served via the Court's ECF system to all counsel of record on March 23, 2020.

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