

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION) MDL 2804
OPIATE LITIGATION)
THIS DOCUMENT RELATES TO:) Case No. 1:17-md-2804
Track One-B Cases) Judge Dan Aaron Polster
) OPINION AND ORDER DENYING
) RITE AID'S MOTION FOR
) SUMMARY JUDGMENT

Before the Court is Rite Aid's Motion for Summary Judgment (Doc. #: 1888). For the reasons set forth below, the Motion is **DENIED**.

Against Rite Aid, Plaintiffs assert common law public nuisance and civil conspiracy claims based on an alleged failure to maintain effective controls against diversion.¹ Rite Aid seeks summary judgment, asserting Plaintiffs: (1) lack expert testimony to show its suspicious order monitoring system ("SOMS") was deficient; and (2) cannot show any of its opioid distributions caused the harm that Plaintiffs claim.

¹ Against the Pharmacy Defendants, the Court has severed all claims except absolute public nuisance and civil conspiracy. *See* Track One-B Case Mgmt. Order at 2, 4 n.5 (Doc. #: 2940); Pls. Revised Position Stmt. re: Continuing Litigation at 3 (Doc. #: 2935). The Court therefore does not address Rite Aid's motion as to any severed claims. The Court has granted Plaintiffs leave to add dispensing claims and related dispensing entities, *see* Track One-B Case Mgmt. Order at 4 (Doc. #: 2940); those claims are not addressed in Rite Aid's motion.

I. Legal Standards.

The Court incorporates the legal standards set forth in the Court's Opinion and Order regarding Plaintiffs' Summary Judgment Motions addressing the Controlled Substances Act. *See* Doc. #: 2483.

II. Analysis.

A. Expert Testimony Regarding SOMS.

Rite Aid argues it is entitled to summary judgment because Plaintiffs have no expert to testify that its SOMS was deficient. In other words, Rite Aid contends that, as a matter of law, determining whether a defendant's SOMS was effective is a matter outside the common knowledge of a layperson such that expert testimony is required. *See* Mem. at 4-5 (Doc. #: 1888-1).

Plaintiffs respond expert testimony is not required because, on the facts of this case, the breach of duty is so obvious it can be easily recognized by an average juror.² *See* Opp. at 2-4 (Doc. #: 2184). Specifically, Plaintiffs point to, *inter alia*, evidence suggesting the following facts. Rite Aid maintained a list of "suspicious prescribers" but did not actually take any steps to identify whether orders from those prescribers were suspicious.³ Although Rite Aid utilized an asset protection system that could identify suspicious orders, it identified such orders only after they

² Plaintiffs also assert they *do* have an expert, Seth Whitelaw, who can testify about the applicable standard of care. *See* Opp. at 5 (Doc. #: 2184). In ruling on Defendants' *Daubert* motions, however, the Court granted Defendants' motion as to Whitelaw and excluded his testimony. *See* Doc. #: 2551. The Court notes that another of Plaintiffs' experts, James Rafalski, a former DEA investigator, may testify about, *inter alia*, the components of an effective SOMS and the importance of retaining documentation to maintain effective control and prevent diversion. *See* Doc. #: 2494 at 9-10.

³ Janet Hart Depo. at 163:4-10, 173:1-22 (Doc. #: 3025-54).

were shipped; Rite Aid did not use the system to report suspicious orders to the DEA.⁴ Further, Rite Aid did not identify or report as suspicious any orders from stores: (1) that dispensed opioids to customers of a notorious, convicted Ohio pill-mill doctor;⁵ or (2) whose pharmacists lost their licenses for diverting controlled substances.⁶ Rite Aid utilized a threshold-based SOMS that imposed the same threshold to every store, regardless of its dispensing volume trends.⁷ If an order came in above a store's threshold limit, Rite Aid would fill the order to the threshold limit from its own distribution center and allow the store to pick up the additional quantity from distributor McKesson.⁸ Rite Aid did not perform due diligence on these orders.⁹

Construed in a light most favorable to Plaintiffs, the existing record presents a triable issue of fact regarding the adequacy of Rite Aid's suspicious order monitoring system.¹⁰ Moreover, this evidence suggests obvious deficiencies that a layperson could plainly recognize. *See, e.g., United States v. Elliot*, 876 F.3d 855, 866 (6th Cir. 2017) (expert testimony was not necessary in light of "evidence of plainly improper prescribing practices that a lay juror could recognize as illegitimate"). Accordingly, Rite Aid is not entitled to summary judgment on this ground.

⁴ See Hart Depo. at 269:6-11 (Doc. #: 3025-54).

⁵ See Hart Depo. at 186:3-8 (Doc. #: 3025-54); Pls. Ex. 3 (email correspondence increasing a store's threshold based on an increased demand for Oxycodone prescribed by Dr. Adolph Harper).

⁶ See Hart Depo. at 210:13-18, 217:1-23 (Doc. #: 3025-54).

⁷ See Hart Depo. at 235:6-24 (Doc. #: 3025-54).

⁸ See Hart Depo. at 251:11-15, 251:23 to 252:4 (Doc. #: 3025-54).

⁹ See Debra Chase Depo. at 94:7-18 (Doc. #: 3025-28).

¹⁰ In light of this finding, the Court does not address Plaintiffs' argument that a jury could find Rite Aid's SOMS was deficient based on the mere fact that, during the height of the opioid crisis, it did not report a single order as suspicious. *See Opp.* at 3-4 (Doc. #: 2184).

B. Causation.

Rite Aid asserts Plaintiffs cannot show its opioid distributions substantially caused their alleged injuries. Specifically, Rite Aid contends it distributed as little as .048% of the total number of milligrams of morphine equivalents, or MMEs, in Cuyahoga and Summit Counties, and Plaintiffs cannot show any diversion or injury resulted from Rite Aid shipments.¹¹ *See* Opp. at 6 (Doc. #: 2184).

The Court has previously denied the Distributor Defendants' Motion for Summary Judgment on Proximate Causation Grounds (Doc. #: 1920), concluding that, based on "the massive increases in the supply of prescription opioids into the *Track One* Counties, combined with evidence that suggests a complete failure by the Distributors and Pharmacies to maintain effective controls against diversion, a factfinder could reasonably infer these failures were a substantial factor in producing the alleged harm suffered by Plaintiffs." SJ Order re: Causation at 9 (Doc. #: 2561). Additionally, the Court has denied summary judgment motions brought by other arguably *de minimis* distributors of opioids, including one that purported to have shipped "only 0.03% of opioids sold in Summit County between 2006 and 2014." SJ Order re: Small Distributors (Doc. #: 2559). In so ruling, the Court noted "even a very small proportional contribution by one of numerous defendants could equate with a rather large and substantial absolute quantity, both in monetary terms and in terms of the consequent harms." *Id.* at 5.

Based on these earlier rulings and Plaintiffs' evidence of insubstantial anti-diversion efforts, the Court finds Plaintiffs have produced evidence upon which a jury could reasonably conclude Rite Aid's distribution activities caused Plaintiffs' alleged injuries. Accordingly, Rite Aid is not entitled to summary judgment.

III. Conclusion.

For the reasons stated above, the Motion is **DENIED**.

IT IS SO ORDERED.

/s/ Dan Aaron Polster January 27, 2020
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

¹¹ Rite Aid asserts that, from January 2006 to December 2014, it distributed 0.71% of the total MMEs in the *Track One* Counties and, “during the limitations period (after April 2014),” its share was 0.048%. *See* Mem. at 2 (Doc. #: 1888-1). To the extent Rite Aid may be asserting that Plaintiffs’ claims are partially time-barred, the Court rejects the arguments for the reasons stated in its earlier ruling on Defendants’ motions for summary judgment. *See* SJ Order on SOL at 3-6, 12 (Doc. #: 2568) (under Ohio law, no statute of limitations applies to public nuisance claims or to conspiracy claims based on a public nuisance).