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Opioid Multidistrict Litigation Secrecy

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"I don't think anyone in the country is interested in a whole lot of finger-pointing at this point, and I'm not either. People aren't interested in depositions, and discovery, and trials."[1]

"Although it has many purposes and goals, litigation is a fact-finding device designed as a search for the truth."[2]

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[1] Transcript of Proceedings at 4, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Jan. 9, 2018), ECF No. 58 [hereinafter Transcript of Jan. 9, 2018 Hearing] (statement of United States District Court Judge Dan Aaron Polster).

[2] *In re* Vioxx Prods. Liab. Litig., 235 F.R.D. 334, 346 (E.D. La. 2006).

I. INTRODUCTION

Considerable attention has been devoted to the massive opioid multidistrict litigation (MDL), which consists of nearly 2000 federal court cases consolidated in the United States District Court for the Northern District of Ohio before Judge Dan Aaron Polster.[3] Journalists have examined whether the plaintiff counties, municipalities, and tribes have pleaded viable causes of action against the defendant manufacturers, distributors, and chain pharmacies that stand accused of exacerbating the opioid crisis by misbranding, aggressively marketing, and failing to monitor, flag, and report suspicious shipments of prescription opioid pills.[4] Pundits have speculated as to the scope of potential damages in play given that experts estimate that the crisis has cost the United States at least $1 trillion since 2001 and will cost an additional $500 billion through 2020 unless the country pursues strategies that curb the crisis.[5] And the media has enthusiastically covered the nefarious allegations that have been levelled at the opioid crisis's most notorious villains: the wealthy Sacklers of Purdue Pharma fame[6]—who have removed themselves from the opioid MDL in an attempt to shield their immense family fortune from liability by filing for bankruptcy protection.[7]

Until recently, however, scant attention has been consigned to the opioid MDL's most salient and, arguably, most disturbing feature: its insidious secrecy.[8] The clandestine nature of the MDL has prevented the public from

[3] Benjamin Lesser et al., *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/ [https://perma.cc/63V2-W9N2].

[4] Robert VerBruggen, *Who's to Blame for Opioid Abuse?*, NAT'L REV. (June 8, 2017), https://www.nationalreview.com/2017/06/opioid-lawsuits-long-odds-tricky-legal-arguments/ [https://perma.cc/EH95-UXTB].

[5] Dan Mangan, *Economic Cost of the Opioid Crisis: $1 Trillion and Growing Faster*, CNBC (Feb. 13, 2018), https://www.cnbc.com/2018/02/12/economic-cost-of-the-opioid-crisis-1-trillion-and-growing-faster.html [https://perma.cc/X4AK-9KQY]; *see also* Alison Frankel, *Expert Witness in Opioids MDL: Fixing Crisis Will Cost $483 Billion*, REUTERS (Apr. 18, 2019), https://www.reuters.com/article/us-otc-opioids-idUSKCN1RU2I5 [https://perma.cc/427P-4FA8] (citing an expert witness in the opioid MDL who estimated the cost of addressing the crisis to be near $480 billion).

[6] *See, e.g.*, Danny Hakim et al., *Lawsuits Lay Bare Sackler Family's Role in Opioid Crisis*, N.Y. TIMES (Apr. 1, 2019), https://www.nytimes.com/2019/04/01/health/sacklers-oxycontin-lawsuits.html [https://perma.cc/4APF-VUMX].

[7] *See* Renae Merle & Lenny Bernstein, *Purdue Pharma's Bankruptcy Plan Includes Special Protection for the Sackler Family Fortune*, WASH. POST (Sept. 18, 2019), https://www.washingtonpost.com/business/2019/09/18/purdue-pharmas-bankruptcy-plan-includes-special-protection-sackler-family-fortune/ [https://perma.cc/23V3-J5S9].

[8] Daniel Fisher, *Judge Sees Litigation as Only an 'Aid in Settlement Discussions' for Opioid Lawsuits*, FORBES (May 10, 2018), https://www.forbes.com/sites/legalnewsline/2018/05/10/judge-sees-litigation-as-only-an-aid-in-settlement-discussions-for-opioid-lawsuits/#6e5a09844b99 [https://perma.cc/4EJ8-D7XG] (explaining that opioid MDL

understanding the plaintiffs' allegations and legal arguments, the basic facts concerning the scope of corporate marketing, distribution, and sale of prescription opioids, and the DEA's confounding failure to detect suspicious sales of the drugs and, thereby, mitigate diversion.[9] This Article examines the events that instigated the opioid MDL's secrecy, discusses the legal merits of the district court's nondisclosure rulings in the mass tort public health litigation, analyzes the United States Court of Appeals for the Sixth Circuit's decision vacating and remanding the district court's nondisclosure rulings, discusses the district court's disclosure-related decisions on remand, and, ultimately, contends that a trial court's failure to make crucial evidence transparent in aggregate national health emergency lawsuits, like the opioid MDL, is likely to undermine the public health promoting outcomes such litigation aims to achieve.

II. DEA ARCOS DATABASE

The opioid MDL's pervasive secrecy stems from the public entity plaintiffs' request for discovery of critical prescription opioid transaction data contained in the federal Drug Enforcement Administration's (DEA) Automation of Reports and Consolidated Orders System (ARCOS) database. The 1970 Controlled Substances Act (CSA) devised a closed chain of controlled substances distribution specifically designed to prevent the diversion of legal products into the illicit market.[10] That system requires CSA Schedule II and III opioid manufacturers and distributors to submit reports detailing "every sale, delivery or other disposal" of prescription opioids to the DEA.[11] These manufacturer and distributor opioid transaction disclosures are uploaded to the ARCOS database, which summarizes them into reports that can be used to identify suspicious orders and the potential diversion of prescription opioids.[12]

ARCOS, therefore, is "an automated, comprehensive drug reporting system which monitors the flow of DEA controlled substances from their point of

Judge "Polster has sworn both sides to secrecy and many documents remain sealed, including the complaints").

[9] *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE DRUG ENFORCEMENT ADMINISTRATION'S REGULATORY AND ENFORCEMENT EFFORTS TO CONTROL THE DIVERSION OF OPIOIDS 13 (Sept. 2019), https://oig.justice.gov/reports/2019/a1905.pdf [https://perma.cc/LH8C-HTRK] [hereinafter DOJ IG DEA OPIOIDS REPORT]; Lenny Bernstein, *DEA Allowed Huge Growth in Painkiller Supply as Overdose Deaths Rose, IG Says*, WASH. POST (Oct. 1, 2019), https://www.washingtonpost.com/health/dea-allowed-huge-growth-in-painkiller-supply-as-overdose-deaths-rose-ig-says/2019/10/01/458b2aac-e451-11e9-a6e8-8759c5c7f608_story.html [https://perma.cc/L8B9-BZ5W].

[10] Controlled Substances Act, 21 U.S.C. §§ 801–971 (2012).

[11] *Id.* § 827(d)(1).

[12] *See, e.g.*, DIVERSION CONTROL DIV., DRUG ENF'T ADMIN., 2017 RETAIL DRUG SUMMARY REPORT (July 2018), https://www.deadiversion.usdoj.gov/arcos/retail_drug_summary/report_yr_2017.pdf [https://perma.cc/H4YK-WBM8].

manufacture through commercial distribution channels to point of sale or distribution at the dispensing/retail level."[13] ARCOS data includes the following information for each CSA-regulated drug transaction: supplier's name, DEA registration number, address, and business activity; buyer's name, DEA registration number, and address; prescription drug code, transaction date, total dosage units, and total grams.[14] The CSA also imposes specific duties upon wholesale distributors to monitor, identify, halt, and report "suspicious orders" of prescription opioids.[15]

III. MDL ARCOS PROCEEDINGS: PRODUCTION TO PUBLIC ENTITY PLAINTIFFS

The battle for access to the DEA's ARCOS opioid data was set in motion prior to the opioid MDL's existence. During an October 24, 2017 status conference involving nineteen opioid cases before the United States District Court for the Southern District of Ohio, the plaintiff Ohio counties and municipalities sought the court's permission to subpoena the DEA to obtain pertinent opioid transaction information stored in the ARCOS database.[16] The district court granted that request but stayed discovery pending the United States Judicial Panel on Multidistrict Litigation's (JPML) ruling on motions to create an opioid MDL.[17]

The DEA promptly raised a dozen objections to the Ohio plaintiffs' ARCOS subpoena.[18] The agency's opposition to the data request relied primarily on a pair of troublesome contentions. First, the DEA claimed that production of historical ARCOS data "would reveal investigatory records compiled for law enforcement purposes, and [as such] interfere with [its Controlled Substances Act] enforcement proceedings."[19] It further maintained that ARCOS disclosure would improperly reveal opioid manufacturer and distributor trade secrets and confidential business information and, consequently, cause those entities substantial competitive harm.[20] In other words, the DEA—a federal agency created by Congress to monitor and improve controlled substance-related public health outcomes—injected itself into the opioid litigation not to assist the public

[13] Declaration of John J. Martin in Support of the United States of America's Brief Posing Objections to Disclosure of ARCOS Data ¶ 6, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio June 26, 2018), ECF No. 663-1.

[14] *Id.* at ¶ 7.

[15] 21 C.F.R. § 1301.74 (2016).

[16] Pretrial Order No. 2 at 3–4, City of Cincinnati v. AmerisourceBergen Drug Corp., No. 2:17-cv-713 (S.D. Ohio Oct. 30, 2017), ECF No. 75.

[17] *Id.* at 3.

[18] Objections of the U.S. Dep't of Justice, Drug Enforcement Admin. to Plaintiff's Subpoena at 3–9, AmerisourceBergen Drug Corp., No. 2:17-cv-713, ECF No. 101.

[19] *Id.* at 5.

[20] *Id.* at 6.

entity plaintiffs but to advance the alleged privacy interests of *the defendant pharmaceutical corporations that it is charged with regulating*.

If a September 2019 Department of Justice (DOJ) Inspector General (IG) Report is any guide, the DEA also was motivated to intervene in the litigation to keep secret from the public its own massive failure to regulate the supply and distribution of prescription opioids.[21] The DOJ IG Report levelled several damning accusations at the DEA, finding that the agency "was slow to respond to the significant increase in the use and diversion of opioids since 2000."[22] The Report further found that "DEA did not use its available resources, including its data systems and strongest administrative enforcement tools, to detect and regulate diversion effectively," and "DEA policies and regulations did not adequately hold registrants accountable or prevent the diversion of pharmaceutical opioids."[23]

It is hardly any surprise, then, that the DEA robustly objected to any disclosure of its ARCOS data. In support of its data nondisclosure posture, the DEA pointed to the federal Privacy Act[24] and *Touhy* regulations,[25] which enumerate the factors that the agency must consider in response to requests for production of information.[26] The *Touhy* regulations, however, do not require the DEA to withhold data even where, unlike the ARCOS information, it indisputably contains investigatory records or trade secrets. Instead, they expressly permit the DEA to produce such information so long as disclosure is required by the "administration of justice."[27] In determining whether an information request satisfies the "administration of justice" standard, the *Touhy* regulations mandate that the DEA consider, among other things, "[t]he seriousness of the violation . . . involved," "[t]he past history . . . of the violator," "[t]he importance of the relief sought," and "[t]he importance of the legal issues presented."[28]

The plaintiffs' ARCOS opioid transaction data requests appear to satisfy the administration of justice criteria. The nation's drug use and overdose crisis has claimed hundreds of thousands of lives and, as previously noted, cost American taxpayers approximately a trillion dollars since 2001.[29] And numerous of the

[21] *See* DOJ IG DEA OPIOIDS REPORT, *supra* note 9, at 13–27.

[22] *Id.* at i.

[23] *Id.*

[24] 5 U.S.C. § 552a (2012).

[25] 28 C.F.R. § 16.26 (2018). The *Touhy* regulations derive their name from *United States ex rel. Touhy v. Ragen*, in which the Supreme Court held that the head of a federal agency may determine on their sole authority whether to produce documents in response to a subpoena. 340 U.S. 462, 470 (1951).

[26] Objections of the U.S. Dep't of Justice, Drug Enforcement Admin. to Plaintiff's Subpoena, *supra* note 18, at 5 ("DEA objects to the production of the requested information under DOJ's [*Touhy*] regulations because it would violate the Privacy Act." (citations omitted)).

[27] *Id.* § 16.26(c).

[28] *Id.* § 16.26(c)(1)–(4).

[29] Mangan, *supra* note 5.

MDL defendants' pertinent "past history" is atrocious. The federal government has extracted hundreds of millions of dollars in fines and penalties from the opioid manufacturers and distributors as a result of their unlawful market-related behavior, and it has even criminally indicted certain defendants due to their opioid-related conduct.[30] The DEA's disclosure objections, however, made no mention of either the administration of justice rule or its factors, let alone contended that the rule was inapplicable to the plaintiffs' ARCOS data request.[31]

The DEA also ignored relevant and dispositive provisions of the federal Privacy Act that compromised its objections to ARCOS data production. Because the Privacy Act expressly exempts from its purview court-ordered discovery, it is legally impossible for data released pursuant to a district court order to violate the statute.[32] And even if that was not the case, the Privacy Act permits the disclosure of agency records to any person upon "a showing of compelling circumstances affecting the health or safety of an individual."[33] Given that the plaintiffs have alleged that the defendants' prescription opioid branding, distribution, and marketing behavior collectively and proximately caused a national health emergency resulting in the deaths of hundreds of thousands of people, the ARCOS data request arguably satisfies the Privacy Act's health and safety exception.[34]

Before the district court had an opportunity to rule on the DEA's objections to the ARCOS subpoena, however, the JPML consolidated the sixty-four opioid cases then-pending across the federal districts and transferred them to the United States District Court for the Northern District of Ohio for pre-trial proceedings.[35] Judge Dan Polster thereby inherited the ARCOS opioid data production feud.[36] He entered into the fray by ordering the plaintiffs and DEA to attempt to reach a consensus regarding ARCOS data production.[37] In so doing, the judge pointed to the DEA's admission that it was willing "to continue discussions with plaintiffs concerning the disclosure of ARCOS data consistent with disclosures it has made to other requestors, e.g., state and local government

[30] *See* Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES (May 10, 2007), https://www.nytimes.com/2007/05/10/business/11drug-web.html [https://perma.cc/D2VX-R8R3].

[31] *See* Objections of the U.S. Dep't of Justice, Drug Enforcement Admin. to Plaintiff's Subpoena, *supra* note 18, at 3–9.

[32] *See* 5 U.S.C. § 552a(b)(11) (2012).

[33] *Id.* § 552a(b)(8).

[34] *See* Re: Touhy Request for ARCOS/DADS Database Production at 4, City of Cincinnati v. AmerisourceBergen Drug Corp., No. 2:17-cv-713 (S.D. Ohio Oct. 31, 2017), ECF No. 81-1 (alleging the defendant drug corporations' involvement in the opioid epidemic); Transfer Order at 3, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (J.P.M.L. Dec. 12, 2017), ECF No. 1 (stating the common allegations upon consolidation).

[35] Transfer Order, *supra* note 34, at 1.

[36] *Id.* at 4.

[37] Order Re: ARCOS/DADS Database at 2, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Feb. 2, 2018), ECF No. 112.

entities."[38] In other words, the DEA conceded that it had previously disclosed ARCOS data to public entities, including local governments, much like the opioid MDL plaintiffs.

After much back and forth, the DEA and MDL plaintiffs remained unable to resolve their differences. The plaintiffs sought data for each opioid transaction stored in the ARCOS database from January 1, 2006 through January 15, 2015, including the date of the transaction; the seller's name, DEA registrant number, business activity, state, and transaction code; the buyer's name, DEA registrant number, business activity, county, state, and zip code; and the drug code, manufacturer, dosage units, grams-weight, and quantity.[39] The DEA, on the other hand, would only agree to produce limited, de-identified opioid data devoid of any transactional information that would enable the plaintiffs to ascertain "(a) which manufacturers (b) sold what types of pills (c) to which distributors" or "(d) which distributors (e) sold what types of pills (f) to which retailers (g) in what locations."[40]

Judge Polster held a February 26, 2018 hearing in a final push to nudge the public entity plaintiffs and DEA toward a mutually acceptable resolution to the ARCOS data production dispute.[41] When that effort proved futile, the judge made two important decisions. First, he put in place a protective order applicable to all ARCOS data.[42] Second, he issued an opinion, which determined the scope of ARCOS data that the court required the DEA to produce to the public entity plaintiffs.[43]

The district court's ARCOS data protective order was sweeping. It demanded that any disclosed ARCOS information remain confidential, limited the use of that data to litigation and law enforcement purposes, and required the redaction or sealing of all court-filed documents, including pleadings, inclusive of such data.[44] The protective order also commanded the public entity plaintiffs to notify the DEA *and* MDL defendants immediately upon their receipt of any public records request for ARCOS data and, in a move to cement ARCOS data-related secrecy into perpetuity, ordered the public entity plaintiffs to either destroy or return to the DEA all ARCOS information produced during the litigation at the conclusion of those proceedings.[45]

[38] *Id.* at 1–2 (quoting Objections of the U.S. Dep't of Justice, Drug Enforcement Admin. to Plaintiff's Subpoena, *supra* note 18, at 9).

[39] Order Regarding ARCOS Data at 4, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Apr. 11, 2018), ECF No. 233.

[40] *Id.* at 6.

[41] *See* Transcript of Proceedings at 5, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Mar. 1, 2018), ECF No. 156 [hereinafter Transcript of Feb. 26, 2018 Hearing].

[42] Protective Order Re: DEA's ARCOS/DADS Database at 1, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Mar. 6, 2018), ECF No. 167.

[43] Order Regarding ARCOS Data, *supra* note 39, at 22.

[44] Protective Order Re: DEA's ARCOS/DADS Database, *supra* note 42, at 1–4.

[45] *Id.* at 6–7.

The ARCOS data protective order, however, appears unlawful on its face. A federal court's issuance of a protective order "is circumscribed by a long-established legal tradition which values public access to court proceedings."[46] Federal Rule of Civil Procedure (FRCP) 26(c) proscribes a federal court from granting a protective order unless the party that seeks protection—here, the DEA—establishes good cause.[47] This means that, in order to be entitled to a protective order, the moving party is required to demonstrate with particularity and specificity that harm or prejudice will result if the protective order is not granted. Speculative and conclusory statements do not constitute good cause.[48] Moreover, federal courts are not required to issue protective orders even where the party seeking protection demonstrates sufficient harm. Instead, upon such a showing of harm, the court is required to balance the public's interest in disclosure against the protection-seeking party's interest in secrecy.[49]

The Federal Rules of Civil Procedure make no exceptions where, as here, the parties stipulate to a proposed protective order or agree to certain of its terms.[50] The district court's ARCOS protective order, however, makes no reference whatsoever to good cause. And it is entirely bereft of any findings or conclusions that could be fairly characterized as either a good cause analysis or a balancing of the respective interests at stake.[51] The ARCOS data protective order, therefore, failed to comport with federal law.

In addition to issuing an overly broad and legally suspect protective order, the district court rejected the plaintiffs' request for opioid transaction-specific information and limited the DEA's production burden to the narrow subset of de-identified ARCOS data that the agency was willing to share.[52] Specifically, the court ordered the DEA to

> (a) provide Excel spreadsheets to Plaintiffs that (b) identified the top manufacturers and distributors who sold 95% of the prescription opiates (c) to each State (d) during the time period of January 1, 2006 through December 31, 2014 (e) on a year-by-year and State-by-State basis, along with (f) the

[46] Procter & Gamble Co. v. Bankers Tr. Co., 78 F.3d 219, 227 (6th Cir. 1996) (internal quotations omitted).

[47] FED. R. CIV. P. 26(c)(1).

[48] Nemir v. Mitsubishi Motors Corp., 381 F.3d 540, 550 (6th Cir. 2004) (quoting Gulf Oil Co. v. Bernard, 452 U.S. 89, 102 n.16 (1981) ("[A] protective order [is authorized] only under circumstances 'which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,' the potential for which must be illustrated with 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'").

[49] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 at 67 (2004) ("In assessing [protective order] requests, courts balance the potential harm to the party seeking protection against the requesting party's need for the information and the public interest served by its release.").

[50] *See* FED. R. CIV. P. 26(c).

[51] *See* Protective Order Re: DEA's ARCOS/DADS Database, *supra* note 42, at 1–2.

[52] Order Regarding ARCOS Data, *supra* note 39, at 5–6.

> aggregate amount of pills sold and (g) the market shares of each manufacturer and distributor.[53]

The district court, therefore, adopted the DEA's data production proposal *in toto*.

Judge Polster, however, abruptly reversed course just five weeks later by overruling his own ARCOS data disclosure decision. In a written opinion, he concluded that the DEA had failed to satisfy its burden of demonstrating good cause to withhold the transaction-specific ARCOS data requested by plaintiffs under FRCP 45(d), which controls third-party subpoenas.[54] Judge Polster characterized the DEA's law enforcement interests and the defendants' trade secret objections as speculative and conclusory and ordered the DEA to produce the opioid transaction information to the plaintiffs subject to the ARCOS protective order.[55] Several issues salient to the court's change-of-heart regarding the scope of ARCOS data that was subject to disclosure warrant emphasis.

First, the ARCOS opioid transaction information sought by the plaintiffs constitutes evidence central to proving or refuting their allegations that the defendants deliberately overflooded plaintiffs' respective jurisdictions, e.g., counties, cities, towns, municipalities, and tribal nations with prescription opioids. ARCOS data identifying precisely how many and which type of pills each opioid manufacturer and distributor delivered to each retail pharmacy on specific dates would—and, ultimately, did—enable the plaintiffs to determine which entities they should name as defendants, permit the litigation "to proceed based on meaningful, objective data, not conjecture or speculation," and "provid[e] invaluable, highly specific information regarding historic patterns of opioid sales."[56] As Judge Polster explained:

> There is overwhelming need for the Plaintiffs in this case to learn the truth surrounding marketing and distribution of opioids, including what the manufacturers, distributors, retailers, and DEA knew and when they knew it; what, if anything, was kept, intentionally or unintentionally, away from the DEA and the public by defendants; and what, if anything, the DEA kept, intentionally or unintentionally, from the States, counties, and cities that have filed the MDL lawsuits.[57]

In other words, it was impossible for the public entity plaintiffs to glean "the *extent* to which each defendant and potential defendant engaged in the allegedly

[53] *Id.* at 6.

[54] *Id.* at 19; *see* FED. R. CIV. P. 45(d).

[55] Order Regarding ARCOS Data, *supra* note 39, at 16–17, 19.

[56] Second Order Regarding ARCOS Data at 2, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio May 8, 2018), ECF No. 397.

[57] Order Regarding ARCOS Data, *supra* note 39, at 21.

fraudulent marketing of opioids, filling of suspicious orders, and diversion of drugs" without the ARCOS opioid transaction data.[58]

Second, the DEA's ARCOS database does not comprise any law enforcement investigatory information or corporate trade secrets. ARCOS simply stores business-generated controlled substance transaction reports, including prescription opioid transaction reports, compiled and produced by controlled substance manufacturers and distributors.[59] ARCOS does not contain any law enforcement analysis or work-product or confidential business information or trade secrets, such as pill formulations.[60] Judge Polster did not mince words on this latter point, stating: "Where the pills went is not a trade secret."[61] He was even less enthralled by the pharmaceutical defendants' confidential business information argument, retorting that "market data over three years old carried *no risk of competitive harm*,"[62] and, in any event, "there shouldn't be a lot of competition for distributing opioids."[63]

Third, the DEA's contention that the disclosure of historic ARCOS opioid transaction data would interfere with law enforcement interests is undermined by the staleness of the information requested, which was limited to the time period 2006–2014.[64] The DEA is bound by the CSA's five-year statute of limitations applicable to the prosecution of controlled substance offenses.[65] Consequently, the agency was unable to convince Judge Polster, a former federal prosecutor, that it had any viable enforcement interests in historic ARCOS data.[66] As the judge acknowledged, "[W]hatever was going on in 2010, '11, '12, '13, . . . there's no law enforcement objective there now; that's historic, but it's important for this litigation."[67] Bolstering that observation is a recently decided Minnesota federal district court opinion, which held that the release of at least five-year-old, company-specific ARCOS opioid transaction data carried little risk of competitive harm in a case involving a similar opioid information production dispute between the DEA and a plaintiff.[68]

Finally, the MDL court's ARCOS opioid transaction data production order articulates a questionable rationale to justify its refusal to compel the DEA to produce that very same information to the plaintiffs when they initially requested it much earlier in the litigation. The order concedes that the "[d]etailed

[58] *Id.* at 15.

[59] *See supra* Part II.

[60] Transcript of Feb. 26, 2018 Hearing, *supra* note 41, at 25 ("[T]his is simply DEA's data because it's been received by the government, but there's absolutely nothing whatsoever that's been generated by any government office or agent or employee.").

[61] *Id.* at 15.

[62] Order Regarding ARCOS Data, *supra* note 39, at 17 (emphasis added).

[63] Transcript of Feb. 26, 2018 Hearing, *supra* note 41, at 52.

[64] Order Regarding ARCOS Data, *supra* note 39, at 1.

[65] 18 U.S.C. § 3282(a) (2012).

[66] *See* Transcript of Feb. 26, 2018 Hearing, *supra* note 41, at 14.

[67] *Id.*

[68] Madel v. United States, No. 13-2832, 2017 WL 111302, at *2 (D. Minn. Jan. 11, 2017).

ARCOS data evidence [the plaintiffs demand] is relevant . . . to prove culpability [and] . . . for purposes of allocation of settlement funds."[69] It nonetheless goes on to explain that the court had initially sided with the DEA because the much more limited ARCOS data that the agency had agreed to produce was "sufficient to address the Court's immediate focus on 'forward-looking initiatives and actions to help ameliorate the opioid crisis.'"[70] By "forward-looking initiatives and actions," the court was referring to its unbridled enthusiasm for a rapid, global settlement devoid of protracted discovery or trials that might reveal to the public information that could either bolster or undermine the plaintiffs' allegations against the defendants and, thereby, permit the public to critically assess any proposed settlement agreement between the parties.

Since the opioid MDL's inception, Judge Polster has made it clear that his singular objective is to ensure that the parties settle the aggregate litigation pre-trial.[71] At first blush, that goal seems unremarkable. The overwhelming majority of civil cases either settle or are dismissed pre-trial.[72] Judge Polster, however, went to extraordinary lengths to try to corral a quick deal to resolve the aggregated federal opioid cases pre-trial and, thereby, avoid robust discovery and public trials.[73]

For example, during his very first gathering of the MDL parties, which he characterized as a "settlement conference," Judge Polster compelled the entities on both sides of the litigation to engage in settlement negotiations.[74] He also made public his preference that the parties reach a "rapid settlement rather than trying cases" and engaging in vigorous discovery so that communities across the country devastated by opioid use disorder and overdoses could receive funds to fight the crisis.[75] And the judge was entirely transparent about his intentions during a January 9, 2018 public hearing, during which he said: "I don't think anyone in the country is interested in a whole lot of finger-pointing, and I'm not either. People aren't interested in depositions, and discovery, and trials."[76] He went on to declare: "[W]e don't need a lot of briefs and we don't need

[69] Order Regarding ARCOS Data, *supra* note 39, at 15 n.8.

[70] *Id.*

[71] Fisher, *supra* note 8.

[72] *See generally* Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009) (discussing the importance of gathering and analyzing data on settlement rates and the variability in settlement rates based on the type of case).

[73] Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. 1287, 1289 (2019) (explaining that Judge Polster "took an unusually aggressive pro-settlement stance from the start").

[74] *See* Minutes of 1-31-18 Settlement Conference and Scheduling Order at 1, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Feb. 2, 2018), ECF No. 111.

[75] Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html [https://perma.cc/K83J-FZWJ].

[76] Transcript of Jan. 9, 2018 Hearing, *supra* note 1, at 4.

trials. . . . [N]one of them are . . . going to solve what we've got."[77] Professor Howard Erichson has characterized these remarks as "stunning statement[s] from a judge."[78] As the complex litigation expert aptly observed:

> It is one thing for a judge to say that abatement of the crisis is an important goal, that the federal MDL has a role to play in achieving this goal, that the judge intends to manage the litigation in a way that furthers this goal wherever possible, and that ultimately a negotiated resolution may be the best way to achieve this goal. *It is quite another thing to forswear litigation and adjudication altogether*.[79]

As already noted, Judge Polster expressly defended his initial refusal to grant the plaintiffs access to the opioid transaction data—in violation of, among other things, the Federal Rules of Civil Procedure—on the grounds that "only circumscribed information within the ARCOS database is necessary to facilitate *settlement*."[80] *Forbes* went so far as to publish an article about Judge Polster's management of the opioid MDL entitled *Judge Sees Litigation as Only an "Aid in Settlement Discussions" for Opioid Lawsuits*.[81] That report describes Judge Polster as "peeved" that he was pressured to manage an MDL "litigation track" and schedule bellwether trials, which he described as "necessary to do" "but . . . not a substitute or replacement [for settlement] in any way."[82]

Judge Polster reiterated his aggressive pro-settlement, anti-litigation stance during an August 2, 2018 hearing, during which he made the following statements:

> I didn't want this litigating track. The defendants insisted they wanted to file all these motions. I said, All right. . . .
>
> . . . .
>
> So, you know, *all this discovery and depositions and whatever, and a trial, will accomplish zero*. . . .[83]
>
> . . . .

[77] *Id.* at 9.
[78] Erichson, *supra* note 73, at 1291.
[79] *Id.* (emphasis added).
[80] Order Regarding ARCOS Data, *supra* note 39, at 7.
[81] Fisher, *supra* note 8.
[82] *Id.*
[83] Transcript of Status Conference Proceedings at 24–25, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Aug. 7, 2018), ECF No. 854 (emphasis added).

> . . . I don't want to be essentially encouraging the parties to spend all their efforts on this litigating track, because that . . . not only isn't going to solve anything, I think it's going to make resolution virtually impossible.[84]

Judge Polster continued to advocate for a global settlement even as the first bellwether trial loomed. In an September 11, 2019 decision certifying a "novel" MDL "negotiation class," he wrote: "From the outset of this MDL, the Court has encouraged the parties to settle the case. Settlement is important in any case. Here, a settlement is especially important as it would expedite relief to communities so they can better address this devastating national health crisis."[85] Shortly thereafter, the distributor and retail pharmacy defendants moved Judge Polster to recuse himself from the MDL proceedings pursuant to 28 U.S.C. § 455(a), relying on, among other things, his numerous judicial and extra-judicial statements in support of a settlement and opposed to discovery and public trials.[86]

However well-intentioned, the court's anti-litigation, settlement-at-all-costs approach suffered at least two noteworthy flaws insofar as the public entity plaintiffs' ARCOS disclosure request was concerned. First, the plaintiffs simply could not assess the potential culpability—if any—of each of the opioid defendants without the ARCOS opioid transaction data. As the district court ultimately acknowledged, the plaintiffs could not even ascertain which opioid manufacturers, distributors, and retailers they should name as defendants without the ARCOS transaction data.[87] This is because there simply was no other way to determine which of those entities were in the chain of distribution of prescription opioids that ended up being dispensed in the public entity plaintiffs' respective jurisdictions.[88] The failure of the DEA to provide the plaintiffs with the ARCOS opioid transaction information precluded the plaintiffs from engaging in well-informed settlement negotiations and, therefore, potentially undermined the court's objective of reaching a rapid, global settlement.

Judge Polster's initial refusal to disclose the ARCOS transaction data to the plaintiffs further indicates that he was persuaded by the defendants' argument that the opioid MDL could be quickly settled so long as the plaintiffs had access to each defendant's market share. While a market share approach might work in litigation involving defendants that manufacture near-fungible, health-harming

[84] *Id.* at 29.

[85] Memorandum Opinion Certifying Negotiation Class at 2, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Sept. 11, 2019), ECF No. 2590.

[86] *See* Memorandum in Support of Motion to Disqualify Pursuant to 28 U.S.C. § 455(a) at 1–2, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Sept. 14, 2019), ECF No. 2603-1.

[87] *See* Order Regarding ARCOS Data, *supra* note 39, at 6.

[88] *Id.* at 6–7.

products like cigarettes,[89] it is an inapt settlement model for the opioid MDL. Prescription opioids are not only legal, FDA-approved products, they are the best treatment modality for particular patients in certain circumstance.[90] They are not per se defective, health-harming products like cigarettes. As a result, a market share-driven settlement could lead to inequitable outcomes by, for example, imposing a huge liability burden on a defendant with a large market share but relatively benign market behavior while permitting a defendant with a smaller market share that engaged in much more culpable conduct to free ride.

More problematic, Judge Polster's desire for a quick settlement was immaterial to any lawful assessment of the plaintiffs' entitlement to the ARCOS transaction data. Federal Rule of Civil Procedure 45, which governed the plaintiffs' ARCOS data subpoena, does not flinch where a federal judge or a party or even, as in the opioid MDL proceedings, a federal agency third-party subpoena target believes that nondisclosure of indisputably pertinent information would help secure a fast resolution to the litigation.[91] Instead, and in line with Judge Polster's order requiring the DEA to produce the ARCOS opioid transaction data, Rule 45 requires courts to order third-party data custodians to produce all relevant information sought by subpoena exclusive of trade secrets, privileged data, or other confidential commercial information.[92] In sum, the court's eagerness to settle the litigation in no manner undermined the plaintiffs' legal entitlement to relevant ARCOS information under the Federal Rules of Civil Procedure.

IV. MDL ARCOS PROCEEDINGS: PRODUCTION TO THE PUBLIC

Soon after the DEA produced the ARCOS opioid transaction information to the MDL plaintiffs, HD Media Company, which owns the *Charleston Gazette-Mail*, filed a West Virginia Freedom of Information Act request seeking the ARCOS transaction data from MDL plaintiff Cabell County, West Virginia.[93]

[89] *See generally* Christopher Schroeder, *The Multistate Settlement Agreement and the Problem of Social Regulation Beyond the Power of State Government*, 31 SETON HALL L. REV. 612 (2001) (discussing key features of the Master Settlement Agreement reached between states and cigarette manufacturers in 1998); Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 WIDENER L. REV. 159 (2011) (discussing the structure and far-reaching effects of the Master Settlement Agreement reached between states and cigarette manufacturers in 1998).

[90] *See generally* Deborah Dowell et al., *CDC Guideline for Prescribing Opioids for Chronic Pain — United States, 2016*, 65 MORBIDITY & MORTALITY WKLY. REP. 1 (2016) (recommending when to initiate or continue opioids for chronic pain outside of active cancer treatments, palliative care, and end-of-life care).

[91] *See* FED. R. CIV. P. 45(d)(3).

[92] *Id.*

[93] United States of America's Notice of Objections to Disclosure of ARCOS Data at 1, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio June 11, 2018), ECF No. 603.

The *Washington Post* filed similar state public records requests directed at two Ohio county MDL plaintiffs.[94] Consistent with the ARCOS protective order, the DEA and defendants were notified of those media requests and promptly objected to them on the same grounds that they had raised in opposition to the plaintiffs' ARCOS subpoena.[95] The DEA contended that, "While the United States understands the public interest in this case, the ARCOS data contains confidential commercial information about DEA registrants' commercial activities, Privacy Act protected information, and Law Enforcement Sensitive Information."[96] Reflective of the level of secrecy that had infused the opioid MDL's day-to-day proceedings since the court issued the ARCOS protective order, the DEA's brief and affidavit in support of its objections to public disclosure of the ARCOS data—to which the media companies ultimately were required to respond—were so heavily redacted that they were difficult to evaluate on their merits.[97]

In response to the DEA's objections to their public records requests, the media companies intervened in the opioid MDL to petition the court to lift the ARCOS protective order and, thereby, provide the public access to the ARCOS opioid transaction data as well as the voluminous pleadings, motions, and other documents that had been filed under seal in the MDL pursuant to the protective order.[98] The media companies maintained that Judge Polster had failed to make a good cause finding sufficient to support the ARCOS protective order,[99] there existed a strong presumption in favor of open court records under longstanding precedent,[100] the American public had a compelling interest in obtaining the information in the midst of a national public health emergency,[101] and the public's interest outweighed the DEA and defendants' interest in secrecy.[102] The media companies also argued that the law enforcement and competitive harms alleged by the DEA and defendants were speculative and conclusory.[103] To bolster those claims, the media intervenors pointed out that neither the DEA nor the defendants could identify any harm attributable to detailed ARCOS

[94] *Id.*

[95] *Id.* at 1–2.

[96] *Id.* at 2.

[97] *See generally* United States of America's Brief in Support of Objections to Disclosure of ARCOS Data, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio June 25, 2018), ECF No. 663 (showing the redactions made to the brief).

[98] Brief in Support of Disclosure of ARCOS Data Filed on Behalf of the Washington Post at 1–2, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio July 9, 2018), ECF No. 718; HD Media Co., LLC's Brief in Support of Public Disclosure of ARCOS Data at 1, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio July 9, 2018), ECF No. 725.

[99] Brief in Support of Disclosure of ARCOS Data Filed on Behalf of the Washington Post, *supra* note 98, at 8.

[100] *Id.* at 4–5.

[101] *Id.* at 9–10.

[102] *Id.* at 1.

[103] *Id.* at 11–13.

opioid transaction data released to the public by a West Virginia trial court in 2016.[104]

Judge Polster denied the media companies' request to release the ARCOS information.[105] Notwithstanding his earlier ruling rejecting the DEA and defendants' objections to disclosure of the ARCOS transaction data to the public entity plaintiffs, Judge Polster concluded that the DEA and defendants had demonstrated good cause sufficient to justify the ARCOS data protective order under Federal Rule of Civil Procedure 26(c)(1).[106] In other words, the court flip-flopped on its ARCOS-related good cause determination for a second time in the litigation.

Cribbing directly from the DEA's redacted brief in objection to ARCOS data production to the media companies, the court found that the information sought was "sensitive to pharmacies and distributors because it is confidential business information . . . and . . . sensitive from the DEA's perspective because it is crucial to law enforcement efforts."[107] Notably absent from Judge Polster's opinion denying the media companies access to the ARCOS data were his earlier admonitions that the DEA and defendants' asserted interests carried no weight because, as he concluded, "market data over three years old carried *no risk* of competitive harm"[108] and "it is untenable that exposure of the data will actually or meaningfully interfere with any ongoing enforcement proceeding."[109]

Judge Polster's order also denied the media companies access to the ARCOS opioid transaction data on the theory that such disclosure would violate the federal Freedom of Information Act (FOIA).[110] In so doing, he engaged in judicial jiu-jitsu to avoid the inconvenient fact that the media companies sought the ARCOS data not pursuant to federal FOIA but under pertinent state law, specifically, the Ohio and West Virginia public records statutes. As he explained:

> ARCOS data is not a record generated by the Counties that are, or may be, subject to state public records requests. It is a law-enforcement tool of the United States that it shares only with local law enforcement agencies to stem illicit drug-trafficking. Plaintiffs have gained the ARCOS data solely by virtue of the Court's discovery processes. The data does not transmogrify into a

[104] HD Media Co., LLC's Brief in Support of Public Disclosure of ARCOS Data, *supra* note 98, at 6–7.

[105] Opinion and Order at 12, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio July 26, 2018), ECF No. 800.

[106] *Id.* at 8.

[107] *Id.* at 9–10.

[108] Order Regarding ARCOS Data, *supra* note 39, at 17 (emphasis added).

[109] *Id.* at 16.

[110] Opinion and Order, *supra* note 105, at 10–11.

> public record merely because it has been disclosed privately to the parties in this civil litigation.[111]

This line of reasoning is difficult to defend on several counts. As already explained, the media companies did not request the ARCOS opioid transaction data from either the DEA or any other federal entity under federal FOIA. Rather, they sought the information from West Virginia and Ohio counties pursuant to those states' public records laws. Those public records laws, in turn, make clear that the ARCOS information did transmogrify into state public records upon their receipt by the West Virginia and Ohio counties.[112]

It is further worth pointing out that the DEA has been a proponent of the notion that otherwise private records transmogrify into documents to which it is entitled when those records are transferred from private parties to public custodians in federal civil litigation. For example, the DEA has taken the position on several occasions in federal district court that individual patients lose their privacy interests in their medical prescribing records when state law compels those records to be transferred by a dispensing pharmacy to a state prescription drug monitoring program (PDMP).[113] According to the DEA, a retail pharmacy's involuntary transfer of a patient's prescribing records to the state PDMP database deprives that patient of standing to even object to the DEA's warrantless access of the patient's record.[114]

The point here is a simple one. Record transmogrification is not a one-way doctrine. It cannot be the case that records do not transmogrify when such a result might defeat a federal agency or corporate defendant's desire for secrecy but do so when it would benefit a federal agency at the expense of an individual's privacy interests. The DEA's position that individual patient prescribing records transmogrify once they are stored in state PDMP databases is not a random example. The DEA and opioid manufacturer and distributor defendants expressly advanced the argument in the opioid MDL that the public entity plaintiffs ought to be required to mine their own state PDMP databases—rather than be granted access to the ARCOS opioid transaction data—in order to ascertain patterns of suspicious opioid sales and diversion.[115] Needless to say, and unlike the ARCOS database, state PDMP databases do not include any

[111] *Id.* at 11.

[112] *See* OHIO REV. CODE § 149.43(A)(1) (2019) ("'Public record' means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units . . . ."); W. VA. CODE ANN. § 29B-1-2(4) (2015) ("'Public record' includes any writing containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the conduct of the public's business.").

[113] U.S. Dep't of Justice v. Utah Dep't of Commerce, No. 2:16-cv-611-DN-DBP, 2017 WL 3189868, at *8 (D. Utah July 27, 2017); Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin., 998 F. Supp. 2d 957, 966–67 (D. Or. 2014), *rev'd*, 860 F.3d 1228 (9th Cir. 2017).

[114] *See Or. Prescription Drug Monitoring Program*, 998 F. Supp. 2d at 962–63.

[115] Transcript of Feb. 26, 2018 Hearing, *supra* note 41, at 39–40.

opioid manufacturer and distributor transaction data. PDMPs track prescription opioid pills from the point of prescribing to the point of dispensing of the drug to the individual patient.[116]

V. SIXTH CIRCUIT ARCOS PROCEEDINGS

The media intervenors appealed the district court's decision denying their request for the ARCOS opioid transaction data and myriad sealed or redacted opioid MDL documents to the United States Court of Appeals for the Sixth Circuit.[117] The Sixth Circuit held that the district court's determination that the DEA and defendants had shown "good cause" sufficient to prevent the Ohio and West Virginia counties from disclosing the ARCOS transaction data to the public constituted an abuse of discretion.[118] The appellate court pointed out that "the best evidence that good cause did *not* exist for the Protective Order comes from the district court's own balancing of the interests in disclosure versus nondisclosure" in its earlier order granting the public entity plaintiffs access to the ARCOS data.[119]

The Sixth Circuit characterized Judge Polster's "complete about-face concerning the relevant interests at stake" in the ARCOS data production disputes as "bizarre."[120] The appellate court found it incredible that the district court would anchor its denial of the media companies' requests for ARCOS information in the very same speculative and conclusory grounds that the court had previously and vigorously rejected: the defendants' and DEA's purported commercial and law enforcement-related harms.[121] Writing for the majority of a split panel, Judge Clay opined that the district court had gotten things right in its opinion ordering the DEA to disclose the ARCOS data to the public entity plaintiffs in the first instance because "representatives of the public . . . have a substantial interest in disclosure of the ARCOS data, while the DEA and Defendants have only a lesser interest in avoiding potential harms that can be avoided by narrower, less categorical means."[122]

The Sixth Circuit also questioned whether the district court was motivated to keep the ARCOS data secret so that it could deploy the possibility of future public disclosure as leverage in settlement discussions. The panel mused whether Judge Polster's repeated statements in favor of a pre-trial settlement "suggest[ed] that at least part of the reason for the district court's about-face on

[116] *See, e.g.*, *Or. Prescription Drug Monitoring* Program, 860 F.3d at 1232 (citing OR. REV. STAT. § 431A.860) ("[P]harmacies . . . are required to report electronically to the PDMP, among other things, the patient's name, address, date of birth, and sex; the dispensing pharmacy's identity; and the prescribing practitioner's identity.").

[117] *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 923 (6th Cir. 2019).

[118] *Id.* at 931, 938.

[119] *Id.* at 931.

[120] *Id.* at 932–33.

[121] *Id.*

[122] *Id.* at 933.

what interests Defendants and the DEA have in nondisclosure of the ARCOS data might have been a desire to use the threat of publicly disclosing the data as a bargaining chip in settlement discussions."[123] With regard to that possibility, the panel delivered a stinging rebuke: "If this was a motivation for its holding, then the district court abused its discretion by considering an improper factor. And even if this was not part of the district court's motivation, it appears that the court abused its discretion by acting irrationally."[124]

Another point of contention for the Sixth Circuit was the district court's failure to take into account the relevant consequences that flowed from the aforementioned West Virginia trial court's release of West Virginia ARCOS opioid transaction data in 2016.[125] The media companies had argued in the district court that the aftermath of the West Virginia ARCOS disclosure favored public access to the MDL ARCOS opioid data because, while the release of the West Virginia information had provoked public and policymaker awareness about—and, for better or worse, action in response to—the opioid crisis, neither the DEA nor the defendants had suffered any harm.[126] In fact, and as HD Media brought to the district court's attention, the West Virginia distributor defendants neither sought a stay of nor appealed the West Virginia trial court's decision to release the ARCOS data to the public.[127]

The district court, of course, had not been moved by those arguments. It quickly disposed of the need to even evaluate the relative impacts of the release of the West Virginia ARCOS transaction information for two reasons. First, the court explained that the West Virginia request only sought to unseal second amended complaints, which are subject to a presumption of public access, and not data contained in discovery produced pursuant to a protective order, which are governed by the lower standard of good cause.[128] In addition, the court contended that the West Virginia ARCOS disclosure was distinguishable from the media's MDL ARCOS data request insofar as the distributor defendants in the West Virginia litigation only invoked competitive commercial harm in opposition to disclosure whereas, in the opioid MDL, the DEA "cites as a basis for nondisclosure, in addition to confidential commercial information, the need to protect law enforcement-sensitive information, which is a subject this Court takes very seriously."[129]

The Sixth Circuit was not impressed with the district court's reasoning. It pointed out that public disclosure of the West Virginia "specific transactional data has proved extremely effective and consequential in calling attention to the horrors of the opioid crisis" by, for instance, inciting the United States House of

[123] *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 933.

[124] *Id.* (internal citations and quotations omitted).

[125] *See id.* at 933–34.

[126] HD Media Co., LLC's Brief in Support of Public Disclosure of ARCOS Data, *supra* note 98, at 6–11.

[127] *Id.* at 3.

[128] Opinion and Order, *supra* note 105, at 7.

[129] *Id.* at 7–8.

Representatives Energy and Commerce Committee to investigate and issue a report about the crisis.[130] As the record established, the *Charleston Gazette-Mail*'s reporting based on the West Virginia ARCOS opioid transaction data "result[ed] in a Pulitzer Prize, a Congressional Committee report, and a broader public understanding of the scope, context, and causes of the opioid epidemic."[131] The panel also emphasized that the DEA's inability to "point to any resulting harm [from the West Virginia ARCOS data disclosure] demonstrates that there is little chance of *imminent* harm from disclosure of the [MDL] ARCOS data."[132] The appellate court, therefore, concluded that the DEA's alleged "law enforcement interests do not seem very weighty"[133] and ordered the district court to reconsider the protective order:

> [T]he district court may entertain arguments by the DEA as to why *particular* pieces of ARCOS data that relate to *specific* ongoing investigations should not be disclosed; however, the district court shall not enter a blanket, wholesale ban on disclosure pursuant to state public records requests. Nor shall any modified protective order specify that the ARCOS data be destroyed or returned to the DEA at the conclusion of this litigation.[134]

The Sixth Circuit went on to vacate all of the district court's MDL orders that permitted numerous court records, including public entity plaintiff complaints, to be filed under seal or with redactions pursuant to the ARCOS protective order.[135] The appellate court easily reached that result due to the significantly more robust right of public access that pertains to court records than that which applies to discovery produced pursuant to a protective order.[136] American constitutional and common law afford court records a strong presumption of openness, which the panel explained "applies here with extra strength given the paramount importance of the litigation's subject matter."[137]

It is also well-settled that, given the public's presumptive right to access court records, judges are proscribed from sealing court documents without espousing specific findings and conclusions to justify nondisclosure—even when no party objects to a request to seal.[138] As a recent media investigative report into court secrecy explained, "In [Judge] Polster's court, as lawyers began fleshing out their cases against the opioid industry in amended complaints, they

[130] *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 934.
[131] *Id.* at 938.
[132] *Id.* at 936.
[133] *Id.* at 936–37.
[134] *Id.* at 938.
[135] *Id.* at 939–40.
[136] *See* Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016) ("[T]here is a stark difference between so-called 'protective orders' entered pursuant to the discovery provisions of Federal Rule of Civil Procedure 26, on the one hand, and orders to seal court records, on the other.").
[137] *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 939.
[138] *Shane Grp., Inc.*, 825 F.3d at 306.

redacted details of the companies' conduct. In almost every instance, Polster failed to provide on the record his reason for allowing the secrecy . . . ."[139]

Judge Polster's opinion denying the media companies' requests for the ARCOS opioid transaction data similarly provided no such findings or conclusions in support of nondisclosure.[140] "[T]he district court[, therefore,] *ispo facto* abused its discretion."[141] Consequently, the Sixth Circuit ordered Judge Polster to re-evaluate every one of the documents he had allowed to be filed redacted or under seal with the following guidance:

> The court is advised to bear in mind that the party seeking to file under seal must provide a "compelling reason" to do so and demonstrate that the seal is "narrowly tailored to serve that reason." On remand, if the district court permits a pleading to be filed under seal or with redactions, it shall be incumbent upon the court to adequately explain "why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary." In doing so, the district court is to pay special attention to this Court's statement that "[o]nly the most compelling reasons can justify non-disclosure of judicial records."[142]

VI. THE IMPORTANCE OF TRANSPARENCY IN PUBLIC HEALTH LITIGATION

> *"The judge is the primary representative of the public interest . . . . He may not rubber stamp a stipulation to seal the record."*[143]

The Sixth Circuit's ARCOS data opinion, which commanded the district court to conduct a lawful, public analysis of the competing arguments for and against public disclosure of the ARCOS opioid transaction information,[144] was a victory for opioid MDL transparency. Judge Polster, in fact, reconsidered his decision to deny the media access to the ARCOS MDL information *in toto* and, in so doing, lifted the protective order as to the 2006-2012 ARCOS data.[145] The *Washington Post* thereafter released a report about that data, which revealed that opioid manufacturers and distributors flooded the country with more than 76 billion prescription opioid pills during the six-year period at issue.[146] The report

[139] Lesser et al., *supra* note 3.

[140] *See In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 939.

[141] *Id.*

[142] *Id.* at 940 (quoting *Shane Grp., Inc.*, 825 F.3d at 305–06).

[143] Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) (internal citations omitted).

[144] *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 939–40.

[145] Order Regarding ARCOS Data Protective Order at 1–2, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio July 15, 2019), ECF No. 1845.

[146] Scott Higham et al., *76 Billion Opioid Pills: Newly Released Federal Data Unmasks the Epidemic*, WASH. POST (July 16, 2019), https://www.washingtonpost.com/investigations/76-billion-opioid-pills-newly-released-federal-data-unmasks-the-epidemic/2019/07/16/5f29fd62-a73e-11e9-86dd-d7f0e60391e9_story.html?utm_term=.8e8c6785485f [https://perma.cc/9VTQ-FREL].

contains a panoply of incredible statistics, including the fact that distributors and manufacturers sent *306 prescription pills per person per year* to the tiny hamlet of Norton, Virginia.[147]

While Judge Polster's decision to release the 2006–2012 ARCOS data on remand was a welcome development in the opioid MDL, he has refused to revisit his decision not to release to the public more recent ARCOS information, industry suspicious order reports, and millions of other discovery documents and court records that remain sealed or redacted. As such, and for several reasons, the public should be concerned about the pervasive secrecy that has infected the litigation since its inception and continues to deny it, the real party in interest, access to critical health and safety evidence pertinent to the country's drug use and overdose crisis.

A. *The Public Has a Compelling Interest in Transparent Health and Safety Litigation*

First, the public has a particularly compelling interest in transparency in the opioid MDL. The MDL represents public interest litigation in its purest form: its plaintiffs are taxpayer-funded public entities advocating in the federal courts on behalf of their constituents in an attempt to mitigate an ongoing national public health emergency.[148] The public is not only footing the bill for the litigation, it is a direct party in interest to the proceedings. As the *Washington Post* aptly submitted to the Sixth Circuit, "This is not a 'private' dispute being litigated in public. Rather, it is a public dispute that is wrongly being litigated in private."[149]

The notion that the public has a fundamental interest in transparent court proceedings, of course, is neither a new nor novel concept even where, unlike in the opioid MDL, the public is not a direct party in interest to the proceedings. In fact, it is a longstanding, bedrock attribute of the Anglo-American justice system. "The roots of open trials reach back to the days before the Norman Conquest . . . in England,"[150] which then "carried over into proceedings in colonial America."[151]

Over the years, American courts have waxed poetic about the public's right to access the courts as well as the intrinsic purposes of that fundamental right. In 1894, the District of Columbia Circuit explained that "[a]ny attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to

[147] *Id.*

[148] *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 923.

[149] Brief of Appellant/Intervenor The W.P. Company, LLC, dba, The Washington Post at 14, *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919 (6th Cir. 2019) (No. 18-3860), ECF No. 23.

[150] Press-Enter. Co. v. Superior Court of Cal., Riverside Cty., 464 U.S. 501, 505 (1984).

[151] *Id.* at 508.

which all persons have the right of access."[152] Nearly a century later, the United States Supreme Court formalized the public's First and Fourteenth Amendment rights to open criminal trials in *Richmond Newspapers, Inc. v. Virginia*, expounding that "[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'"[153]

Three years after *Richmond Newspapers*, the Sixth Circuit extended the holding and reasoning of that case to civil proceedings in *Brown & Williamson Tobacco Corp. v. FTC*.[154] Much like the opioid MDL ARCOS data appeal, *Brown & Williamson* provided the Sixth Circuit with an opportunity to assess the public's right to access important public health information that had been mired in secrecy in the district court.[155] The decision was provoked by cigarette manufacturer Brown & Williamson Tobacco Company's (B&W) appeal of the district court's dismissal of its suit to enjoin the Federal Trade Commission (FTC) from publishing damaging information about some of its tobacco products in the Federal Register.[156] Specifically, B&W sought to restrain the FTC from announcing that the agency's cigarette testing methodology had underestimated the amount of tar in B&W's Barclay cigarettes and the amount of both tar and nicotine in B&W's Kool Ultra and Kool Ultra 100's cigarettes.[157]

The Public Citizen Health Research Group (Public Citizen) filed an amicus brief on appeal asking the Sixth Circuit to lift the blanket seal that the district court had placed on all documents filed by the FTC, which B&W vigorously opposed.[158] The appellate court sided with Public Citizen, holding that the seal violated the public's common law and First Amendment rights to access court proceedings.[159] The court explained that, "In either the civil or the criminal courtroom, secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption."[160]

Brown & Williamson held that the public was entitled to the FTC court records because "[t]he subject of this litigation potentially involves the health of citizens who have an interest in knowing the accurate 'tar' and nicotine content of the various brands of cigarettes on the market" and "how the government agency has responded to allegations of error in [its] testing program."[161] The Sixth Circuit wound up its opinion with a straightforward observation: "[C]ommon sense tells us that the greater the motivation a

[152] *Ex parte Drawbaugh*, 2 App. D.C. 404, 407–08 (1894).
[153] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980).
[154] Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178–79 (6th Cir. 1983).
[155] *See id.* at 1172.
[156] *Id.* at 1167–68.
[157] *Id.*
[158] *See id.* at 1169.
[159] *Id.* at 1176.
[160] *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179.
[161] *Id.* at 1180–81.

corporation has to shield its operations, the greater the public's need to know."[162] Not long after deciding *Brown & Williamson*, the Sixth Circuit extended the presumption of public access to pre-trial civil discovery.[163]

If the public's right of access to court proceedings is longstanding, has expanded in scope over time, and appears to be robustly guarded by the federal appellate courts, then why the fuss? The unfortunate reality, which the opioid MDL ARCOS data dispute brings into sharp contrast, is that trial courts are highly likely to seal documents, issue blanket protective orders, and permit parties to secretly litigate cases that implicate public health and safety. A recent *Reuters* investigative report targeting secrecy in mass tort litigation confirms this conclusion.[164] *Reuters*' analysis of Westlaw data from 3.2 million federal civil suits filed between 2006 and 2016 "revealed that judges allowed litigants to seal material in at least 65 percent of product-liability actions"[165] and, "over the past 20 years, judges sealed evidence relevant to public health and safety in about half of the 115 biggest defective-product cases."[166]

Reuters further reported that, "[i]n 85 percent of the cases where . . . [public] health and safety information [was] under seal, judges provided no explanation for allowing the secrecy,"[167] which is, as explained above, blatantly illegal. The judges that *Reuters* interviewed conceded that they issued blanket seals without cause in cases of great public import because they were swamped with litigation and such practice expedited case resolution.[168] As former United States District Judge Jeremy Fogel explained: "You're overburdened. You've got a limited bandwidth. You have lawyers fighting about everything. And so, when they finally agree on something, you're all too happy to accept that . . . . [Therefore,] information that could have really made a difference sometimes doesn't come to light."[169]

Retired West Virginia Trial Judge Booker T. Stephens similarly responded when asked why he had kept West Virginia ARCOS transaction data filed in the State's case against OxyContin manufacturer Purdue Pharma under seal *for twelve years* before releasing it to the *Charleston Gazette-Mail* in 2016: "This case was sealed because both sides agreed and asked me to seal it."[170] He went on to say that, "Obviously[,] when you settle a case of this magnitude and of

[162] *Id.* at 1180.

[163] Meyer Goldberg, Inc. v. Fischer Foods, Inc., 823 F.2d 159, 162–64 (6th Cir. 1987) ("[A]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.") (quoting American Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (7th Cir. 1978)).

[164] *See* Lesser et al., *supra* note 3.

[165] Benjamin Lesser et al., *How We Did the Data Analysis*, REUTERS (June 25, 2019), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-how/ [https://perma.cc/VJ2X-Z62T].

[166] Lesser et al., *supra* note 3.

[167] *Id.*

[168] *See id.*

[169] *Id.*

[170] *Id.*

this nature, Purdue Pharma would not want to let the world know they had engaged in deceptive marketing practices."[171]

Judge Stephens's remarks are as concerning as they are candid. Federal law is clear that, while "[a] corporation very well may desire that the allegations lodged against it in the course of litigation be kept from public view to protect its corporate image, . . . the First Amendment right of access does not yield to such an interest."[172] The fuss, in sum, is about the rampant secrecy in mass tort public interest litigation notwithstanding the law, which demonstrates that even well-settled, fundamental public rights can suffer substantial erosion if not vigorously defended.

B. *Public Transparency Provides an Important Check on the Pro-Secrecy and Pro-Settlement Forces that Drive MDLs*

Public disclosure also provides an important check on the incentives that promote secrecy and rapid settlements in general civil litigation, which are super-charged in mass tort MDLs like the aggregate opioid litigation.[173] As the Sixth Circuit explained in *Brown & Williamson*:

> [P]ublic access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court. The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court. . . . [P]ublic access provides an element of accountability. One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion.[174]

To be fair, it is not just trial judges that forego transparency in order to move cases forward and secure more expeditious settlements in run-of-the-mill civil litigation. Private, contingency-fee-compensated plaintiffs' attorneys, who want a quick return on their up-front investment rather than protracted proceedings and are required by the rules of ethics to place primacy on their clients' interests, are incentivized to agree to secret proceedings and confidential settlements that may not be in the public's interest.[175] Corporate defense attorneys are also motivated to keep their clients' wrongdoing shielded from public scrutiny and seek confidential settlement agreements to protect their clients' reputations.[176]

[171] *Id.*

[172] Doe v. Pub. Citizen, 749 F.3d 246, 269 (4th Cir. 2014).

[173] Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (6th Cir. 1983).

[174] *Id.*

[175] *See* L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 247 (2004) ("Plaintiffs' attorneys receive a hefty contingency fee from each individual client, but have to negotiate only one settlement.").

[176] *See id.*

Certain features unique to MDLs, however, hyper-incentivize judges, lead plaintiffs' counsel, and defendants to collude to reach quick, confidential, global settlements that often operate to the plaintiffs' disadvantage and keep the public in the dark.[177] After highlighting the extravagant paucity of MDL cases that ever proceed to trial, which is, precisely, "very few," Judge William Young aptly observed that "the 'settlement culture' for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice."[178] It is particularly important, therefore, to demand and enforce public transparency to curb the MDL's settlement-above-all-else priorities.

Unlike class action litigation, which is governed by FRCP 23, the MDL process is subject to the 1968 Multidistrict Litigation Act.[179] Pursuant to that statute, the Chief Justice of the United States Supreme Court appoints a panel of seven federal judges that has the power to transfer groups of cases that are pending across various federal district courts and involve a common question of fact to a single federal district court.[180] That "transferor" court then coordinates and conducts consolidated pre-trial proceedings.[181] The Multidistrict Litigation Act mandates remand of transferred cases to the original "transferee" courts once the pretrial proceedings have concluded in the MDL transferor venue.[182]

In order to manage their massive dockets and avoid resource-depleting, direct interaction with thousands of plaintiffs' lawyers, MDL judges appoint a small group of attorneys as "lead counsel."[183] Lead counsel are responsible for the defining events in the litigation, including "negotiat[ing] settlements and dictat[ing] trial strategy."[184] As a result, the lawyers who have primary access to the MDL judge, decide the key litigation maneuvers, and negotiate exclusively with defense counsel are not the attorneys who represent the overwhelming majority of plaintiffs forced to litigate their claims in MDL venues and away from their home districts.[185]

MDL judges appoint the same "repeat players" over and over again to MDL leadership positions purportedly due to their specialized aggregate litigation expertise.[186] "Once appointed, lead lawyers highjack the cockpit and restrict

[177] *See id.* at 170–71 ("[A]ll mass torts share three key features that contribute to the potential for collusion in settlements: 'repeat player' attorneys who routinely represent mass tort plaintiffs or defendants; aggregation before a single court; and a judge who wants to dispose of burdensome mass tort litigation.").

[178] DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 150 (D. Mass. 2006) (footnote omitted).

[179] 28 U.S.C § 1407(a) (2012).

[180] *Id.* § 1407(a), (d).

[181] *Id.* § 1407(b).

[182] *Id.* § 1407(a).

[183] ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 17 (2019).

[184] *Id.* at 18.

[185] *Id.* at 19.

[186] *Id.* (reporting that 74.6% of leadership positions on MDLs are filled with repeat players).

access to the judge."[187] Indeed, "some judges funnel all communications through their handpicked leaders."[188]

MDL judge-selected lead counsel, of course, do not work on behalf of the aggregate group of plaintiffs pro bono. Instead, judges award lead attorneys "common-benefit" fees for their efforts, which are funded by the MDL plaintiffs who have, at least in theory, "benefitted" from lead counsel's work.[189] Common benefit fees are a significant motivator for lead counsel, who control settlement negotiations, because those fees are often (1) hefty and well-eclipse contingency fees and (2) negotiated with defense counsel during settlement talks.[190] As a result, the common-benefit fee arrangement often works to the advantage of lead counsel and the defendants at the expense of the MDL plaintiffs. As complex litigation expert and law professor Elizabeth Chamblee Burch has pointed out: "[B]y offering lead lawyers '"red-carpet treatment on fees" in return for favorable terms elsewhere,' defendants can take advantage of lead attorneys' control over settlement to strike deals that benefit the defendant and the plaintiffs' leaders, but not the plaintiffs."[191]

Repeat player lead attorneys are also less likely to pursue litigation tactics that are disfavored by the MDL judge that appointed them, determines their common-benefit fee awards, and controls their potential future appointments to MDL leadership positions even when such tactics might not be in the plaintiffs' best interests.[192] Moreover, because contingency fee lead attorneys are heavily leveraged in up-front funding of MDL litigation, the longer MDL cases linger on the docket, the more likely lead attorneys are to suffer adverse financial consequences up to and including bankruptcy.[193] Lead counsel, therefore, are dangerously incentivized to acquiesce to MDL judges that favor secrecy and rapid, global settlements at the expense of their clients' and the public's interest.

MDL lead counsel and defense attorneys also are incentivized to reach a global, pre-trial settlement in order to circumvent the MDL procedure that requires that cases be remanded to their home districts for trial.[194] Lead counsel seek to avoid remand because the transfer of the litigation back to home district courts deprives them of having their fees determined by the MDL judge that they have worked so hard to please over the course of the MDL pre-trial proceedings.[195] Remand, instead, relegates control over lead counsel fees to any

[187] *Id.*

[188] *Id.*

[189] BURCH, *supra* note 183, at 20.

[190] *Id.* at 20–22.

[191] *Id.* at 22 (quoting Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 109–10 (2010)).

[192] Silver & Miller, *supra* note 191, at 109–10 (explaining "[t]he price of [lead counsel] impertinence" to the MDL Judge that appointed them).

[193] BURCH, *supra* note 183, at 24–25.

[194] 28 U.S.C § 1407(a).

[195] BURCH, *supra* note 183, at 26.

number of independent home federal district court judges—none of whom lead counsel have had the exclusive opportunity to court during pre-trial proceedings.[196]

Defense attorneys, on the other hand, disfavor remand because it requires them to either litigate against, or make piecemeal deals with, individual plaintiffs across the federal districts instead of resolving all of the cases against their clients once and for all in a global settlement.[197] As Professor Burch points out, corporate clients strongly prefer the finality of a global settlement deal because it "reassures shareholders, puts [public relations] nightmares to rest, and returns focus to a company's primary enterprise."[198]

Federal judges are also hyper-incentivized to push for expeditious settlements in MDL proceedings. The overwhelmingly majority of federal district court judges, 70%, want to be assigned an MDL, and 80% of those who have been assigned to one desire to be assigned to another.[199] "Multidistrict litigations are plum judicial assignments; they involve interesting facts, media attention, and some of the nation's most talented attorneys."[200] The federal panel that assigns MDLs rewards judges who resolve MDLs efficiently with additional MDL assignments and is unlikely to assign another MDL to a judge who failed to resolve a previous one quickly.[201] Describing the pressure exerted on federal district court judges to rapidly resolve pending litigation, retired federal district court Judge Nancy Gertner wrote:

> Decry the "vanishing trial," but do everything you can to end cases as quickly and summarily as possible. Value efficiency above all, which mean[s] encouraging the parties in a civil case to settle, or those in a criminal case to plead guilty. Confidential settlements were always good no matter what the issue; don't look too deeply to see if the issues were fairly litigated. *Any* closing after all is as good as *any other*.[202]

In sum and for the reasons provided above, a quick, global, confidential settlement is the endgame for most MDL judges, lead plaintiffs' counsel, and defense attorneys. Because MDL transparency provides a public check on the aggregate litigation's heightened perverse incentives, it is of paramount importance.

[196] *See id.*
[197] *See id.*
[198] *Id.* at 27.
[199] *Id.* at 30.
[200] *Id.*
[201] BURCH, *supra* note 183, at 30.
[202] Nancy Gertner, *Opinions I Should Have Written*, 110 NW. U. L. REV. 423, 428 (2016) (internal footnote omitted).

C. *Transparent Discovery Is More Likely to Improve Public Health Policymaking than Secret Proceedings and Confidential Settlements*

The public also should advocate for transparent health and safety litigation because history teaches that it is the disclosure of health crisis provoking and exacerbating facts—and not the award of settlement funds—that drive meaningful public health reform. The 1990s tobacco litigation, which culminated in a massive global settlement, provides an illustrative example. Research demonstrates that few of the significant tobacco-related public health gains that have been realized in the United States since the 1998 tobacco settlement are attributable to the litigation's enormous Master Settlement Agreement (MSA) payouts.[203] This is because states devoted only a small fraction of those proceeds to tobacco-related public health issues.[204] Instead, they diverted tobacco settlement money into their general funds and spent the vast majority of it closing budget gaps, keeping their Medicaid programs in the black, and supporting infrastructure projects.[205]

Several tobacco-producing states actually expended their MSA tobacco settlement funds to subsidize *the manufacture and marketing of tobacco*.[206] North Carolina, for example, dedicated 75% of its MSA settlement proceeds to just such efforts.[207] Worse yet, "a recent study showed that higher MSA payments were actually associated with *weaker* tobacco control measures; because a state's share of MSA funds was dependent on the number of smokers in the state and its estimated tobacco-related Medicaid expenditures, the MSA did not necessarily discourage diversion of funds to other purposes."[208]

There is a consensus among experts, on the other hand, that the public disclosure of damning internal tobacco industry documents enhanced tobacco control policy and, thereby, improved public health outcomes.[209] A group of public health scholars asked Judge Polster to take into consideration the

[203] Brief of Amici Curiae in Support of Settlement with Favorable Public Health Outcomes at 6–9, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio May 9, 2019), ECF No. 1626. *See generally* MASTER SETTLEMENT AGREEMENT §§ IX, XI (1998), https://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf [https://perma.cc/B862-KVRW] (requiring the original participating manufacturers to pay a minimum of $206 billion over the initial twenty-five years of the agreement).

[204] Brief of Amici Curiae in Support of Settlement with Favorable Public Health Outcomes, *supra* note 203, at 6–9.

[205] *Id.* at 8–9.

[206] *See* U.S. GEN. ACCOUNTING OFFICE, GAO-01-851, TOBACCO SETTLEMENT: STATES' USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 34–36 (2001) ("Seven of the 13 tobacco states allocated $651 million of their MSA payments for assistance to tobacco growers and/or economic development projects.").

[207] Brief of Amici Curiae in Support of Settlement with Favorable Public Health Outcomes, *supra* note 203, at 8.

[208] *Id.* at 7 (citing Jayani Jayawardhana et al., *Master Settlement Agreement (MSA) Spending and Tobacco Control Efforts*, 9 PLOS ONE 1, 13 (2014)).

[209] *Id.* at 12–13.

mistakes and successes of the tobacco litigation in devising a public health-promoting opioid settlement in an MDL amici curiae brief. As they explained:

> [T]he [tobacco] MSA required tobacco companies to open, at their expense, a website which includes all documents produced in state and other smoking and health related lawsuits, maintain it for 12 years, and add all documents produced in future civil actions involving smoking and health cases. These documents have been cited to in Congressional hearings on tobacco regulation and in rulemaking, and created the dataset for a significant bibliography of scholarship, including nearly 800 journal articles and 29 full books, which has influenced public health policy for tobacco prevention and beyond.[210]

In sum, "the implementation of transparency provisions [in the tobacco MSA]" "clearly had a positive effect on tobacco control" and, therefore, is "regarded as [a] public health success[.]"[211] It is certainly difficult to imagine the achievement of this country's positive tobacco-cessation-related public health outcomes had the damning tobacco industry documents produced in discovery been placed under seal into perpetuity. It is, likewise, difficult to imagine that an opioid litigation settlement devoid of any document disclosure mandate will have a meaningful impact on the country's drug use and overdose crisis, regardless of the size of the ultimate payout. A group of American medicine and public health historians recently filed an amici curiae brief in the opioid MDL that emphasized this significant concern:

> [*A*]*mici* believe in the possibility of a successful settlement that could serve several critical interests of the public. Among these interests is access to information. The concealment of information about the abuse potential and distribution patterns of opioid painkillers allowed the opioid crisis to take root in the first place and to grow to its current dimensions. Since secrecy fueled the crisis, no just and genuinely remedial settlement can be reached unless it honors the public's right to know and secures the conditions for its effective exercise into the future. As scholars, *amici* regard it as their mission to bring to light the largely hidden web of social and economic forces, corporate practices, cultural beliefs, and political decisions in which the victims of the crisis were trapped. . . . [*A*]*mici* . . . believe that a prospective settlement should take additional steps to guarantee full and permanent access to the records that will enable scholars and policymakers to develop evidence-based measures aimed at remedying the crisis in future years. A settlement exclusive of such provisions, *amici* fear, might entail yet another irreparable loss.[212]

[210] *Id.* at 13 (internal footnotes omitted).

[211] *Id.* at 12.

[212] Brief of Amici Curiae in Support of a Settlement Agreement Including Broad Transparency Provisions in the Interest of Future Research at 7–8, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Sept. 14, 2019), ECF No. 2604.

D. *Lack of Transparency in Cases Involving Ongoing Public Health and Safety Issues Can Kill*

Both history and common sense also teach that, in cases like the opioid MDL that involve an ongoing public health emergency, secrecy can exacerbate crises and put lives at risk. There are, unfortunately, more examples of such phenomena than this Article has the space to re-tell. But for just one such instance of public health and safety litigation secrecy leading to unnecessary deaths, generally, and the entirely preventable deaths of children, specifically, we need look no further than the Remington Model 700 rifle litigation.

In the early 1990s, a plaintiff brought a personal injury case against gun manufacturer Remington Arms Company in the United States District Court for the District of Montana.[213] The complaint alleged that a product defect in the firing mechanism of Remington's popular 700-series bolt-action rifle caused the weapon to discharge without a trigger pull.[214] The case, *Aleksich v. Remington*, settled in 1995 and was subsequently sealed in its entirety.[215]

Richard Barber intervened in the *Aleksich* case on October 20, 2011 to petition the court to unseal the court records, contending that he, a member of the public, had a right to access the documents.[216] Mr. Barber was on a very personal search for answers. "On October 23, 2000, [his] nine-year-old son, Richard Augustus 'Gus' Barber, was mortally wounded when the family's Remington Model 700 rifle fired as his mother pushed the safety to the 'off' position in order to unload the gun."[217] At no time did Mrs. Barber touch the rifle's trigger.[218] As Mr. Barber's heartbreaking investigation would reveal, numerous others, including several children, had been injured or killed by an unprovoked firing of a Remington 700 rifle and, in addition to the *Aleksich* case, several lawsuits had been filed well in advance of Gus's death contending that the rifle's firing mechanism was faulty.[219]

During the fifteen years between the *Aleksich* settlement and Mr. Barber's motion to unseal the *Aleksich* records, Remington refused to either recall the 700 rifle or issue a safety warning about its firing mechanism.[220] Instead, the company continued to manufacture the rifle.[221] Mr. Barber, therefore, intervened in *Aleksich* to unseal the court records with the "hope that once the information in the . . . court file is made public, Remington will finally have no

[213] Brief in Support of Richard Barber's Motion to Unseal *Aleksich* Court Filings at 1, Aleksich v. Remington, No. CV-91-5-BU-PGH (D. Mont. 2012), ECF No. 427.

[214] *Id.*

[215] *Id.*

[216] Brief in Support of Richard Barber's Motion to Intervene at 1, Aleksich v. Remington, No. CV-91-5-BU-PGH (D. Mont. 2011).

[217] *Id.*

[218] *Id.*

[219] *Id.* at 1–2.

[220] *See id.* at 2, 4.

[221] *See id.*

choice but to issue an adequate safety warning, recall these fire controls from the market, and/or remove them from production altogether."[222]

The timing of Mr. Barber's intervention was provoked by a *CNBC* documentary entitled *Remington Under Fire: A CNBC Investigation*, which premiered on October 20, 2010.[223] Among other things, the documentary profiled the following documents that had been produced by Remington in the *Aleksich* case and sealed by the trial judge:

- An internal memorandum from Remington's lead engineer Mike Walker, dated December 3, 1946, warning of a "theoretical unsafe condition" involving the Model 700's safety, which is the mechanism that is supposed to keep the gun from firing accidentally.
- An internal memorandum from a Remington test engineer, dated April 9, 1947, noting that the Model 700 could fire "by pushing the safety to the 'off' position," which was "very dangerous from a safety and functional point of view."
- An internal memorandum from Mike Walker, dated August 16, 1948, where Walker proposed a change in his original design that would have incorporated a blocking device to keep the Model 700's trigger mechanism from falling out of alignment.
- A 1948 internal memorandum from Remington executives, noting that Walker's proposed change to incorporate a blocking device "is the best design," but concluding that "its disadvantages lay in the high expenditure required to make the conversion," which—according to the same memorandum—would have been 5.5 cents per gun.
- A memorandum from Remington's patent attorney, dated August 31, 1948, noting, "Our usual potential liability for the safety of our product is augmented somewhat by our knowledge that some Model 721 safeties have misfunctioned [sic] . . . . However, our liability does not seem out of proportion to the advantage of retaining the present . . . construction, pending receipt of further complaints from the field."
- An internal memorandum from a Remington research manager, dated March 18, 1975, noting that Remington "could duplicate" the fire control problems on a Model 700 rifle that had been returned to the factory.[224]

These documents, which the *Aleksich* court had sealed into perpetuity before Mr. Barber's intervention, demonstrate that Remington knew that the Model 700 rifle contained a faulty firing mechanism as early as the 1940s, that is, some

[222] Brief in Support of Richard Barber's Motion to Intervene, *supra* note 216, at 4.
[223] *Id.* at 7.
[224] *Id.* at 7–8.

five-plus decades before the rifle claimed young Gus Barber's life. Remington also was well-aware that replacing the faulty firing mechanism with the "best design" was entirely feasible but would cost 5.5 cents per rifle, and, therefore, simply refused to either warn the public about the potentially deadly design flaw or recall the weapon.[225] The company's response to the CNBC documentary was entirely disingenuous but predictable for a going concern that had grown comfortable with getting away with murder: "[T]he Model 700, including its trigger mechanism, has been free of any defect since it was first produced . . . ."[226]

The stark reality is that countless individuals and children were needlessly wounded or killed by a product whose manufacturer knew was defective and potentially deadly for sixty-plus years. Equally concerning, the Montana Federal District Court went out of its way to ensure that the company could continue to cover up the Model 700 rifle defect by placing the entire litigation under seal indefinitely.[227] During the fifteen years that the important public health and safety information produced by Remington in *Aleksich* remained under seal, of course, Mr. Barber's young son, Gus, fell victim to court-ordered secrecy while Remington continued to manufacture the Model 700.[228] As the above-discussed Reuters investigation into opioid litigation court secrecy concluded:

> The trail of hidden evidence running through the opioid crisis is emblematic of a pervasive and deadly secrecy that shrouds product-liability cases in U.S. courts, enabled by judges who routinely allow the makers of those products to keep information pertinent to public health and safety under wraps. And since nearly all such cases are resolved before trial, the evidence often remains secret indefinitely, robbing consumers of the chance to make informed choices and regulators of opportunities to improve safety.[229]

E. *Transparency in Complex Health and Safety Litigation Can Inform and Shift Sticky Narratives that Provoke Problematic Policymaking*

On a related note, transparency in complex, public health litigation, like the opioid MDL, can operate to shift sticky—but incomplete or inaccurate—public narratives regarding the causal forces of a health crisis and, thereby, provoke more thoughtful, evidence-based public health policymaking. Transparent discovery and trials, after all, promote "true and accurate fact finding."[230] As scholars have pointed out, the media, policymakers, and public have adopted an

[225] *See id.*

[226] *Id.* at 8.

[227] Brief in Support of Richard Barber's Motion to Unseal *Aleksich* Court Filings, *supra* note 213, at 1.

[228] *See id.* at 2–3.

[229] Lesser et al., *supra* note 3.

[230] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980) (Brennan, J., concurring).

overly simplistic narrative about the opioid crisis that the epidemiological data simply does not support.[231] That popular narrative goes as follows: prescription opioid manufacturers flooded communities with their products and used deceptive marketing tactics to advance the belief that those products were not addictive; doctors, in turn, overprescribed prescription opioids, which led to massive diversion and rampant addiction and, ultimately, hundreds of thousands of entirely preventable prescription opioid overdose deaths.[232]

This narrative not only animates the opioid MDL but has provoked the enactment of supply-side, law-enforcement-centric laws and policies, including the ubiquitous creation of prescription drug monitoring programs that the DEA and other law enforcement agencies routinely sweep through to crack-down on prescription opioid prescribers and so-called opioid overutilizers or "doctor shoppers."[233] The threat of criminal and administrative prosecution and its concomitant potential loss of livelihood has incentivized doctors to either force their opioid patients to quickly taper off the drugs, which is ineffective at treating narcotic dependency, or, worse, abandon those patients altogether.[234] Rapid, forced opioid tapering and patient abandonment motivated by vigorous

[231] *See* Leo Beletsky, *Deploying Prescription Drug Monitoring to Address the Overdose Crisis: Ideology Meets Reality*, 15 IND. HEALTH L. REV. 139, 140–41 (2018); Jennifer D. Oliva, *Prescription Drug Policing: The Right to Health Information Privacy Pre- and Post-*Carpenter, 69 DUKE L.J. (forthcoming 2020) (manuscript at 1).

[232] Nabarun Dasgupta et al., *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 182 (2018) ("The accepted wisdom about the US opioid crisis singles out opioid analgesics as causative agents of harm, with physicians as unwitting conduits and pharmaceutical companies as selfish promoters."); Sally Satel, *The Myth of What's Driving the Opioid Crisis*, POLITICO (Feb. 21, 2018), https://www.politico.com/magazine/story/2018/02/21/the-myth-of-the-roots-of-the-opioid-crisis-217034 [https://perma.cc/2HVW-R9DT] (explaining that "[t]he myth that the epidemic is driven by patients becoming addicted to doctor-prescribed opioids . . . [which] is now a media staple and a plank in nationwide litigation against drug makers . . . misconstrues the facts"); *The Myth of an Opioid Prescription Crisis*, CATO INST. (Sept./Oct. 2017), https://www.cato.org/policy-report/septemberoctober-2017/myth-opioid-prescription-crisis [https://perma.cc/GY95-HKP8] (arguing that "only one-quarter of people who take opioids for nonmedical reasons get them by obtaining an prescription," "the opioid-related overdose rate for people who are on chronic pain medicine under the guidance of a doctor is 0.2 percent," and "that the big cause of overdose problems now is heroin"); *see also* J. Baxter Oliphant, *Prescription Drug Abuse Increasingly Seen as a Major U.S. Public Health Problem*, PEW RES. CTR. (Nov. 15, 2017), http://www.pewresearch.org/fact-tank/2017/11/15/prescription-drug-abuse-increasingly-seen-as-a-major-u-s-public-health-problem/ [https://perma.cc/Y4WW-L5X5] (pointing out that, in October 2017, "76% of the public sa[id] that prescription drug abuse is an extremely or very serious public health problem in America").

[233] Oliva, *supra* note 231, at 6.

[234] Stephen J. Ziegler, *Patient Abandonment in the Name of Opioid Safety*, 14 PAIN MED. 323, 323 (2013); Madeline St. Amour, *Chronic Pain Patients Suffer in Opioid Crisis as Doctors Fear Retribution*, DAILY CAMERA (June 2, 2019), https://www.dailycamera.com/2019/06/02/chronic-pain-patients-suffer-in-opioid-crisis-as-doctors-fear-retribution/ [https://perma.cc/RB6A-CB6V].

law enforcement monitoring, in turn, compelled many patients with a dependency on prescription opioids to substitute those FDA-regulated medications for unregulated—and much more powerful and dangerous—illicit substances, such as heroin and fentanyl, to avoid the crushing symptoms of "dopesickness," which itself can be fatal.[235]

This more complex narrative in no way implies that profit-driven prescription opioid manufacturers and distributors should be absolved of their significant contributions to the crisis. The West Virginia ARCOS opioid data that Judge Stephens eventually unsealed in 2016 certainly supports the claim that the opioid defendants flooded small, rural Appalachian towns with prescription opioids while the DEA sat on its hands.[236] And as we now know, the national level ARCOS opioid transaction information, which the DEA and defendants went to great lengths to keep under wraps in the opioid MDL, indicates that the MDL pharmaceutical industry defendants engaged in similar behavior in communities across the country.[237]

The point here is that the dominant narrative, which points the blame exclusively at the over-supply of prescription opioids and provoked policymakers to implement crackdown laws and regulations instead of an evidence-based harm reduction response, seems to have caused considerably more harm than good. Since the implementation of numerous supply-side crackdown tactics, including rampant PDMP surveillance, opioid prescribing has precipitously declined while opioid-related overdose deaths, the

[235] Puja Seth et al., *Quantifying the Epidemic of Prescription Opioid Overdose Deaths*, 108 AM. J. PUB. HEALTH 500, 500 (2018) ("From 2013 to 2014, fentanyl submissions increased by 426%. The increases were strongly correlated with increases in synthetic opioid deaths but not with pharmaceutical fentanyl prescribing rates, suggesting that the increases were largely due to [illicitly manufactured fentanyl]."); Josh Katz, *The First Count of Fentanyl Deaths in 2016: Up 540% in Three Years*, N.Y. TIMES (Sept. 2, 2017), https://www.nytimes.com/interactive/2017/09/02/upshot/fentanyl-drug-overdose-deaths.html?mtrref=www.google.com&assetType=REGIWALL [https://perma.cc/E3BM-RKE4] ("Drug overdoses are expected to remain the leading cause of death of Americans under 50, as synthetic opioids – primarily fentanyl and its analogues – continue to push the death count higher."); Maia Szalavitz, *Why Trump's Opioid Plan Will Harm More People than It Will Save*, SELF (Mar. 28, 2018), https://www.self.com/story/trump-opioid-plan [https://perma.cc/D9RF-U5CU] (notwithstanding the fact that "[t]he number of overall opioid prescriptions . . . has been falling for years . . . opioid overdose deaths in 30 states actually *increased* between 2010 and 2015, largely because of people switching to illegal drugs").

[236] DOJ IG DEA OPIOIDS REPORT, *supra* note 9, at i ("[T]he rate of opioid overdose deaths in the United States grew, on average, by 8 percent per year from 1999 through 2013 and by 71 percent per year from 2013 through 2017. Yet, from 2003 through 2013 DEA was authorizing manufacturers to produce substantially larger amounts of opioids."); Eric Eyre, *Drug Firms Poured 780M Painkillers into WV Amid Rise of Overdoses*, CHARLESTON GAZETTE-MAIL (Dec. 17, 2016), https://www.wvgazettemail.com/news/cops_and_courts/drug-firms-poured-m-painkillers-into-wv-amid-rise-of/article_99026dad-8ed5-5075-90fa-adb906a36214.html [https://perma.cc/3EL5-TUNT].

[237] *See* DIVERSION CONTROL DIV., DRUG ENF'T ADMIN., *supra* note 12.

overwhelming majority of which are attributable today to illicit substances—and not prescription pills—has continued to climb.[238] Patients with well-documented, crippling pain conditions have been forced to suffer due to tapering and physician abandonment.[239] And the opioid crisis is beginning to be eclipsed by the surge in other illicit drug-related deaths, including methamphetamine and cocaine, across the country.[240]

The argument here is that, had the American public known the truth about the deceptive marketing practices of the opioid defendants and the addictive qualities of prescription opioids earlier in the crisis, policymakers might have been forced to respond to that information before the situation developed into a full-blown national health emergency. And perhaps policymakers would have been inclined to implement more thoughtful, evidence-based, public health-promoting responses if they had had the opportunity to tackle the crisis before it spiraled out of control. It is possible, for instance, that transparency would have nudged the public to ask hard questions about the DEA's role in the crisis and insist on controlled-substance-related agency reforms instead of immediately turning to the DEA and law enforcement for solutions. As it turns out, there is simply nothing like a well-hyped American controlled substance "emergency" that creates hysteria and provokes knee-jerk demands for a law-enforcement-driven, supply-side crackdown on the culprit class of drugs accompanied by little concern for widespread collateral damage.

VII. CONCLUSION

As the opioid MDL and recent investigative reporting reveal, American health and safety litigation continues to be shrouded in secrecy to the public's detriment and to the benefit of negligent regulators and profit-driven

[238] IQVIA INST., MEDICINE USE AND SPENDING IN THE U.S.: A REVIEW OF 2017 AND OUTLOOK TO 2022 12 (Apr. 2018) (explaining that prescription opioid volumes peaked in 2011 and have since declined by 29% and that 23.3 billion fewer MMEs were dispensed to patients on a volume basis in 2017); Dasgupta et al., *supra* note 232, at 183 ("Overdose deaths attributable to prescription opioids have not decreased proportionally to dispensing.").

[239] Deborah Dowell et al., *No Shortcuts to Safer Opioid Prescribing*, 380 NEW ENG. J. MED. 2285, 2285–86 (2019); Jayne O'Donnell & Josephine Chu, *Chronic Pain Patients, Overlooked in Opioid Crisis, Getting New Attention from Top at FDA*, USA TODAY, https://www.usatoday.com/story/news/politics/2018/07/02/chronic-pain-patients-needs-ignored-opioid-epidemic/727015002/ [https://perma.cc/R3AJ-896Q] (last updated July 3, 2018).

[240] Mbabazi Kariisa et al., *Drug Overdose Deaths Involving Cocaine and Psychostimulants with Abuse Potential — United States, 2003–2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 388, 389 (May 3, 2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6817a3.htm [https://perma.cc/SFG5-SG4A] ("Overdose deaths involving cocaine and psychostimulants continue to increase. During 2015–2016, age-adjusted cocaine-involved and psychostimulant-involved death rates increased by 52.4% and 33.3%, respectively."); Marc Levy, *Cocaine, Meth on Rise in Pennsylvania's Early Warning Areas*, ASSOCIATED PRESS (Mar. 4, 2019), https://apnews.com/2427001f843c478480b8535e93db2577 [https://perma.cc/4XC6-2K7A].

corporations for no legitimate legal reason. The courts routinely, without cause, issue blanket protective orders and place key health and safety documents produced in litigation under seal into perpetuity in the name of efficiency and in violation of federal law. This Article contends that the public should be aware of—and concerned about—this ongoing travesty of justice beyond its sheer illegality. Among other things, it argues that the public has a compelling interest in transparent health and safety litigation, such transparency provides an important check to the perverse incentives that drive secrecy and confidential settlements in MDL proceedings, transparency is more likely to improve public health policymaking than secrecy and confidential settlements, nondisclosure of public health and safety information can exacerbate public health crises and risk lives, and transparency in public health litigation can help inform and shift the prevailing narrative about a public health crisis and, thereby, provoke more informed, evidence-based policymaking.

It seems that Judge Polster was onto something when, in comparing the opioid crisis to a plague, he asserted that disclosure of the ARCOS data "is a reasonable step toward defeating the disease" because the information exposes "how and where the virus grew."[241] Hopefully, he takes his own advice seriously going forward in the opioid MDL and orders the disclosure of the millions of litigation documents and court records that remain secret, under seal, and/or redacted. Perhaps even more important, and as at least two amici curiae have argued, history makes clear that it is highly unlikely that an opioid MDL settlement will have any laudable impact on the country's drug use and overdose crisis unless it mandates the disclosure and preservation of the litigation documents into perpetuity.[242] The law requires the federal courts, after all, to place the public's interest in transparency and public health over a corporate defendant's or a government agency's self-interested secrecy.

[241] Order Regarding ARCOS Data, *supra* note 39, at 21–22.

[242] *See, e.g.*, Brief of *Amici Curiae* in Support of a Settlement Agreement Including Broad Transparency Provisions in the Interest of Future Research, *supra* note 212, at 7 ("Since secrecy fueled the crisis, no just and genuinely remedial settlement can be reached unless it honors the public's right to know and secures the conditions for its effective exercise into the future.").