



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

Civil Action No. 19-C-9000

THIS DOCUMENT APPLIES TO ALL CASES

**ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL
WALMART TO PRODUCE INVESTIGATION MATERIALS**

This matter comes before the Discovery Commissioner on *Plaintiffs' Motion to Compel Walmart to Produce Investigation Materials* (Transaction ID 65972436). The Discovery Commissioner has reviewed the Motion, Defendants Walmart Inc. and Wal-Mart Stores East, LP's ("Walmart") *Opposition to Plaintiffs' Motion to Compel Walmart to Produce Investigation Materials* (Transaction ID 66004220) and Plaintiffs' *Reply* (Transaction ID 66021921).

Plaintiffs served three discovery requests on Walmart that are at issue in this Motion. All three requests target "investigation materials"; that is, the identification of investigations by state and federal agencies into Walmart's opioid-related practices and production of documents related to those investigations. The requests were contained in *Plaintiffs' First Discovery Requests to Defendant Group 2*. Walmart responded and objected to the requests on July 31, 2020.

Plaintiffs' Interrogatory No. 2 requests that Walmart:

State whether any state or government agency has investigated, suspended or revoked Your registrations, licenses, approvals, or permits pertaining to controlled substances from 1996 to the present including the date of the investigation, suspension or revocation, the state or governmental agency that initiated the investigation or issued the suspension or revocation, the reason for the investigation, suspension or revocation, and the length of the suspension, if applicable.

Plaintiffs' Request for Production 16 sought "all Documents produced to and all Communications related to the United States House Energy and Commerce Committee arising out of its investigation into 'opioid dumping' into West Virginia."

Plaintiffs' Request for Production 19 sought "all Documents related to investigations of You by the DEA and/or DOJ or the West Virginia Board of Pharmacy related to the distribution or dispensing of opioids. Such records shall include all investigations in West Virginia and nationally." RFP 19 specifically requested that Walmart produce documents related to the DEA's investigation of Walmart as reported in a March 25, 2020 ProPublica article entitled *Walmart Was Almost Charged Criminally Over Opioids. Trump Appointees Killed the Indictment*.

Plaintiffs argue that investigation materials are highly relevant to proving Walmart's liability for public nuisance in West Virginia. They note that West Virginia courts follow the Restatement (Second) Torts, § 821B in evaluating claims for public nuisance, and that the requested materials are relevant to evaluating Walmart's conduct under at least two of the Restatement factors. Plaintiffs also contend that the materials are highly relevant to Walmart's defense that its opioid-related conduct was in conformance with applicable law in all instances. Plaintiffs further argue that production of these materials imposes little or no burden on Walmart because it has already collected and produced to government agencies the majority of responsive documents.

In its Opposition, Walmart raises four principal arguments against complying with Plaintiffs' requests as written. First, Walmart argues that documents relating only to its dispensing practices are not relevant to Plaintiffs' claims. Second, Walmart argues that documents relating to investigations outside of Plaintiffs' specific West Virginia communities are also irrelevant to establishing a public nuisance inside those communities. Third, Walmart contends that the Discovery Commissioner should follow the lead of the federal MDL Court, which ruled that Walmart need not produce materials produced to government investigators where the federal investigations are still ongoing. Finally, Walmart argues that the discovery requested is overly

burdensome given Walmart’s view of the relevance of the documents and the asymmetric nature of the requests on the parties. As to Request for Production No. 16 specifically, Walmart argues that it was not the target of the Congressional Investigation, that it is “not aware” of any documents produced to the government in the course of that investigation, and, in any event, that any internal communications that post-date the issuance of the Commission’s report are irrelevant.

The Court has ordered that a “non-jury trial on the issue of liability for public nuisance will be conducted as soon as practicable, after a reasonable period of discovery on this issue is conducted.” Order Regarding Trial of Liability for Public Nuisance, Feb. 19, 2020, Transaction ID 64739341. “The scope of discovery in civil cases is broad[.]” *State ex rel. Shroades v. Henry*, 187 W. Va. 723, 725, 421 S.E.2d 264, 266 (1992). “Rule 26(b)(1) of the West Virginia Rules of Civil Procedure . . . provides, in pertinent part, that the ‘[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .’ *Id.*

The Discovery Commissioner declines Walmart’s invitation to decide this Motion in terms of four categories of documents. Walmart’s categories are incomplete and, for example, would not include state investigations or West Virginia Board of Pharmacy documents that are encompassed by Plaintiffs’ requests.

Other than certain arguments made with respect to the House Energy Committee investigation materials described in RFP 16, Walmart’s main arguments apply generally to each request. The first two of these arguments—the “dispensing” and “geography” objections—relate to the materials’ relevance. The Discovery Commissioner agrees with Plaintiffs that investigatory materials are highly relevant. West Virginia law follows the Restatement (Second) Torts, § 821B, and the materials sought go directly to determining Walmart’s liability for public nuisance in West

Virginia because they will shed light on Walmart's potential non-compliance with state or federal statutes and regulations and go directly to Walmart's knowledge of the likely effects in West Virginia of its national policies and procedures. Investigatory materials also go directly towards rebutting or confirming any defense that Walmart's conduct complied with the law.

More specifically, the Discovery Commissioner recently considered and rejected the Chain Pharmacies' arguments concerning the relevance of "dispensing" discovery in the *Order Granting Plaintiffs' Motion to Compel Chain Pharmacy Defendants to Produce West Virginia Dispensing Data* (Transaction ID 66015062). As noted in that Order, dispensing-related information was available to Walmart for use in its "suspicious order monitoring" programs. Information or knowledge that Walmart became aware of through a dispensing-related investigation, including information Walmart either did review or could have reviewed, is relevant to Walmart's knowledge of the effect of its policies. Because Walmart implemented policies, procedures, and protocols for its pharmacies on a national a basis, any investigation that showed Walmart's policies were failing to prevent diversion in one state is evidence that Walmart knew those policies would fail in West Virginia. Accordingly, the Discovery Commissioner agrees that Walmart may not withhold responsive documents simply because they concern "dispensing" investigations.

The Discovery Commissioner also finds that materials related to investigations outside of West Virginia are also relevant. Walmart's policies and procedures apply nationwide and any investigation into Walmart's corporate practices necessarily has relevance to Walmart's conduct in West Virginia. As just one example, Walmart does not contest that it's 2011 Memorandum of Agreement with the DEA, which followed an investigation into its practices in California, required Walmart to implement changes to its national procedures and to comply with reporting requirements on a national basis.

Walmart further objects to producing materials related to investigations that are still ongoing. The Discovery Commissioner notes that although Walmart states in its Opposition that in the MDL the Special Master “ordered production of information relating only to closed investigations,” Walmart omits that the Special Master’s ruling applied only to closed federal—but not state—investigations. Accordingly, Walmart shall identify and produce documents responsive to Plaintiffs’ requests for all state investigations.

The Discovery Commissioner also finds Walmart’s other arguments unpersuasive. As an initial matter, Plaintiffs point out that although Walmart represents to this Court that the DOJ’s criminal investigation into it is ongoing, Walmart has represented to at least one court that the investigation finished without an indictment issuing. Walmart’s inconsistent representations to this Court and others concerning the status of the DOJ’s criminal investigation into it is concerning, to say the least.

Regardless, the Discovery Commissioner agrees that Walmart should identify and produce documents and materials relating to any investigation into Walmart’s opioid distribution or dispensing practices, including the materials Walmart produced to the United States Attorney’s Office in the Eastern District of Texas. Walmart’s production here of materials it produced to the DOJ, for example, in response to the DOJ’s investigation of Walmart does not interfere with or otherwise implicate the concerns raised regarding pending investigations. Whatever “roadmap” or information might be gleaned from those productions, Walmart already has it as the producing party. The Discovery Commissioner remains aware of the Department of Justice’s concern that the disclosure of documents relating to pending federal government investigations may be problematic. If the Defendants’ in complying with this Order or any discovery response have legitimate concerns that the information requested is or remains a part of an ongoing federal

investigation, they shall alert the Discovery Commissioner within 5 days and immediately inquire of the Department of Justice if they object to production of the information.

Walmart's last general objection is that production of the materials requested is overly burdensome. The party objecting to discovery requests on the grounds that the information sought is not relevant has the burden of proof in establishing that its objection is proper. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 630, 425 S.E.2d 577, 585 (1992). As the party asserting burden as an objection, Walmart "must do more than make unsubstantiated or conclusory statements that a discovery request is overly broad and burdensome." *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 120, 640 S.E.2d 176, 183 (2006) (citing *Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005), and *Carlson v. Freightliner LLC*, 226 F.R.D. 343, 370 (D. Neb. 2004) ("An objection that discovery is overly broad and unduly burdensome must be supported by affidavits or evidence revealing the nature of the burden and why the discovery is objectionable.")). The Discovery Commissioner agrees that there is virtually no burden to Walmart in producing here documents that it has already produced to government agencies. And Walmart has not presented any evidence of burden as to the remainder of responsive materials. Nor has Walmart cited to any basis in West Virginia law to support its argument that the requested discovery should be limited because it is too "asymmetric." In short, Walmart has not met its burden to show burden, and that objection is overruled.

With respect to each specific request, the Discovery Commissioner notes that Walmart has made no additional arguments as to why it should not be required to respond fully to Plaintiffs' Interrogatory 2.

With respect to Plaintiffs' Request for Production No. 16, Walmart argues that it was not the target of the Congressional Investigation, that it is "not aware" of any documents produced to

the government in the course of that investigation, and, in any event, that any internal communications that post-date the issuance of the Commission's report are irrelevant. Walmart's Opposition is not clear as to whether Walmart has performed a reasonable inquiry to search for documents produced to the Congressional investigators. If it has not, it shall. Walmart objects that communications related to the report that post-date the report's issuance are irrelevant but does not further develop its argument. Walmart makes no argument as to why pre-report communications related to the Congressional Investigation are irrelevant. Accordingly, Walmart's specific objections to Plaintiffs' Request for Production No. 16 are overruled, and Walmart is ordered to search for and produce communications regarding the Commission's investigation and report.

Walmart has indicated that certain information that is the subject of this motion and Order requires that the Order be filed under seal. After consideration the Discovery Commissioner finds no reason to do so and denies this request.

Finally, the Discovery Commissioner notes that Walmart states in its Opposition that it has agreed to produce or will produce various subcategories of responsive documents. To the extent Walmart has not yet produced those documents, it should do so by no later than December 15, 2020. If it has already produced responsive documents, it should identify those documents with sufficient detail to permit Plaintiffs to locate and identify them.

Accordingly, Walmart's objections are **OVERRULED** and Plaintiffs' Motion to Compel is **GRANTED**. Walmart is hereby **ORDERED** to provide responses and responsive documents no later than November 23, 2020, in response to:

- a. *Plaintiffs' First Discovery Requests to Defendant Group 2 Interrogatory No. 2;*
- b. *Plaintiffs' First Discovery Requests to Defendant Group 2 Request for Production No. 16; and*

c. *Plaintiffs' First Discovery Requests to Defendant Group 2* Request for Production No. 19.

A copy of this Order has this day been electronically served on all counsel of record via File & Serve *Xpress*.

IT IS SO ORDERED.

ENTERED: October 20, 2020.

/s/ Christopher C. Wilkes
Discovery Commissioner