



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 19-C-9000

THIS DOCUMENT APPLIES TO:

CITY OF CLARKSBURG, WEST VIRGINIA,

Plaintiff,

v.

Civil Action No. 19-C-259 MSH

ALLERGAN PLC, et al.,

Defendants.

**ORDER OVERRULING DEFENDANT RITE AID CORPORATION'S
OBJECTIONS TO DISCOVERY COMMISSIONER'S ORDER DENYING
PROTECTIVE ORDER REGARDING JURISDICTIONAL DISCOVERY**

Pending before the Court is *Defendant Rite Aid Corporation's Objections to Discovery Commissioner's Order Denying Protective Order Regarding Jurisdictional Discovery* (Transaction ID 66059318). RAC requests that the Court reverse the Discovery Commissioner's *Order Denying Protective Order* (Transaction ID 66036670), which required RAC to provide substantive responses to Plaintiff's Jurisdictional Interrogatories and Requests for Production. The Court has reviewed the Discovery Commissioner's Order, Defendant Rite Aid Corporation's ("RAC") Objections, Plaintiff City of Clarksburg's ("Plaintiff") Response (Transaction ID 66073468) and RAC's Reply (Transaction ID 66094865).

The Discovery Commissioner's findings of fact and conclusions of law are reviewed *de novo* and procedural matters are reviewed for abuse of discretion. *Order Appointing Discovery Commissioner*, p. 3 (Transaction ID 64839031). After a thorough review of the record, the Court finds that jurisdictional discovery is proper against RAC in the above-captioned matter. For the reasons set forth below, the Court **OVERRULES** RAC's Objections and **AFFIRMS** the

Discovery Commissioner's Order requiring RAC to answer jurisdictional discovery served by Plaintiff in compliance with the Discovery Commissioner's Order.

FINDINGS OF FACT

1. Plaintiff instituted the present action against RAC seeking to hold it liable for damages caused by, *inter alia*, the alleged public nuisance of over dispensing opioid drugs resulting in massive addiction in the Clarksburg community. Complaint filed by the *City of Clarksburg*, Civil Action No. 19-C-259 MSH ("Compl.").

2. Plaintiff alleges that RAC, as the parent company of the Rite Aid Subsidiaries, "established national policies and procedures governing the distribution and dispensing of controlled substances throughout the United States" and "it directed and intended that those policies and procedures would be implemented on a nationwide basis including, specifically, West Virginia." Compl. ¶ 130. Plaintiff further alleges that RAC "was responsible for directing and implementing policies and procedures governing the distribution and dispensing of controlled substances by its subsidiaries, including but not limited to the Rite Aid Subsidiaries, throughout the United States, including in West Virginia and Plaintiff's community specifically." *Id.*

3. On May 29, 2020, RAC moved to dismiss the claims against it for lack of personal jurisdiction due to limited or no contacts with West Virginia. *Memorandum in Support of Rite Aid Corporation's Motion to Dismiss for Lack of Personal Jurisdiction* (Transaction ID 65665201).

4. On the pleadings, Plaintiff has alleged that RAC maintains minimum contacts with the forum state, West Virginia, through imposing and enforcing policies and procedures regarding opioids on its subsidiaries within the state. RAC has denied these allegations.

5. On June 9, 2020, Plaintiff served "Plaintiff's Jurisdictional Interrogatories" and "Plaintiff's Jurisdictional Requests for Production" on RAC.

6. On June 12, 2020, Plaintiff responded to RAC's motion to dismiss and suggested completion of jurisdictional discovery. *Plaintiffs' Memorandum of Law in Opposition to Defendant Rite Aid Corporation's Motion to Dismiss for Lack of Personal Jurisdiction* (Transaction ID 65696608).

7. On July 2, 2020, RAC filed a motion for protective order (Transaction ID 65742304) seeking to avoid answering Plaintiff's jurisdictional discovery.

8. On October 20, 2020, the Discovery Commissioner denied RAC's motion for protective order, concluding that "the discovery requests by Plaintiff are sufficiently narrow in scope of inquiry and therefore are allowable jurisdictional discovery." *Order Denying Protective Order* (Transaction ID 66036670).

STANDARD OF REVIEW

1. As stated in Syllabus Point 4 of *State ex rel. Bell Atlantic W. Va. Inc. v. Ranson*, 201 W.Va. 402, 404, 497 S.E.2d 755, 757 (1997):

When a defendant files a motion to dismiss for lack of personal jurisdiction under *W.Va.R.Civ.P.* 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. At this stage, the party asserting jurisdiction need only make a *prima facie* showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a *prima facie* showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. If, however, the court conducts a pretrial evidentiary hearing on the motion, or if the personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence.

2. "It is within the trial court's sound discretion whether to permit discovery to aid its decision of a motion to dismiss for lack of personal jurisdiction, made pursuant to Rule 12(b)(2) of the West Virginia Rules of Civil Procedure, or whether to decide such a motion based solely upon the pleadings, affidavits and other documentary evidence. The court's decision will not be

overturned absent an abuse of discretion.” Syl. Pt. 1, *Bowers v. Wurzburg*, 202 W.Va. 43, 45, 501 S.E.2d 479, 481 (1998).

4. “A plaintiff asserting personal jurisdiction over a nonresident defendant must establish that his or her claim is not frivolous. To do so, the plaintiff must *allege* the requisite jurisdictional contact in his or her complaint and must assert more than bare allegations of jurisdictional facts in response to a motion to dismiss under Rule 12(b)(2) of the West Virginia Rules of Civil Procedure. Once these threshold criteria have been met, the court generally should permit limited jurisdictional discovery, unless the court’s jurisdiction or lack thereof, is clear.” *Id.* Syl. Pt. 3 (emphasis added).

OPINION

I. JURISDICTIONAL DISCOVERY AGAINST RAC IS PROPER AT THIS PHASE.

The issue before the Court is whether to require RAC to answer jurisdictional discovery served by Plaintiff in reaction to RAC’s pending motion to dismiss for lack of personal jurisdiction. To the extent the parties’ briefs venture into arguments better framed for the pending motion to dismiss, the Court will address those arguments when it rules on that motion. For purposes of reviewing RAC’s objections to the Discovery Commissioner’s Order, the Court must apply the legal requirements for jurisdictional discovery to determine whether it is proper at this phase of litigation. In doing so, the Court is mindful of the discretion afforded to trial court judges in making such a decision. *See, Bowers v. Wurzburg*, 202 W.Va. 43, 51, 501 S.E.2d 479, 487 (1998) (Trial court has discretion to “permit limited jurisdictional discovery” where minimum contacts are alleged.).

Because Plaintiffs have alleged specific jurisdictional contacts with West Virginia beyond mere bald assertions that jurisdiction exists; and discovery on these allegations is not overly broad

or excessively burdensome to RAC; the Court agrees with the Discovery Commissioner that Plaintiff's jurisdictional discovery is proper at this phase.

A. Plaintiff has Alleged Specific Jurisdictional Contacts with West Virginia Beyond Bald Assertions that Jurisdiction Exists.

For purposes of deciding whether to allow jurisdictional discovery on a W. Va. R. Civ. P. 12(b)(2) motion, a *prima facie* showing of personal jurisdiction is achieved when a plaintiff alleges specific contacts with the forum state beyond a conclusory statement that jurisdiction exists. *Id.* In this case, Plaintiff has alleged RAC maintained contact with West Virginia by creating, implementing, imposing and enforcing policies and procedures on their subsidiaries operating within the state. Specifically, Plaintiff alleges "Rite Aid of West Virginia was in the business of holding and operating retail pharmacies in West Virginia, including in the City of Clarksburg, on behalf of its parent company Rite Aid Corporation. Rite Aid of West Virginia orders . . . controlled substances from Rite Aid of Maryland. These controlled substances are distributed and dispensed according to practices and procedures established by Rite Aid Corporation." Compl., ¶125.

As stated in the complaint:

At all relevant times, and as the parent company of the Rite Aid Subsidiaries, Defendant Rite Aid Corporation established national policies and procedures governing the distribution and dispensing of controlled substances throughout the United States that it directed and intended that those policies and procedures would be implemented on a nationwide basis including, specifically, West Virginia. At all times relevant to this Complaint, Defendant Rite Aid Corporation was responsible for directing and implementing policies and procedures governing the distribution and dispensing of controlled substances by its subsidiaries, including but not limited to the Rite Aid Subsidiaries, throughout the United States, including in West Virginia and Plaintiff's community specifically.

Compl., ¶130

These paragraphs place the Defendant on notice that Plaintiff asserts contacts with West Virginia both through direct action and jurisdiction over a parent corporation through the

relationship between the parent and subsidiary, the *Bowers v. Wurzburg* standard.¹ 202 W. Va. 43 at 54, 501 S.E.2d at 490. As asserted by Plaintiff, this is consistent with RAC’s public description of its role:

The Company is a Delaware corporation and through its 100% owned subsidiaries, *operates* a pharmacy retail healthcare company in the United States of America. The Company *operates* through its two reportable segments: the Retail Pharmacy segment and the Pharmacy Services segment. The Retail Pharmacy segment operates one of the largest retail drugstore chains in the United States, with 2,469 stores in operation as of March 2, 2019. The Retail Pharmacy segment’s drugstores’ primary business is the sale of brand and generic prescription drugs.

See, Excerpts 2019 SEC 10-K filing (emphasis added).

Plaintiff’s Complaint alleges that Rite Aid distributed 2,022,198 dosage units of opioids into the City of Clarksburg, West Virginia from 2006 to 2014. Compl., ¶131. Plaintiff contends that, through directing its subsidiaries, RAC distributed massive amounts of opioids into West Virginia thereby, “transacting business” in West Virginia “to supply services or things” which “caused tortious injury” in West Virginia thereby satisfying the long-arm statute. *See*, W. Va. Code, § 56–3–33(a); W. Va. Code § 31D–15–1501(d).

Plaintiffs have characterized the specific contacts it alleges RAC has maintained with West Virginia. Regardless of whether these contacts are sufficient to confer personal jurisdiction and/or whether these facts will ultimately be established through discovery, the Court views these

¹ The *Bowers* non-exhaustive list of factors include questions of: (1) Whether the parent corporation owns all or most of the capital stock of the subsidiary; (2) Whether the parent and subsidiary corporations have common directors and officers; (3) Whether the parent corporation finances the subsidiary; (4) Whether the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation; (5) Whether the subsidiary has grossly inadequate capital; (6) Whether the parent corporation pays the salaries and other expenses or losses of the subsidiary; (7) Whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (8) Whether in the papers of the parent corporation or in the statement of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation’s own; (9) Whether the parent corporation uses the property of the subsidiary as its own; (10) Whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter’s interest; and (11) Whether the formal legal requirements of the subsidiary are not observed. *Bowers*, 202 W. Va. 43 at 54, 501 S.E.2d at 490 (reversing dismissal to afford Plaintiffs a reasonable opportunity to conduct jurisdictional discovery about defendants).

allegations as more than a bald assertion that personal jurisdiction exists.² The U.S. Supreme Court has acknowledged that “a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.” *Daimler AG v. Bauman*, 571 U.S. 117, 135 n.13 (2014); *See also, Hill by Hill* 188 W.Va. at 659, 425 S.E.2d at 614. Moreover, other courts in West Virginia overseeing opioid litigation have denied motions to dismiss finding personal jurisdiction over corporate parent entities.³ This is precisely what Plaintiff is alleging against RAC. Therefore, the Court finds that Plaintiff’s allegations are more specific than bald assertions that jurisdiction exists and are sufficient to demonstrate their claims are not frivolous.

B. Plaintiff’s Jurisdictional Discovery is Reasonable and Tailored to the Inquiries Raised in Plaintiff’s Theory of Jurisdiction.

Upon review, Plaintiff’s jurisdictional discovery requests focus on the specific standards set forth in West Virginia, including the eleven factors under *Bowers v. Wurzburg*, and discovery resulting from Judge Polster in the opioid MDL which granted Plaintiffs’ leave to conduct personal jurisdiction discovery of RAC. See, Order Regarding Jurisdictional Discovery of Rite Aid Corporation, February 24, 2020, *In Re: National Prescription Opiate Litigation*, (1:17-md-2804) (MDL 2804) at Docket No. 3180. Plaintiff’s jurisdictional discovery inquiries go to fundamental questions of the operation of RAC and its subsidiaries under the allegations discussed by the Court *supra*.

² The Court reserves these issues as more appropriately suited for review on RAC’s pending W. Va. R. Civ. P. 12(b)(2) motion.

³ For example, Judge Hummel in *Brooke County* found that plaintiffs had sufficiently pled personal jurisdiction over an Irish Company, Allergan plc, which through its subsidiary, Actavis, Inc., promoted opioids for the treatment of chronic pain, exercised control over sales efforts, and benefitted from the resulting profits. Order Denying the Allergan and Actavis Defendants’ Mot. to Dismiss, Dec. 28, 2018, *Brooke Co. Commission v. Purdue Pharma L.P.*, Civ. No. 17-C-248 (Cir. Ct. Marshall Co., W. Va.) at ¶¶ 28-29. The Court found that although “Allergan plc is simply a holding company that uses Actavis, Inc. to conduct its business in the United States,” it “may properly exercise jurisdiction over Allergan when it exercises jurisdiction over [its subsidiary] Actavis, Inc.” because the parent “uses Actavis, Inc. to conduct its business” here. *Id.* at ¶ 30. These circumstances are directly analogous to the claims asserted here.

In its Response, Plaintiff meticulously walks the Court through each interrogatory at issue and ties it to the underlying theory of jurisdiction alleged in the Complaint. The Discovery Commissioner exercised his discretion and deemed these explanations satisfactory in scope and sufficiently tailored to Plaintiff's theory of personal jurisdiction. The Court agrees with the Discovery Commissioner. If RAC has specific objections to answering discovery or producing particular information, it is incumbent upon them to raise these objections in their responses; however, they are not abdicated of their responsibility to answer the jurisdictional discovery pursuant to the Discovery Commissioner's Order.

RAC's assertions that Plaintiff's jurisdictional discovery is overly broad and unduly burdensome are antithetical to the nature of the limited, preliminary discovery pending before them. By engaging in limited, preliminary jurisdictional discovery, RAC is being afforded a lighter burden and being required to answer only inquiries tailored to a specific legal issue. Plaintiff has served Defendant with eight jurisdictional interrogatories and thirty-five requests for production totaling seventeen pages.⁴ The Court does not see how this places an unreasonable burden upon RAC. Therefore, the Court finds that the Discovery Commissioner appropriately denied Defendant's Motion for Protective Order and Defendant's Objections should be overruled.

CONCLUSION

For the foregoing reasons, the Court **OVERRULES** RAC's Objections and **ORDERS** RAC to answer jurisdictional discovery served by Plaintiff in compliance with the Discovery Commissioner's *Order Denying Protective Order* (Transaction ID 66036670). A copy of this Order has this day been served upon all counsel of record via File & Serve*Xpress*.

⁴ RAC has filed sixty-three (63) pages of objections to Plaintiff's Jurisdictional Interrogatories.

It is so **ORDERED**.

ENTERED: December 2, 2020.

/s/ Alan D. Moats
Lead Presiding Judge
Opioid Litigation

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation