



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 21-C-9000-PHARM

THIS DOCUMENT APPLIES TO:

**STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, Attorney General,**

Plaintiff,

**v.
PNM**

CIVIL ACTION NO. 22-C-111

THE KROGER CO., et al

Defendants.

**ORDER DENYING DEFENDANTS' MOTION TO DEPOSE
THE ATTORNEY GENERAL AND KEY ATTORNEY GENERAL STAFF
REGARDING ATTORNEY GENERAL REPORT**

This matter comes before the Discovery Commissioner on the *Motion to Depose the Attorney General and Key Attorney General Staff Regarding Attorney General Report* (Transaction ID 68459435) of Defendants, The Kroger Co. *et al.* ("Kroger"); the Opposition (Transaction ID 68527380) of Plaintiff the State of West Virginia, acting through its Attorney General, Patrick Morrisey (the "State"); and Kroger's Reply (Transaction ID 68612500). Having reviewed and considered the Motion, Opposition, and Reply, the Discovery Commissioner **DENIES** Kroger's Motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The Discovery Commissioner's and the Panel's Prior Rulings are Controlling.

1. The Discovery Commissioner previously ruled that the State need not provide the prior Pharmacy Defendants (Walgreens, Walmart, CVS, and Rite-Aid) a document custodian on the Attorney General's investigation of the U.S. Drug Enforcement Administration ("DEA") and

limited the scope of discovery of the Attorney General's Office to its work on developing the "Best Practices for Prescribing Opioids in West Virginia" guidelines (the "Best Practices Guidelines"). *Order Regarding Pharmacy Defendants' Motion to Compel Plaintiff to Comply with Discovery Obligations* (Transaction ID 67900613) ("*August 4 Order*") at 4 n.5. The Mass Litigation Panel (the "Panel") affirmed this Order. *Order Affirming Discovery Commissioner's August 4, 2022, Order* (Transaction ID 67959934) ("*Order Affirming*"). Kroger has provided no basis for the Discovery Commissioner to reconsider these prior rulings by giving Kroger deposition discovery into topics already ruled to be out-of-bounds.

2. In combining the State's cases against Kroger and remaining Pharmacy Defendant Walgreens, the Panel made clear with respect to the scope of discovery that "[a]ll the orders that we've done are going to be the same unless there's something specific to Kroger." Tr. of 9/19/22 Pharmacies Case Pretrial Hearing ("9/19 Tr.") at 10:6-8. The Discovery Commissioner reiterated that "this is not going to be a reopening of discovery or a reevaluation of prior discovery rulings that have been made" unless Kroger makes a "showing of uniqueness" as to how a prior ruling "applies to Kroger differently than others to allow access" to disallowed discovery. Tr. of 9/29/22 Teleconference ("9/29 Tr.") at 9:7-18. Kroger agreed. *Id.* at 10:13-16 ("[W]e have no intention of retreading old ground and fully intend to do this as efficiently as we possibly can.").

3. Kroger's motion to depose the Attorney General and his key staff seeks to do exactly that—retread old ground without showing any unique material facts as to Kroger. The only ostensibly unique fact Kroger identifies is that the State sued Kroger later than it did the other Pharmacy Defendants. Motion at 3-4. The procedural distinction has no bearing on discovery into the Attorney General's Office's investigation of the DEA. The Discovery

Commissioner disallowed the prior Pharmacy Defendants discovery into the DEA investigation, and the Panel affirmed. There is nothing about the timing of when the State sued Kroger that could alter this determination. The Attorney General's investigation report (Kroger Ex. 1) does not once mention Kroger (or any Pharmacy Defendant) by name. The prior rulings disallowing this discovery therefore remain controlling.

4. Nor does the amount of time the Panel provided for discovery merit reconsideration of the prior rulings. See Motion at 4. Kroger's claim of prejudice on this ground fails for three reasons. First, Kroger has been a party to West Virginia opioid litigation involving public nuisance claims based in part on alleged violations of the federal Controlled Substances Act ("CSA") since 2017. Kroger's claim that Walgreens has had longer access to this discovery therefore is incorrect. Second, Walgreens did not obtain discovery on the DEA investigation other than the same access to the public investigation report that Kroger has. The Discovery Commissioner and the Panel disallowed any further discovery. *August 4 Order* at 4 n.5; *Order Affirming* at 1. Kroger labors under no disadvantage on this topic. Third, the longer pendency of the State's action against Walgreens is a fact Kroger knew of when it agreed not to duplicate fact discovery or "retread[] old ground" on which the Discovery Commissioner and/or the Panel already ruled. 9/29 Tr. at 10:7-16. Kroger's argument on the time it has for discovery therefore is likewise not grounds for reconsideration.

5. Also still controlling are the Discovery Commissioner's and the Panel's prior rulings limiting the scope of the prior Pharmacy Defendants' discovery into the Attorney General's Office's work on developing the Best Practices Guidelines. The Discovery Commissioner rejected the prior Pharmacy Defendants' request for multiple documents custodians on this topic, *August 4 Order* at 4 n.5, and Kroger and Walgreens' Rule 30(b)(7)

deposition of the State covering the Best Practices Guidelines was conducted on December 12, 2022. Kroger had the same opportunity as Walgreens to pursue discovery concerning the Best Practices Guidelines, and it does not identify anything in the Guidelines that differentiates Kroger from any other Pharmacy Defendant. Nor does the timing of when the State sued Kroger bear on the scope of permissible discovery into this non-Defendant-specific topic. The prior rulings setting forth the manner and scope of this discovery therefore remain controlling.

6. Kroger's claim that these prior rulings were limited to the other Pharmacy Defendants' attempts to obtain *custodial* discovery, Motion at 7, has no merit. As to the DEA investigation, any distinction between custodial and other types of discovery is irrelevant because the Discovery Commissioner and the Panel disallowed discovery altogether on this topic. *August 4 Order* at 4 n.5; *Order Affirming* at 1. A ruling that the State must make six individuals available for depositions on the DEA report would undermine the rationale for the prior rulings disallowing custodial discovery on this topic.

7. As to the Best Practices Guidelines, the Discovery Commissioner and the Panel set the precise parameters of discovery and disallowed requests for more. *August 4 Order* at 4 n.5; *Order Affirming* at 1. There is nothing about the topic of the opioid prescribing Best Practices Guidelines that is unique to Kroger. Kroger therefore is limited to the same discovery on this topic that the Discovery Commissioner and the Panel ordered for all Pharmacy Defendants.

8. Since there are no material facts pertaining to the DEA investigation or the Best Practices Guidelines that are unique to Kroger, the Discovery Commissioner's and the Panel's prior rulings on these topics are controlling as to Kroger and compel denial of its motion to depose the Attorney General and key Attorney General staff.

II. The Requested Discovery Would Not Be Permissible in Any Event.

9. Even if the Discovery Commissioner and the Panel had not already ruled on the discovery Kroger is seeking, this discovery still would not be permissible.

10. First, as to the Attorney General's Office's DEA investigation, Kroger seeks information that is both irrelevant and privileged. Kroger claims that the DEA investigation is relevant to apportionment of fault. Motion at 4. The Panel has ruled, however, that evidence of comparative or third-party fault is irrelevant to public nuisance liability or to liability or remedy under the West Virginia Consumer Credit and Protection Act ("WVCCPA"). *See, e.g., Amended Rulings Order-Pharmacies* (Transaction ID 68198574) at 3. Since fault and attempted fault-shifting are not at issue in the Phase I trial, Kroger's attempt to obtain discovery from the State on the alleged fault of the DEA would fail for lack of relevancy even if this discovery had not already been disallowed (which it has).

11. The Attorney General's Office's DEA investigation—other than publicly disclosed documents like the investigation report itself—also is shielded from discovery by the executive deliberative process privilege. The privilege is applied to “exempt from disclosure written internal government communications, such as opinions and recommendations, which reflect an agency's deliberative processes.” *Daily Gazette Co., Inc. v. W. Va. Devel. Office*, 198 W. Va. 563, 572, 482 S.E.2d 180, 189 (1996). Its primary purpose “is to encourage the free exchange of ideas and information within government agencies, particularly between subordinates and superiors, during the processes of deliberation and policymaking.” *Id.* at 571, 482 S.E.2d at 188. Kroger's attempt to obtain discovery into the Attorney General's Office's investigatory processes separate and apart from its publicly reported findings is prohibited by the

deliberative process privilege and therefore would be impermissible even if this discovery had not already been disallowed (which it has).

12. Second, depositions of the Attorney General and senior staff named by Kroger on the Office's work in developing the Best Practices Guidelines are not reasonably calculated to lead to discovery of admissible evidence under Rule 26(b)(1). The named deponents—Attorney General Morrisey; Chief Deputy Attorney General Anthony Martin; Solicitor General Lindsay See; Assistant Solicitor General Thomas Lampman; Special Assistant Robert Cheren; and Tera McCown—have no demonstrated knowledge of the Office's work developing prescribing best practices. Kroger extracted these names from the Attorney General's prefatory letter to the DEA investigation report. *See* Kroger Ex. 1 (report). The Attorney General thanked these staff members for their work on the DEA investigation. *Id.* This does not connect these staff members to the Office's separate efforts to develop prescribing best practices, which the report mentions only as "background" to the DEA investigation. *Id.* at 1, 5. Kroger does not otherwise demonstrate this connection. These depositions therefore are not reasonably calculated to lead to discovery of admissible evidence. This conclusion is underscored by the fact that the deposition of the individual who is most knowledgeable about the Best Practices Guideline was already taken on December 12, 2022.

13. Third, depositions of the Attorney General and senior staff named by Kroger "regarding investigations of chain pharmacies related to opioid dispensing[,]" Motion at 5, also are not reasonably calculated to lead to discovery of admissible evidence for the same reason and also seek privileged information. Kroger contends that it should be allowed to depose the Attorney General and named senior staff regarding unspecified investigations of chain pharmacies and opioid dispensing. Motion at 5. Here, too, Kroger does not identify any

connection between the Attorney General, the Chief Deputy Attorney General, the Solicitor General, the Assistant Solicitor General, or the Special Assistants it names as deponents and the unspecified chain pharmacy investigations on which it seeks to depose them. Absent any demonstrated connection, these depositions are not reasonably calculated to lead to discovery of admissible evidence.

14. Kroger's proposed depositions of the Attorney General and named senior staff on unspecified chain pharmacy investigations also seek information that is protected from discovery by the executive deliberative process privilege and/or the work product doctrine. To the extent Kroger seeks to depose the Attorney General and senior staff on any non-litigation, policy-related investigations, the deliberative process privilege prohibits this discovery. *Daily Gazette*, 198 W. Va. at 572, 482 S.E.2d at 189. To the extent Kroger seeks to depose the Attorney General and senior staff on any litigation-related investigations, the work product doctrine prohibits this discovery. W. Va. R. Civ. P. 26(b)(3). Kroger did not attempt to show that it satisfies the Rule's requirements of substantial need and undue hardship in order to overcome work-product protection. The requested depositions on unspecified investigations of chain pharmacies therefore are impermissible both because they are not reasonably calculated to lead to discovery of admissible evidence and because they seek information of a type that would be privileged.

15. Fourth, depositions of the Attorney General and named senior staff regarding "whether the Attorney General put chain pharmacies, like Kroger, on notice of potential actions related to opioid dispensing[,]" Motion at 5, seek information that is irrelevant from persons who are not shown to be likely sources of admissible evidence. Provision of notice is not required for either the State's public nuisance abatement claim or its WVCCPA public enforcement claim.

Cf. Findings and Fact and Conclusions of Law in Support of Order Denying Kroger's Motion to Dismiss (Transaction ID 68388011) (“*FOFCOL-Kroger*”) at 4, ¶¶5-6 (Medical Professional Liability Act’s pre-suit notice requirement does not apply to State’s claims). Even if it were, Kroger again does not identify any connection between the Attorney General and named senior staff as deponents and the unspecified provision of notice on which it seeks to depose them. The requested depositions therefore would not be reasonably calculated to lead to discovery of admissible evidence even if the subject of pre-suit notice were relevant (which it is not).

16. Finally, the requested depositions of the Attorney General, the Chief Deputy Attorney General, the Solicitor General, the Assistant Solicitor General, and Special Assistants would be barred as unjustified depositions of high-ranking public officials who here also are counsel for a party. It is well-established in West Virginia that “highly placed public officials are not subject to a deposition absent a showing that the testimony of the official is necessary to prevent injustice to the party requesting it.” *State ex rel. Paige v. Canady*, 197 W. Va. 154, 161, 475 S.E.2d 154, 161 (1996). This protection reflects “the public’s interest in limiting unnecessary demands on the time of highly-placed public officials.” *Id.* (internal quotation marks and citations omitted). This protection has been applied to State Attorneys General, *see, e.g., Stagman v. Ryan*, 186 F.3d 986, 994-95 (7th Cir. 1999), as well as to deputy-level executive officials, *see, e.g., Martin v. Valley Nat’l Bank of Ariz.*, 140 F.R.D. 291, 315 (S.D.N.Y. 1991) (U.S. Deputy Assistant Secretary of Labor for ERISA Operations). Kroger does not satisfy the substantial burden for taking depositions of high-ranking public officials, as it does not even show that the Attorney General or named senior staff are sources of relevant information on most of the topics it lists, let alone that they are the only sources of information on these topics so that their depositions could be deemed necessary.

17. Depositions of an opposing party’s counsel likewise are disfavored and require the same showing of necessity. *See, e.g., Asbury v. Litton Loan Serv., LP*, 2009 WL 973095, at *1 (S.D. W. Va. April 9, 2009) (“[T]he mere request to depose a party’s attorney constitutes good cause for obtaining a . . . protective order unless the party seeking the deposition can show both the propriety and need for the deposition.”) (internal quotation marks and citation omitted). Kroger argues that the Attorney General and named staff are not counsel in this action. Motion at 8. This is incorrect. The Attorney General is the legal representative of the State acting as *parens patriae* for its citizens seeking to vindicate public interests. *See FOFCOL-Kroger* at 5-6, ¶¶12-13 (citing *State of West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 176 (4th Cir. 2011)). The Attorney General and staff are legal counsel for the State. *See, e.g., State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 434, 859 S.E.2d 374, 377 (2021) (listing proposed deponent “Lindsay S. See, Esq., Solicitor General” as “Counsel for Respondent State of West Virginia ex rel. Patrick Morrissey, Attorney General”). Here, too, Kroger does not satisfy the substantial burden for taking depositions of an opposing party’s counsel, as it does not even show that the Attorney General or named senior staff are sources of relevant information on most of the topics it lists, let alone that they are the only sources of this information so that their depositions could be deemed necessary.

18. Since the depositions Kroger requests seek information that is irrelevant to the Phase I proceedings, are not reasonably calculated to lead to discovery of admissible evidence, and seek information that is privileged, Kroger’s motion would be denied even if this discovery had not already been disallowed (which it has).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Kroger's *Motion to Depose the Attorney General and Key Attorney General Staff Regarding Attorney General Report* (Transaction ID 68459435) is **DENIED**.

Kroger's objections and exceptions are noted for the record.

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

It is so **ORDERED**.

ENTERED: January 4, 2023.

/s/ Christopher C. Wilkes
Discovery Commissioner

Prepared by:

/s/ John D. Hurst

John D. Hurst (WVSB No. 10861)
MOTLEY RICE LLC
50 Clay Street, Suite 1
Morgantown, WV 26501
304-413-0456 / 304-413-0458 (fax)
Email: jhurst@motleyrice.com

Anne McGinness Kearse (WVSB No. 12547)
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464
843-216-9000 / 843-216-9450 (fax)
Email: akearse@motleyrice.com

Linda Singer (pro hac vice)
David I. Ackerman (pro hac vice)
MOTLEY RICE LLC
401 9th Street NW, Suite 630
Washington, DC 20004
202-386-9627 / 202-386-9622 (fax)
Email: lsinger@motleyrice.com
Email: dackerman@motleyrice.com

/s/ Ann L. Haight

ANN L. HAIGHT (WVSB No. 1527)
Deputy Attorney General
VAUGHN T. SIZEMORE (WVSB No. 8231)
Deputy Attorney General
LAUREL K. LACKEY (WVSB No. 10267)
Assistant Attorney General
ABBY G. CUNNINGHAM (WVSB No. 13388)
Assistant Attorney General
Consumer Protection/Antitrust Division
Office of the West Virginia Attorney General
1900 Kanawha Blvd., East
State Capitol Complex Bldg. 6, Suite 401
Charleston, WV 25305
304-558-8986 / 304-558-0184 (fax)

*Counsel for Plaintiff the State of West Virginia
ex rel. Patrick Morrissey, Attorney General*