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Transaction ID 68877876

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. **CIVIL ACTION NO. 22-C-111 PNM**

THE KROGER CO., et al

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO NAME INDISPENSABLE PARTY OR, IN THE ALTERNATIVE, MOTION TO REQUIRE THE STATE TO JOIN THE UNNAMED PARTIES

Pending before the Mass Litigation Panel ("Panel") is Kroger's *Motion to Dismiss for Failure to Name Indispensable Party or, in the Alternative, Motion to Require the State to Join the Unnamed Parties* (Transaction ID 68486143). Upon review of Kroger's Motion, the Opposition of Plaintiff the State of West Virginia, acting through its Attorney General, Patrick Morrisey (the "State") (Transaction ID 68620592), and Kroger's Reply (Transaction ID 68721438), the Panel finds that oral argument will not aid in the decisional process. Therefore, the Panel makes the following findings of fact and conclusions of law in support of its decision to **DENY** Kroger's Motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The State filed suit against Kroger on August 23, 2022. The State claims that Kroger engaged in unlawful and/or unreasonable conduct in connection with its wholesale distribution and retail dispensing of prescription opioids in West Virginia, which contributed to a

public nuisance and constituted unfair practices in violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code §§ 46A-6-101 *et seq.*

2. More specifically, the State alleges that Kroger acted unlawfully and unreasonably by breaching its statutory, regulatory, and common law duties to maintain effective controls against diversion in distributing opioids, including by failing to maintain systems to detect, report, and block shipment of suspicious orders, Complaint (Transaction ID 68310197), ¶ 44 (citing 21 U.S.C. § 823; 21 C.F.R. §§ 1301.71, 1301.74; W. Va. Code § 60A-3-303; W. Va. C.S.R. § 15-2-5.3), and in dispensing opioids, including by failing to hold "red flag" prescriptions unless and until diligent investigation resolved suspicion of diversion. *Id.*, ¶ 57 (citing, *inter alia*, 21 C.F.R. §§ 1301.71, 1306.04); *see also* W. Va. C.S.R. § 15-2-8.4.1.

3. The State served its Complaint on Kroger through the Secretary of State on August 24, 2022. State Exhibit A (Secretary of State record of service).

4. Kroger filed its first motion to dismiss the Complaint, for failure to state a claim upon which relief can be granted, on September 23, 2022 (Transaction ID 68182043). The State opposed the motion (Transaction ID 68247888). The Panel denied Kroger's first motion to dismiss by Order issued October 18, 2022 (Transaction ID 68267930) and entered Findings of Fact and Conclusions of Law on November 15, 2022 (Transaction ID 68388011) ("*FOFCOL-Kroger*").

5. Kroger then filed a second motion to dismiss on December 1, 2022 (Transaction ID 68486143) claiming that other private entities in the opioid supply chain (distributors, other pharmacies, hospitals, and unnamed prescribers) and federal and State regulatory authorities (U.S. Drug Enforcement Administration ("DEA"), West Virginia Board of Pharmacy, and others) are indispensable parties under Rule 19(a)-(b) whose non-joinder compels dismissal

under Rule 12(b)(7) because, in their absence as parties, the Panel cannot fairly and equitably accord complete relief on the State's claims. Motion at 1-2.

6. Under West Virginia Rule of Civil Procedure 12, "when service of the summons is made on or accepted on behalf of a defendant through or by an agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of such defendant . . . , the answer shall be served within 30 days after service[.]" W. Va. R. Civ. P. 12(a). A motion raising any of the defenses enumerated in Rule 12(b) "shall be made before pleading if a further pleading is permitted." W. Va. R. Civ. P. 12(b). A motion to dismiss under Rule 12(b) therefore is subject to the deadlines set forth in Rule 12(a). *Holmes v. Manford*, No. 12-1047, 2013 WL 5508153, at *2 n.6 (W. Va. Oct. 4, 2013).

7. Kroger's second motion to dismiss is untimely under Rule 12. The State served its Complaint through the Secretary of State on August 24, 2022. State Exhibit A. Any motion to dismiss by Kroger therefore was due by September 23, 2022, 30 days after service.

8. Kroger effectively acknowledged its September 23, 2022, deadline by filing both its first Motion to Dismiss (Transaction ID 68182043) and its Answer (Transaction ID 68182043) on this date. Kroger did not, however, seek dismissal under Rule 12(b)(7) for failure to join indispensable parties at that time. Instead, it waited to do so until December 1, 2022, over two months later, long after the deadline passed. The motion therefore will be denied. *See U.S. Bank Nat'l Ass'n v. Gunn*, No. 11-1155-RGA, 2013 WL 1405775, at *1 (D. Del. April 8, 2013) ("Gunn filed the Motion to Interplead or, in the alternative, Dismiss Action under [Federal] Rules 12(b)(7) and 19(a) and (b) for Failure to Join Parties on October 11, 2012, well past the deadlines to do so. No explanation was offered. Therefore, the Motion will be denied.").

9. Here, Kroger filed its second motion to dismiss over two months past the deadline even after the Panel specifically warned it that any motion to dismiss under Rule 12(b)(7) would be untimely. After the State moved to strike Kroger's jury demand (Transaction ID 68339782), Kroger responded in part by arguing that "there are associated potential claims against various indispensable governmental agency parties" and declaring that "Kroger will be filing a Motion to Dismiss for Failure to Join Indispensable Parties seeking this very relief." *Kroger Opp'n to Motion to Strike Jury Demand* (Transaction ID 68396162) at 10. The State replied by pointing out, *inter alia*, that Kroger's deadline to file a Rule 12(b)(7) motion to dismiss has passed almost two months earlier. *Plaintiff's Reply in Support of Motion to Strike Defendants' Jury Trial Demand* (Transaction ID 68407629) at 6. The Panel agreed, finding "Kroger's deadline for filing a motion to dismiss for failure to join indispensable parties under Rule 12(b)(7) has passed." *Order Granting Plaintiff's Motion to Strike Defendants' Jury Trial Demand* (Transaction ID 68421842) at 7, ¶ 18.

10. Notwithstanding the Panel's finding, Kroger filed a motion to dismiss under Rule 12(b)(7) on December 1, 2022. Although Rule 12(h)(2) provides that "a defense of failure to join a party indispensable under Rule 19 . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits" Kroger did not do that. Instead, Kroger filed a Rule 12(b)(7) motion to dismiss without seeking leave or otherwise acknowledging the Panel's ruling.

11. Kroger's second motion to dismiss is therefore **DENIED** as procedurally barred.

12. Furthermore, Kroger's second motion to dismiss is also **DENIED** as substantively deficient for failure to demonstrate that any identified third-party entity is a necessary or indispensable party to the State's claims in this action.

13. Under West Virginia Rule of Civil Procedure 19, a "person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties[.]" W. Va. R. Civ. P. 19(a)(1).

14. If a person identified as a necessary party under Rule 19(a) cannot be made a party, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." W. Va. R. Civ. P. 19(b). The factors considered in determining whether an action shall proceed or be dismissed in the absence of a necessary party include: "first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." *Id.*

15. "The determination of whether a party is indispensable under the provisions of Rule 19(a) of the West Virginia Rules of Civil Procedure is in the sound discretion of the trial court." *Wachter v. Dostert*, 172 W. Va. 93, 94, 303 S.E.2d 731, 733 (1983) (internal quotation marks and citation omitted).

16. Here, none of the third-party entities Kroger identified in its second motion to dismiss is a necessary party to the State's claims under Rule 19(a).

17. First, there is no other party in interest to the State's WVCCPA claim besides the State and Kroger. This claim focuses solely on Kroger's conduct as grounds for awarding relief. The State's rights to injunctive and appropriate equitable relief and civil penalties under the Act are triggered solely by Kroger's conduct found to violate the Act. *See* W. Va. Code § 46A-7-108

("The attorney general may bring a civil action to restrain a person from violating this chapter and for other appropriate relief."); § 46A-7-111(2) ("The attorney general may bring a civil action against a creditor or other person to recover a civil penalty for willfully violating this chapter, and if the court finds that the defendant has engaged in a course of repeated and willful violations of the chapter, it may assess a civil penalty of no more than five thousand dollars for each violation of this chapter.").

18. No other person or entity is potentially liable under the WVCCPA for Kroger's conduct. Kroger contends that other private opioid supply chain actors and public regulatory authorities are necessary parties because they, too, contributed to opioid epidemic harms in West Virginia. *See* Motion at 8. This argument has no application to the State's WVCCPA claim because causation of harm is not an element of this claim, as the Panel previously has held. *See* Oct. 27, 2021, *Order* (Transaction ID 67047934) at 8 ("Because there is no causation requirement for the State's WVCCPA claims, the Panel finds that WVCCPA liability, civil penalties, disgorgement, and injunctive relief based upon the Manufacturer and Pharmacy Defendants' alleged violations of the WVCCPA should be decided in Phase I of those respective trials.") *citing State ex rel. McGraw v. Johnson and Johnson*, 226 W. Va. 677, 684, 704 S.E.2d 677, 684 (2010) ("To enforce the provisions of this Act, the attorney general may bring a civil action to restrain a defendant from engaging in such unfair or deceptive acts. *Id.* at § 46A–7–107. If the attorney general can prove that a defendant has engaged in a course of repeated and willful violations of the Act, then a court may assess a civil penalty of no more than five thousand dollars for each violation. *Id.* at § 46A–7–111(2)."); W. Va. Code § 46A-6-102(7)(A) (defining "unfair or deceptive acts or practices" to include "any deception, fraud, false pretense, false promise or misrepresentation . . . whether or not any person has in fact been misled,

deceived, or damaged thereby."); s*ee also Amended Rulings Order and Findings of Fact and Conclusions of Law Regarding Motions for Summary Judgment, Motions to Exclude Expert Testimony, and Motions in Limine* (Transaction ID 68198574) entered in the State's cases against Pharmacy Defendants CVS, Walgreens and Walmart on October 1, 2022 at 3 ("Defendants' fault-shifting defenses do not apply to the State's WVCCPA claims, because the State seeks only civil penalties, injunctive and equitable relief. Under that claim, the fault of the State or anyone else is irrelevant."). Since the State need not prove causation of harm to establish Kroger's liability under the WVCCPA, the question of whether other entities contributed to opioid epidemic harms does not bear on this claim. These entities therefore cannot be deemed necessary parties to the State's WVCCPA claim under Rule 19(a).

19. Kroger also argues that the State's WVCCPA claim's reference to conduct violating the West Virginia Uniform Controlled Substances Act ("WVCSA"), W. Va. Code §§ 60A-1-101 *et seq.*, makes the West Virginia Board of Pharmacy a necessary party to this claim. Motion at 16. It does not. The Board of Pharmacy's authority to directly enforce the WVCSA does not preclude the State or other parties from bringing statutory or common law claims that use WVCSA requirements as standards of conduct or care, as this Panel and other courts repeatedly have held. *See, e.g., FOFCOL-Kroger, supra*, at 12-13, ¶¶ 33-34 (citing *State ex rel. Morrisey v. AmerisourceBergen Drug Corp.*, No. 12-C-141, 2014 WL 12814021, at *14 (W. Va. Cir. Ct., Boone Cnty, Dec. 12, 2014) in support of finding that conduct prohibited by the WVCSA may be a predicate for the State's WVCCPA unfair practices claim).

20. Moreover, Kroger's statement that the Board of Pharmacy "is a contributing party to the opioid issue in West Virginia," Motion at 16, is legally irrelevant because, as set forth above, causation and harm are not elements of the State's WVCCPA claim. Finally, this

argument also is legally incorrect because the Board of Pharmacy's alleged failure to enforce the WVCSA against Kroger does not make it a responsible party for opioid epidemic harms even if this were an element of the State's WVCCPA claim (which it is not). *See Benson v. Kutsch*, 181 W. Va. 1, 3, 380 S.E.2d 36, 38 (1989) (a "governmental entity is not liable because of its failure to enforce regulatory or statutory penalties.").

21. For all these reasons, Kroger's argument that the Board of Pharmacy or any other entity besides the State and Kroger is a necessary party to the State's WVCCPA claim is incorrect as a matter of law. None of these entities is a necessary party to this claim under Rule 19(a), and Kroger's motion to dismiss this claim under Rule 12(b)(7) is **DENIED**. For the same reason, Kroger's alternative request that the State be ordered to join these entities as parties to the WVCCPA claim, *see* Motion at 17, is also **DENIED.**

22. Second, the private and public entities Kroger identifies also are not necessary parties to the State's public nuisance claim under Rule 19(a). In arguing to the contrary, Kroger appears to believe that any entity that may have contributed to the opioid epidemic is a necessary party to the State's public nuisance claim. *See* Motion at 9 ("The Complaint . . . acknowledges rogue prescribers' role in creating the alleged nuisance but nevertheless fails to identify and name any such rogue prescriber in this action. The same is true for non-party pharmacies which may have assisted rogue prescribers in channeling opioids for illicit use.") (internal quotation marks and citations omitted). This argument fails in light of the equitable abatement relief the State seeks for its public nuisance claim and the Panel's prior rulings on liability for this relief.

23. A person or entity not sued shall be joined as a defendant if "in the person's absence complete relief cannot be accorded among those already parties[.]" W. Va. R. Civ. P. 19(a)(1). This standard is not satisfied where liability among potential defendants is joint and

several so that the plaintiff may "select and collect the full amount of his damages against one or more joint tortfeasors." *Sitzes v. Anchor Motor Freight, Inc.*, 169 W. Va. 698, 707, 289 S.E.2d 679, 685 (1982). Courts applying the federal analog to Rule 19(a) have held repeatedly that potential defendants who are joint tortfeasors are not necessary parties. *See Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) ("[C]learly, in the federal forum, joint tortfeasors are not indispensable parties."); *Stabilisierungsfonds Fur Wein v. Kaiswer Stuhl Wine Distrs. Pty. Ltd.*, 647 F.2d 200, 207 (D.C. Cir. 1981) ("Courts have long held that in patent, trademark, literary property, and copyright infringement cases, *any member of the distribution chain can be sued as an alleged joint tortfeasor.* Since joint tortfeasors are jointly and severally liable, the victim . . . may sue as many or as few of the alleged wrongdoers as he chooses; those left out of the lawsuit, commentary underscores, are not indispensable parties.") (citing 3A Moore's Federal Practice P 19.14(2.-4)) (emphasis added); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 358 (2d Cir. 2000) (same); *Copley v. Argus Energy, LLC*, No. 3:13-cv-25305, 2014 WL 1269224, at *4 n.3 (S.D. W. Va. March 21, 2014) ("'[I]t is generally held that a non-diverse defendant who is a jointly and severally liable tort-feasor is *not* an indispensable party to a diversity action . . . and may be dismissed by the court in order for it to retain jurisdiction.'") (quoting *Linnin v. Michielsens*, 372 F. Supp. 2d 811, 826 (E.D. Va. 2005)) (emphasis in original).

24. Here, this Panel's prior rulings establish that Kroger and any of the potentially liable entities it identifies are (at most) joint tortfeasors that are jointly and severally liable for public nuisance abatement. In denying Kroger's motion to dismiss, the Panel held that the State's "WVCCPA statutory remedies of an injunction, other equitable relief, and civil penalties

are not damages" and that its "public nuisance remedy of prospective equitable abatement likewise is not damages[.]" *FOFCOL-Kroger, supra*, at 6, ¶¶ 16-17.

25. Based on this same conclusion, the Panel earlier held that W. Va. Code § 55-7-13d and its predecessor § 55-7-24 (collectively, "the Apportionment Acts") do not apply to claims by the State for civil penalties and equitable relief under the WVCCPA and abatement of a public nuisance. *Order Regarding the State's Motion to Strike Defendants' Notices of Non-Party Fault* (Transaction ID 65820504) at 4. Absent application of the Apportionment Acts, Kroger's (and any other entity's) liability for public nuisance abatement is joint. *Order Regarding Plaintiffs' Motion to Strike Defendants' Notice of Non-Party Fault* (Transaction ID 65807300) at 6, ¶ 7 ("[D]efendants who were concurrently at fault in creating a nuisance were subject to joint liability.") (citing *Baker v. City of Wheeling*, 117 W. Va. 362, 185 S.E. 842, 844 (1936)); *see also Amended Rulings Order and Findings of Fact and Conclusions of Law Regarding Motions for Summary Judgment, Motions to Exclude Expert Testimony, and Motions in Limine* (Transaction ID 68198574) entered in the State's cases against Pharmacy Defendants CVS, Walgreens and Walmart on October 1, 2022 at 3 ("Defendants' fault-shifting defenses—*contributory negligence, comparative fault, contributory fault, failure to enforce the law, and failure to mitigate*—are inapplicable to the State's public nuisance claim because comparative fault is not an element of the liability phase (Phase I) of this public nuisance case. *Manufacturer Cases Order* at 3 (citing *City of Huntington v. AmerisourceBergen Drug Corp.*, 2021 WL 1711382, at *2 (S.D. W. Va. Apr. 29, 2021))").

26. Since Kroger is subject to joint and several liability and all the non-party entities it identifies as contributing to the public nuisance condition are at most joint tortfeasors, these entities are not necessary parties under Rule 19(a). Kroger's motion to dismiss the State's public

nuisance claim under Rule 12(b)(7) is therefore **DENIED**, as is Kroger's alternative request that the State be ordered to join these entities as parties to the public nuisance claim, *see* Motion at 17.

27. Third, with respect to the public regulatory authorities Kroger identifies, the motion to dismiss for failure to join these public entities is also denied because they are not even potential parties to the State's claims, let alone necessary parties under Rule 19(a).

28. Kroger contends that these public entities are liable for public nuisance based on their failure to regulate or undertake enforcement action. *See* Motion at 13. This argument is legally incorrect.

29. Under West Virginia law, a state government agency's failure to engage in regulatory or enforcement activity is not tortious conduct. West Virginia courts long have recognized the "public duty doctrine, which, simply stated, is that a governmental entity is not liable because of its failure to enforce regulatory or penal statutes." *Benson*, 181 W. Va. at 3, 380 S.E.2d at 38; *see also Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 172, 483 S.E.2d 507, 518 (1996) (same); *Jeffrey v. W. Va. Dept. of Public Safety, Div. of Corrections*, 198 W. Va. 609, 614, 482 S.E.2d 226, 231 (1996) (same). The public duty doctrine applies to a governmental entity's duties "owed to the general public," while recognizing an exception where "the injured party can demonstrate that some special relationship existed between the injured person and the allegedly negligent entity[.]" *Jeffrey*, 198 W. Va. at 614, 482 S.E.2d at 231. Here, the conduct that Kroger alleges—"failing to properly regulate opioid distribution and dispensing with their regulatory activity," Motion at 13—is precisely the type of act or omission by a public authority that the public duty doctrine provides is not grounds for liability in tort.

30. Kroger attempts to avoid this conclusion by arguing that the State entities are shielded by "sovereign immunity," which would render their joinder "not feasible under Rule 19(a)." Motion at 12. This assumes that these public entities *are* tortfeasors by virtue of their conduct but are shielded from liability for their tortious conduct by an external immunity that renders their joinder infeasible. They are not. As the Supreme Court of Appeals has explained, the "public duty doctrine is separate and distinct from the principle of immunity." *Walker v. Meadows*, 206 W. Va. 78, 83, 521 S.E.2d 801, 806 (1999). The doctrine "does not rest squarely on the principle of governmental immunity, but rests on the principle that recovery can be had for negligence only if a duty has been breached which was owed to the particular person seeking recovery." *Parkulo*, 199 W. Va. at 172, 483 S.E.2d at 518. Therefore, the public duty doctrine "is not based on immunity from existing liability. Instead, it is based on *the absence of duty in the first instance.*" *Holsten v. Massey*, 200 W. Va. 775, 782, 480 S.E.2d 864, 871 (1997) (emphasis added). Since the identified State agencies' alleged failure to regulate is not an actionable tort, they are not even potential parties to this action, let alone necessary parties as covered by Rule 19(a).

31. The same conclusion applies to the DEA under federal law. Kroger contends that by "not taking any actions against Kroger's license or regarding Kroger's suspicious order monitoring program, under the State's theory, the DEA is complicit in Kroger's alleged fault in causing the opioid issue." Motion at 5; *see also id.* at 10 ("DEA bears responsibility given its failure to properly regulate the [national opioid] production quotas and thus is a necessary party."). This is incorrect. Under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, the federal government may assert any defense available to the officer whose conduct gave rise to a purported claim. 28 U.S.C. § 2674. This includes the defense that the Tort Claims Act does not

provide a damages action for an "act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation" or a "failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the federal government, whether or not the discretion involved be abused." 28 U.S.C. § 2680. DEA's alleged failure to regulate or enforce therefore is not an actionable tort. Nor is any alleged error in setting national production quotas, which is a regulatory function over which DEA exercises considerable discretion. *See* 21 C.F.R. § 1303.11(b)(7) (listing factors DEA considers in setting national production quota "as the Administrator finds relevant"). DEA therefore is likewise not even a potential party, let alone a necessary party to the State's public nuisance (or WVCCPA) claim under Rule 19(a).

32. While the foregoing reasons that the private and public entities Kroger identifies are not necessary parties under Rule 19(a) suffice to deny the motion to dismiss, these entities also would not be "indispensable" parties under Rule 19(b). Rule 19(b) empowers the Panel to remedy any prejudice that may result from non-joinder of a truly necessary party "by protective provisions in the judgment, by the shaping of relief, or other measures[.]" W. Va. R. Civ. P. 19(b). In light of these powers, dismissal of the State's claims would not be warranted under Rule 19(b) even if Kroger did identify necessary parties under Rule 19(a), which it did not.

33. Because the private and public entities Kroger identifies are not necessary parties under Rule 19(a) nor indispensable parties under Rule 19(b), Kroger's motion to dismiss for failure to join these entities as parties is **DENIED**.

For all of the foregoing reasons, it is **ORDERED** that Kroger's *Motion to Dismiss for Failure to Name Indispensable Party or, in the Alternative, Motion to Require the State to Join the Unnamed Parties* (Transaction ID 68486143) is **DENIED.**

Kroger's objections 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 12, 2023.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation