



**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.  
WALGREENS BOOTS ALLIANCE, INC.,  
et al.,  
Defendants.

CIVIL ACTION NO. 20-C-82 PNM

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

v.  
THE KROGER CO. et al.,  
Defendants.

CIVIL ACTION NO. 22-C-111 PNM

**CASE MANAGEMENT ORDER RELATING TO  
THE KROGER AND WALGREENS CASES**

At a hearing on September 19, 2022, the Mass Litigation Panel continued the trial set for September 26, 2022, on these matters brought by the State of West Virginia<sup>1</sup> against pharmacy defendants Walgreens Boots Alliance, Inc., Walgreens Co., Walgreen Eastern Co., Inc., (Civil Action No. 20-C-82 PNM), (hereinafter “Walgreens”), and The Kroger Co., Kroger Limited Partnership I d/b/a Peyton’s Southeastern, Kroger Limited Partnership II d/b/a Peyton’s Northern (hereinafter “Kroger”) to a bench trial to begin on June 5, 2023. *See Order Continuing September 26, 2022, Trial of the State of West Virginia’s Cases Against Pharmacies* (Transaction ID 68120458). The Court further ordered Discovery Commissioner Wilkes to “meet and confer with the parties and to prepare a Case Management Order for the Phase I trial for submission no later

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<sup>1</sup> For purposes of the State Opioid Pharmacy Proceedings, the State is deemed to include all executive branch state agencies of the State of West Virginia other than the West Virginia Board of Pharmacy, which is represented by separate counsel (“State”). State as used herein does not include political subdivisions.

than October 14, 2022.” Pursuant to Rules 16 and 26 of the West Virginia Rules of Civil Procedure, and the Court’s Order to conduct a non-jury trial on June 5, 2023 (Transaction ID 68120458), the Court enters the following Case Management Order (“Order”).

## **I. APPLICABILITY AND SCOPE OF ORDER**

### **A. Scope**

This Order is intended to conserve judicial resources, serve the convenience of the parties and witnesses, and promote the just and efficient conduct of this litigation.

### **B. Amendment and Exceptions**

This Order may be amended by the Court on its own motion and any party may apply at any time to this Court for a modification of or exception to this Order.

Discovery shall be governed by applicable West Virginia Rules of Civil Procedure except as otherwise provided herein, in other stipulations or agreements by the parties, or in a subsequent order from the Court and/or Discovery Commissioner. The provisions of this Order, and any subsequent pretrial order or case management order issued in the State Opioid Pharmacy Proceedings, shall supersede any inconsistent provisions of the West Virginia Trial Court Rules.

## **II. STATUS OF *STATE v. WALGREENS***

### **A. Status**

Except as specifically noted below, fact and expert discovery is closed in the *State v. Walgreens* matter (“Walgreens matter”).

### **B. Exceptions**

The following discovery may proceed in the Walgreens matter based upon the schedule outlined below:

1. Walgreens may take the deposition of a 30(b)(7) witness to testify regarding the State's "Best Practices" publications.
2. The State may take the deposition of Dr. Timothy Deer at a date and time convenient for all parties.
3. Having reviewed *The State's Motion to Strike Walgreens' "Cross-Notice" of Deposition of Kristine Lucas f/k/a Kristine Atwell* (Transaction ID 68222222) and Walgreens' *Opposition* (Transaction ID 68226628) the Court **DENIES** the motion. The Court will allow testimony from that deposition to be played at trial.
4. The State and Walgreens may take the depositions of expert witnesses who have not been deposed subsequent to issuing supplemental reports pursuant to the *Order on the Production of Electronic Notes Fields and Hard Copy Prescriptions* of August 19, 2022 (Transaction ID 67948030).
5. Each side shall have an opportunity to depose any likely-to-call witnesses not previously deposed.
6. The State and Walgreens may produce documents from custodial files of trial witnesses in advance of those depositions.

With the exception of the deposition of Dr. Timothy Deer, these depositions and document productions are to be completed by **Friday, December 16, 2022**.

**C. Leave of Court**

Except as noted above, all other discovery with respect to the Walgreens matter is closed and no party may supplement expert disclosures in that matter without leave of Court or agreement of the parties.

### III. FACT DISCOVERY IN STATE V. KROGER

#### A. Form of Discovery and Limitations on Discovery

1. Time for Response. The parties initially shall have **thirty (30) days** from the date of the receipt of interrogatories, requests for admissions, and requests for production of documents in which to serve a response. Nothing herein shall be construed to prevent the parties from agreeing between themselves to extensions of time, as necessary.
2. Depositions. The parties shall communicate in advance of the scheduling of any deposition in order to try to schedule the deposition at a time and place mutually acceptable to the witnesses and the parties. Depositions may be taken remotely, and the parties are directed to meet and confer about an appropriate remote deposition protocol.

#### B. Document Production and Interrogatories

1. The parties shall meet and confer regarding the proposed use of documents and testimony produced in other opioid litigation, and nothing herein shall be construed to affect in any manner the admissibility at trial or any other court proceeding of any document, testimony, or other evidence. Kroger is working to ensure its access to documents produced by all parties in the proceeding captioned as *In re: Opioid Litigation*, Civil Action No. 19-C-9000 (“MLP Litigation”), subject to all applicable protective orders, including the July 30, 2020 Protective Order in this case (Transaction ID 65810931). Documents that the State produced as a third party in *City of Huntington v. AmerisourceBergen Drug Corporation, et al.* and *Cabell County Commission v. AmerisourceBergen Drug Corporation, et al.*, Case No. 3:17-CV-1362 (“MDL CT2”) are available to the parties as described in the Court’s September 24, 2020, *Third-Party Discovery Protocol* (Transaction ID 65963866). Any documents produced pursuant to this provision are subject to all applicable protective orders, including the July 30, 2020, *Stipulated Protective Order*

in this case (Transaction ID 65810931). All documents produced by the State in the MDL CT2 and in any other opioid litigation initiated by the State, including against distributors and pharmacies,<sup>2</sup> as well as documents produced in the State Opioid Manufacturer Proceedings<sup>3</sup> will be produced in the State Opioid Pharmacy Proceedings on a rolling basis as available, subject to all applicable protective orders. Likewise, documents produced by Kroger in the MDL (*In re: National Prescription Opiate Litigation*, Case No. 1:17-MD-2804 (MDL 2804)), will be reproduced to the State, subject to all applicable protective orders.

2. Absent good cause, no new requests for production or interrogatories may be served after **Monday, December 12, 2022**. However, nothing in this paragraph shall prohibit a party from taking the position at a later date that particular documents that have come to its attention fall within the scope of an earlier-served request and should be produced.

3. If a party contends that documents it is requested to produce are not in its possession, custody, or control and should instead be sought from a third party (such as a vendor or former employee), it shall give prompt notice of that fact, identifying the documents or categories of documents at issue and the third-party source from which they should be sought.

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<sup>2</sup> *State of West Virginia ex rel. Darrell V. McGraw v. Cardinal Health*, Civil Action No. 12-C-140 (Cir. Ct. Boone County, W. Va.); *State of West Virginia ex rel. Darrell V. McGraw v. AmerisourceBergen Drug Corp.*, Civil Action No. 12-C-141 (Cir. Ct. Boone County, W. Va.); *State of West Virginia ex rel. Patrick Morrissey v. McKesson Corporation*, Civil Action No. 16-C-1 (Cir. Ct. Boone County, W. Va.); *State of West Virginia ex rel. Patrick Morrissey v. Crab Orchard Pharmacy, Inc.*, Civil Action No. 17-C-12-D (Cir. Ct. Raleigh County, W. Va.); *State of West Virginia ex rel. Patrick Morrissey v. Judy's Drug Store, Inc.*, Civil Action No. 16-C-54 (Cir. Ct. Hardy County, W. Va.); *State of West Virginia ex rel. Patrick Morrissey v. Larry's Drive-In Pharmacy*, Civil Action No. 16-C-202 (Cir. Ct. Boone County, W. Va.) (hereinafter "Distributor and other pharmacy" cases).

<sup>3</sup> *State Of West Virginia ex rel. Patrick Morrissey v. Teva Pharmaceutical Industries, Ltd., et al.*, Civil Action No. 19-C-104 BNE; *State Of West Virginia ex rel. Patrick Morrissey v. Janssen Pharmaceuticals, Inc., et al.*, Civil Action No. 19-C-105-BNE; *State Of West Virginia ex rel. Patrick Morrissey v. Endo Health Solutions Inc., et al.*, Civil Action No. 19-C-151 BNE.

4. If a party contends that documents specific to the State of West Virginia that are responsive to a discovery request were produced by either the State or Kroger in the MLP Litigation<sup>4</sup> or by Kroger in the MDL, the producing party must make a good faith effort to identify such documents clearly and concisely by Bates number or Bates range in its discovery responses. This requirement to identify documents by Bates number will not apply to any Request for Production of Documents or Interrogatories that seek “all documents” or “all communications” for a particular subject, unless the request and scope is defined more specifically. Requests for Production of Documents or Interrogatories that seek documents regarding a contention by a party are likewise excepted from this provision. The failure to identify a document by Bates number or other comparably specific means in response to any Request for Production or Interrogatory does not preclude a party from using or relying on that document for any purpose, including, but not limited to, in motion briefing or introduction at trial, subject to any applicable protective order and admissibility rulings.

### **C. Depositions**

1. The parties agree that Kroger shall produce to the State the final transcript of all depositions of Kroger’s current and former employees deposed in the MDL. The parties further agree that the State will produce to Kroger the depositions taken of third parties that are within the State’s possession and State witnesses, whether as a party or third party, in other opioid matters, including in the State’s litigation against Distributors and other pharmacies, as well as State witnesses deposed in MDL CT2.

2. The parties agree that fact witness deposition testimony of parties taken in other opioid matters as described herein, and fact witness deposition testimony of consenting third parties may be used for any purpose at trial of this matter, subject to the West Virginia Rules of Evidence.

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<sup>4</sup> *In re: Opioid Litigation*, Civil Action No. 19-C-9000.

Depositions may be taken remotely as described in paragraph II.2 of this Order. Before noticing the deposition of a witness who was previously deposed in other opioid litigation, counsel shall review prior deposition testimony of the witness to determine if an additional deposition is necessary and shall inform counsel for the witness of the approximate amount of time needed for the additional deposition. The parties shall meet and confer as necessary regarding the length and/or scope of depositions of witnesses who have previously been deposed. If the parties are unable to agree regarding deposing a previously deposed witness, the party seeking to take the deposition must seek leave of court to depose the witness. If either party seeks to depose a third-party witness who was previously deposed in other opioid litigation, that party must confer with the witness or, if represented, counsel representing the witness regarding the scope and length of the additional deposition. If an agreement is reached with that third-party witness or counsel, the deposition will proceed pursuant to the terms of the agreement. If an agreement is not reached, the party seeking to depose a previously deposed third-party witness must seek leave of court to depose the witness. This requirement to meet and confer and/or seek leave of court regarding third-party depositions will not apply if the party is cross-noticing a deposition noticed in another jurisdiction, where the deposition is being taken either by agreement or decision of the court in the jurisdiction where the deposition was originally noticed. If the deponent's custodial file is requested by the noticing party, the file must be produced **ten (10) days prior** to the deposition. The parties are urged to prioritize those witness for whom documents are sought so they can proceed expeditiously with depositions.

3. The parties agree that there will be a **seven (7) hour** time limit on all fact depositions, except for 30(b)(7) depositions, for which a designee may appear over multiple **seven (7) hour** days, subject to the provisions in the preceding paragraph requiring the parties to meet and confer

regarding the length and scope of witnesses who have been previously deposed. Should any party believe that additional time is required for any fact deposition, the parties shall meet and confer before approaching the Court and/or Discovery Commissioner for additional time.

**D. Third Party Discovery**

1. All Subpoenas for production of documents must be served on third parties by **Monday, December 12, 2022.**

**V. OTHER DISCOVERY REQUIREMENTS.**

The following additional limitations and requirements shall govern discovery. However, the parties may by agreement make exceptions or otherwise adjust these provisions for particular situations.

**A. Communications with Witnesses**

1. Any party that communicates with a former employee or agent of another party shall comply strictly with all applicable ethical rules. Any written communications with such a person concerning the subject matter of this litigation, or documents obtained from the person, are subject to discovery and shall be produced promptly. A party seeking to schedule the deposition of a current employee of a party shall coordinate with counsel for the witness's employer.

**B. Third Party Discovery**

1. The parties shall comply strictly with the requirement to provide timely notice of any third-party subpoenas served and shall provide the third-party subpoenas served with the notice to all parties.
2. Any party that serves a subpoena for documents on a third party shall make any documents produced in response to that subpoena, whether formally or informally in lieu of formal production, available to all parties on the production site and serve a cover letter identifying the



source and Bates range of the documents within **three (3) days** of processing of the documents by that party's e-discovery vendor. Such documents shall be processed expeditiously for this purpose. To avoid disputes about compliance with these requirements, a party receiving documents from a third party pursuant to a subpoena shall provide separate notice of that fact to all other parties within three (3) days of receipt of any such documents. If delay of **more than seven (7) days** is anticipated in the processing of the documents by the party's e-discovery vendor for re-production as provided above, notice shall be given of that fact. If documents are received from a third party whose deposition is to take place less than **ten (10) days** after receipt of the documents, the party in possession of the documents shall make **immediate** production of the documents to all other parties in the format received from the third party.

3. If any party submits a *Touhy* request to the federal government (or a similar request to any state agency) for any discovery sought in Trial Proceedings, it shall serve that request **contemporaneously** on all parties. Any formal response received in response to such a request shall be served on all parties upon receipt.

## **VI. ADDITIONAL DEADLINES**

1. Kroger previously produced its West Virginia dispensing data to Plaintiff. The parties agree to meet and confer regarding joint stipulation for the timing of Kroger's production of dispensing notes, which shall be in accordance with the sampling method set forth in the Discovery Commissioner's *Order on the Production of Electronic Notes Fields and Hard Copy Prescriptions*. (Transaction ID 67948030.) **On or before October 28, 2022**, the parties will submit a joint stipulation or, if agreement is not reached, separate proposals regarding the timing of Kroger's production of dispensing notes.

2. Mediation will be conducted by the Resolution Judges **on January 17-18, 2023**. *See Order Scheduling Mediation on January 17-18, 2023* (Transaction ID 68261236).
3. Fact discovery shall be complete by **Friday, January 27, 2023**.
4. Plaintiff shall provide a report for each person whom it expects to call as an expert witness in support of its claims against Kroger by **Friday, February 10, 2023**. The report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; a list of the data, documents, or other information considered by the witness in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; a statement of the compensation to be paid for the study and testimony in the case; and a list of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Plaintiff shall provide Kroger with the data or documents relied upon by the expert if such data or documents are not publicly available or produced in the litigation. The report shall not include any opinions that apply to Walgreens that have not been previously disclosed in Plaintiff's case against Walgreens. Plaintiff shall provide Kroger with three (3) proposed deposition dates for each expert when the reports are served.
5. Kroger shall provide a report for each person whom they expect to call as an expert witness by **Monday, March 20, 2023**. The report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; a list of the data, documents, or other information considered by the witness in forming the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; a statement of the compensation to be paid for the study and testimony in the case; and a list of any other cases in which the witness has testified as an expert at trial or

by deposition within the preceding four years. Kroger shall provide Plaintiff with the data or documents relied upon by the expert if such data or documents are not publicly available or produced in the litigation. Kroger shall provide Plaintiff with three (3) proposed deposition dates for each expert when the reports are served.

6. Consistent with Fed. R. Civ. P. 26(b)(4), no party will seek discovery of any experts' notes, drafts of expert reports, or communications with counsel, provided, however, that counsel may serve discovery or inquire at a deposition about any facts, data, or assumptions provided to the expert by counsel and upon which such expert is relying in expressing the expert's opinions. Each party also agrees to bear its own expert costs.
7. Expert depositions shall begin after Kroger's expert reports are served. The parties will work, to the extent practicable, to schedule depositions of Plaintiff's experts to occur before depositions of Kroger's experts, particularly within logical groupings of experts (*e.g.* marketing experts). The parties will, to the extent practicable, work with counsel in other pending opioid cases to coordinate depositions of common experts for either party in order to minimize multiple depositions of the same experts. In addition, for experts who have previously been deposed in the opioid litigation, the parties will make a good faith effort to limit their deposition questions to matters that were not inquired into or adequately addressed in the expert's prior depositions. Expert depositions shall otherwise be limited to **seven (7) hours**. Should any party believe that additional time is required for an expert deposition, the parties shall meet and confer before approaching the Court or Discovery Commissioner to seek additional time.
8. All expert discovery shall be concluded by **Friday, April 14, 2023**.

9. Motions for summary judgment and motions challenging the admissibility of expert testimony shall be due **no later than 12:00 p.m. on Monday, April 24, 2023**. Oppositions to such motions shall be due **no later than 12:00 p.m. on Monday, May 8, 2023**. **No replies will be permitted**. Upon the filing of any motion challenging the admissibility of expert testimony, the filing party must identify whether prior motions to limit or exclude the subject expert's testimony in other opioid related matters were granted or denied.
10. The hearing on expert motions and motions for summary judgment will be held at a time set by the Court.
11. Motions in limine shall be filed **no later than 12:00 p.m. on Wednesday, May 10, 2023**. Oppositions to such motions shall be filed **no later than 12:00 p.m. on Friday, May 19, 2023**. **No replies will be permitted**.
12. Witness lists shall be exchanged no later than **Friday, May 5, 2023**. The parties shall develop a process to differentiate their likely-to-call witnesses, and each side shall have an opportunity to depose any likely-to-call witnesses not previously deposed.
13. Exhibit lists shall be filed no later than **no later than 12:00 p.m. on Friday, May 12, 2023**. The parties shall develop a stipulated rolling process for objections to trial exhibits (similar to stipulations entered in other opioid cases).
14. Pretrial memoranda shall be filed **no later than 12:00 p.m. on Wednesday, May 24, 2023**.
15. Deposition designations and objections shall be delivered to the Presiding Judges and Counsel to the Mass Litigation Panel **no later than 12:00 p.m. on Friday, May 12, 2023**.
16. The pretrial conference shall be held at **9:00 a.m. on Friday, May 26, 2023**.
17. The trial in this case shall begin at **8:30 a.m. on Monday, June 5, 2023**.

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

It is so **ORDERED**.

**ENTERED:** October 18, 2022.

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

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation