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Transaction ID 68388011

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,

vs. **Civil Action No. 22-C-111 PNM**

THE KROGER CO., *et al*

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER DENYING KROGER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Pending before the Mass Litigation Panel ("Panel") is *Defendant Kroger's*[1] *Motion to Dismiss Plaintiff's Complaint and Memorandum of Law in Support Thereof* ("Motion") (Transaction ID 68182043). Having reviewed and considered the arguments raised in Kroger's Motion,[2] the State of West Virginia's Opposition (Transaction ID 68247888), and Kroger's Reply (Transaction ID 68284055), the Panel denied Kroger's Motion and ordered the State to file and serve a detailed proposed order with findings of fact and conclusions of law, consistent with the Panel's August 3, 2022, Order (Transaction ID 67895252) denying other Pharmacy

[1] As used herein, "Kroger" will mean and refer to the Kroger Defendants collectively. The Kroger Defendants are: The Kroger Co, Kroger Limited Partnership I d/b/a Peyton's Southeastern, and Kroger Limited Partnership II d/b/a/ Peyton's Northern.

[2] Because Kroger provides a detailed recitation of the procedural history of its motion to dismiss, the Panel will not repeat it here.

Defendants' motions to dismiss. *Order Regarding the Kroger Defendants' Motion to Dismiss Complaint* (Transaction ID 68267930), and *Order Granting Defendant Kroger's Motion for Leave to File Reply in Support of its Motion to Dismiss* (Transaction ID 68291719).

Having now reviewed and considered the State's proposed findings of fact, conclusions of law and order denying Kroger's motion to dismiss Plaintiff's Complaint (Transaction ID 68324546), Kroger's Objections (Transaction ID 68332315), Plaintiff's Response (Transaction ID 68352101), and Kroger's Reply (Transaction ID 68377148), the Panel makes the following findings of fact and conclusions of law in support of its decision:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The State has sued Kroger in connection with its wholesale distribution and retail dispensing of prescription opioids in West Virginia, alleging that its unlawful and/or unreasonable conduct in both activities 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.*

The Legal Standard

2. As explained by the Court in *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 245 S.E.2d 157 (1978):

> The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the Complaint. For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true. Since common law demurrers have been abolished, pleadings are now liberally construed so as to do substantial justice. W. Va. R. Civ. P. 8(f). The policy of the rule is thus to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied.

* * *

> In view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one.

Id. at 604-06, 158-59.

3. A trial court considering a motion to dismiss under Rule 12(b)(6) must "liberally construe the complaint so as to do substantial justice." *Cantley v. Lincoln Cnty. Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) (citing W. Va. R. Civ. P. 8(f)). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at Syl. pt. 2 (*quoting* Syl. pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977)).

Application of Standard

A. Medical Professional Liability Act and Opioid Dispensing-Based Claims

4. The State alleges that Kroger violated the WVCCPA and contributed to a public nuisance—the public health and safety crisis of the opioid epidemic in West Virginia—through its wholesale distribution and retail dispensing of opioids in West Virginia. *See State v. Kroger* Complaint ("Complaint") (Transaction ID 68181003), ¶¶ 107-28. The State alleges Kroger did so by failing to maintain systems to prevent diversion and ensure that prescriptions were issued for legitimate purposes, including by not using Kroger's own dispensing and claims data to enable pharmacists to assess opioid prescribing practices and trends. *Id.*, ¶¶ 30-31, 80-81, 87, 91-95.

5. Kroger argues that the Panel lacks subject matter jurisdiction over the State's claims based on opioid *dispensing* because these are "medical professional liability" claims governed by the Medical Professional Liability Act ("MPLA"), W. Va. Code §§ 55-7B-1 *et seq.*, and the State has not complied with the Act's prerequisites for filing suit. *See* Motion at 6-8, 21 (citing W. Va. Code § 55-7B-6). Kroger does not raise this argument as to the State's claims based on opioid *distribution*.

6. The Panel concludes that the MPLA does not apply to the State's public nuisance and WVCCPA claims based on opioid dispensing by Kroger through Kroger's pharmacy stores in West Virginia.

7. The MPLA's prerequisites to suit apply only to a "medical professional liability action." W. Va. Code § 55-7B-6(a). "Medical professional liability" is a defined term:

> "Medical professional liability" means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.

W. Va. Code § 55-7B-2(i).

8. The MPLA defines "Plaintiff" as "a patient or representative of a patient who brings an action for medical professional liability under this article," W. Va. Code § 55-7B-2(n), and "Patient" as "a natural person who receives or should have received health care from a licensed health care provider under a contract, express or implied." W. Va. Code § 55-7B-2(m).

9. The MPLA also defines "health care" services to include, in relevant part, "[a]ny act, service or treatment provided under, pursuant to or in the furtherance of a physician's care, a health care facility's plan of care, medical diagnosis or treatment[.]" W. Va. Code § 55-7B-2(e)(1).

10. Thus, for the MPLA to apply, the plaintiff must be a "patient or representative of a patient" who is or was a "natural person" who suffered "death or injury" from the provision of or failure to provide "health care services" that are in furtherance of medical treatment, for which the plaintiff may seek tort or breach of contract damages and related relief. The State is not such a plaintiff covered by the MPLA for at least three independent reasons.

11. First, the State is not a patient or representative of a patient, as the Act requires for its provisions to apply. Rather, the State filed these lawsuits in its capacity as sovereign charged to enforce State laws and protect the public health and safety.

12. The State has express statutory authority to enforce the WVCCPA. *See* W. Va. Code § 46A-7-108 ("The attorney general may bring an 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[.]"). It does so not as an injured consumer or representative of injured consumers, but as sovereign charged with enforcing the Act to help ensure a fair and honest marketplace:

> [The Attorney General] is authorized to file suit independently of any consumer complaints, as a *parens patriae*, that is, as the legal representative of the State to vindicate the State's sovereign and quasi-sovereign interests, as well as the interests of the State's citizens. Indeed, the fact that the Attorney General is acting to obtain disgorgement of ill-gotten gains, separate and apart from the interest of particular consumers in obtaining recompense, validates this action as a *parens patriae* action.

State of West Virginia ex rel. McGraw v. CVS Pharmacy, Inc., 646 F.3d 169, 176 (4th Cir. 2011) (internal quotation marks and citation omitted).

13. So, too, is the State, through its officers and agencies, empowered at common law to bring suit to remedy a public nuisance that is interfering with the public health and safety. *See, e.g., State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 242,

488 S.E.2d 901, 922 (1997) ("The [Department of Environmental Protection's] allegation of public nuisance does not encompass damages to property owned by the DEP nor does it encompass damages for personal injuries to the DEP. Instead, the DEP is seeking damages for the harm caused to the public health, safety, and the environment.") (internal quotation marks omitted).

14. Since the State brings its WVCCPA and public nuisance claims as sovereign vindicating the interests of the public, not as an injured patient or representative of an injured patient, the MPLA does not apply to these claims.

15. Second, the conclusion that the MPLA does not apply is underscored by the fact that the State also does not seek damages.

16. The Panel already has ruled that the WVCCPA statutory remedies of an injunction, other equitable relief, and civil penalties are not damages. *See* Order Regarding the State's Motion to Strike Defendants' Notices of Non-Party Fault ("State NNPF Order") (Transaction ID 65820504) at 4 ("[T]he State seeks . . . civil penalties and equitable relief under the WVCCPA, not damages . . . .").

17. The Panel also has ruled that the State's public nuisance remedy of prospective, equitable abatement likewise is not damages, which the State has waived. *See id.* at 3, 4; *see also* Order Granting Plaintiffs' Motion to Strike Defendants' Notices of Non-Party Fault ("Cities-Counties NNPF Order") (Transaction ID 65807300) at 4-5 ("[T]he 'distinction between abatement of nuisances and recovery of damages for injuries occasioned by wrongful acts constituting nuisances' is both 'apparent' and 'vast.'") (quoting *McMechen v. Hitchman-Glendale Consol Coal Co.*, 88 W. Va. 633, 107 S.E. 480, 482 (1921)).

18. The Supreme Court of Appeals considered the Panel's rulings on these points and left them undisturbed. *See State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 443 and n.55, 859 S.E.2d 374, 386 and n.55 (2021) (defendants' argument concerning "joinder of legal and equitable claims" and right to jury trial "does not apply to the State, which has brought claims for public nuisance and violation of the WVCCPA.").

19. The recent ruling in *City of Huntington v. AmerisourceBergen Drug. Corp.*, No. 3:17-01362, ___ F. Supp. 3d ___, 2022 WL 2399876 (S.D. W. Va. July 4, 2022), does not warrant reconsideration of the Panel's rulings that the State's WVCCPA and public nuisance claims do not seek damages, as required under the MPLA.

20. The Panel finds the federal multidistrict litigation (MDL) court's and the *Restatement (Second) of Torts*' discussions of the nature and scope of public nuisance abatement persuasive and applicable to this case. *See In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 WL 4043938, at *2 (N.D. Ohio Aug. 26, 2019) ("Thus, the Court, exercising its equitable powers, has the discretion to craft a remedy that will require Defendants, if they are found liable, to pay the prospective costs that will allow Plaintiffs to abate the opioid crisis."); 529 F. Supp. 3d 790, 2022 WL 671219, at *27 (N.D. Ohio March 7, 2022) ("Even if as Defendants assert, they discontinued the conduct that led to the existence of the nuisance, they are still subject to liability for abatement of any ongoing consequential effects of the nuisance."); *Restatement (Second) of Torts* (1979), § 834 cmt. e ("[I]f the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm."). The

remedy the State seeks here is not damages, but equitable abatement to which the MPLA does not apply.

21. Third, the State's WVCCPA and public nuisance claims are not based on "health care services rendered," W. Va. Code §55-7B-2(i), in furtherance of a physician or health care facility's plan of care, medical diagnosis or treatment. § 55-7B(2)(e)(1). Rather, the State alleges that Kroger failed to discharge its duties as registrants under the federal and West Virginia Controlled Substances Acts to maintain "effective controls against diversion of controlled substances into *other than* legitimate medical, scientific, and industrial channels." 21 U.S.C. § 823(b)(1) (emphasis added); *see also* W. Va. Code § 60A-3-303(a)(1) (same), 21 C.F.R. § 1301.71(a), W. Va. C.S.R. § 15-2-5.1.1. This includes the requirement that dispensing pharmacies operate systems to detect and block medically *illegitimate* prescribing. *See* 21 C.F.R. § 1306.04(a), W. Va. C.S.R. § 15-2-8.4.1. The State alleges that Kroger violated these duties by, *inter alia*, failing to use its own dispensing and claims data to identify doctors with prescribing patterns that present red flags for diversion and *non-medical* use. *See* Complaint ¶¶ 85-88, 98.

22. The federal and state regulations that the State alleges Kroger failed to comply with provide specifically that:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription . . . .

21 C.F.R. § 1306.04(a); *see also* W. Va. C.S.R. § 15-2-8.4.1 (same). The alleged failure by Kroger to prevent diversion by failing to investigate red flags of diversion and illegitimate

prescriptions does not fall under the MPLA's protections. *See East Main St. Pharmacy; Affirmance of Suspension Order*, 75 FR 66149-01, 66157, 2010 WL 4218766 (D.E.A. Oct. 27, 2010) ("'[A] pharmacist can know that prescriptions are issued for no legitimate medical purpose without his needing to know anything about medical science.'") (quoting *U.S. v. Hayes*, 595 F.2d 258, 261 n.6 (5th Cir. 1979)). Since the diversion-control duties underpinning the State's WVCCPA and public nuisance claims are not delivered in furtherance of the treatment of patients, but pursuant to registrants' duties to prevent diversion outside of legitimate patient care, the MPLA does not apply to these claims.

23. Kroger's argument for broader application of the MPLA does not have merit. Kroger relies upon the Act's provision for claims involving controlled substances dispensing. *See* Motion at 7 (citing W. Va. Code § 55-7B-5(d)). This provision, however, refers to claims "by or on behalf of a *person* whose *damages* arise as a proximate result of a violation of the Uniform Controlled Substances Act[.]" W. Va. Code § 55-7B-5(d) (emphasis added). These limitations echo and thus underscore those in the Act's provisions limiting its application to claims by or on behalf of patients for damages sustained from receiving medical treatment.

24. The decision in *State v. Judy's Drug Store, Inc.*, No. 16-C-54 (W. Va. Cir. Ct. Hardy Cnty. Nov. 8, 2019), relied upon by Kroger, addressed different types of claims than those at issue here. *See id.* at 8, ¶ 25 ("Plaintiff seeks relief and damages allegedly resulting from the death or injury of persons . . . ."). Kroger's reliance on the decision in *State v. Crab Orchard Pharmacy, Inc.*, No. 17-C-12-D (W. Va. Cir. Ct. Raleigh Cnty., March 8, 2019) is similarly misplaced. There, the court held that the MPLA applies to a public nuisance claim "because the allegations in paragraph VI of the Complaint relate to the provision of health care," *id.* at 12,

without addressing whether this claim was brought on behalf of individual patients or sought damages as opposed to equitable abatement relief.

25. The Panel holds that the MPLA does not apply to the State's WVCCPA claims for an injunction, other equitable relief, and civil penalties or its public nuisance claims for equitable abatement because these claims are not brought by or on behalf of a patient and do not seek damages for a patient's death or injury in receiving medical services.

B. Comprehensive Regulation and Federal or State Statutory Preemption

26. The Panel also rejects Kroger's arguments that purportedly comprehensive regulation of controlled substances distribution and dispensing under federal and state law preempt or otherwise preclude the State's WVCCPA and public nuisance claims. *See* Motion at 8-13, 21.

27. First, the federal Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq.*, and U.S. Drug Enforcement Administration ("DEA") regulations do not preempt the State's West Virginia state-law claims. The State seeks to hold Kroger liable for conduct that it alleges violates state law as well as the CSA. *See, e.g.*, Complaint ¶¶ 43-44, 55-57, 98. The CSA specifically contemplates and preserves this type of state-law liability. The Act contains an express savings clause, titled "Application of State law," which provides that:

> No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and the State law so that the two cannot consistently stand together.

21 U.S.C. § 903. This savings clause alone demonstrates that the CSA does not occupy the field of controlled substances regulation and does not preempt liability under state law absent a positive conflict between the CSA and state law, which Kroger does not demonstrate.

28. The DEA's regulatory guidance underscores this conclusion that the CSA and federal regulation do not *per se* preempt state-law liability for improper conduct in dispensing opioids. In a 2006 policy statement titled "*Dispensing Controlled Substances for the Treatment of Pain*," the DEA explained that:

> [I]t has been the case for more than 70 years that a practitioner who dispenses controlled substances for other than a legitimate medical purpose, or outside the usual course of professional practice, is subject to legal liability under both State and Federal law.

71 FR 52716-01, 52717, 2006 WL 2540907 (D.E.A. Sept. 6, 2006).

29. In light of the statutory command and DEA statement, courts uniformly have rejected the argument that the CSA and comprehensive DEA regulation preempt state-law public nuisance and consumer protection statute claims based on diversion-control failures in the distribution or dispensing of prescription opioids. *See City and Cnty of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 662 (N.D. Cal. 2020) (holding that 21 U.S.C. § 903 "precludes any argument that Congress intended to preempt state laws that enforce the CSA absent a positive conflict" and that "[n]o such conflict exists" with respect to state-law public nuisance claims); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 4178591, at *12 (N.D. Ohio Sept. 3, 2019) ("The Court has previously rejected this obstacle preemption argument, albeit with respect to the FDA, and now does so with respect to the DEA."); *State of South Dakota v. Purdue Pharma L.P.*, No. 32CIV18-000065, 2021 WL 5873046, at *4 (S.D. Cir. Ct. Jan. 13, 2021) ("In 21 U.S.C. § 903, the [CSA] contemplates that states' traditional enforcement of tort law will supplement the federal enforcement scheme."); *State of New Mexico v. Purdue Pharma L.P.*, No. D-101-CV-2017-02541 (N.M. Dist. Ct. July 1, 2022) at 4 ("[T]he Court rejects the argument that the State's claims are preempted because they purportedly seek to enforce the [CSA] . . . .").

30. The Panel thus holds that the CSA and DEA regulation do not preempt or otherwise preclude the State's WVCCPA and public nuisance claims based on Kroger's alleged diversion-control failures in its distribution and/or dispensing of prescription opioids as controlled substances.

31. Second, the West Virginia Uniform Controlled Substances Act ("WVCSA"), W. Va. Code §§ 60A-1-101 *et seq.*, likewise does not preempt or otherwise preclude the State's WVCCPA and public nuisance claims. Kroger argues that both claims are precluded by the WVCSA's grant of exclusive enforcement authority to the West Virginia Board of Pharmacy. *See, e.g.,* Motion at 11-13, 17-20. The Panel previously has rejected this argument as applied to common law negligence claims, as other courts have with respect to WVCCPA and public nuisance claims.

32. In its earlier *Order Denying Pharmacy Defendants' Motion to Dismiss Plaintiffs' Complaint* ("Pharmacies Order") (Transaction ID 64374772), the Panel adopted as law of the case the ruling by the Circuit Court of Marshall County rejecting several defendants' assertions that a claim incorporating WVCSA standards was an impermissible enforcement action. This ruling explained as follows:

> The Court finds and concludes that Plaintiffs are not attempting to assert a private right of action under the WVCSA. Instead, they rely on the WVCSA to help establish a standard of care for their common-law negligence claim, which is permissible under the law.

Id. at Ex. A, p.6 ¶ 15. The Panel adopted and incorporated this ruling as law of the case in this mass litigation. *Id.* at 3.

33. In *State ex rel. Morrisey v. AmerisourceBergen Drug Corp.*, No. 12-C-141, 2014 WL 12814021 (W. Va. Cir. Ct., Boone Cnty Dec. 12, 2014), *writ denied*, *State ex rel. AmerisourceBergen Drug Corp. v. Thompson*, No. 15-1026 (W. Va. Jan. 5, 2016), Judge

Thompson ruled that the State may base a WVCCPA unfair practices claim upon defendant opioid distributors' conduct violating their statutory and regulatory duties to maintain effective controls against diversion. While the defendants argued that "not all violations of a statute or regulation are unfair[,]" *id.* at *14, the court ruled that the "question of 'unfairness' is decided on a case-by-case basis" and denied dismissal of the claim. *Id.*

34. The court in *State v. AmerisourceBergen* ruled correctly that the State may base a WVCCPA unfair practices claim upon a defendant's conduct violating WVCSA statutory and regulatory duties to maintain effective controls against diversion of controlled substances. The WVCCPA declares "unfair or deceptive acts or practices in the conduct of any trade or commerce" to be "unlawful." W. Va. Code § 46A-6-104. The Act provides a non-exclusive definition of what may constitute an unfair practice. W. Va. Code § 46A-6-102(7). The Act further provides that "[i]t is the intent of the Legislature that, in construing this article, the courts be guided by the policies of the Federal Trade Commission [FTC] and interpretations given by the [FTC] and federal courts to [15 U.S.C. § 45(a)(1)], as from time to time amended . . . ." W. Va. Code § 46A-6-101(1). The FTC has considered in assessing whether an act or practice is "unfair" under the federal statute "whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, common law, or otherwise . . . ." FTC, *Statement of Basis and Purpose of Trade Regulation Rule*, 29 FR 8324, 8355 (1964). Conduct prohibited by the WVCSA thus may be a predicate for a WVCCPA unfair practices claim.

35. So, too, conduct prohibited by the WVCSA may support a public nuisance claim. "A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons." *Duff v. Morgantown Energy Ass'n*, 187 W. Va. 712, 716, 421

S.E.2d 253, 257 (1992) (internal quotation marks and citation omitted). The Supreme Court of Appeals has found that "this definition is consistent with the *Restatement (Second) of Torts* § 821B(1) (1979), which defines a public nuisance as 'an unreasonable interference with a right common to the general public.'" *Id.* at 716 n.6, 421 S.E.2d at 257 n.6. Under the *Restatement* provision, "[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include . . . whether the conduct is proscribed by a statute, ordinance or administrative regulation[.]" *Restatement (Second) of Torts* § 821B(2)(b). Thus, although unlawful conduct is not *required*, *see Duff*, 187 W. Va. at 716, 421 S.E.2d at 257 (a "business lawful in itself [may] constitute[] a public nuisance"), this is a permissible way to prove conduct unreasonable in support of public nuisance liability. *See State v. AmerisourceBergen*, 2014 WL 12814021, at *9 (denying dismissal of State's public nuisance claim alleging that opioid distributor defendants "failed to provide effective controls against the diversion of controlled substances and failed to operate a system that discloses suspicious orders of controlled substances"). Conduct prohibited by the WVCSA thus may be a predicate for a public nuisance claim.

36. The Panel holds that the WVCSA does not preempt or otherwise prohibit the State's WVCCPA and public nuisance claims alleging in part that Kroger violated its statutory and regulatory duties to maintain effective controls against diversion of the prescription opioids it distributed and dispensed in West Virginia.

37. The Panel thus holds that the CSA and the WVCSA do not preempt the State's WVCCPA and public nuisance claims.

C. The State's WVCCPA Public Enforcement Claims

38. The State alleges that Kroger committed unfair or deceptive acts or practices in violation of the WVCCPA through its failures to maintain effective controls against diversion of the prescription opioid drugs it distributed into West Virginia and dispensed and sold through its West Virginia pharmacy stores. *See, e.g.*, Complaint ¶¶ 91-101. Kroger raises numerous arguments for dismissal of the State's WVCCPA claims.

39. First, Kroger argues that the WVCCPA does not apply to commerce involving prescription medications, because "licensed prescribers—not consumers—dictate prescription medication purchasing decisions." Motion at 9 (citing *White v. Wyeth*, 227 W. Va. 131, 141, 705 S.E.2d 828, 838 (2010)); *see also id.* at 13 (arguing that the CCPA contains "no explicit indication in the statute that it extends to the prescription drug supply chain). The Panel rejects this argument as contrary to well-established West Virginia law.

40. The WVCCPA is a remedial statute that, by its express terms, "shall be liberally construed so that its beneficial purposes may be served." W. Va. Code § 46A-6-101(1). The Supreme Court of Appeals and other courts thus have repeatedly addressed WVCCPA claims by the State against sellers and distributors of prescription drugs, including Defendants in this and other cases in this mass litigation, without questioning the Act's application. *See State ex rel. McGraw v. Johnson & Johnson*, 226 W. Va. 677, 680 and 684, 704 S.E.2d 677, 680 and 684 (2010) (WVCCPA claim involving deceptive communications to healthcare providers about prescription medications; addressing availability of civil penalties); *State v. CVS, supra*, 646 F.3d at 171 (WVCCPA claim involving unlawful acts in the sale of generic prescription drugs; addressing federal court jurisdictions); *State v. AmerisourceBergen, supra*, 2014 WL 12814021,

at *14 ¶ 82 (WVCCPA claim involving improper and illegal distribution of prescription opioid pills without required diversion controls; denying motion to dismiss).

41. The Supreme Court of Appeals' decision in *White v. Wyeth, supra*, is not to the contrary. In *White*, the Court held that "the *private* cause of action afforded consumers under West Virginia Code § 46A-6-106(a) does not extend to prescription drug purchases" because of the unlikelihood that a private consumer could establish causation of a loss in connection with a prescription drug purchase where "[t]he intervention by a physician in the decision-making process necessitated by his or her exercise of judgment whether or not to prescribe a particular medication . . . protects consumers in ways respecting efficacy that are lacking in advertising campaigns for other products." *Id.* *White*'s analysis of private consumer claims does not apply to the State's public enforcement claims. The difference between the two types of claims is critical.

42. The State in a public enforcement action like those here does not have to prove loss-causation, reliance, or damages, which was the basis for the ruling in *White*. Instead, when a defendant has committed an unfair or deceptive act or practice prohibited by the WVCCPA, the State, through the Attorney General, "may bring a civil action to restrain [the defendant] from violating [the WVCCPA] and for other appropriate relief." W. Va. Code § 46A-7-108. The phrase "other appropriate relief" in § 108 "indicates that the legislature meant the full array of equitable relief to be available in suits brought by the Attorney General." *State ex rel. McGraw v. Imperial Mktg.*, 203 W. Va. 203, 215-16, 506 S.E.2d 799, 811-12 (1998) ("*Imperial Mktg. II*"). This includes disgorgement of ill-gotten gains. *See, e.g., State v. CVS*, 646 F.3d at 176. It also includes civil penalties for repeated and willful violations. W. Va. Code § 46A-7-111(2). To obtain these remedies, the State must submit proof of the defendant's conduct, and nothing

more. *See, e.g., State v. Johnson & Johnson*, 226 W. Va. at 684, 704 S.E.2d at 684 ("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."). Since loss-causation, reliance, and damages are not required for the State's WVCCPA public enforcement claims, *White v. Wyeth* is inapposite, and the State may proceed on its claims involving distribution and dispensing of prescription drugs.

43. Kroger also argues that the State's WVCCPA claims based on opioid dispensing must be dismissed for failure to allege unfair or deceptive acts or practices occurring in the scope of trade or commerce. *See* Motion at 14-16.[3] The occurrence of an unfair method of competition or unfair or deceptive act or practice "in the conduct of any trade or commerce," W. Va. Code § 46A-6-104, is a requirement of the WVCCPA. It is one, however, that the State readily satisfies in its claims based on Kroger's dispensing of prescription opioids.

44. The WVCCPA defines "'Trade' or 'commerce" to encompass "the advertising, offering for sale, *sale* or distribution *of any goods* or services" and to "include any trade or commerce, directly or indirectly, affecting the people of this state." W. Va. Code § 46A-6-102(6) (emphasis added). Defendants' dispensing of opioid pills to consumers through their pharmacy stores in West Virginia is by definition the sale of a good affecting the people of West Virginia. *See id.* Further, the definition's inclusion of "advertising" and "sale" of goods in the disjunctive demonstrates that neither advertising nor marketing is a predicate to allege an unfair or deceptive act or practice—the covered sale of goods may "directly or indirectly[] affect[] the people of this state" and does not require direct advertising or marketing. W. Va. Code § 46A-6-

[3] Kroger did not make this argument with respect to the State's claims based on opioid *distribution*.

102(6). The State therefore satisfies the WVCCPA's "trade or commerce" requirement for its claims based on Kroger's dispensing of opioid pills in West Virginia.

45. Kroger next argues that the State "failed to allege any conduct that the [WV]CCPA, itself, defines as unfair or deceptive." Motion at 16. This argument, too, lacks merit.

46. The WVCCPA declares "unfair or deceptive acts or practices in the conduct of any trade or commerce" to be "unlawful." W. Va. Code § 46A-6-104. The Act provides a non-exclusive definition of what may constitute an unfair practice. W. Va. Code § 46A-6-102(7). The Act further provides that "[i]t is the intent of the Legislature that, in construing this article, the courts be guided by the policies of the Federal Trade Commission [FTC] and interpretations given by the [FTC] and federal courts to [15 U.S.C. § 45(a)(1)], as from time to time amended . . . ." W. Va. Code § 46A-6-101(1). The federal statute assesses unfairness based on whether "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). The FTC may "consider established public policies as evidence to be considered with all other evidence[,]" although these "may not serve as a primary basis for such determination." *Id.* The "likely . . . consumer injury" that supports a finding of unfairness may include "[u]nawarranted health and safety risks[.]" FTC, *Statement of Policy, supra*, 104 F.T.C. 949, 1984 WL 565290, at *97. The FTC also has considered in assessing unfairness "whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, common law, or otherwise . . . ." FTC, *Statement of Basis, supra*, 29 FR at 8355.

47. Based on the foregoing, Judge Thompson in *State v. AmerisourceBergen, supra*, held that the State's allegation of a failure to maintain effective controls against diversion in the distribution of prescription opioids supported an unfair practices claim under the WVCCPA. 2014 WL 12814021 at *14 ("The State has pled that Defendants have profited off the prescription drug epidemic by ignoring state-law anti-diversion regulations, thereby supplying Pill Mills. That meets the pleading requirement of unfairness at this stage.").

48. This Panel ruled similarly in this litigation in denying motions by Manufacturer Defendants to dismiss the State's WVCCPA claims alleging in part their failure to maintain effective controls against diversion. *See* Order Denying Allergan and Teva Defendants' Motions to Dismiss State's First Amended Complaint ("Teva Order") (Transaction ID 65887418) at 3; Order Denying Janssen Defendants' Motion to Dismiss State's Complaint ("Janssen Order") (Transaction ID 65899715) at 4.

49. In urging a contrary ruling here, Kroger contends that the common thread running through the WVCCPA's enumerated examples of "unfair or deceptive acts or practices" is that the conduct deceives, misleads, or confuses a consumer. *See, e.g.,* Motion at 14-15 ("[T]he State does not (or even attempted to) explain how the volume of a lawful product, in itself, could be unfair or deceptive." (emphasis omitted)). This argument fails because the WVCCPA expressly provides with respect to these enumerated examples of "unfair or deceptive acts or practices" that this concept "means and includes, *but is not limited to*, any one or more of the following[.]" W. Va. Code § 46A-6-102(7) (emphasis added); *see also State v. AmerisourceBergen*, 2014 WL 12814021 at *14 ("This language indicates the list is not exclusive, and other conduct can constitute unfair or deceptive acts or practices.").

50. The Panel therefore holds that the State sufficiently pleads an "unfair practices" claim under the WVCCPA based on its allegations that Kroger failed to maintain effective controls against diversion in distribution and dispensing of prescription opioid pills in West Virginia.

51. Kroger also seeks dismissal of the State's WVCCPA claims for failure to plead with particularity as required by W. Va. R. Civ. P. 9(b) for claims sounding in fraud. *See* Motion at 16-17. A WVCCPA public enforcement claim by the State does not sound in fraud. *See, e.g.*, W. Va. Code § 46A-6-102(7)(M) (misrepresentation or concealment of material facts can be an unfair or deceptive act or practice "whether or not any person has in fact been misled, deceived or damaged thereby"). The Panel thus has ruled in this litigation that Rule 9(b) does not apply to the State's WVCCPA claims against other Defendants. *See* Teva Order (Transaction ID 65887418) at 3; *Findings of Fact and Conclusions of Law on Order Denying Pharmacy Defendants' Motions to Dismiss Complaints and Amended Complaints* (Transaction ID 67895252). Other courts have ruled likewise. *See, e.g., Moore v. RoundPoint Mortg. Serv. Corp.*, No. 2:18-cv-01222, 2018 WL 4964362, at *3 (S.D. W. Va. Oct. 15, 2018) ("The court finds, however, that [Federal] Rule 9(b) does not apply to the plaintiffs' allegation that RoundPoint violated Section 46A-2-128, as the plaintiffs allege only that RoundPoint used unfair or unconscionable means to collect a debt, which does not require a showing of fraud."); *see also FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985) (holding that elements of fraud do not apply to FTC action). The Panel thus holds that Rule 9(b) does not apply to the State's WVCCPA public enforcement claims against Kroger.

52. Moreover, even if Rule 9(b) did apply, the State's detailed allegations of how Kroger failed to maintain effective controls against diversion of the opioids it distributed and

dispensed provide more than sufficient detail of the circumstances of the alleged unlawful conduct to give Kroger notice of the claims against it. *See, e.g.*, Complaint ¶¶ 80-90 (systematic failures to maintain effective controls against diversion in distribution and dispensing of prescription opioids), ¶¶ 91-101 (failures in West Virginia). These allegations would readily satisfy Rule 9(b) if it applied, which it does not.

53. The Panel thus holds that the State pleads viable WVCCPA public enforcement claims against Kroger.

D. The State's Public Nuisance Claims

54. The State alleges that Kroger contributed to a public nuisance because its failures to maintain effective controls against diversion in its distribution and dispensing of prescription opioid pills contributed to the oversupply and diversion of these pills that have fueled the public health and safety harms of the opioid epidemic in West Virginia. *See, e.g.*, Complaint, ¶¶ 91-98, 102-06, 116-128.

55. West Virginia defines public nuisance as "'an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons.'" *Duff, supra*, 187 W. Va. at 716, 421 S.E.2d at 257 (quoting *Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 595-96, 34 S.E.2d 348, 354 (1945)). The Supreme Court of Appeals has found that "this definition is consistent with the *Restatement (Second) of Torts* § 821B(1) (1979), which defines a public nuisance as 'an unreasonable interference with a right common to the general public.'" *Duff*, 187 W. Va. at 716 n.6, 421 S.E.2d at 257 n.6. Under the *Restatement (Second) of Torts* § 821B(2):

> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Although unlawful conduct is not *required* to establish public nuisance, *see Duff*, 187 W. Va. at 716, 421 S.E.2d at 257 (a "business lawful in itself [may] constitute[] a public nuisance"), this is one of the permissible ways to prove that an interference is unreasonable in support of public nuisance liability.

56. The Panel has issued orders in this mass litigation denying motions by the Pharmacy, Distributor, and Manufacturer Defendants for dismissal or summary judgment on the State's or City and County Plaintiffs' public nuisance claims. *See* Pharmacies Order, *supra*, at 3 and Ex. A pp. 11-12; Distributors Order, *supra*, at 3 and Ex. A pp. 13-14; *Order Denying Manufacturer Defendants' Joint Motion to Dismiss Plaintiffs' Complaint* ("Manufacturers Order") (Transaction ID 64374079) at 2-3 and Ex. A p. 12; Teva Order, *supra*, at 2-3; Janssen Order, *supra*, at 1-4; *Amended Order Regarding Rulings Issued During March 25, 2022, Pretrial Conference* ("Manufacturers MSJ Order") (Transaction ID 67650385) at 4 (denying summary judgment for Manufacturer Defendants on State's public nuisance claims).

57. The Panel also set forth comprehensive findings and legal conclusions concerning the application of public nuisance to governmental opioid claims. *See Findings of Fact and Conclusions of Law and Order Denying Defendants' Motion for Summary Judgment re "Factual Issue #2"* ("Distributors MSJ Order 2") (Transaction ID 67786397) at 1-9 (denying summary judgment for Distributor Defendants on City and County Plaintiffs' public nuisance claims).

That decision set forth the historical background of public nuisance claims both in West Virginia and nationwide opioid litigation and explained why contrary decisions are unpersuasive. *Id.* at 1-6. The Panel reaffirms those conclusions and incorporates them here.

58. Kroger nonetheless raises several arguments for dismissal of the State's public nuisance claims. The Panel addresses each of these arguments in turn.

59. First, Kroger seeks dismissal on the ground that the State does not allege harm to real property. *See* Motion at 20. This argument fails first as a factual matter because the State *does* allege damage to public property and resources caused by Kroger's conduct. *See, e.g.*, Complaint ¶ 105 (harms suffered by State include "children placed in foster care, babies born addicted to opioids, criminal behavior, poverty, [and] property damage"), ¶ 121 ("The greater demand for emergency services, law enforcement, addiction treatment, and other social services places an unreasonable burden on governmental resources."). These allegations show that the State may be able to demonstrate that an oversupply and the diversion of prescription opioids and an epidemic of opioid misuse and addiction have contributed harms to the State and public that include loss of use of public space, property, and resources due to drug abuse and related criminal behavior. *Cf. In re Opioid Litigation: Manufacturer Cases*, No. 21-C-9000-MFR (April 5, 2022 Transcript of Proceedings) at 447 17-21 ("We also had people that were deliberately injecting themselves in shopping mall bathrooms, gas stations, other places . . . ."), at 489:8-12 ("As part of the Department of Health and Human Resources, we are also responsible for foster care, and we found that a substantial portion of foster care was – was being driven – increases being driven by [the] substance use crisis . . . .") (testimony Rahul Gupta, M.D.). Based on the foregoing, the Panel finds that the State alleges harm to public property and resources. These allegations can and should be evaluated on a fuller factual record.

60. Moreover, even if the State had not alleged property damage as one of its harms, it need not do so to state a claim for public nuisance. The Panel has repeatedly so held. *See* Pharmacies Order at Ex. A p.11 ("The Court finds and concludes that public nuisance is not limited to property disputes and that West Virginia courts have applied the public nuisance doctrine in numerous contexts, including in opioids cases like this."); Distributors Order at Ex. A p. 13 (same); Manufacturers MSJ Order at 4 ("The Court further notes that at least 22 states have found public nuisance claims based on the marketing of prescription opioids to be viable."); Distributors MSJ Order 2 at 1-6 (rejecting argument that "governmental public nuisance claims are limited to claims arising out of the use of property"). So, too, have other courts. *See Lemongello v. Will Co., Inc.*, No. 02-cv-2952, 2003 WL 21488208, at *2 (W. Va. Cir. Ct. June 19, 2003) ("This Court finds that West Virginia law does not necessarily involve interference with use and enjoyment of land."); *State v. AmerisourceBergen*, 2014 WL 12814021, at *9 (denying dismissal of State's public nuisance claim based on same public health and safety harms as State alleges herein); *see also Restatement (Second) of Torts* § 821B cmt. h ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land."). These rulings and authority are consistent with the Supreme Court of Appeals' recognition that "nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations." *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 483, 334 S.E.2d 616, 621 (1985).

61. The decision in *City of Huntington, supra*, does not warrant reconsideration of the Panel's rulings that public nuisance does not require harm to real property or the authority on which they are based. In *City of Huntington*, the court found that "the West Virginia Supreme Court has only applied public nuisance law in the context of conduct that interferes with public

property or resources" and that the "extension of the law of nuisance to cover the marketing and sale of opioids is inconsistent with the history and traditional notions of nuisance." 2022 WL 2399876 at *57. The Panel is not persuaded by this finding.

62. The *City of Huntington* court's placement of an artificial external constraint on this common law cause of action is inconsistent with the Supreme Court of Appeals' longstanding recognition that a public nuisance is any act or condition that "'operates to hurt or inconvenience an indefinite number of persons[,]'" *Duff*, 18 W. Va. at 716, 421 S.E.2d at 257 (quoting *Hark*, 127 W. Va. at 595-96, 34 S.E.2d at 354), and that "nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations." *Sharon Steel*, 175 W. Va. at 483, 334 S.E.2d at 621.

63. In any event, even under the *City of Huntington* court's reformulation of public nuisance to require "conduct that interferes with public property or resources," the State sufficiently alleges interference with public property or resources. *See, e.g.*, Complaint, ¶¶ 12-15, 102-106, 117, 119. Thus, the decision does not support dismissal of the State's public nuisance claims even on its own terms.

64. The Panel thus holds that the State pleads viable public nuisance claims based on unreasonable interference with public health, safety, peace, comfort, and/or convenience, and that the State's separate allegations of harm to public property and resources are sufficient though not necessary to support these claims.

65. Kroger also seek dismissal because it contends that the State does not sufficiently allege proximate causation of the public nuisance. *See, e.g.*, Motion at 21-22. This argument fails as grounds for dismissal on the pleadings because "[t]he question of proximate causation is

ordinarily a factual one" that is "within the province of the jury." *Anderson v. Moulder*, 183 W. Va. 77, 89-90, 394 S.E.2d 61, 73-74 (1990) (internal quotation marks and citation omitted).

66. The Panel has repeatedly rejected this argument for dismissal or summary judgment in this mass litigation. *See* Pharmacies Order at Ex. A pp. 4-6; Distributors Order at Ex. A pp. 11-13; Manufacturers Order at Ex. A pp. 6-7; *see also* Findings of Fact and Conclusions of Law and Order Denying Distributor Defendants' Motion for Summary Judgement re "Factual Issue #1" (Distributors MSJ Order 1) (Transaction ID 67786183) at 11-13 ("An allegedly 'intervening act,' even an illegal act, does not sever causation if it is foreseeable.").

67. These rulings also are consistent with the Supreme Court of Appeals' recognition that "not every intervening event wipes out another's preceding negligence. In fact, 'a tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.'" *Wal-Mart Stores East, L.P. v. Ankrom*, 244 W. Va. 437, 450,854 S.E.2d 257, 270 (2020) (quoting Syl. Pt. 13, *Anderson v. Moulder, supra*).

68. The State's pleading of proximate causation satisfies the West Virginia standard. *See, e.g.,* Complaint ¶ 51 ("Kroger's failure to exercise appropriate controls foreseeably harms the public health and welfare."); ¶ 124 ("[A] reasonable person in Kroger's position would foresee the widespread problems of opioid addiction and abuse that resulted from the drastic oversupply of opioids in this state."). The Panel finds persuasive in this setting the court's recognition in *City and County of San Francisco*, *supra*, that the "very existence of the duties to maintain effective controls supports the notion that opioid misuse is foreseeable. 'A lack of reasonable care in the handling, distribution, and administration of controlled substances can

foreseeably harm the individuals who take them. That's why they're 'controlled' in the first place—overuse or misuse can lead to addictions and long-term health problems.'" 491 F. Supp. 3d at 680 (quoting *Dent v. NFL*, 902 F.3d 1109, 1119 (9th Cir. 2018)). Against this backdrop, the State sufficiently pleads public nuisance proximate causation.

69. In sum, based on the foregoing authority and analysis, the Panel holds that the State pleads viable public nuisance claims against Kroger.

E. Pleading of Right to Equitable Relief

70. The State pleads that it has a right to "[e]quitable relief, including, but not limited to, restitution and disgorgement[.]" Complaint, Prayer for Relief ¶ c. The WVCCPA provides the State with the right to this relief in a public enforcement action.

71. The WVCCPA provides that "[t]he attorney general may bring a civil action to restrain a person from violating this chapter and for other appropriate relief." W. Va. Code § 46A-7-108. The Supreme Court of Appeals has held that the Act's "use of the phrase 'other appropriate relief' indicates that the legislature meant the full array of equitable relief to be available in suits brought by the Attorney General." *Imperial Mktg. II*, 203 W. Va. At 215-16, 506 S.E.2d at 811-12. This includes a right to disgorgement of ill-gotten gains. *See, e.g., State v. Imperial Mktg.*, 196 W. Va. 346, 352 n.7, 472 S.E.2d 792, 798 n.7 (1996) ("The Attorney General is seeking additional relief beyond preliminarily enjoining SCI from engaging in violations of the Consumer Credit and Protection Act . . . , including . . . a disgorgement of funds illegally obtained . . . .").

72. Kroger seeks dismissal of the State's WVCCPA claim for disgorgement and other equitable relief, arguing that this is barred by laches. *See* Motion at 22-23. This argument does not have merit for at least two independent reasons.

73. First, laches does not apply where the State is acting within its police powers, as it is here in bringing this WVCCPA enforcement action. *See* Syl. P.t 7, *State v. Sponaugle*, 45 W. Va. 415, 32 S.E. 283 (1898) ("Laches is not imputable to the state."). Even in cases where laches has been invoked against state-*sponsored* entities (as opposed to the State itself), it is applied narrowly and conservatively so that the interests of the State and the public may be given substantial consideration. *State ex rel Webb v. W. Va. Bd. Of Medicine*, 203 W. Va. 234, 237-38, 506 S.E.2d 830, 833-34 (1998). These principles are consistent with the Supreme Court of Appeals' holding that actions seeking equitable relief are not subject to statutes of limitation. *See* Syl. P.t 2, *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009).

74. Second, Kroger does not demonstrate prejudice, as required for laches to apply, Syl. P.t 3, *Kinsinger v. Pethel*, 234 W. Va. 463, 766 S.E.2d 410 (2014), given the recent nature of its conduct, its denial of liability, and the fact that its conduct is alleged to have created harms that are as-of-yet unabated. *See* Syl. Pt. 2, *Mundy v. Arcuri*, 165 W. Va. 128, 267 S.E.2d 454 (1980) ("Where a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes not steps to enforce the same until the condition of the other party has, in good faith, become so changed, that he cannot be restored to his former state if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right.").

75. For each of these reasons, the Panel holds that the doctrine of laches does not apply to support dismissal on the pleadings of the State's WVCCPA claim seeking equitable relief.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Kroger's *Motion to Dismiss Plaintiff's Complaint and Memorandum of Law in Support Thereof* (Transaction ID 68182043) 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 & Serve*Xpress*.

It is so **ORDERED.**

ENTERED: November 15, 2022.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation