



**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 22-C-111 PNM**

**THE KROGER CO. *et al.*,**

**Defendants.**

**STIPULATION ON PRODUCTION OF ELECTRONIC  
NOTES FIELDS AND HARD COPY PRESCRIPTIONS BY KROGER**

Pursuant to the Case Management Order of October 18, 2022 (Transaction ID 68269611), the State of West Virginia and Kroger<sup>1</sup> submit this joint stipulation regarding the production of electronic notes fields and hard copy prescriptions by Kroger in the above captioned matter. The State and Kroger stipulate to the following procedures and deadlines:

1. The parties enter into this stipulation in order to avoid a discovery dispute concerning the scope of dispensing notes to be produced during discovery in this matter. Kroger contends it would be burdensome to produce all notes for all prescriptions that are “flagged” by the State’s methodology. The State is willing to accept a more limited production of dispensing notes but requires confirmation that Kroger will not rely on that limited production in terms of the sample size and store selection to criticize the State’s experts’ methodology.

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<sup>1</sup> 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”).

2. The production of dispensing notes materials will be done consistent 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) (the "Order"). The parties agree that:

a. The sample size and store selection referenced in the Discovery Commissioner's "Order on the Production of Electronic Notes Fields and Hard Copy Prescriptions" (Transaction ID 67948030) will not be challenged as to whether the sample size and store selection are sufficient to make statistical inferences within a reasonable margin of error to the larger population of Flagged Opioid Prescriptions. This stipulation does not otherwise prevent Kroger from raising any other challenges, including challenging the conclusions of the State's experts regarding this production or challenging the State's or the State's expert's analyses or methods that are not based on the sample size and store selection.

b. Kroger does not need to produce Electronic Notes Fields and Hard Copy Prescriptions for Associated Prescriptions but if Kroger decides not to produce these materials for Associated Prescriptions, then Kroger may not rely on such unproduced materials at trial.

c. These stipulations do not impact whether Kroger may generally present evidence of policies, procedures, and common practices of pharmacists regarding how pharmacists evaluate and dispense prescriptions to the extent such evidence is otherwise admissible. However, the parties do not agree and reserve all their rights and objections as to whether Kroger may contend that notes exist (or may exist) for specific prescriptions if those notes have not been produced as provided in this stipulation on any grounds, including that the parties may not rely on evidence not produced during discovery.

3. Kroger provided the State with a list of its West Virginia stores in numerical order on **October 12, 2022**.

4. On **November 15, 2022**, Plaintiff produced to Kroger its list of alleged red-flag prescriptions using Kroger's dispensing data. This included the subset of alleged red-flag prescriptions that consist of opioid prescriptions from the beginning of the produced Kroger dispensing data, through the end date of the dispensing data produced by Kroger, sorted by fill date. Kroger's random sample of prescriptions will be selected from the prescriptions in this subset of alleged red-flag prescriptions from the randomly selected ten stores filled between January 1, 2010 and the end date of the dispensing data produced by Kroger. The Plaintiff's red-flag analysis will only include prescriptions filled at stores in West Virginia.

5. On **November 16, 2022**, Kroger told Judge Wilkes what random number generator it will use, and Judge Wilkes generated an eight-digit seed number, which will be used to generate the random list of stores. The number of stores selected will be the greater of 10 stores or 20% of Kroger stores in West Virginia.

6. Using the same seed number, Kroger will draw its sample of 400 from the subset of alleged red-flag opioid prescriptions provided by the State from the randomly selected stores by **November 23, 2022**.

7. The State will provide Kroger with a list of associated prescriptions within 14 days of Kroger providing its sample of 400 from the subset of alleged red-flag opioid prescriptions, or by **December 7, 2022**, whichever date is earliest. If, however, the deadline falls between November 22 and November 28, the deadline will be November 29.

8. On or before **January 15, 2023**, Kroger shall make its dispensing notes production<sup>2</sup> to Plaintiff. Kroger may redact all patient identifying information except the patient zip code and birth year, but will provide the State with a means to correlate the produced materials to the randomly selected prescriptions.

9. The deadline for expert discovery as it relates to the electronic notes fields and hard copy prescriptions production will be governed by the general expert deadlines of the Case Management Order of October 18, 2022.

10. By making this stipulation the State is not waiving its right to seek dispensing data for sales outside the State of West Virginia, and Kroger is not waiving its right to challenge such a request.

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

IT IS SO ORDERED.

ENTER: November 21, 2022

/s/Christopher C. Wilkes  
Discovery Commissioner

Presented by:

/s/ John D. Hurst

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<sup>2</sup> Hard copy prescription production will include the front of prescriptions and the back, if there is any writing or notes reflected thereon. If the backs of prescriptions are blank, they need not be copied.

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