



**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 DEFENDANT KROGER'S MOTION TO VACATE  
ORDER JOINING KROGER AND WALGREENS ACTIONS FOR  
TRIAL OR, IN THE ALTERNATIVE, TO SEVER THE ACTIONS**

Pending before the Mass Litigation Panel ("Panel") is *Defendant Kroger's Motion to Vacate the Sua Sponte Order Dated September 14, 2022, to Join the Kroger Action and Walgreens Action, or, in the Alternative, to Sever the Actions, and Memorandum of Law in Support Thereof* (Transaction ID 68303851) ("Kroger's Motion"). Upon review of Kroger's Motion, the Opposition of Plaintiff the State of West Virginia, acting through its Attorney General, Patrick Morrissey (the "State") (Transaction ID 68368423), and Kroger's Reply (Transaction ID 68402350) 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. On September 14, 2022, the Panel transferred *State of West Virginia ex rel. Patrick Morrissey, Attorney General v. The Kroger Co., et al.*, Civil Action No. 22-C-111 PNM

(“the Kroger Action”) and joined it with *In Re: Opioid Litigation*, Civil Action No. 19-C-9000. *See Order of Transfer to the Mass Litigation Panel* (Transaction ID 68102889).

2. On September 19, 2022, the Panel continued the trial of the State’s claims against Defendant Walgreens that had been set to begin on September 26, 2022<sup>1</sup>, and set both the Walgreens Action and the Kroger Action for a Phase I liability trial to begin June 5, 2023. *See Order Continuing September 26, 2022, Trial of the State of West Virginia’s Cases Against Pharmacies* (Transaction ID 68120458) (“Trial Order”).

3. Kroger does not object to transfer of the Kroger Action to the Panel but does object to the Panel’s Order joining the Kroger Action with the Walgreens Action, contending it has been prejudiced by the joinder. Motion at 2.

4. Rule 42(a) of the West Virginia Rules of Civil Procedure provides in relevant part that “[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial on any or all the matters in issue in the actions[.]”

5. “A trial court, pursuant to the provisions of R.C.P. 42, has a wide discretionary power to consolidate civil actions for joint hearing or trial....” Syl. pt. 1, *State ex rel. Appalachian Power Co. v. Ranson*, 190 W. Va. 429, 438 S.E.2d 609 (1993) (quoting Syl. pt. 1, *Holland v. Joyce*, 155 W. Va. 535, 185 S.E.2d 505 (1971)). When exercising this discretion, the trial court should:

consider the following factors: (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy; (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Syl. pt. 2, *Ranson*, *supra*.

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<sup>1</sup> *State of West Virginia ex rel. Patrick Morrissey, Attorney General v. Walgreens Boots Alliance, Inc., et al.*, Civil Action No. 20-C-82 PNM (“the Walgreens Action”).

6. The Trial Court Rules codify this broad discretion of the Panel in mass litigation. T.C.R. 26.05(a) (“The Panel shall develop and implement case management and trial methodologies to fairly and expeditiously resolve Mass Litigation referred to the Panel by the Chief Justice[.]”). In this setting, the Panel’s trial management plan “designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties.” Syl. pt. 3, *State ex rel. Appalachian Power Co. v. MacQueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996).

7. The State’s actions against Kroger and Walgreens readily satisfy the threshold for consolidated trials that there be “a common question of law or fact.” W. Va. R. Civ. P. 42(a). The Panel’s January 25, 2022, Order (Transaction ID 67261539) sets forth the two primary factual issues that these and all cases in this Mass Litigation present for Phase I trial:

Factual Issue #1: Whether the Defendants engaged in wrongful conduct which caused the alleged oversupply and diversion of opioids throughout West Virginia?

Factual Issue #2: Whether the alleged oversupply and diversion of opioids throughout West Virginia is a public nuisance, which is broadly defined as an unreasonable interference with a right common to the general public – public health and safety?

*Id.* at 3. The first factual issue pertains to Kroger’s and Walgreens’ diversion-control systems and whether alleged deficiencies in these systems contributed to the alleged oversupply and diversion of prescription opioids in West Virginia. *Id.* The second factual issue pertains to whether the alleged oversupply and diversion of prescription opioids contributed to an unreasonable interference with public health and safety in West Virginia. *Id.* These common issues have underpinned all the Panel’s consolidated trial orders. *See, e.g.*, Oct. 27, 2021, Order (Transaction ID 67047934) at 5 (“The Panel finds that all cases filed by the City/County Plaintiffs involve common questions of law or fact such that consolidation of these cases for trial is appropriate under Rule 42(a). As the Supreme Court recognized, ‘plaintiffs are asking solely

for a determination whether the defendants created a public nuisance, which is broadly defined as an unreasonable interference with a right common to the general public.”) (quoting *State ex rel. AmerisourceBergen Drug Corp. v. Hon. Alan D. Moats*, 245 W. Va. 431, 453, 859 S.E.2d 374, 396 (2021) (Hutchison, J. concurring)).

8. Kroger takes issue primarily with Factual Issue #1, arguing that since it and Walgreens employed different opioid dispensing practices, their conduct at issue does not truly present any common question. *See* Motion at 5. This assessment is incorrect. While each Defendant employed its own opioid dispensing practices, the determination of the sufficiency or deficiency of these practices involves application of the same statutory and regulatory standards, *i.e.* whether these systems provided “effective controls” against diversion, 21 C.F.R. § 1301.71(a); W. Va. C.S.R. § 15-2-5.1.1, and whether they ensured that prescriptions were “issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice,” 21 C.F.R. § 1306.04(a); W. Va. C.S.R. § 15-2-8.4.1. The State’s presentation of these common questions against both Defendants involves presentation of closely connected evidence in the form of analysis by the same subject matter expert witnesses. Kroger is following the same process adopted in discovery and expert analysis with the other Pharmacy Defendants, involving the identification, collection, and expert analysis of the due diligence conducted on a sample of red flag prescriptions. That the State’s claims involve common questions about Defendants’ conduct also is shown by the fact that Defendants Walgreens, Walmart, and CVS raised joint challenges to the admissibility of the testimony of the State’s pharmacy practice expert, Carmen Catizone, which the Panel decided jointly as to all Defendants. *See Pharmacy Defendants’ Motion to Exclude Certain of Dr. David Courtwright and Mr. Carmen Catizone’s Opinions* (Transaction ID 67948790); *Amended Rulings Order*

(Transaction ID 68198574) at 7-8 (granting and denying motion in part). The Panel's Factual Issue #1 presents common questions of law and/or fact as to Defendants Kroger and Walgreens.

9. As to Factual Issue #2, concerning whether the alleged oversupply and diversion of opioids contributed to public health and safety harms in West Virginia, Kroger does not dispute that this presents common questions as to both Defendants. Instead, it seeks to diminish their importance. *See* Motion at 5 ("The single similarity between the Walgreens action and the Kroger action is Plaintiff's allegation that both entities caused harm to the public by dispensing opioids. However, alleged harm arising from the same type of substance is insufficient to create a common question of law or fact supporting consolidation of separate actions."). The single case Kroger cites for this assertion, *State ex rel. Atkins v. Burnside*, 212 W. Va. 74, 569 S.E.2d 150 (2002), provides no support. *Atkins* addressed consolidation of 23 plaintiffs' cases for discovery and found this inappropriate based not on the absence or insufficiency of common questions, but on the presence of prejudice from undue delay for certain of the plaintiffs whose cases were further advanced. *Id.* at 85, 569 S.E.2d at 161. No such question of undue delay is presented here. In any event, the State's public nuisance harm and causation allegations are more than sufficiently substantial to satisfy Rule 42(a)'s threshold "common question" requirement.

10. Kroger's separate arguments for finding a risk of prejudice or confusion resulting from a consolidated trial depend upon the assumption that it has a right to a jury trial. *See* Motion at 6, 8. It does not. *See Order Granting Plaintiff's Motion to Strike Defendants' Jury Trial Demand* (Transaction ID 68421842) entered on Nov. 22, 2022. The Panel's detailed findings of fact and conclusions of law set forth in that Order are incorporated by reference as if fully set forth herein.

11. Absent any right to a jury trial, Kroger's arguments about prejudice and confusion arising from different facts concerning Kroger's and Walgreens conduct being tried in one proceeding are inapposite because these concerns do not apply in a bench trial where the Panel is the trier of fact. *See State v. Beard*, 194 W. Va. 740, 747 n.7, 461 S.E.2d 486, 493 n.7 (1995) (“[I]n the context of a bench trial, evidence should not be excluded under [Fed. R. Evid.] 403 on the ground that it is unfairly prejudicial.”) (quoting *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994)); *see also Schultz*, 24 F.3d at 632 (“[E]xcluding relevant evidence in a bench trial . . . on the basis of ‘unfair’ prejudice is a useless procedure. Rule 403 assumes a trial judge can discern and weigh the improper inferences, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision.”) (quoting *Gulf States Utils Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981)).

12. The Panel is capable of discerning which conduct evidence applies to which Defendant. *Cf. Amended Rulings Order* (Transaction ID 68198574) at 18 (“If a witness uses the term ‘defendants’ and is not referring to all Defendants, the witness must specify which Defendant the testimony covers.”). Kroger will not be prejudiced by a consolidated bench trial.

13. Kroger's separate argument that a consolidated trial would be more burdensome than individual trials on the parties, witnesses, and the Panel, *see Motion* at 9-10, has no merit. Kroger does not explain how a joint trial would be any more burdensome than single trials for Defendant-specific witnesses, who would have to testify only once in either case. A joint trial poses no additional burden for these witnesses. In contrast, non-Defendant-specific witnesses testifying on opioid epidemic conditions and/or causation, which include many, if not all the State's expert witnesses, will be common to both cases and would have to appear twice to testify

if there were separate trials. Kroger calls this a “limited burden,” Motion at 9, but fails to explain how this burden is “limited” when the other, Defendant-specific, witnesses face no burden at all from a joint trial.

14. Kroger’s remaining contention, that there will be no increased burden on the Panel from having to hear the same fact and expert witnesses testify twice in separate trials on opioid epidemic conditions and/or causation also is incorrect. The Panel ordered a consolidated trial of these cases precisely because of the burdens that separate five-week trials of these “all-consuming” cases would place upon it. *See* Tr. of Proceedings, Sept. 19, 2022, at 7, 10.

15. Consideration of all relevant factors under Rule 42(a) therefore weighs against Kroger’s request to vacate the consolidated trial order.

16. Kroger requests in the alternative that the Panel sever the trial of the State’s claims against Kroger and Walgreens. Motion at 10-14.

17. Rule 42(c) of the West Virginia Rules of Civil Procedure provides that a court may order a separate trial of any claim “in furtherance of convenience or to avoid prejudice, or when separate trials would be conducive to expedition and economy.”

18. Just as none of these same factors favors vacating the consolidated trial order under Rule 42(a), none favors severing the State’s claims against Kroger from its claims against Walgreens for separate trials under Rule 42(c).

19. Again, Kroger’s only claim of unfair prejudice in favor of severance is based on its assertion of a right to a jury trial. *See* Motion at 11, 12. Since Kroger has no right to a jury trial of the State’s claims seeking equitable relief, its claim of unfair prejudice from the risk of juror confusion is inapposite to the bench trial of these cases and does not support severance.

20. Likewise, Kroger's contentions that the burdens on the parties, witnesses, and the Panel of proceeding with a separate action will be similar to the burdens of proceeding with a joint trial, (Motion at 13) fly in the face of the Panel's findings, borne of its firsthand experience, that these cases are "all-consuming" so that serial five-week liability trials would be substantially more burdensome on the parties, witnesses, and the Panel. *Supra* ¶¶ 13-14.

21. Consideration of all relevant factors under Rule 42(c) likewise weighs against Kroger's alternative request to sever the Kroger Action and the Walgreens Action for separate trials.

For all of the foregoing reasons, it is **ORDERED** that *Defendant Kroger's Motion to Vacate the Sua Sponte Order Dated September 14, 2022, to Join the Kroger Action and Walgreens Action, or, in the Alternative, to Sever the Actions, and Memorandum of Law in Support Thereof* (Transaction ID 68303851) 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:** November 22, 2022

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

/s/ Derek C. Swope  
Presiding Judge  
Opioid Litigation