



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.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF ORDER
DENYING DEFENDANTS' MOTION TO CONTINUE TRIAL DATE OF JUNE 5, 2023,
AND MOTION FOR RECONSIDERATION OF ORDER DENYING CONTINUANCE**

Pending before the Mass Litigation Panel ("Panel") is *Kroger's Motion to Continue Trial Date of June 5, 2023* (Transaction ID 68685982) ("Motion to Continue"). Having reviewed and considered the Motion to Continue, the State's Opposition (Transaction ID 68728934), and Kroger's Reply (Transaction ID 68769947), the Panel denied the Motion. *Order Denying Kroger's Motion to Continue Trial Date of June 5, 2023* (Transaction ID 68849044) entered on January 10, 2023 ("January 10, 2023, Order").

On January 13, 2023, Kroger gave the Panel notice it intends to seek an extraordinary writ challenging the Panel's Order denying the Motion to Continue and the Panel's denial of Kroger's Motion for Reconsideration of the Panel's Order granting Plaintiff's motion to strike Defendants' jury trial demand and moved the Panel for an Order setting forth findings of fact and conclusions of law regarding those orders. (Transaction ID 68881568). The State filed a Response and submitted proposed findings of fact and conclusions of law regarding the Panel's Order denying Kroger's Motion to Continue. (Transaction ID 69011626) filed on January 27,

2023. Kroger filed a Reply objecting to the State’s proposed findings of fact and conclusions of law on February 1, 2023 (Transaction ID 69052175).

On January 20, 2023, Kroger filed a *Motion for Reconsideration of the Court’s January 10, 2023, Order Denying Kroger’s Motion to Continue Trial Date of June 5, 2023* (Transaction ID 68944375) (“Motion for Reconsideration”) based upon the State’s January 18, 2023, announcement that it had settled its claims against Pharmacy Defendants Walgreens Boots Alliance, Inc., et al. (“Walgreens”), and the State’s prior settlements with Rite Aid in August 2022, and CVS and Walmart in September 2022, leaving Kroger as the only remaining Pharmacy Defendant. The State filed an Opposition to the Motion for Reconsideration and a proposed order with findings of fact and conclusions of law on February 3, 2023 (Transaction ID 69067592). Kroger filed a Reply in support of the Motion for Reconsideration on February 9, 2023 (Transaction ID 69107396).

Having reviewed and considered the arguments set forth in each of these filings and having determined oral argument will not aid in the decisional process, the Panel makes the following findings of fact and conclusions of law in support of its decision to **DENY** Kroger’s Motion to Continue and Kroger’s Motion for Reconsideration.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The State filed suit against Kroger on August 23, 2022. The State claims that Kroger engaged in unlawful and/or unreasonable conduct in connection with its wholesale distribution and retail dispensing of prescription opioids in West Virginia, which contributed to a public nuisance and constituted unfair practices in violation of the West Virginia Consumer Credit and Protection Act (“WVCCPA”), W. Va. Code §§ 46A-6-101 *et seq.*

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

3. In the interests of judicial economy and because of the State’s recent filing of a similar civil action against Kroger, the Panel continued the September 26, 2022, Phase I liability trial of the State’s case against Walgreens and ordered a Phase I liability trial of the State’s cases against Walgreens and Kroger to commence June 5, 2023. *Order Continuing September 26, 2022, Trial of the State of West Virginia’s Cases Against Pharmacies* (Transaction ID 68120548) (“Trial Order”), entered on September 19, 2022.

4. The Panel entered a Case Management Order setting deadlines for fact and expert discovery and pretrial motions and submissions. *Case Management Order Relating to the Kroger and Walgreens Cases* (Transaction ID 68269611) (“CMO”), entered on October 18, 2022.

5. One week later, Kroger moved to vacate the Trial Order. *Kroger’s Motion to Vacate the Sua Sponte Order Dated Sept. 19, 2022, to Join the Kroger Action and Walgreens Action* (Transaction ID 68303851) filed on October 26, 2022. The Panel denied Kroger’s motion. *Order Denying Defendant Kroger’s Motion to Vacate Order Joining Kroger and*

Walgreens Actions for Trial, or in the Alternative, to Sever the Actions (Transaction ID 68424342) entered on November 22, 2022.

6. Less than one month later, Kroger moved to continue the June 5 trial date, contending it was or would be prejudiced by the State’s purported delay in filing suit, alleged delays in discovery, and purportedly insufficient time for expert discovery. *Motion to Continue* (Transaction ID 68685982) filed on December 20, 2022. The Panel again denied Kroger’s Motion. *Order Denying Kroger’s Motion to Continue* (Transaction ID 68849044) entered on January 10, 2023.

7. Kroger now moves the Panel to continue the trial date of June 5, 2023 on grounds that this trial date is prejudicial to Kroger. The Panel **DENIES** Kroger’s Motion to Continue for the following reasons.

8. The Supreme Court of Appeals of West Virginia established the Mass Litigation Panel as part of a “process for efficiently managing and resolving mass litigation[.]” T.C.R. 26.01. The West Virginia Trial Court Rules authorize the Panel to “develop and implement case management and trial methodologies to fairly and expeditiously resolve Mass Litigation referred to the Panel by the Chief Justice[.]” T.C.R. 26.05(a). The Panel is accorded broad discretion in carrying out this charge. Syl. pt. 3, *State ex rel. Appalachian Power Co. v. MacQueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996) (a trial 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.”).

9. Kroger first argues it “has been prejudiced regarding discovery and trial preparation due to the State’s delay in bringing its action against Kroger.” Motion to Continue at 2. Kroger relies in part on the Panel’s prior statements about the timing of filings of suit in this

litigation, first at a 2019 hearing that addressed “global resolution” and then at a 2021 hearing that addressed how to “allot fault” for public nuisance. *Id.* at 2-3. Because fault is not at issue in the upcoming Phase I liability trial, neither of the Panel’s referenced statements bears upon the appropriateness of the June 5, 2023 trial date for determining public nuisance liability and WVCCPA liability and remedy for the State’s claims against Kroger.

10. The Panel repeatedly has held that fault is not an element of public nuisance liability. *See Amended Rulings Order-Pharmacies* (Transaction ID 68198574) at 3 (“[C]omparative fault is not an element of the liability phase (Phase I) of this public nuisance case.”); *Amended Rulings Order-Manufacturers* (Transaction ID 67650385) at 3 (same); *see also City of Huntington v. AmerisourceBergen Drug Corp.*, 2021 WL 1711382, at *2 (S.D. W. Va. Apr. 29, 2021) (“Defendants have not established that there is a ‘fault’ element (in the way they describe it) of a public nuisance claim under West Virginia law.”).

11. Nor is fault relevant to the State’s WVCCPA claim, which focuses solely on Kroger’s conduct, not the harms it caused or anyone else’s conduct. *See* Oct. 27, 2021 Order (Transaction ID 67047934) at 8 (“Because there is no causation requirement for the State’s WVCCPA claims, the Panel finds that WVCCPA liability, civil penalties, disgorgement, and injunctive relief based upon the Manufacturer and Pharmacy Defendants’ alleged violations of the WVCCPA should be decided in Phase I of the respective trials.”) (citing *State ex rel. McGraw v. Johnson and Johnson*, 226 W. Va. 677, 684, 704 S.E.2d 677, 684 (2010)).

12. Since the Panel discussed the timing of suit only in connection with “global resolution” and how to “allot fault” for public nuisance abatement, issues that are not relevant to the Phase I trial, the timing of the State’s filing of suit does not prejudice Kroger with respect to the upcoming trial date.

13. Kroger further argues in support of its claim of prejudice and/or unfairness that “the June 5 trial date was set even before Kroger filed its Answer in this matter.” Motion at 2. Kroger, however, cites no court rule or other authority that requires a trial court to wait for an answer before scheduling trial. Indeed, the Panel set a trial date for the State’s claims against the other Pharmacy Defendants on September 10, 2021, *Order Regarding Rulings Issued During September 10, 2021 Status Conference* (Transaction ID 66922721) at 2, which was over ten months before those Defendants filed Answers. *See, e.g.,* Walgreens Answer to Plaintiff’s First Amended Complaint (Transaction ID 67857716) (filed July 25, 2022).

14. Kroger contends “[t]he State had ample opportunity to initiate the Kroger action within a reasonable timeframe[.]” Motion at 3. Although the State did not initiate this suit until August 23, 2022, Kroger is not new to the Opioid Litigation. Kroger has been a party to public nuisance cases filed by various cities and counties concerning its opioid distribution and alleged Controlled Substances Act violations in West Virginia since 2017 and has actively participated in the Opioid Litigation since it was referred to the Panel on June 7, 2019. *See Order Denying Pharmacy Defendants’ Motion to Dismiss Plaintiffs’ Complaint* (Transaction ID 64374772) (filed Oct. 31, 2019) at 1 n.1 (identifying Kroger as party to cases filed in 2018); *id.* at Ex. A (*Brooke Cnty. Comm’n v. Purdue Pharma L.P.*, No. 17-C-248 (W. Va. Cir. Ct., Marshall Cnty. Dec. 28, 2018) (Order Denying Kroger and other Defendants’ motion to dismiss case filed in 2017)).

15. Kroger also contends with respect to the timing of the State’s suits against Kroger and Walgreens that there was a “full twenty-six months of discovery, depositions, hearings and trial preparation that Walgreens has that Kroger does not.” Motion at 3. This, too, is not grounds for finding unfair prejudice. *See Standard Oil Co. v. Fed. Trade Comm’n*, 475 F. Supp.

1261, 1275 (N.D. Ind. 1979) (“[N]othing in the Constitution mandates that . . . plaintiffs are entitled to discovery ‘equal’ to the discovery of complaint counsel.”). Kroger labors under no disadvantage with respect to discovery or trial preparation based on the timing of when the State filed suit against it or any other Defendant.

16. Kroger argues it has been “prejudiced regarding the production of its electronic notes fields and hard copy prescriptions for selected prescriptions.” Motion at 5. Arguments concerning discovery production should have been raised with the Discovery Commissioner, and not in the first instance as grounds for continuing trial. *Order Appointing Discovery Commissioner* at 1.

17. Kroger also does not dispute that the State provided it with a list of alleged red-flag prescriptions using Kroger’s dispensing data on November 15, 2022, pursuant to the parties’ agreement, *see Stipulation on Production of Electronic Notes Fields and Hard Copy Prescriptions by Kroger* (Transaction ID 68415974) at 3, ¶4; nor that when Kroger alleged a deficiency with the State’s list, the State provided the requested additional data fields within two days, State Ex. C (Nov. 23, 2022 email of counsel); nor that the State completed all of its required steps for the notes fields production process within the time period originally agreed to by the parties, *see State Opposition* at 8; Kroger Reply at 5. Kroger’s arguments about the electronic notes fields discovery process do not establish grounds for continuing the trial date.

18. Kroger argues that the more-than eight months to prepare for trial, including over six months for fact and expert discovery (CMO at 10-11, ¶¶3-8), are insufficient and violate its due process rights. *See Motion for Continuance* at 5-6. Specifically, Kroger argues it is “further prejudiced” because the “highly compressed expert discovery schedule” gives it “only six months to conduct expert discovery[,]” which “is not enough time for Kroger to conduct

adequate discovery in this Action.” *Id.* However, Kroger has cited no court rule or other authority supporting this argument. *Cf. Gray v. Netherland*, 518 U.S. 152, 168 (1996) (“[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.”).

19. The more-than six months Kroger has for fact and expert discovery is considerably more than other Defendants in this litigation have had before commencing trial. *See Case Management Order Relating to the State Opioid Manufacturer Proceedings* (Transaction ID 66992975) (filed Oct. 6, 2021) at 8, ¶6 (expert discovery end date of February 11, 2022, four months after CMO); *Case Management Order Relating to the Mass Litigation Panel Opioid Distributor Proceedings* (Transaction ID 67239486) (filed Jan. 19, 2022) at 7, ¶6 (expert discovery end date of May 4, 2022, 3.5 months after CMO). Kroger’s arguments about the time allotted for expert discovery likewise do not establish grounds for continuing the trial date.

20. The Panel’s Orders scheduling and reaffirming the June 5, 2023, trial date for the State’s claims against Kroger fall well within the bounds of the Panel’s authority to “develop and implement case management and trial methodologies to fairly and expeditiously resolve Mass Litigation” and its broad discretion in carrying out this charge. *See* T.C.R. 26.05(a) and Syl. pt. 3, *State ex rel. Appalachian Power Co. v. MacQueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996).

21. The Panel also **DENIES** Kroger’s *Motion for Reconsideration of the Panel’s January 10, 2023, Order denying Kroger’s Motion to Continue Trial Date of June 5, 2023* (Transaction ID 68944375), which is based upon the State’s settlement with Walgreens, as announced on January 18, 2023, and the State’s prior settlements with Rite Aid in August 2022,

and CVS and Walmart in September 2022, leaving Kroger as the only remaining Pharmacy Defendant. Motion for Reconsideration at 3-4, ¶¶10-11.

22. Kroger argues that because of the State’s settlements with “all four of the original Pharmacy Defendants, the Panel’s concerns regarding judicial economy in resolving those cases *should no longer outweigh* Kroger’s right to a fair opportunity to develop its case and prepare its defense.” *Id.* at 4, ¶13 (emphasis added). This argument mischaracterizes the Panel’s prior orders. The Panel has never ruled that concerns regarding judicial economy “outweigh” Kroger’s right to a fair opportunity to develop its case. To the contrary, the Panel has scheduled these proceedings to ensure *both* a full and fair opportunity for each party to develop its claims or defenses *and* an efficient and expeditious resolution of these matters, as it is charged to do.

23. Kroger contends the settlement with Walgreens on January 18, 2023, “has fundamentally changed the nature of the action. The State initiated its action against Walgreens on June 3, 2020, yet waited until August 23, 2022, over two years later, to initiate its action against Kroger. The Panel held both Defendants to a June 5, 2023 trial date. This provided Walgreens with three years to prepare for trial, providing Kroger only nine months to do the same.” Reply, p. 2. Kroger is incorrect on this point. The State’s against Pharmacy Defendants Walgreens, Rite Aid, CVS, and Walmart were not transferred to the Panel and joined with the Opioid Litigation until July 20, 2021. *Order Granting Motions to Transfer Cases to the Mass Litigation Panel* (Transaction ID 66781772). The State’s case against Kroger was transferred to the Panel and joined with the Opioid Litigation on September 14, 2022, approximately fourteen months later. *Order of Transfer to the Mass Litigation Panel* (Transaction ID 68102889).

24. On November 5, 2021, the Panel entered a case management order for the State’s cases against Walgreens, Rite Aid, CVS, and Walmart which scheduled fact discovery to be

completed by March 18, 2022, expert discovery to be completed by July 8, 2022, and trial to begin on September 12, 2022. *Case Management Order Relating to the Pharmacy Cases* (Transaction ID 67073428). The Panel later extended the deadline for fact discovery in these cases to May 27, 2022, extended the deadline for expert discovery to August 10, 2022, and moved the trial date to September 26, 2022, giving the parties just over nine months to complete discovery after the first case management order was entered. *Order Regarding Modifications to Case Schedule* (Transaction ID 67582233).

25. Moreover, the September 26, 2022, Phase I Liability trial of the State’s public nuisance and WVCCPA claims against Pharmacy Defendants Walgreens, CVS, Rite Aid, and Walmart was only one of three Phase I Liability trials scheduled to be conducted in 2022. The Phase I Liability trial of the State’s public nuisance and WVCCPA claims against certain manufacturers of prescription opioids was conducted for almost 8 weeks beginning on April 4, 2022, and the trial of the City and County Plaintiffs’ public nuisance claims against certain distributors of prescription opioids was scheduled to begin on July 5, 2022.¹

26. As the Panel noted when it continued the September 26, 2022, trial “Now this doesn’t mean discovery is going to be thrown wide open. It will have to be opened up to Kroger. We will be contacting Judge Wilkes, and he will have to fashion a new order, coming up with dates to work towards that June 5 trial date, to decide what discovery needs to be. All the orders that we’ve done are going to be the same unless there’s something specific to Kroger.” Transcript of September 19, 2022 Pretrial Conference, page 9, line 24 through page 10, line 8.

27. The Panel finds and concludes that settlement of the State’s public nuisance and WVCCPA claims against Pharmacy Defendants Walgreens, Rite Aid, CVS and Walmart is not

¹ The July 5, 2022, trial was continued. The parties announced they had reached a settlement on August 1, 2022. *Cities, counties reach \$400 million settlement with ‘Big Three’ opioid distributors*, West Virginia Record, August 1, 2022.

relevant and has no effect on the pretrial discovery being conducted in preparation for the June 5, 2023, Phase I Liability Trial of the State's public nuisance and WVCCPA claims against Kroger. Therefore, Kroger's Motion for Reconsideration is **DENIED**.

For all of the foregoing reasons, Kroger's *Motion to Continue Trial Date of June 5, 2023* (Transaction ID 68685982) and *Motion for Reconsideration of Order Denying Continuance* (Transaction ID 68944375) are **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: February 14, 2023.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation