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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 DEFENDANTS' MOTION TO COMPEL STATE'S RESPONSES TO KROGER'S FIRST SET OF DISCOVERY REQUESTS

This matter comes before the Discovery Commissioner on Defendants The Kroger Co., Kroger Limited Partnership I, d/b/a Peyton's Southeastern, and Kroger Limited Partnership II, d/b/a Peyton's Northern ("Kroger" or "Defendants") Motion to Compel State's Responses to Kroger's First Set of Discovery Requests (Transaction ID 69016581); the Opposition (Transaction ID 69094834) of Plaintiff the State of West Virginia, acting through its Attorney General, Patrick Morrisey (the "State"); and Kroger's Reply (Transaction ID 69151325). Having reviewed and considered the Motion, Opposition, Reply and argument at the hearing held February 27th 2023, the Discovery Commissioner **DENIES** Kroger's Motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

1. Kroger's Motion challenges the State's relevance objection to one Request for Production and the State's objections and responses to 38 of the 60 Requests to Admit ("RTAs") that Kroger served.

2. "A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that the Supreme Court will interfere with the exercise of that discretion." Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, 5th Ed., §26, p. 740.

3. Mere disagreement does not render responses to requests to admit insufficient. "Although [Defendant] may disagree with responses, that disagreement does not render the responses inadequate." *Bernstein v. Principal Life Ins. Co.*, 2010 WL 4922093, at *4 (S.D.N.Y. Dec. 2, 2010); *see also Carver v. Bank of N.Y. Mellon*, 2018 WL 4579831, at *3 (S.D.N.Y. Sep. 25, 2018) ("First, BNYM has denied each of the RFAs in question, and, as such, no amended responses are needed."); *Republic of Turkey v. Christie's Inc.*, 326 F.R.D. 394, 400 (S.D.N.Y. 2018) (same); *Order Denying Walmart's Motion to Compel and to Determine the Sufficiency of Plaintiff's Discovery Responses* (Transaction ID 67721422)

4. Furthermore, "Rule 36 is not a discovery procedure" and "'was not designed to elicit information, to obtain discovery of the existence of facts, or obtain production of documents.'" *Tamas v. Family Video Movie Club, Inc.*, 301 F.R.D. 346, 347 (N.D. Ill. 2014) (quoting 7 Moore's Fed. Prac. § 36.02[2] (3d ed. 2000)). Although Rule 36 authorizes requests that are "designed to identify and eliminate those matters on which the parties agree," *id.* at 347, it is not intended to "identify" various forms of evidence. "[W]here requests for admission are not designed to identify and eliminate matters on which the parties agree, but to seek information as to fundamental disagreement[s] at the heart of the lawsuit . . . a court may excuse a party from responding to the requests." *Republic of Turkey*, 326 F.R.D. at 399; *see also Carver*, 2018 WL 4579831, at *4; *In re: Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 2020 WL

6290584, at *5 (S.D.N.Y. Oct. 27, 2020); *See also Order Denying Walmart's Motion to Compel and to Determine the Sufficiency of Plaintiff's Discovery Responses* (Transaction ID 67721422)

II. KROGER IS NOT ENTITLED TO PRODUCTION OF THE STATE'S FEE AGREEMENTS (RFP NO. 6).

1. Kroger seeks an order compelling the State to produce its fee agreements with counsel in "*In Re Opioid Litigation*, Civil Action No. 19-C-9000" (*i.e.* all opioid litigations) (RFP No. 6). Kroger is not entitled to production of the State's fee agreements. This request is irrelevant to this proceeding and the State's objection is justified.

2**.** Kroger argues that the State's objection is "boilerplate." It is not. Unlike the responding party in *Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co.*, 246 F.R.D. 522 (S.D.W. Va. 2007) (which Kroger cites at p. 5 of its motion), the State has not engaged in "a larger strategy of noncompliance and an unnecessarily obstructionist approach to discovery." *Id.* at 526. Rather, the State asserts this specific objection in response to this specific request because the State contends that the request is, in fact, irrelevant to the issues in this suit.

3. "A threshold issue regarding all discovery requests is relevancy." *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 218 W. Va. 593, 596, 625 S.E.2d 355, 358 (2005). "The question of the relevancy of the information sought through discovery . . . essentially involves a determination of how substantively the information requested bears on the issues to be tried." *State Farm Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 628, 425 S.E.2d 577, 583 (1992). The Panel defined "the issues to be tried" in the Phase I trial over a year ago: "Whether [Kroger] engaged in wrongful conduct which caused the alleged oversupply and diversion of opioids

throughout West Virginia?"[1] The factual circumstances surrounding the State's contractual relationship have no bearing on this question.

4. Kroger's justification for this request appears in a single sentence and references the "fee shifting provision" of the West Virginia Consumer Credit and Protection Act. (Motion at p. 5, citing W.Va. Code § 46a-5-104). This position ignores the fact that it is the Panel which will "in the event of any judgment for Plaintiffs or settlement determine the gross attorneys' fees to be awarded…" *See Order Establishing Common Benefit Fee Fund* (Transaction ID 67071292). Moreover, the statute that Kroger cites provides that attorneys' fees, if awarded under the statue, will be calculated "upon examination" of a list of 12 factors. W.Va. Code § 46A-5-104(a). None of those factors require reference to or consultation of the actual fee agreement in this case. Rather, as is typical in these types of cases, they involve an examination of the totality of the firm's effort expended in the case. *See, e.g., Dan's Car World, LLC v. Delaney*, 246 W. Va. 289, 873 S.E.2d 820 (2022). The Discovery Commissioner therefore denies Kroger's request for production of the State's fee agreements with counsel.

III. THE STATE'S OBJECTIONS AND RESPONSES TO RTAS CONCERNING MARKETING AND MISLEADING STATEMENTS (NO. 1-5) ARE APPROPRIATE.

1. Kroger's RTA No. 1 asks that the State "[a]dmit that Kroger never marketed Prescription Opioids in West Virginia." In its response, served on December 1, 2022, the State objected on the grounds that the discovery had not yet concluded in this matter and also on the grounds that the term "marketing" was vague, but ultimately responded: "Subject to and without waiving all objections, except as expressly admitted herein, the State denies this Request." *See* Motion, Ex. 2 at p. 39. The State's objections are well founded. Kroger did not finish its

[1] *Order Affirming in Part and Modifying in Part January 4, 2022 and January 12, 2022 Discovery Orders* (Transaction ID 67261539), filed January 25, 2022, at 3.

production of responsive documents until the evening of Friday, January 27, 2023—nearly two months after the State responded.

2. Regardless, although Kroger takes issue with this response, Kroger received an answer and is not entitled to different a one. The State denied the RTA, which ends the inquiry. "Although [Defendant] may disagree with responses, that disagreement does not render the responses inadequate." *Bernstein*, 2010 WL 4922093, at *4; *see also Carver v. Bank of N.Y. Mellon*, 2018 WL 4579831, at *3 (S.D.N.Y. Sep. 25, 2018) ("First, BNYM has denied each of the RFAs in question, and, as such, no amended responses are needed."); *Republic of Turkey v. Christie's Inc.*, 326 F.R.D. 394, 400 (S.D.N.Y. 2018) (same); *Lakehead Pipe Line Co. v. Am. Home Assur. Co.*, 177 F.R.D. 454, 458 (D. Minn. 1997) ("Rule 36(a) does not authorize a Court to prospectively render determinations concerning the accuracy of a denial to a Request for Admission, or to order that the subject matter of the request be admitted because the opposing party's unequivocal denial is asserted to be unsupported by the evidence").[2]

3. Kroger's RTAs Nos. 2 through 5 demand that the State admit that it "ha[s] not identified" various topics, including:

> ". . . any specific statement or omission made or decimated [sic] by Kroger regarding Prescription Opioids that was false, misleading, unfair, deceptive, or otherwise actionable," (RTA No. 2);
>
> ". . . any Health Care Provider (HCP) in West Virginia who received or was influenced by statements or omissions by Kroger regarding Prescription Opioids that [the State] claim[s] was false, misleading, unfair, deceptive, or otherwise actionable;" (RTA No. 3);
>
> ". . . any HCP in West Virginia who prescribed medically unnecessary or excessive Prescription Opioids because of any statement or omission by Kroger;" (RTA No. 4);

[2] The parties agree that federal decisions are instructive in determining this dispute. *See* Motion at 5.

". . . any HCP in West Virginia who was unable to accurately counsel their patients about Prescription Opioids as a result of conduct by Kroger" (RTA No. 5).

4. The State's objections are appropriate for several reasons.

5. First, the Discovery Commissioner has previously ruled that, because the State will be presenting its case via aggregate proof, the State need not provide evidence identifying prescribers who were supposedly misled by opioid-related statements nor must the State respond to discovery aimed at the identification of specific "medically unnecessary" prescriptions. *See Order Denying Defendants' Motions to Compel Production of Evidence on the Effect of Manufacturer Defendants' Marketing* (Transaction ID 67228909), filed January 12, 2022. The Panel affirmed this Order, requiring only that the State certify "(1) the State will not assert, either in expert opinions or factual presentations at trial, that any individual prescriber was misled by any . . . Defendant's marketing, or that any individual prescription for an opioid medication was medically unnecessary; and (2) the State will rely, at trial and in expert opinions, solely on a theory aggregate proof." *Order Regarding Discovery Commissioner's Order Denying Defendants' Motions to Compel Production of Evidence on the Effect of Manufacturer Defendants' Marketing* (Transaction ID 67305440), filed February 10, 2022.

6. The State's Opposition makes its similar election here clear. As before, the State represents that it will prove its case solely with reference to aggregate proof. *See, e.g., In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 21, 46 (1st Cir. 2013); *In re National Prescription Opiate Litig.*, 2019 WL 4178613, at *2 (N.D. Ohio Sept. 3, 2019). The State represents that it will not assert, either in expert opinions or factual presentations, that any individual prescriber was misled by Kroger's marketing or that any individual prescription for an opioid medication was "medically unnecessary" for a *particular* patient. The State's analysis of

prescription "red flags" to identify indicia of diversion that Kroger failed to investigate is applied on an aggregate basis across a sample of prescriptions.

7. Moreover, all of these RTAs are inappropriate in their form, as they ask for information regarding what the State has or has not identified. The State's efforts to gather evidence for trial constitute protected work product and, consequently, are protected from discovery per Civil Procedure Rule 26(b)(3).[3]

8. Finally, the State concluded each RTA by stating: ". . . except as expressly admitted herein, the State denies this Request." As explained above, the State's denials are dispositive and Kroger is not entitled to further relief. *See, e.g., Bernstein*, 2010 WL 4922093, at *4; *Carver*, 2018 WL 4579831, at *3; *Republic of Turkey*, 326 F.R.D. at 400; *Lakehead Pipe Line Co.*, 177 F.R.D. at 458.

[3] The RTAs also are not designed to identify discrete factual matters on which the parties agree. Like the federal rules counterparts, requests for admission are "not a discovery device, but rather create[] a procedure for obtaining admissions for the record of facts already known by the party propounding the request." *SEC v. Nutmeg Grp., LLC*, 285 F.R.D. 403, 405 (N.D. Ill. 2012); *see also Republic of Turkey*, 326 F.R.D. at 400 (denying motion to compel where "the RFAs in dispute are not consonant with the purpose of Rule 36" because they "do not seek to establish admission of facts about which there is no real dispute"); *Tamas v. Family Video Movie Club, Inc*., 301 F.R.D. 346, 347-48 (N.D. Ill. 2014). But these RTAs do not seek to confirm information that is either known to Kroger or agreed to by the State. They are therefore improper.

Further, RTA No. 4 requires expert analysis to determine whether individual prescriptions are "medically unnecessary and/or excessive." Such a response necessarily requires expert opinion or evaluation, as such a conclusion requires the application of medical expertise. "To the extent the requested opinions" in the RTAs "are held by testifying experts, these opinions can only be discovered through expert reports." *Emerson v. Lab. Corp. of Am.*, No. 1:11-CV-01709-RWS, 2012 WL 1564683, at *4 (N.D. Ga. May 1, 2012).

IV. RTAS CONCERNING SPECIFIC ORDERS AND SPECIFIC PRESCRIPTIONS (NO. 14-26)

1. Kroger's RTAs No. 14-26 similarly seek admissions concerning whether the State has or has not "identified" specific suspicious orders and specific diverted prescriptions. The State objected to these Requests as improper under Civil Procedure Rule 36(a), in that the Requests do not seek "the truth of any matters within the scope of Rule 26(b) . . . that relate to statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request." Rather, for all the reasons set forth above, these Requests impermissibly seek admissions concerning the State's identification of specific matters, and thus "are not consonant with the purpose of Rule 36" because they "do not seek to establish admission of facts about which there is no real dispute" but rather "seek information as to [the] fundamental disagreement at the heart of the lawsuit." *Republic of Turkey*, 326 F.R.D. at 400.

2. Additionally, these requests seek individualized evidence that the State need not present at trial. As explained above, the State represents that it will present its proof at trial via aggregate proof or statistical evidence. As the Discovery Commissioner previously found, and was upheld by the Panel, the State need not provide burdensome individualized information or analyses in discovery. *See Order Regarding Pharmacy Defendants' Motion to Compel Plaintiff to Comply with Discovery Obligations* (Transaction ID 67900613) affirmed at *Order Affirming Discovery Commissioner's August 4, 2022, Order* at 5 (Transaction ID 67959934). Because these RTAs ask for the State to admit information related to individualized proof, such RTAs are improper for the same reasons that the Discovery Commissioner has previously denied a motion to compel individualized proof.

3. Finally, as noted above, the State concluded each RTA by stating: ". . . except as expressly admitted herein, the State denies this Request." As explained above, the State's denials

are dispositive and Kroger is not entitled to further relief. *See, e.g., Bernstein*, 2010 WL 4922093, at *4; *Carver*, 2018 WL 4579831, at *3; *Republic of Turkey*, 326 F.R.D. at 400; *Lakehead Pipe Line Co.*, 177 F.R.D. at 458.

V. RTAS CONCERNING THE STATE'S AWARENESS OF ILLEGAL TRAFFICKING (NO. 28-30)

1. Kroger served three RTAs seeking admissions that the State was "aware of illegal trafficking and diversion of Opioids in West Virginia prior to" 2010, 2000, and 1990 respectively (RTAs Nos. 28-30). The State objected and explained that it could neither affirm nor deny this request because "[t]he State is not a unitary entity and certain facts may be known to State employees or residents, but that knowledge cannot be imputed to the State. In that respect, the Request seeks an improper legal conclusion." For that reason, the State objected to the request as unduly burdensome and additionally objected as irrelevant.

2. The State's responses are proper. The RTAs are vague and unduly burdensome. Kroger's motion dismisses this objection as "gamesmanship of the highest caliber" but also takes the position that "[t]he State and State entities comprise the 'State' in this action." Kroger's circular reasoning establishes the burden required in responding. The State is not a unitary entity—its employees and leadership change on a regular basis.

3. Kroger's assertion that these RTAs involve "simple fact[s]" misses the mark. *See* Def. Mot at 13-14. The questions Kroger asks involve the knowledge of an unknown number of people and require complex judgments about what knowledge should and should not be imputed to the State, rendering the requests unanswerable. For that reason, Kroger's reliance on *Checker Leasing, Inc. v. Sorbello*, 181 W. Va. 199, S.E.2d 36 (1989) is misplaced. The court in *Checker Leasing* held that "[w]here the requested admission involves a fact that is relatively simple, ***such as invoices reflecting services rendered, i.e., hospital, medical, or other expenses***, the

reasonableness of which is obviously readily obtainable, there can be little excuse for the failure to make such admission." 181 W. Va. at 202, 382 S.E.2d at 39 (emphasis added).

4. Kroger's motion excludes the bolded and italicized language above. Determining the boundaries of knowledge attributable to the State is magnitudes more difficult than ascertaining amounts set forth on invoices reflecting the prices of "services rendered." The full context of the *Checker Leasing* holding thus does not support Kroger's argument.

5. Moreover, the vast effort required to respond to this RTA stands in stark contrast to the minimal relevance this concept has for the Phase I trial. The State's knowledge of "illegal trafficking and diversion" in general has no bearing on the Panel's evaluation of Kroger's conduct. To the extent Kroger seeks to assign fault to the State, the Panel repeatedly has disallowed that argument, including in its October 1, 2022 *Amended Rulings Order and Findings of Fact and Conclusions of Law regarding Motions for Summary Judgment, Motions to Exclude Expert Testimony, and Motions In Limine* (Transaction ID 68198574), in which the Panel held:

> Defendants' fault-shifting defenses—*contributory negligence, comparative fault, contributory fault, failure to enforce the law, and failure to mitigate*—are inapplicable to the State's public nuisance claim because comparative fault is not an element of the liability phase (Phase I) of this public nuisance case. *Manufacturer Cases Order* at 3 (citing *City of Huntington v. AmerisourceBergen Drug Corp.,* 2021 WL 1711382, at *2 (S.D. W. Va. Apr. 29, 2021)). Similarly, Defendants' fault-shifting defenses do not apply to the State's WVCCPA claims, because the State seeks only civil penalties, injunctive and equitable relief. Under that claim, the fault of the State or anyone else is irrelevant. *Id.* (citing *State ex rel. 3M Co. v. Hoke,* 244 W. Va. 299, 313, 852 S.E.2d 799, 813 (2020)).

10/1/22 Order at 3; *see also Id.* at 13 (granting the State's motion *in limine* to exclude "evidence concerning alleged fault by the State [or] other government actors"); *Order Granting Plaintiffs' Motion to Strike Defendant's Notice of Non-Party Fault* (Transaction No. 66896380); *Order Regarding Rulings Issued During March 25, 2022, Pretrial*

Conference (Transaction No. 67434309) ("Defendants cannot use such testimony or evidence as a backdoor way to introduce third party or non-party fault.").

6. The Panel recently re-affirmed this holding in its *Order Denying Kroger's Motion to Consolidate Phase I and Phase II of Trial and/or Reconsider Order Affirming in Part and Modifying in Part January 4, 2022 and January 12, 2022 Discovery Orders* (Transaction ID 68963625), entered January 23, 2023, by repeating the language excerpted above. As such the State appropriately responded to these requests and Kroger's motion to compel is denied.

VI. RTAS CONCERNING "LEGITIMATE MEDICAL NEED" (NO. 34-38)

1. Kroger served several RTAs seeking admissions that "Prescription Opioids can serve a legitimate medical need" for patients in various situations. As noted in the State's objections, these broad requests are flawed and ultimately irrelevant.

2. Requests for admission must be tied to the facts of the case. *See, e.g., Story v. M/T Allegiance*, No. C07-139RSL, 2007 WL 279060, at *1 (W.D. Wash. Sept. 24, 2007) (affirming objection to request for admission because it "seeks an admission as to a hypothetical"); *Buchanan v. Chi. Transit Auth.*, No. 16-CV-4577, 2016 WL 7116591, slip op. at *5 (N.D. Ill. Dec. 7, 2016) ("Since requests to admit 'must be connected to the facts of the case, courts do not permit "hypothetical" questions within requests for admission.'") (quoting *Morley v. Square, Inc.*, No. 4:14cv172, 2016 WL 123118, at *3 (E.D. Mo. Jan. 1, 2016)). Yet Kroger's requests effectively ask hypothetical questions. Not all patients are the same. Whether opioids serve a "legitimate medical need" for patients with "acute pain" (RTA No. 34) or "chronic pain" (RTA No. 35) or "cancer" (RTA No. 36) or receiving "palliative" or "end-of-life care" (RTA Nos. 37-38) requires consideration of a host of other factors other than whether the patient is suffering

from one of those conditions or in "palliative" or "end-of-life care." Thus, the State appropriately explained that it was unable to admit or deny the requests on that basis.[4] (Motion, Ex. 2 at 90-97)

3. Kroger's RTAs are also irrelevant because Kroger seeks to conflate its legal duty to determine whether a prescription is written for a legitimate medical purpose[5] with the question of whether opioids generally serve a legitimate medical function. Kroger's duty exists regardless of whether opioids may be prescribed in certain circumstances. Whether or not opioids may be medically appropriate for acute pain or palliative care has nothing to do with whether Kroger complied with the CSA in determining whether prescriptions presented to it were legitimate.

VII. RTAS CONCERNING DRUG COMBINATIONS AND DOSAGE LIMITATIONS (NO. 42-43)

1. Kroger seeks admissions "that the State of West Virginia has not prohibited the dispensing of the combination of an opioids, a benzo, and a muscle relaxer" (RTA No. 42) and "that the State of West Virginia has never placed a limitation on dosage units for opioid prescriptions" (RTA No. 43). *See* Kroger's RTAs Nos. 42-43. The State admitted Request No. 42 in part and denied that Request in part, noting:

> [The] State admits only that it enacted various regulations and statutes during the relevant time period addressing opioid prescribing, including, but not limited to, statutes acknowledging "[t]he risks of addiction and overdose associated with Schedule II opioid drugs and the dangers of taking Schedule II opioid drugs with alcohol, benzodiazepines, and other central nervous system depressants," W.V. Code § 16-54-5(b)(1), and authorizing discipline for "[a]bnormal or unusual prescribing or dispensing patterns." W.V. Code § 30-3A-3. Except as expressly admitted herein, the State denies this Request. (Motion, Ex. 2 at 102).

The State denied Request No. 43 in full. (Motion, Ex. 2 at 103).

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[4] The RTAs also impermissibly seek expert opinion because Kroger's use of the term "legitimate medical need" necessitates expert analysis and the exercise of medical expertise. *Emerson v. Lab. Corp. of Am.*, 2012 WL 1564683, at *4.

[5] 21 C.F.R. § 1306.04(a).

2. As explained above, the State's denials are dispositive and Kroger is not entitled to further relief. *See, e.g., Bernstein*, 2010 WL 4922093, at *4; *Carver*, 2018 WL 4579831, at *3; *Republic of Turkey*, 326 F.R.D. at 400; *Lakehead Pipe Line Co.*, 177 F.R.D. at 458.

3. Kroger's claims that the RTAs state "obvious facts" are beside the point, but ultimately untrue. The State has enacted laws regarding opioid prescribing and limitations on unusual prescribing of opioids, many of which are cited in the State's response. *See, e.g.,* W.Va. Code § 16-54-4 (a)-(d) & (f)-(i).

VIII. RTAS REGARDING KROGER'S OWN LICENSING (NO. 44)

1. Kroger's RTA No. 44 seeks an admission that each of its pharmacies was "duly licensed by the West Virginia Board of Pharmacy to dispense controlled substances while it was operating in the State." The State interposed objections and admitted the request in part:

> Subject to and without waiving the foregoing objections, the State admits only that the Board of Pharmacy issued licenses to certain Kroger pharmacies in West Virginia at various points based on information supplied by Kroger in its licensing applications. Except as expressly admitted, the State denies this Request.

Motion, Ex. 2 at 103.

2. This response is appropriate, as are the State's objections. Kroger did not ask whether its pharmacies were "licensed" by the Board of Pharmacy (a third party to this litigation), but rather whether those pharmacies were "duly licensed." *Id.* Insertion of the adverb "duly" into this inquiry inserts ambiguity that the State cannot resolve. Additionally, responding to this admission thus would require in-depth examination of the circumstances surrounding license applications for each of Kroger's pharmacies, an effort that is not warranted here.

3. Further, that examination is reliant on material that is within the custody or control of the Board of Pharmacy – an entity that has maintained separate counsel and is not a

party to this litigation. The State and Kroger have both subpoenaed material from the Board of Pharmacy but the Board of Pharmacy has not yet completed production of those materials. As a result, the State's objection referencing the Board of Pharmacy was appropriate.

4. Regardless, the State's substantive response forecloses further relief on this request. The State admitted certain facts and denied the remainder of the request. As explained above, the State's denial is dispositive and Kroger is not entitled to further relief. *See, e.g., Bernstein*, 2010 WL 4922093, at *4; *Carver*, 2018 WL 4579831, at *3; *Republic of Turkey*, 326 F.R.D. at 400; *Lakehead Pipe Line Co.*, 177 F.R.D. at 458.

IX. RTA REGARDING NON-DEFENDANT PHARMACY FAULT (RTA NO. 45)

1. Kroger's RTA No. 45 seeks an admission that "pharmacists at non-defendant pharmacies have failed to exercise their corresponding responsibility in filling prescriptions for Prescription Opioids at their non-defendant pharmacies in West Virginia." The State objected on relevance grounds, and provided the following answer:

> Subject to and without waiving any of the foregoing objections, the State admits only that it has brought actions against other pharmacies that operated in West Virginia seeking to abate the public nuisance caused by the reckless distribution and dispensing of opioids in the State. (Motion, Ex. 2 at 104-05)

2. This answer is appropriate. As explained above, the Panel has deemed evidence of third-party fault irrelevant to the Phase I proceedings. In its October 1, 2022 *Amended Rulings Order and Findings of Fact and Conclusions of Law Regarding Motions for Summary Judgment, Motions to Exclude Expert Testimony, and Motions In Limine* (Transaction ID 68198574), the Panel found that the defendants' "fault-shifting defenses" were "inapplicable to the State's public nuisance claim because comparative fault is not an element of the liability phase (Phase I) of this public nuisance case" and that the same defenses "do not apply to the State's WVCCPA claims, because the State only seeks civil penalties, injunctive and equitable relief." *Id.* at 3. Thus, the

Panel concluded "the fault of the State or anyone else is irrelevant" to the WVCCPA claim. *Id.* In that same order, the Panel granted the State's motion *in limine*, ruling that "Defendants may not argue or offer evidence to establish alleged contributory fault by the State, other government actors, or other opioid supply chain actors in Phase I." *Id.* at 13.

3. Kroger's arguments ignore these rulings and do not explain why such information would be discoverable in this case when the Panel excluded the information in both the manufacturer and prior pharmacy litigations. The Panel's prior rulings foreclose Kroger's requested relief.

X. RTAS REGARDING THE EFFECTS OF HEROIN AND FENTANYL (NOS. 46-47)

1. Kroger's RTAs Nos. 46 and 47 seek admissions that "the sale and use of" heroin and "illicitly manufactured fentanyl," respectively, "caused or contributed to the nuisance or harms alleged in Your Complaint . . ." The State responded to both RTAs by objecting that the requests sought expert opinion and provided the following responses:

> Subject to and without waiving the foregoing objections, the State admits only that prior expert reports issued in this litigation have recognized that reckless distribution and dispensing of opioids similar to that the State alleges in this action has resulted in a public nuisance, that [heroin/fentanyl] use is a part of that public nuisance, and that increases in [heroin/fentanyl] use are attributable to increases in the supply of opioids in West Virginia. The State confirms that it has made a reasonable inquiry and the information known or readily obtainable to the State is insufficient to enable the State to admit or deny the entirety of this request, and except as expressly admitted, denies on that basis. (Motion, Ex. 2 at 105-106).

The State's objections and response are proper. As in prior litigation tracks, the State indicates it will be offering one or more experts to testify regarding the origins and impact of heroin and fentanyl use. Thus, "[t]o the extent the requested opinions" in the RTAs "are held by testifying

experts, these opinions can only be discovered through expert reports." *Emerson*, 2012 WL 1564683, at *4.

2. Nor do either of these requests seek "acknowledgement of a simple fact," as Kroger contends. The prevalence and effects of heroin and fentanyl use require vast examination and have been the subject of numerous epidemiological studies. They are complicated issues that require expert research and explanation. Indeed, Kroger's RTAs are objectionable because they impermissibly "seek information as to fundamental disagreement at the heart of the lawsuit" and therefore the State need not respond. *Republic of Turkey*, 326 F.R.D. at 399; *Tamas*, 301 F.R.D. at 347.

3. Regardless, the State has admitted the RTAs in part and denied them in part. In these circumstances, Kroger is not entitled to further relief. *See, e.g., Bernstein*, 2010 WL 4922093, at *4; *Carver*, 2018 WL 4579831, at *3; *Republic of Turkey*, 326 F.R.D. at 400; *Lakehead Pipe Line Co.*, 177 F.R.D. at 458.

XI. RTAS REGARDING OTHER THIRD-PARTY FAULT (RTA NOS. 51-56)

1. Kroger's RTA Nos. 51-56 also concern third party fault issues, seeking admissions that conduct by "Pill Mills in West Virginia" (RTA No. 51), "Rogue Internet Pharmacies" (RTA No. 52), "HCPs in West Virginia" (RTA No. 53), "drug cartels" (RTA No. 54), "illicit drug manufacturers from China" (RTA No. 55) and "Illicit Drug dealers" (RTA No. 56) all "caused or contributed to the nuisance or harms alleged in Your Complaint and for which you seek to recover." The State objected to each of these RTAs *inter alia* as ambiguous and irrelevant to Phase I liability proceedings. The State then offered the following response to each of these RTAs:

> Subject to and without waiving any of the foregoing objections, the State admits only that Defendants failed to identify, investigate, and stop shipment

> of suspicious orders and that Defendants failed to properly train and support their pharmacist employees with the resources necessary to permit those employees to exercise their corresponding responsibility, which the State alleges in this action is one cause of the opioid epidemic public nuisance. To the extent the Request suggests unnamed ["Pill Mills"/"Rogue Internet Pharmacies"/"HCPs"/"drug cartels"/"illicit drug manufacturers from China"/"Illicit Drug dealers"] are the sole cause of the opioid epidemic public nuisance or that unnamed ["Pill Mills"/"Rogue Internet Pharmacies"/"HCPs"/"drug cartels"/"illicit drug manufacturers from China"/"Illicit Drug dealers"] are a superseding or intervening cause, the State denies this Request. Except as expressly admitted herein, the State denies the remainder of this Request. (Motion, Ex. 2 at 108-17).

2. Kroger is not entitled to further relief with respect to these RTAs.

3. The RTAs are impermissibly vague. Kroger does not identify the "pill mills," "rogue internet pharmacies," "HCPs" or "drug cartels" or "manufacturers from China" to whom it refers. This failure to specifically identify the entities in the Requests precludes Kroger's requested relief. *See, e.g., Erie Ins. Prop. & Cas. Co. v. Johnson*, 272 F.R.D. 177, 185 (S.D.W.V. 2010) (upholding vagueness objection to request for admission seeking information about unnamed "insureds"). Nor is this a matter of "grammatical gamesmanship;" the onus is on Kroger to identify actors with specificity.

4. More fundamentally, these RTAs are barred by the Panel's rulings cited above precluding "fault-shifting" defenses and excluding evidence wrongdoing of third parties. *See Amended Rulings Order and Findings of Fact and Conclusions of Law Regarding Motions for Summary Judgment, Motions to Exclude Expert Testimony, and Motions In Limine* (Transaction ID 68198574) at 3 and 13. Kroger's explanation that these RTAs seek information "highly relevant to the State's actions regarding opioid crisis" (Motion at 19) in and of itself demonstrates the flaws in Kroger's arguments. The Panel has repeatedly admonished in these orders and others that the Phase I trial concerns the *defendant's* conduct.

5. Finally, as noted above, the State concluded each RTA by denying the requests. As explained above, the State's denials are dispositive and Kroger is not entitled to further relief. *See, e.g., Bernstein*, 2010 WL 4922093, at *4; *Carver*, 2018 WL 4579831, at *3; *Republic of Turkey*, 326 F.R.D. at 400; *Lakehead Pipe Line Co.*, 177 F.R.D. at 458.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Kroger's Motion to Compel State's Responses to Kroger's First Set of Discovery Requests (Transaction ID 69016581)) 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 & ServeXpress.

It is so **ORDERED.**

ENTERED: February 28th, 2023

/s/Christopher C. Wilkes
Discovery Commissioner

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