



**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 KROGER DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

This matter comes before the Discovery Commissioner on the Kroger Defendants' ("Kroger") December 30, 2022, *Motion for Protective Order* (Transaction ID 68775114, hereinafter, the "Motion"); the State's Opposition to the Motion (Transaction ID 68849560); the Kroger Defendants' Reply in support of the Motion (Transaction ID 68901724); the State's Surreply in opposition to the Motion (Transaction ID 68926683); and the Kroger Defendants' Sur-Response (Transaction ID 68939931). The Discovery Commissioner heard oral argument from both parties on January 25, 2023. Having reviewed and considered the Motion, Opposition, Reply, Surreply, Sur-Response, all attachments thereto, and the arguments at oral argument, the Discovery Commissioner **DENIES** Kroger's Motion.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The State's December 13, 2022 Requests for Admission concern the authenticity and contents of two sets of documents: (1) twenty-eight separate meeting minutes of Kroger's quarterly Pharmacy Compliance Committee meetings (from 2012 to 2018), and (2) two March 2013 audit reports prepared by a third-party consultant, Buzzeo PDMA, of Kroger's suspicious

order monitoring system (the “Buzzeo Audits”). Kroger seeks a Protective Order relieving it of its obligation to respond to the Requests for Admission, asserting that the subject documents are privileged and also the State did not follow the proper procedures regarding privilege challenge so therefore they are not obligated to respond.

2. Kroger cites to the July 31, 2020 *Order Regarding Document and Electronically Stored Information Production Protocol* (“ESI Protocol”) and the case of *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman*, 222 W.Va. 37, 658 S.E.2d 728 (2008), as support for its claim that the documents at issue need to be challenged and reviewed *in camera*. However, neither is applicable to the instant matter. The ESI Protocol and *Kaufman* address the procedure to follow for challenging privilege claims *in order to compel production*. As detailed herein, the documents already have been produced pursuant to court orders and many are also publicly available.

3. The October 18, 2022 *Case Management Order Relating to the Kroger and Walgreens Cases* (Transaction ID 68269611) (“CMO”) provides: “documents produced by Kroger in the MDL (*In re: National Prescription Opiate Litigation*, Case No. 1:17-MD-2804 (MDL 2804)), **will be reproduced to the State subject to all applicable protective orders.**” Para. III.B.1 (emphasis added). Kroger produced the Buzzeo Audits and PCC Meeting Minutes at issue in this Motion into the MDL Repository (following MDL briefing that resulted in a sanctions order against Kroger). As such, the CMO specifically authorizes the State to access and use these documents in this litigation.

4. The State’s Requests for Admission attached the versions of the documents that Kroger produced into the MDL. The CMO does not permit Kroger to pick and choose which MDL documents it will and will not reproduce, nor does it authorize Kroger to redact previously produced documents when providing them to the State.

5. Kroger may not alter the plain terms of the CMO by service of a privilege log. While Kroger continues to assert its claim of privilege it may not violate the CMO by producing its prior documents with additional redactions, and thus altering the substance of what exists in the MDL repository, which is the material to which the CMO guarantees access. To the extent Kroger wanted to assert privilege claims over its *previously produced* documents, Kroger needed to seek relief from the provisions of the CMO forming the basis of the State's right to access those documents. It failed to do so. Instead, Kroger issued a privilege log and re-numbered certain of the documents for production in this case. That action does not affect the fact that the documents are and remain available to the State in unredacted form in the MDL repository.

6. Kroger's reliance on reservations of rights language contained in prior letters (*see* Motion at pp. 4, 7) does not alter this conclusion. Kroger could not alter the substance of the CMO—an order from the MLP Panel—by inserting a few sentences into its production letters and discovery responses.

7. Kroger's reliance on its reservations of rights letters is immaterial to the consideration of the issue decided herein, that is whether a protective order is warranted to relieve it from answering Plaintiff's Request for Admissions on already produced documents.

8. Kroger's argument that the State was obligated to follow privilege challenge procedures as set out in the *Order Regarding Document and Electronically Stored Information Production Protocol* (Transaction ID 65816364) is misplaced as that order governs the production of documents not already produced.

9. The State argues that even if the plain language of the CMO was not controlling, Kroger's Motion must be denied because the documents at issue have been publicly disclosed and are available on the docket in the New Mexico litigation. Counsel for Kroger indicated during the

hearing that all the documents were on the public docket in the New Mexico case but subsequently has advised the Commissioner that certain of the documents at issue are not available on the site for public view. Again, the Commissioner is not making the determination on the issue of privilege but only deciding the issue of the issuance of a protective order regarding documents that have already been produced.

10. The State urges the Commissioner to find that privilege waiver rulings in New Mexico<sup>1</sup> and substantive privilege rulings in the MDL<sup>2</sup> apply here. The Commissioner declines to rule on that issue at this time, and reserves judgment unless and until the issue is raised through motions practice or some other vehicle. The Commissioner notes, however, that parties should take heed of prior rulings from other tribunals concerning these and substantively similar documents.

### **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, Kroger's *Motion for Protective Order* (Transaction ID 68775114) 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 6, 2023

/s/ Christopher C. Wilkes  
Discovery Commissioner

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<sup>1</sup> See Opposition, Ex. 2 at 1-2 & Ex. 3 at 19:16-28

<sup>2</sup> See Opposition, Ex. 8 (3/31/2019 Discovery Ruling 14, Part 5 Regarding Privilege Claim on Cardinal's Dendrite Audit, MDL Doc. 1498) ("DR 14-5"); Opposition, Ex. 9 (6/9/2019 Discovery Ruling 14, Part 8 Regarding Privilege Claims on SOMS Audits, MDL Doc. 1666)