



**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 GRANTING PLAINTIFF'S MOTION TO COMPEL  
TESTIMONY ON TOPIC 5(K) OF 30(B)(7) NOTICE**

This matter comes before the Discovery Commissioner on Plaintiff the State of West Virginia's letter Motion to Compel testimony and Kroger's letter response to that motion, the procedure agreed to by the parties. Having reviewed and considered the Motion and Opposition, the Discovery Commissioner **GRANTS** the State's Motion.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The parties have been negotiating over the scope and timing of Kroger's response to the Plaintiff's Notice of 30(b)(7) Deposition to Kroger (the "30(b)(7) Notice"). While the parties have made significant progress, one dispute remains. Kroger refused to produce a live witness for 30(b)(7) Notice topic number 5(k), which requests information regarding "[Kroger's] West Virginia pharmacists' concerns that they were being asked to fill and/or otherwise filling prescriptions from doctors who were running pill mills or engaged in suspicious prescribing or prescriptions that otherwise were not for legitimate medical purposes." See Ex. A at p. 12.

2. The State has agreed to narrow this deposition topic to 10 prescribers, identified 10 days in advance of the deposition.

3. “The scope of discovery in civil cases is broad[.]” *State ex rel. Shroadess v. Henry*, 187 W. Va. 723, 725, 421 S.E.2d 264, 266 (1992). “Rule 26(b)(1) of the West Virginia Rules of Civil Procedure . . . provides, in pertinent part, that the ‘[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .’” *Id.*; *see also State ex rel. W. Va. State Police v. Taylor*, 201 W. Va. 554, 565 n.16, 499 S.E.2d 283, 294 n.16 (1997) (“We have traditionally given the Rules a liberal construction favoring broad discovery, because broad discovery policies are ‘essential to the fair disposition of both civil and criminal lawsuits’”) (quoting *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W.Va. 431, 444, 460 S.E.2d 677, 690 (1995)).

4. Broad discovery is necessary to eliminate surprise and trial by ambush and to further “ferret out evidence which is in some degree relevant to the contested issue. Syl. Pt. 1, *Evans v. Mut. Mining* 199 W. Va. 526, 530, 485 S.E.2d 695, 699 (1997); *see also McDougal v. McCammon*, 193 W. Va. 229, 237, 455 S.E.2d 788, 795-96 (1995). Moreover, “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” W. Va. R. Civ. P. 26(b)(1).

5. “A party may in a notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested.” W. Va. Rule of Civ. Proc. 30(b)(7). Such a notice obligates the recipient to “designate one or more” designees “to testify on its behalf” as to “matters known or reasonably available to the organization.” *Id.*

6. The party objecting to discovery requests on the grounds that the information sought is not relevant has the burden to establish that its objection is proper. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 630, 425 S.E.2d 577, 585 (1992). Further, the party asserting burden as an objection, the Chain Pharmacy “must do more than make unsubstantiated or conclusory statements that a discovery request is overly broad and burdensome.” *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 120 640 S.E.2d 176, 183 (2006) (citing *Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005), and *Carlson v. Freightliner LLC*, 226 F.R.D. 343, 370 (D. Neb. 2004) (“An objection that discovery is overly broad and unduly burdensome must be supported by affidavits or evidence revealing the nature of the burden and why the discovery is objectionable.”)).

7. The Discovery Commissioner finds that the 30(b)(7) Notice topic at issue is highly relevant and not unduly burdensome. Testimony concerning pharmacists’ concerns about problematic opioid prescribing bears directly on Kroger’s dispensing policies as they apply to West Virginia. If the evidence shows pharmacists did not complain and that voluminous and questionable prescriptions were filled by Kroger this issue is relevant on the training or lack thereof Kroger provided to its pharmacists. If pharmacists complained about problematic prescribers and Kroger failed to take action, that conduct is likewise relevant. Furthermore, if Kroger did take action with respect to certain prescribers the State is entitled to know when Kroger took action, what actions Kroger took and why.

8. Written responses here are insufficient. Each of these questions (especially questions about when, what, and why) likely require follow-up questions that cannot be asked of a written response.

9. The information is also relevant to the State’s burden in proving a public nuisance. “Factual Issue #2” of the Panel’s Order Affirming in Part and Modifying in Part January 4, 2022 and January 12, 2022 Discovery Orders, entered January 25, 2022 (Transaction ID 67261539), requires the parties to present evidence concerning “[w]hether 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 p. 3. Complaints by Kroger pharmacists regarding problematic prescribing or overprescribing are relevant to that question and can establish both the existence of such prescribing and the effects thereof.

10. Further, the information will assist the State to counter Kroger’s defenses – which include, among other things, that Kroger that “complied with all DEA letters, guidance, reminders, initiatives, and directives”. See, e.g., Kroger’s Answer to Plaintiff’s Complaint at pp. 11-13, ¶¶ 61, 64, 66-69, 72-78 (Transaction ID 68182043).

11. In addition to the above reasons, various rulings and findings from the Discovery Commissioner have consistently found the type of information at issue to be highly relevant. For example, in an earlier pharmacy track, the Discovery Commissioner has held that “[i]nformation or knowledge that Walmart became aware of through a dispensing-related investigation, including information Walmart either did review or could have reviewed, is relevant to Walmart’s knowledge of the effect of its policies.” The same reasoning applies to Kroger’s and/or its pharmacists’ knowledge of pill mills, suspect prescribers and/or suspicious prescriptions.

12. Finally, with respect to Kroger’s burden argument, it is worth noting that every other chain pharmacy defendant voluntarily agreed to provide testimony on the very topic at issue and

relative to the same number of suspect prescribers at issue. Moreover, unlike the typical 30(b)(7) topic, the State has agreed to make preparation easier for Kroger (as it did for the other pharmacy defendants) – by (a) limiting the topic to ten (10) prescribers and (b) by providing the names of those prescribers to Kroger at least ten (10) days in advance of the deposition. Any claimed burden by Kroger is eliminated or greatly reduced by the State’s willingness to both limit the topic and provide advanced notice as outlined.

### **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the State’s letter Motion to Compel Testimony is **GRANTED**.

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:** April 3, 2023

/s/ Christopher C. Wilkes  
Discovery Commissioner