IN THE SUPREME COURT OF THE STATE OF NEVADA

TEVA PHARMACEUTICALS USA, INC., MCKESSON CORPORATION, AMERISOURCEBERGEN DRUG CORPORATION, CARDINAL HEALTH, INC., CARDINAL HEALTH 6 INC., CARDINAL HEALTH TECHNOLOGIES LLC, CARDINAL HEALTH 108 LLC d/b/a METRO MEDICAL SUPPLY, CEPHALON, INC., ENDO HEALTH SOLUTIONS INC., ENDO PHARMACEUTICALS INC., ALLERGAN USA, INC., ALLERGAN FINANCE, LLC f/k/a ACTAVIS, INC. f/k/a WATSON PHARMACEUTICALS, INC., WATSON LABORATORIES, INC., ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC., ACTAVIS LLC, and MALLINCKRODT, LLC,

Petitioners,

v.

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Washoe, and the HONORABLE BARRY L. BRESLOW, DISTRICT JUDGE,

Respondents,

and

CITY OF RENO,

Real Party in Interest.

Supreme Court Case No.

District Court Case No. CV18-01895

PETITIONERS' APPENDIX
VOLUME VI

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CHRONOLOGICAL INDEX TO PETITIONERS' APPENDIX

DATE	DOCUMENT	VOLUME	PAGE RANGE	
12/7/2017	Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00001	PA00050
5/15/2018	First Amended Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00051	PA00109
9/18/2018	Complaint (Case No. CV18-01895)	II	PA00110	PA00167
12/03/2018	First Amended Complaint (Case No. CV18-01895)	II	PA00168	PA00226
3/4/2019	Manufacturer Defendants' Joint Motion to Dismiss First Amended Complaint	III	PA00227	PA00264
3/5/2019	Distributors' Joint Motion to Dismiss First Amended Complaint	III	PA00265	PA00386
4/26/2019	City of Reno's Opposition to Manufacturer Defendants' Joint Motion to Dismiss and All Joinders Thereto	IV-V	PA00387	PA00709
4/26/2019	City of Reno's Opposition to Distributor Defendants' Joint Motion to Dismiss and All Joinders	VI-VII	PA00710	PA00958
5/28/2019	Reply in Support of Manufacturer Defendants' Joint Motion to Dismiss First Amended Complaint	VIII-IX	PA00959	PA01214
5/28/2019	Distributors' Joint Reply in Support of Motion to Dismiss First Amended Complaint	X	PA01215	PA01285

DATE	DOCUMENT	VOLUME	PAGE RANGE	
6/17/2019	Complaint (Case No. A-19-796755-B)	XI-XII	PA01286	PA01535
6/27/2019	First Amended Complaint (Case No. A-19-796755-B)	XIII-XV	PA01536	PA02049
7/3/2019	Order Directing Answer (Case No. 79002)	XVI	PA02050	PA02052
8/22/2019	Complaint (Case No. A-19-800695-B)	XVI	PA02053	PA02144
8/22/2019	Complaint (Case No. A-19-800697-B)	XVI	PA02145	PA02235
8/22/2019	Complaint (Case No. A-19-800699-B)	XVII	PA02236	PA02326
9/12/2019	Third Amended Complaint and Demand for Jury Trial (Case No. A-17-76828-C)	XVII	PA02327	PA02423
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DATE	DOCUMENT	VOLUME	PAGE RANGE	
1/4/2020	City of Reno's Supplemental Briefing in Support of Oppositions to Distributors' Joint Motion to Dismiss	XVIII	PA02592	PA02602
1/7/2020	Transcript of Proceedings	XIX-XX	PA02603	PA02871
1/8/2020	Transcript of Proceedings	XXI	PA02872	PA03034
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5/28/2019	Distributors' Joint Reply in Support of Motion to Dismiss First Amended Complaint	X	PA01215	PA01285
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1/8/2020	Transcript of Proceedings	XXI	PA02872	PA03034

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that Petitioners' Appendix Volume VI does not contain the social security number of any person.

Dated this 1st day of May, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 1st day of May, 2020, a copy of the foregoing Petitioners' Appendix Volume VI was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex) and served via U.S. Mail, postage prepaid, on the following individuals:

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In addition, in compliance with NRAP 21(a)(1) and Administrative Order 2020-05, a copy of this Petitioners' Appendix Volume VI was served upon the Honorable Barry Breslow, District Judge via electronic service and email to Christine.Kuhl@washoecourts.us.

By: /s/ Pat Lundvall
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EGLET PRINCE

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

CITY OF RENO,

Plaintiff,

vs.

PURDUE PHARMA, L.P., PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY, INC. D/B/A THE PURDUE FREDERICK COMPANY, INC.; PURDUE PHARMACEUTICALS, L.P.; TEVA PHARMACEUTICALS USA, INC.; MCKESSON CORPORATION; AMERISOURCEBERGEN DRUG CORPORATION; CARDINAL HEALTH, INC.; CARDINAL HEALTH 6 INC.; CARDINAL HEALTH TECHNOLOGIES

Case No.: CV18-01895
Dept. No.: 8

CITY OF RENO'S OPPOSITION TO DISTRIBUTOR DEFENDANTS' JOINT MOTION TO DISMISS AND ALL JOINDERS THERETO

LLC; CARDINAL HEALTH 108 LLC D/B/A METRO MEDICAL SUPPLY; DEPOMED, INC.; CEPHALON, INC.; JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEUTICA, INC. N/K/A JANSSEN PHARMACEUTICALS, INC.; ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. N/K/A JANSSEN PHARMACEUTICALS, INC.; ENDO HEALTH SOLUTIONS INC.; ENDO PHARMACEUTICALS, INC.; ALLERGAN USA, INC.; ALLERGAN FINANCE, LLC F/K/A ACTAVIS, INC. F/K/A WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; ACTAVIS PHARMA, INC F/K/A WATSON PHARMA, INC.; ACTAVIS LLC; INSYS THERAPEUTICS, INC., MALLINCKRODT, LLC; MALLINCKRODT BRAND PHARMACEUTICALS INC.; AND MALLINCKRODT US HOLDINGS, INC.; ROBERT GENE RAND, M.D. AND RAND FAMILY CARE, LLC; DOES 1 THROUGH 100; ROE CORPORATIONS 1 THROUGH 100; AND ZOE PHARMACIES 1 THROUGH 100, INCLUSIVE,

Defendants.

CITY OF RENO'S OPPOSITION TO DISTRIBUTOR DEFENDANTS' JOINT MOTION TO DISMISS

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Plaintiff, City of Reno, by and through the undersigned attorneys, files its Opposition to the Distributor Defendants' Joint Motion to Dismiss. This Opposition is based upon the following Memorandum of Points and Authorities set forth herein, the pleadings and papers on file herein, and any oral argument this Court may entertain.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit arises out of the opioid epidemic that plagues Reno. Defendant Distributors ("Distributors") are alleged to have contributed to the spread of the epidemic through their failures to appropriately monitor and report suspicious orders of opioids. Instead, Distributors focused on their potential for profits over concerns for the community. Distributors' Joint Motion to Dismiss fails to recognize the law in Nevada and requests this Court to adopt various rulings or doctrines adopted by other jurisdictions in cases entirely unrelated to the opioid epidemic. In fact, there are in excess of 900 cases pending nationwide in which cities, counties, and states have sued drug manufacturers, distributors, and pharmacies, in an attempt to recover damages incurred as a result of the use, and abuse, of opioids in their respective jurisdictions. The courts in those cases have recognized the validity of the claims asserted against opioid distributors. Reno has alleged sufficient facts to satisfy Nevada's notice pleading standard, thus this Court should deny Distributors' Joint Motion to Dismiss.

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim is procedural and tests the sufficiency of the complaint. The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this Court must construe the pleading liberally, take all factual allegations in the complaint as true,

and draw every fair inference in favor of the nonmoving party. *Vacation Village v. Hitachi America*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). In considering a motion to dismiss under NRCP 12(b)(5), a court must accept the allegations set forth in the complaint as true and draw every fair inference in favor of the plaintiff. *Capital Mortgage Holding v. Hahn*, 101 Nev. 314, 315, 705 P.2d 126 (1985). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim. *In re VeriFone Sec. Litig.*, 11 F.3d 865 (9th Cir. 1993).

III. ARGUMENT

A. RENO'S NEGLIGENT MISREPRESENTATION CLAIM IS PROPERLY PLED

Distributors argue that Reno's Claim for Negligent Misrepresentation should be dismissed because the City failed to allege that the Distributors made any false representations and, thus, failed to argue that the City relied on any false representations. *See* Mot. at 5:10-6:5. Nevada adopted the definition of negligent misrepresentation set forth in the Restatement Second of Torts, which provides:

> One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for the pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Barmettler v. Reno Air, Inc., 114 Nev. 441, 449 (1998) (quoting Restatement (Second) of Torts §552). The Restatement (Second) of Torts, §§ 551 and 552, also recognizes the tort of negligent misrepresentation by nondisclosure. *See Schnelling v. Budd*, 291 F. Supp. 2d 1186,

1191-1192 (D. Nev. Nov. 10, 2003). The state courts' adoption of the Restatement's definition of negligent misrepresentation suggests that it would also adopt the tort of negligent misrepresentation by nondisclosure. *Id.*

A defendant may be liable for negligent misrepresentation by nondisclosure if the defendant fails to disclose a fact to the plaintiff that the defendant knows may induce the plaintiff to behave in a certain way in a business transaction. *Id.* at 1192 (quoting Restatement (Second) of Torts §551). This tort applies if the defendant was under a duty to exercise reasonable care to disclose the facts in question. *Id.* "[S]ilence about material facts basic to the transaction, when combined with a duty to speak, is the functional equivalent of a misrepresentation or 'supplying false information' under Restatement § 552." *Id.* Nevada has already recognized a cause of action for fraud by nondisclosure, which suggests that Nevada would similarly recognize a claim for negligent misrepresentation by nondisclosure. *See Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634-635 (1993).

Reno's negligent misrepresentation claim can be based on misrepresentations made to third parties. The negligent misrepresentation claim can also be based on Distributor's concealment of the facts from a third-party which resulted in the City not having notice of the Distributors' potential liability and possible legal claims. Here, Reno alleges that, Distributors intentionally ignored the law, paid fines, and continued to unlawfully fill suspicious opioid orders, of which the City was unaware. FAC ¶¶ 153, 164. Reno further alleges that the "wrongful concealment" by Defendants resulted in **"Plaintiff's inability to obtain vital information underlying its claims."** FAC ¶ 237 (emphasis added). These allegations support a reasonable inference that the Distributors intended to induce Reno to rely on their omissions in order to deter potential liability for injuries such as those alleged in the First Amended Complaint ("FAC"). Based on the

foregoing, a genuine dispute of fact exists as to whether Reno justifiably relied on alleged fraudulent statements and omissions, and, thus is not appropriately decided on a motion to dismiss.

Each time Distributors filled a suspicious order in Reno, they were involved in a business transaction. Every single one of those suspicious orders had a direct impact on the City and its residents. Distributors' argument that there was no business transaction, completely overlooks the substantial amount of business Distributors are alleged to have conducted within Reno. The City specifically alleges that Distributors "ignored the law, paid the fines, and continued to unlawfully fill suspicious orders of unusual size, orders deviating from a normal pattern and/or orders of unusual frequency in Reno." FAC ¶¶ 153, 164. Those transactions consisted of omissions that denied the City of the ability to obtain complete information as to the products entering the area and causing damages to citizens and the City itself.

Distributors' failure to disclose important information regarding the dangers of opioids and the proper uses of opioids, as well as the failure to report suspicious orders of opioids, is sufficient to meet the pleading requirements for a negligent misrepresentation claim.

B. RENO'S PUBLIC NUISANCE CLAIMS ARE VIABLE AND VALID AGAINST DISTRIBUTORS

1. <u>The City Can Bring a Statutory Nuisance Claim.</u>

a. There is a Right to a Civil Claim Under Nevada's Public Nuisance Statute.

Distributors next claim that Nevada's criminal public nuisance statute deprives Reno, or anyone else, of a civil claim for public nuisance. This argument is inaccurate and contrary to Nevada's law. Reno can bring a statutory nuisance claim because Reno's ability to assert a civil cause of action for public nuisance is implied in the language of NRS 202.450 *et seq.* Where a statute does not expressly provide for a private cause of action, a plaintiff may still pursue such a claim if it can

be implied after considering the statutory scheme, reason, and public policy at issue. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958 (2008). Courts consider the following three factors when determining if an implied civil cause of action exists: (1) whether the plaintiffs are of the class for whose special benefit the statute at issue was enacted; (2) whether the legislative history indicates any intention to create or deny a private remedy; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislative scheme. *Id.* at 958-959. Moreover, the factor given the most weight in any such determination is whether the Legislature intended to create a private judicial remedy. *Id.* at 959. An analysis of NRS 202.450 *et seq*, and the related legislative history, demonstrates there is an implied private cause of action for public nuisance in Nevada.

Here, Reno and its residents (i.e., the "public") undeniably are of the class for whose special benefit the public nuisance statute was enacted. It is difficult to understand any argument that Reno and its citizens would not be the intended beneficiaries of a statute that condemns and punishes the creation of a public nuisance. Further, the Nevada Supreme Court recently considered whether the labor statutes in NRS 608 *et seq.* would support an implied private cause of action for recovery of unpaid wages. *See Neville v. Eighth Judicial Dist. Ct.*, 406 P.3d 499 (Nev. 2017). Under the language of NRS 608.180, the Labor Commissioner has the power to enforce the provisions of all statutes within Chapter 608. *See Id.* at 502. In determining the Legislature's intent behind the labor statutes, the Court observed that NRS 608.140 is titled "Assessment of attorney fees in action for recovery of unpaid wages." *Id.* at 503. The *Neville* Court ultimately found that the inclusion of the statute allowing for recovery of attorney fees indicated that the Legislature intended to create a private cause of action arising out of the violation of NRS 608 *et seq. Id.* Here, although Distributors claim that Reno is not entitled to a civil statutory cause of action arising out of NRS 202 *et seq.* because the statutes outline the criminal misdemeanor offenses, the language of the statutes, much like those in

Neville, indicate a legislative intent to permit a private, civil cause of action arising out of public nuisance.

First, NRS 202.450(3) defines a public nuisance as "[e]very act unlawfully done and every omission to perform a duty, which act or omission: (a) Annoys, injures or endangers the safety, health, comfort or repose of any considerable number of persons; . . . (d) In any way renders a considerable number of persons insecure in life or the use of property." The Legislature clearly elected to define a public nuisance broadly and did not strictly limit a public nuisance to any single definition. As such, Reno's First Amended Complaint does not limit its allegations to any specific part of NRS 202.450.[1] Reno further alleges that Distributors contributed to and/or assisted in creating and maintaining a condition harmful to the health of Reno residents. *See* FAC, at ¶180. Distributors' narrow interpretation of NRS 202.450 is not in line with Nevada's law.

Second, NRS 202.480 is titled "Abatement of nuisance; civil penalty." (Emphasis added.) This title alone provides insight into the Legislature's intent to create a private cause of action by allowing recovery of a civil penalty. NRS 202.480 further states that "**[a]ny court or magistrate** before whom there may be pending **any proceeding** for a violation of NRS 202.470 [committing or maintaining a public nuisance] shall, in addition to any fine or other punishment which it may impose for such violation" issue orders for other forms of available punishment, including a civil penalty. NRS 202.480(1) (emphasis added). Similar to *Neville*, per the statute at issue here, "any court or magistrate" may hear cases alleging a public nuisance and such claims may be brought in "any proceeding."

[1] Contrary to the Distributors argument, NRS 202.450 is broad enough to include deceptive sales practices and unlawful marketing of controlled substances to Reno and its residents.

Accordingly, the language of NRS 202.450 *et seq* does not provide for an exclusive criminal cause of action to be brought only by the State against those that create and maintain a public nuisance. Rather, the statutes broadly define a public nuisance and identify the penalties for maintaining such a nuisance in the event the State does bring a criminal action. A private cause of action for public nuisance can therefore be implied from a reading of NRS 202.450 *et seq.*, and there is no provision limiting the evaluation and penalization of a public nuisance to any particular agency. *Cf. Cort v. Ash*, 422 U.S. 66, 75 (1975) (a private right of action could not be implied in a statutory scheme where the Legislature had appointed a commission and established an administrative procedure for processing complaints of alleged statutory violations).

Distributors cite to *Coughlin v. Tailhook Ass'n*, 818 F.Supp. 1366 (D. Nev. 1993), in which a Nevada federal court found that NRS 202.450 did not expressly create a *private* cause of action for public nuisance. The *Coughlin* Court, however, did not conduct any evaluation or interpretation as to whether NRS 202.450 *et seq.* provided for an implied *civil* right of action brought by a governmental entity such as the City. The *Coughlin* Court also did not rule that there can never be a civil cause of action for public nuisance. As such, *Coughlin* is a narrow ruling, on a narrow issue, and is not binding upon this Court. Additionally, Distributors' argument that NRS 40.140 provides the only grounds for a civil cause of action for a *private* nuisance is not applicable, here, as the City is a public entity seeking recovery for damages caused by a public nuisance. Even if this Court elects to follow *Coughlin*, which it should not, it must only be followed only as it relates to whether there is an express, statutory private cause of action for public nuisance, and Distributors' motion must still be denied.

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b. The City's Requested Damages are Available Under the Public Nuisance Statute.

Reno's requested damages are recoverable, and are not limited to the criminal penalties outlined in NRS 202.450 *et seq.* Distributors' actions contributed to the spread of the opioid epidemic in the City of Reno, and this public nuisance has dramatically impacted the health and welfare of Reno's citizens. Accordingly, Reno should not be prevented from pursuing appropriate damages from Distributors for their role in the creation of this nuisance. To that end, Reno has alleged sufficient facts against Distributors, that, if true, would support an implied private cause of action for public nuisance arising out of NRS 202.450 *et seq.* As discussed herein, the City is seeking to recover damages related to the abatement of the public nuisance created, even in part, by Distributors. Abatement orders and orders granting monetary damages for the costs of abatement are appropriate under a public nuisance claim, and Distributors do not point to any law or cases in Nevada that would prevent compensatory damages arising from the costs Reno incurred in dealing with the nuisance caused by Distributors.

Distributors' blanket assertion that the City cannot recover economic loss damages on any of the claims asserted in the FAC is unsupported by Nevada law. Pure economic loss is a legal term of art generally referring to the types of economic loss that would be recoverable as damages in a suit for breach of contract. *Giles v. GMAC*, 494 F. 3d 865, 878 (9th Cir. 2007) (relying upon *Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000) overruled on other grounds by Olson v. Richard,* 120 Nev. 240, 89 P.3d 31 (2004)). In *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 68 206 P.3d 81, 83 (2009), cited by Distributors, the Nevada Supreme Court described the economic loss doctrine as, "mark[ing] the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the

parties, and tort law, which imposes a duty of reasonable care and thereby generally encourages citizens to avoid causing physical harm to others." *Id.*

Nevada courts, however, have acknowledged exceptions to the economic loss rule. *Giles*, *Id.* at 878. The *Terracon* Court even referred to negligent misrepresentation as one such exception, and noted that, "exceptions to the doctrine apply in certain categories of cases when strong countervailing considerations weigh in favor of imposing liability." *Terracon*, 125 Nev. at 73, 79, 206 at 86, 89. Rather than providing an exhaustive list of claims subject to the economic loss doctrine, Nevada courts have adopted a "more reasoned method of analyzing the economic loss doctrine," which involves examining the policies in order to determine the boundary between the "duties that exist separately in contract and tort." *Calloway*, 116 Nev. 250 at fn 3.

Reno does not allege any breaches of contract between the parties and this is not a products liability case. This case involves claims for public nuisance (statutory and common law), negligence, negligent misrepresentation, and unjust enrichment - all based upon Defendants' deceptive and unlawful conduct in marketing, selling and distributing opioids in the City of Reno. Contrary to contract law, which enforces the expectancy interests of the party, "tort law is designed to secure the protection of all citizens from the danger of physical harm to their persons or to their property and seeks to enforce standards of conduct." *Calloway v. City of Reno*, 116 Nev. 250, 260 (Nev. 2000) (superseded by statute as it relates to construction defect claims in *Olson v. Richard*, 120 Nev. 240 (Nev. 2004)). Such standards of conduct are created, and imposed, by society. *Id.* Further, tort law has historically provided individuals with the ability to pursue claims for wrongs even if they caused only economic damages. *Giles*, 494 F.3d at 875 (internal citations omitted). Nevada's economic loss doctrine does not apply to bar tort

recovery "where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Id.* at 879.

Here, Reno has pleaded facts which, if proven, plausibly establish the existence of a common law tort duty. Reno alleges that Distributors committed, and continue to commit, numerous intentional and/or unlawful acts which resulted in the damages suffered by the City. As discussed above, the Complaint contains sufficient allegations regarding Distributors' conduct to provide them with notice that Reno is seeking damages related to such actions. Given the nature of these claims, and given the broad extent of the damage inflicted by Distributors' conduct, "strong countervailing considerations weigh in favor of imposing liability" *Terracon*, 125 at 73, 206 at 86.

Finally, although the City is not asserting personal injury claims on behalf of individual residents, the City's tort and nuisance claims address the City's own past, present, and future expenditures to address drug and addiction-related injuries that have plagued county residents as a result of Distributors' conduct. *See* e.g. FAC ¶¶ 40, 181, 197, and 269 ("Plaintiff has incurred substantial costs including but not limited … addiction treatment, and other services necessary for the treatment of people addicted to prescription opioids."). The underlying physical harm and injuries Defendants caused to the public show that there is more at stake here than purely economic damages, and the economic loss doctrine should not be applied.

2. Common Law Public Nuisance Applies Here Because Distributors' Conduct Substantially Interferes with the Public Health.

Nevada law also recognizes actions for common law nuisance. *State ex. rel. Edwards v. Wilson*, 50 Nev. 141, 144 (1927) ("Whether the maintenance of a public nuisance is or is not

punishable in the law courts as a crime is an immaterial incident so far as the preventive jurisdiction of equity is concerned, for equity ignores its criminality, and visits upon the offender no punishment as for a crime.") The mere existence of a criminal statute does not negate the potential to bring a claim sounding in tort for the wrongdoing described in the statute. *Southern Pac. Co. v. Watkins*, 83 Nev. 471, 491-492 (Nev. 1967). The fact that legislation has been enacted that imposes criminal liability on those that violate the legislation, does not prevent the imposition of civil liability for the same liability. *Id.*

Although Nevada courts have not specifically stated that Nevada follows the definition of a public nuisance in *Restatement (Second) of Torts*, §821B, Distributors acknowledge that Nevada courts considering nuisance issues have looked to the Restatement for guidance. *See* Mot. at p. 14, fn. 8. Caselaw interpreting the Restatement as it relates to nuisances impacting the public health is therefore relevant and persuasive in determining the viability of Reno's claims here.

Section 821(B)(1) defines a public nuisance is "an unreasonable interference with a right common to the general public." An interference with a public right includes "conduct involv[ing] a significant interference with the **public health**, public safety, the public peace, the public comfort or the public convenience." *Id.* at §821(B)(2)(a) (emphasis added).[2] A public nuisance may also be continuing conduct, or conduct that has a permanent or long-lasting effect, that the actor knows, or has reason to know, would significantly impact the public right. *Id.* at §821(B) (2)(c). Any intentional conduct violating the public right must be considered a nuisance. *Id.* at Comment (e). Unintentional conduct violating the public right may also be considered a nuisance when considering the principles of negligence and recklessness, or treatment of abnormally dangerous

[2] Notably, NRS 202.450(3)(a) uses language similar to that of the Restatement by also broadly defining a public nuisance as acts that, "endangers the safety, health, comfort or repose of any considerable number of persons."

activities. *Id.* Furthermore, acts unintentionally interfering with a public right will be considered a public nuisance if such acts are declared to be so by a specific statute, ordinance, or administrative regulation. *Id.*

Accordingly, the definition of a public nuisance set forth in the Restatement is extremely broad, and is not limited to an interference with property rights. *See also City of Cincinnati v. Beretta*, 768 N.E.2d 1136, 1142 (Ohio 2002) ("Contrary to appellees' position, there need not be injury to real property in order for there to be a public nuisance."). Under the Restatement's definition, the City should be permitted to bring a suit against Distributors of products that have resulted in widespread harm and costs to the City and its residents. Indeed, representative public nuisance actions brought by governmental plaintiffs seeking equitable relief have been recognized for centuries. *See Mugler v. Kansas*, 123 U.S. 623, 672-673 (1887) (emphasis added). The Eighth Judicial District Court recently recognized the viability of such claims in Clark County's case against the same Defendants that have been sued in this case. *See* Order Regarding Defendants' Motion to Dismiss, *Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017), **attached as Exhibit "1."** As it relates to the public health, other courts have found non-property based public nuisances. For example, a Michigan court found the unlawful practice of medicine to be harmful to the public and, thus, constituted a public nuisance. *Michigan State Chiropractic Asso. v. Kelley*, 79 Mich. App. 789, 791 (Mich. App. 1977). The Supreme Court of New Mexico also applied common law public nuisance to a scenario in which an individual was practicing medicine without the appropriate license, stating that the individual was unskilled and ignorant as it related to the practice of medicine and, that in prescribing drugs and directing treatment, he was harming the public. *State ex rel. Marron v. Compere*, 44 N.M. 414, 421 (N.M. 1940) (importantly, the court also found that equity would allow for a civil

injunction, despite the state statute imposing criminal penalties for practicing medicine without a license).

California also follows the Restatement approach to public nuisance. *See City of Los Angeles v. San Pedro Boat Works, et al.*, 635 F.3d 440, 2011 AMC 2303, 2319 (9th Cir. 2011); *see also People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105, 929 P. 2d 596, 604 (Cal. 1997)(explaining California follows the Restatement in defining a public nuisance as the substantial and unreasonable interference with a public right). A substantial interference with a public right requires proof of a "significant harm," which has been "defined as a 'real and appreciable invasion of the plaintiff's interests,' one that is 'definitely offensive, seriously annoying or intolerable.'" *See Gallo*, 14 Cal. 4th at 1105, 929 P. 2d 604 (quoting Restatement 2d. Torts, §821F, coms. c & d, pp. 105-106). The determination of whether an interference is unreasonable requires a comparison between the social utility of an activity and the severity of the harm inflicted by that activity. *Id.*

Here, Reno has adequately pled the elements of a public nuisance as it is defined in the Restatement. "The first element that must be alleged to state a claim for public nuisance is the existence of a right common to the general public. Such rights include the rights of public health, public safety, public peace, public comfort, and public convenience." *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004) (internal citations omitted). The City is seeking abatement of the public nuisance and recovery of the costs the City will incur abating the nuisance created by the Distributors. Additionally, Reno has alleged that the Distributors created or contributed to the creation of a public health hazard within Reno through deceptive sales practices and marketing of opioids in the City.

3. Reno Has Alleged an Interference with a Public Right

Reno's FAC sets forth numerous factual allegations demonstrating the impact Distributors' actions have had on the public health. *See* FAC at ¶¶ 14, 15, 16, 17, 19, 28, 29, 31, 32, 165, 166, and 169. As discussed above, public health is considered a public right in the Restatement (Second) of Torts and under Nevada's statutes, Reno adequately alleged an interference with that public right, as required to make a claim for public nuisance.

Distributors ignore the language of the Restatement, Nevada's statutes, and rulings from courts around the country when they claim that the opioid epidemic cannot constitute a public nuisance because it does not interfere with a "public right." (Mot. at 14:18-15:11). Instead, they attempt to rewrite Reno's claims as private, personal injury claims suffered by City residents. This argument lacks merit for two (2) important reasons. First, as noted *supra*, this case does not seek to recover damages for personal injuries suffered by individual Reno residents. Instead, this case seeks redress for the widespread public harm and related costs to the City as a whole to address the epidemic. *See* FAC at ¶ 34, 35. Second, under the Restatement's definition of a nuisance, the sheer number of people affected can be sufficient to establish that a public nuisance exists.[3] A public nuisance can be something that "affect[s] the health of so many persons as to involve the interests of the public at large." Restatement (Second) of Torts, §821B, Cmt. g. "It is not . . . necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those that come in contact with it in the exercise of a public right or it otherwise

[3] In 2016, Nevada was ranked as the sixth highest state for the number of milligrams of opioids distributed per adult according to a study by the DEA. FAC at ¶ 167. Further, According to data from the Nevada Division of Public and Behavioral Health, the total number of opioid-related hospitalization in Nevada nearly doubled from 2010 to 2015; from 4,518 to 8,231 visits. *Id.*, at ¶168. Nevada has the fourth highest drug overdose mortality rate in the United States. *Id.*, at ¶ 169. From 2010 to 2015, approximately 2,800 deaths in Nevada have been attributed to opioid-related overdose. *Id.*

affects the interests of the community at large." *Id.* The opioid epidemic plaguing Reno fits squarely within this definition.

Other acts that significantly interfere with public health have been found to be public nuisances. *See Beretta*, 768 N.E.2d at 1142. In fact, the New York Supreme Court recently *rejected* the same "public right" argument in an opioid related matter, and found:

> ...it suffices to note the defendants' failure to establish why public health is not a right common to the general public, nor why such continuing, deceptive conduct as alleged would not amount to interference; it can scarcely be disputed, moreover, that the conduct at the heart of this litigation, alleged to have created or contributed to a crisis of epidemic proportions, has affected a considerable number of persons.

See **Exhibit "2"** *[New York Counties]* at p. 28 (internal citations omitted). The City has extensively outlined the acts by Distributors that interfered with the public health and their effects on the City and its residents, and Distributors' motion should be denied. Additionally, the Eighth Judicial District Court recently determined that Clark County can pursue its public nuisance claims against these same Distributors. *See Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017), attached as **Exhibit "1"**; *see also*, Opinion and Order, *In Re National Prescription Opiate Litigation, The County of Summit, Ohio, et al. v. Purdue Pharma L.P., et al.*, United States District Court, District of Ohio Eastern Division Case No. 1:17-md-2804 (2017) (Doc. No. 1203), attached as **Exhibit "3" (allowing the plaintiffs to move forward with their public nuisance claims).**

4. <u>Courts Across the Nation Recognize the Viability of Public Nuisance Claims in Opioid Litigation.</u>

Distributors next suggest that Reno is alleging a "novel theory" designed to "collapse the critical distinction between nuisance and products liability law." Mot. at 16:8-17:12. As an initial matter, the fact that a legal theory is "novel" does not mean that it cannot be pursued or is

somehow subject to immediate dismissal. Regardless, the City's nuisance claims are not novel, and public nuisance laws have never been restricted to apply only to property-based claims. Although Distributors cite to *Jezowski v. Reno*, 71 Nev. 233, 286 P.2d 257 (Nev. 1955) to suggest that public nuisance claims in Nevada are limited to interference with land or water, the Nevada Supreme Court broadly defined a public nuisance in that case as including "indecent or unlawful conduct" causing injury "to the right of another or to the public." Id. at 234, 257. Nowhere in that decision does the Court limit public nuisance claims to interference or misuse of property, or pollution of waterways, as Distributors suggest here. Indeed, the *Jezowski* Court further noted that, "[e]xcept in the rare cases in which something may be characterized as a nuisance as a matter of law, the determination of whether a particular operation constitutes a nuisance **remains a question of fact**." Id. (emphasis added). Such issues of fact remain and are not properly decided at this preliminary pleading stage, and the Distributors' motion should be denied.

Finally, Distributors have failed to address the various jurisdictions around the country that have already held that governmental entities' public nuisance claims in opioid cases survive motions to dismiss. *See e.g.* **Exhibit "3"** *[County of Summit, Ohio]* at 28, 31; **Exhibit "1"** *[Clark County, Nevada]* at p. 3-4. ;**Exhibit "2"** *[New York Counties]* at pp. 27-28; **Exhibit "4"** *[State of Ohio]* at p.7; **Exhibit "5"** *[State of New Hampshire]* at p. 27; and **Exhibit "6"** *[State of West Virginia]* at 27. The creation of, and contribution to, the opioid epidemic is a public nuisance, and the public health has been impacted in dramatic measures, which has led to Reno's substantial expenditures to protect its residents and help them recover. Nevada courts have never rejected public nuisance claims in the face of a vast interference of the public health, and this Court should not do so now. At the very least, the City's allegations are such that, if taken as true, Distributors should be liable for their role in the opioid epidemic, and the motion should be

denied.

C. DISTRIBUTORS OWED A DUTY TO THE CITY OF RENO

Nevada law imposes a duty on all persons to act reasonably towards other persons. *Billingsley v. Stockmen's Hotel*, 111 Nev. 1033, 1037 (1995) (citing *Moody v. Manny*, 110 Nev. 320, 333 (1994)). An individual, or entity, must exercise reasonable care, which is the degree of care that a reasonable individual, or entity, would exercise in similar circumstances. *Driscoll v. Erreguible*, 87 Nev. 97, 101 (1971). The applicable duty of care requires a consideration of the risk of harm created by the conduct in question, here the distribution of opioid medications throughout Reno. *See Merluzzi v. Larson*, 96 Nev. 409, 412 (1980) (overruled on other grounds by *Smith v. Clough*, 106 Nev. 568, 569 (1990)).

The duty of care applies to prevent harm that is reasonably foreseeable. *Butler v. Bayer*, 123 Nev. 450, 464 (2007). A harm is foreseeable when "the level of probability" that the harm would occur is such that it "would lead a prudent person to take effective precautions" to prevent such harm. *Wood v. Safeway, Inc.*, 121 Nev. 724, n. 53 (2005).

In the mid to late 1990s, states, counties, and cities across the country filed lawsuits against gun Distributors and sellers arising out of the harm impacted on the various communities from the rise in gun violence. Courts in Ohio and Massachusetts recognized that the lawsuits alleged that the defendants in those cases engaged in conduct (i.e. the manufacture and sale of firearms) that would result in foreseeable harm to the respective plaintiffs. *See City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E. 2d 1136, 1144-1145 (Oh. 2002); *City of Boston v. Smith & Wesson*, 2000 Mass. Super. LEXIS 352, 12 Mass. L. Rptr. 225 (Mass. 2000). The methods by which the gun defendants created the gun market, without any regard to the likelihood of the damage they would

cause, was determined to be sufficient evidence that it was foreseeable that communities would be plaintiffs in potential litigation. *Id.*

The cases from Ohio and Massachusetts provide helpful guidance here. Distributors created opioid medications, which are controlled substances classified as "dangerous drugs." They determined how those drugs would be introduced into the market. *See* FAC at ¶¶ 131, 132. They determined what type of marketing should be conducted in order to profit from the dangerous drugs. *Id.* at ¶ 93. It was entirely foreseeable that, if not manufactured, advertised, and sold with care, the opioids could cause serious harm. *Id.* at ¶¶ 92, 94, 136. Distributors disregarded the dangers of the products they manufactured and, in fact, used false and misleading advertising to downplay the dangers of the medications, including the possibility of addiction. *Id.* at ¶ 137. The potential that opioids could cause significant harm to communities was so foreseeable that federal and state laws were enacted as an attempt to prevent such harms from occurring. *Id.* at ¶ 92. Distributors were well aware that their false advertising and marketing schemes would lead to the market being flooded with dangerous opioid medications thereby putting communities at risk of increased addictions, crime, and deaths caused by opioid use. *Id.* at ¶¶ 92, 94, 136. The harms the City experienced were not only foreseeable, they were foreseen.

Contrary to Distributors' arguments, there is no requirement that a special relationship exist between Reno and the Distributors in order to find that the Distributors owed a duty of reasonable care to Reno. A special relationship is not required where, as here, Reno's claims are based on the Distributors' own negligent conduct, not the conduct of third parties. *See Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968-969 (1996) (requiring a special relationship in order to establish an individual's duty to protect another from the criminal acts of a third-party). Reno is not alleging that Distributors failed to protect the City from harm caused by others. Rather, Reno

alleges that Distributors engaged in negligent conduct, the foreseeable result of which was harm to the City. FAC at ¶ 233. As pled, the harms alleged by Reno were the result of the over-supply, over-prescription, and over-use of opioids, not only the opioid abuse. Distributors' own conduct caused these foreseeable risks.

As discussed *supra*, the economic loss doctrine does not apply to bar any of Reno's claims for relief in this case. Accordingly, this Court should find that Reno has sufficiently alleged the existence of a common law duty owed by Distributors to Reno to put Distributors on notice of the wrongs for which they may be liable on a negligence theory.

D. RENO'S TORT CLAIMS ARE PROPERLY ALLEGED

1. Proximate Causation is Alleged

A defendant's negligence is the proximate cause of a plaintiff's injury if the cause is part of a "natural and continuous sequence, unbroken by any efficient intervening cause . . . and without which the [injury] would not have occurred." *Drummond v. Mid-W. Growers*, 91 Nev. 698, 705 (1975) (quoting *Mahan v. Hafen*, 76 Nev. 220, 225 (1960)). Proximate cause is not necessarily the "sole cause" of an injury or even the cause closest to the injury causing event. *See Konig v. Nevada-California-Oregon Ry.*, 135 P. 141, 152 (Nev. 1913). The Nevada Supreme Court held that the proximate, or primary cause, is the one that is "so linked and bound to the events succeeding it that altogether [the events] create and become one continuous whole" and to which all succeeding events are tied. *Id.* Under Nevada law, the "issue of proximate cause is almost always an issue of fact rather than one of law." *Price v. Sinnott*, 85 Nev. 600, 607 (1969). Proximate cause is a factual matter to be determined by the jury. *Karlsen v. Jack*, 80 Nev. 201, 206 (1964).

Nevada's law on proximate cause applies to this cas,e not the law from other state and federal courts on which Distributors rely. There is no need to look outside of this jurisdiction for the definition of proximate cause. Distributors also cite the recent decision from the City of New Haven case in Connecticut in support of their position that the City has not alleged facts that could support a finding of proximate cause. *See* Distributor's Motion, at 22:22-23:4. The New Haven court's opinion is irrelevant to this Court's analysis as to whether the City's operative Complaint contains sufficient facts that, if true, would support a finding that Distributors' actions are the proximate cause of the City's injuries. Connecticut law regarding causation is different from established Nevada law. Additionally, the judge in the New Haven case has a history of making overreaching decisions that often do not survive on appeal in that state. The entire opinion as it relates to causation is based upon Connecticut-specific case law. It certainly cannot be considered authoritative here and, based on the difference in the law between the states, can hardly be considered persuasive.

There can be no question that the City has alleged sufficient facts indicating that Distributors' actions were a proximate cause of the City's injuries. As alleged Distributors failed to monitor suspicious shipments and orders of opioids in Reno. *See* FAC ¶¶ 141-145, 152-153. Their actions and inactions led to the increased opioid use in the City. *See Id.* Reno's alleged injuries are all caused by the spread of the opioid epidemic. There is no single cause of the opioid epidemic. The distribution of opioids is one part of a series of events "so linked and bound" that they became a "continuous whole," thus causing the rise of opioid abuse, opioid addiction, opioid deaths, and opioid-related crimes.

2. **The Derivative Injury Rule Does not Apply**

Here again, Distributors ask this Court to apply a rule that has never been applied in Nevada. The cases relied upon by Distributors are all from the federal courts and none rely on the application of Nevada's law regarding causation. *See* Distributors' Motion, at 23:10-25:16. Even the jurisdictions that adopted the derivative injury rule refuse to require a direct injury to find proximate cause. *See Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235 (2d Cir. 1999) ("although the direct injury test is not the sole requirement of [proximate] causation, it has been one of its central elements."). In Nevada, a negligent act "succeeded by a disconnected act of negligence of another person, and which results in injury to a third person, if the original negligence was such that, in the ordinary and natural course of events, the second negligent act should have been anticipated as reasonably likely to happen, the proximate cause of the cause of the injury may be laid in the first negligent act." *Karlsen v. Jack*, 80 Nev. 201, 205-206 (1964).

The Nevada Supreme Court stated that "proximate cause is essentially a policy consideration that limits a defendant's liability to foreseeable consequences that have a **reasonably close connection** with both the defendant's conduct and the harm which that conduct created." *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1481 (1998), overruled on other grounds by *GES, Inc. v. Corbitt*, 117 Nev. 265 (2001) (emphasis added). Accordingly, Nevada's law regarding proximate causation does not require a direct injury, but rather a "reasonably close connection" between the defendant's conduct and the injury.

Distributors' conduct led to an increase in opioid use throughout the City of Reno, which led to an increase in the City's spending to alleviate the damage caused by opioid use and to prevent further damage. There is a reasonably close connection between the Distributors' conduct

and the City's alleged damages to support the determination that Distributors' actions and inactions were a proximate cause of the City's injuries. The facts alleged in the FAC, if true, would support such a determination. Distributors failed to point to any cases with any authoritative value in Nevada that would support dismissal based on the "derivative injury rule." Moreover, the determination of whether the Distributors' conduct caused the City's injury is an issue of fact for the jury and cannot be properly decided at this stage of the litigation.

3. The Free Public Services Doctrine Does not Apply

Distributors next argue that this Court should adopt the municipal cost recovery rule to bar the City's claims for recoupment of government expenditures. *See* Mot. at 6:14-16. This argument should be rejected because the municipal cost recovery rule has never been adopted by the Nevada courts. Moreover, many courts, particularly those involved in the opioid litigation, have either rejected the rule altogether, limited the scope of the rule, or applied the rule's exceptions to allow recovery. *See e.g. City of Newark [James] v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Sup. Ct. App. Div. 2003) ("The rule should be eliminated because it shields industrial tortfeasors from liability..., constitutes a tort subsidy to industry and functions as an insurance scheme for industrial accidents paid for by taxpayers."); *see also City of Boston v. Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225, 2000 WL 1473568 (Mass. Sup. Ct. July 13, 2000); *City of Gary ex. Rel King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243 (Ind. 2003).

a. Nevada Courts Have Not Adopted the Free Public Services Doctrine.

As Distributors concede, Nevada courts have not adopted the municipal cost recovery rule, also known as the free public services doctrine, and for a good reason – the rule has been severely criticized, because it allows for tortious defendants to escape liability. To overcome this fatal defect to their argument, Distributors cite to *Moody v. Manny's Auto Repair*, 110 Nev. 320, 871

P.2d 935 (1994) and *Steelman v. Lind*, 97 Nev. 425, 634 P.2d 666 (1981) to suggest Nevada would adopt the municipal cost recovery rule. *See* Mot. at 6:21-7:2. Those cases discuss Nevada's "Firefighter Rule" which precludes a public officer from suing for physical injuries suffered while performing their job duties. The Firefighter Rule, however, is based entirely on assumption of the risk principles and that, by accepting the job, the plaintiff was "fully aware of the hazard created" by alleged negligence and "in the performance of his duty, confronted the risk." *Steelman*, 97 Nev. at 427, 634 P.2d at 667. Those cases also note that the subject officers willingly accepted the salary and benefits of the job with knowledge of those potential hazards. Id.; *Moody*, 110 Nev. at 324, 871 P.2d at 938.

The municipal cost recovery rule is not premised on assumption of the risk. Instead, the municipal cost recovery rule is based upon concerns about shifting the cost burden of emergency services from the government to private tortfeasors, and whether such a shift would essentially impose a tax without proper legislative action. *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004). Distributors do not point to any Nevada cases discussing concerns about municipal recovery, or that otherwise suggest Nevada would be among the jurisdictions that adopt this rule. Judge Williams in the Eighth Judicial District Court refused to adopt the municipal cost recovery rule in Clark County's case against the Distributors.[4] Because Nevada adopted the Fireman's Rule based on entirely different principles, nothing in the cases cited by Distributors suggests that this Court should adopt the municipal recovery rule here.

[4] *See* Order Regarding Defendants' Motion to Dismiss at pg. 4, *Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017), attached as **Exhibit "1."**

b. Many Jurisdictions Adopting the Free Public Services Doctrine Have Limited it to Typical, Single Event Emergency Situations.

Even though Nevada has never adopted the rule, the Distributors urge this Court to adopt it now because it has been recognized by a few other jurisdictions. Mot. at 12:8-14. Many jurisdictions that have adopted the rule, however, limit its application to events which require typical emergency responses. Those court differentiate between (i) cases with isolated and discrete incidents, which merely require a single and typical emergency response, and (ii) acts of protracted misconduct that were perpetrated over the course of several years. *See e.g. City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1149 (Ohio 2001); *see also City of Newark [James] v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Sup. Ct. App. Div. 2003); *City of Boston v. Smith & Wesson Corp.*, *infra*. For example, one court has held that protracted, and ongoing tortious conduct falls outside the scope of the rule – "Unlike the train derailment that occurred in the [seminal] case, which was a single, discrete incident requiring a single emergency response, the misconduct alleged in this case is ongoing and persistent. The continuing nature of the misconduct may justify the recoupment of such governmental costs…" *City of Cincinnati*, 768 N.E.2d, at 1149.

It is therefore unsurprising that nearly all of the cases the Distributors cite involved a typical, single event emergency situation. *See e.g. Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983) (railroad train carts derailed, forcing an evacuation of all persons within a certain distance of the train); *Walker Cty. v. Tri-State Crematory*, 643 S.E.2d 324 (Ga. App. 2007) (municipality improperly disposed of human remains). None of these cases, involved a situation where, as here, a City sought redress for its extensive expenditure of funds and resources to address ongoing, deceptive conduct by private entities.

Consequently, many courts involved in the opioid litigation have rejected the rule including the Eighth Judicial District Court in Clark County's case against these same Distributors. *See e.g.* Order Regarding Defendants' Motion to Dismiss at pg. 4, *Clark County v. Purude Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017), attached as **Exhibit "1;"** *City of Everett v. Purdue Pharma L.P., et al.*, 2:17-cv-00209-RSM, U.S. Dist. LEXIS 156653 (W.D. Wa. Sep. 25, 2017) at p. 14, attached as **Exhibit "7;"** *State of West Virginia v. Cardinal Health, Inc.*, Case No. 12-C-140 (January 1, 2018), slip. op. at 22 attached as **Exhibit "6;"** *see also* **Exhibit "3"** [*County of Summit, Ohio*] at pp. 19-22. Accordingly, even if this court is inclined to be the first in Nevada to adopt the municipal cost recovery rule, which it should not, the rule should not apply here where the alleged misconduct was not an isolated emergency incident, but instead involved tortious misconduct perpetrated over the course of several years.

c. If the Free Public Services Doctrine Applies, This Case Falls Within an Express Exception to the Rule.

Finally, even if this Court adopts the municipal cost recovery rule, Reno's case would fall within a recognized exception. As is relevant here, the municipal cost recovery rule was first referenced by the U.S. Supreme Court in *U.S. v. Standard Oil of California*, 332 U.S. 201, 214 (1947), although not by that name. Later, the Ninth Circuit discussed the rule in *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983). In *Flagstaff*, the Ninth Circuit carved out several exceptions to the rule: (i) where statute or regulation permits recovery, (ii) where the government incurs expenses to protect its own property, and (iii) ***where the acts of a private party create a public nuisance which the government seeks to abate.*** *Id.* at 324 (emphasis added). See **Exhibit "6"** *[State of West Virginia]* at pp. 23-24 (In addition to finding that the rule

was never adopted in West Virginia, the court also noted the plaintiff satisfied an exception to rule by bringing a claim for public nuisance.)

Here Reno's claims include statutory public nuisance and common law public nuisance claims, and it seeks to recoup governmental costs in order to abate the opioid crisis for which Distributors are responsible. This case therefore falls squarely within the public nuisance exception, which has been consistently applied to public nuisance claims. *See e.g. City of Cleveland [White] v. Smith & Wesson Corp.*, 97 F. Supp. 3d 816, 822 (N.D. Ohio 2000) (stating that acts of private parties which create public nuisances that the government seeks to abate are actionable and not covered by this new rule.); *see also City of Cincinnati v. Beretta U.S.A. Corp.*, *infra*; *City of Newark [James] v. Arms Tech., Inc.*, *infra*. Because Reno's nuisance claims fall under the express exceptions set forth in *Flagstaff* to prevent tortious defendants from escaping liability, Distributors' argument should be rejected.

4. <u>Reno's Claims are Not Barred by the Statewide Concern Doctrine</u>

Reno has acknowledged that it is not alone in its struggle to address the nationwide opioid epidemic. In this action, however, Reno is only seeking redress for the financial burdens it has been forced to bear as a direct result of misconduct by the various Defendants. Specifically, Reno seeks to recover costs incurred, including the City's "human services, social services, court services, law enforcement services, the office of the coroner/medical examiner and health services, including hospital, emergency and ambulatory services." *See* FAC at ¶35. Reno also seeks to recoup the "criminal justice costs, victimization costs, child protective services costs, lost productivity costs, and education and prevention program costs" it has incurred as a result of the Defendants' actions. *Id.* As such, this case is limited to matters of local concern affecting Reno's

day to day operations and resources, and the City is not seeking to recover any costs incurred by the State or other municipality for injuries they have suffered.

Despite the narrow scope of this lawsuit, Distributors contend that Reno has no standing to bring this action. As an initial matter, Reno is of the position that the issue of whether a matter is one of "local concern" is separate and apart from the determination of legal standing. They argue that the City can only recover for its injuries through a lawsuit filed by the Nevada Attorney General because the City's claims, "impermissibly encroach upon the Attorney General's claims" and "usurp the Attorney General's exclusive authority and impermissibly regulate a matter of statewide concern on a city-by-city basis." Mot. at 1:12-14; 6:5-7. Distributors make this argument even though the Nevada Attorney General has never objected to this lawsuit or taken any action to intervene. Distributors' self-serving concern for the Attorney General is misplaced and ignores that the Reno's lawsuit is limited to matters of local concern. This argument by Defendants should be soundly rejected.

a. Standing is a Judicially Created Doctrine in Nevada.

Distributors argue that the application of NRS 244.137 and the "local concern" doctrine can be used to strip Reno of its standing to bring a lawsuit to recover damages caused by Distributors' actions and inactions. "[T]he general standing rule requires the plaintiff to show a particular injury." Omer Kimhi, *Private Enforcement in the Public Sphere – Towards a New Model of Residential Monitoring for Local Governments*, 18 Nev. L.J. 657, 673 (Spring 2018). Standing is based on the theory that the person or entity filing the lawsuit must have suffered an injury and must be the appropriate party to recover damages related to that injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (standing requires that the plaintiff suffered an 'injury in fact;' there must be a causal connection between the injury and the wrongful conduct at issue

in the lawsuit; and it must be likely that the court's favorable decision will redress the injury).

In Nevada, standing is a judicially-created doctrine of convenience as opposed to a constitutional command, as in the federal courts. Although there is not a constitutional "case or controversy" requirement in Nevada, there is a history of requiring an actual justiciable controversy as a predicate to relief. *Kahn v. Dodds (In re Amerco Derivative Litig.)*, 127 Nev. 196, 213 (2011). However, the judicially-created doctrine of standing in Nevada is similar to that in the federal courts as it requires an inquiry into whether the plaintiff has the right to enforce the claims asserted against the defendant and whether the plaintiff has a significant interest in the litigation. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 369 (2011). The question of standing focuses on the party bringing the lawsuit rather than the issues being adjudicated. *Szilagyi v. Testa*, 99 Nev. 834, 838 (1983).

Moreover, pursuant to NRCP 17(a), "[a]n action **must** be prosecuted in the name of the real party in interest." (Emphasis added.) A real party in interest is the party possessing "the right to enforce the claim and who has a significant interest in the litigation." *Painter v. Anderson*, 96 Nev. 941, 943 (1980). The rule allows the defendant to assert all proper defenses and evidence against the real party in interest, which also assures the defendant of the finality of the judgment so that it is not concerned about the possibility of a later suit brought by the real party in interest alleging claims based on the same facts. *Id.* (internal citation omitted).

Distributors have conflated the issue of standing with the application of Dillon's Rule and the argument as to whether this case involves a matter of local concern. As will be discussed, *infra*, Dillon's Rule was created to prevent local governments from passing ordinances, regulations, and requirements that are antithetical to the state law. It was created at a time where there was no means of controlling local governments and they were bankrupting the states. This

case does not involve Reno's decision to pass an ordinance or regulation preventing the distribution of prescription opioids in the City or levying a tax against companies that manufacture and distribute such medication within City lines. If that were the issue, the Dillon's Rule arguments would be well placed. Here, the question is whether Reno has the legal standing to bring claims to recoup damages Reno has suffered at the proverbial hands of opioid distributors, manufacturers, pharmacies, and physicians.

There is no other entity better situated to bring these claims on Reno's behalf. After all, legal standing requires an inquiry as to whether the Plaintiff has suffered an injury, which Reno has alleged; whether there is a causal connection between the wrongful conduct alleged in the complaint and the alleged injury, which Reno has pled with sufficiency; and finally whether a favorable decision from the fact-finder would redress Reno's injury, which it would. There can be no question that the City has the legal standing to bring a claim for injuries caused to its programs, its entities, and its budget. No other Nevada city, county, or municipality has had to pay the increased costs of Reno's healthcare programs or law enforcement. The state of Nevada cannot claim that it is the real party in interest as it relates to the City's damages. Only a lawsuit filed by Reno can assure Distributors any finality as it relates to Reno's damages.

b. Dillon's Rule is Separate from the Issue of Standing.

Distributors focus on NRS 244.137 and NRS 244.143 in an attempt to deprive Reno of standing. Dillon's Rule, on which NRS 244.137 is based, was never intended to prevent counties or municipalities from seeking redress for harms caused to their residents, local governments, and infrastructure. Dillon's rule "limits localities to exercise of those powers expressly delegated to them by the state legislature or necessary to implement or necessarily implied from express legislative grants." Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice*

Theory Justify Local Government Law, 67 Chi.-Kent L. Rev. 959, 963 (1991) (available at http://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss3/14, accessed on April 4, 2019). The rule originated in the 1870s in the Iowa Supreme Court and is named after the former chief justice of that court, Justice John Dillon. Honorable John D. Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, White Paper, a Publication of the American City City Exchange, p. 2, January 2016 (available at https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf, accessed on April 4, 2019). The Rule arose in a time where there were not any legal constraints on municipalities, leading them to incur "substantial debts for the questionable public function of financing railroad companies and other public improvements that subsequently failed, leaving taxpayers in fiscal straits." Gillette, *In Partial Praise of Dillon's Rule*, at 963. Numerous states have adopted Dillon's Rule either in full or recognize a hybrid of Dillon's Rule and Home Rule. As of 1991, "courts [had] invoked the doctrine of limited municipal powers to achieve results as widespread as invalidation of municipal contracts to purchase energy capacity in a decision that led to the largest default of municipal bonds in history, nullification of an ordinance requiring bottle deposits, and invalidation of municipal restrictions on the sale of condominium units." *Id.* at 964-965. There have been debates in various jurisdictions regarding the viability of Dillon's Rule, particularly as it has largely become the job of the courts to determine whether there has been an express or implied grant of power to the municipality at issue. *Id.* at 966; *see Early Estates v. Housing Bd. of Review*, 174 A.2d 117 (R.I. 1961) (in which the court in a single opinion interpreted the same statute to allow a city council to require hallway lights be provided in a condominium building, but could not enact any requirements that hot water be provided).

In fact, in cases where Dillon's Rule has been invoked, it has been in the context of seeking

to invalidate some ordinance, requirement, or other action taken by a city or county. Neither the history of Dillon's Rule nor the cases in which the courts discuss Dillon's Rule support an argument that the Rule could be used to deny a county, city, or municipality from bringing a lawsuit to recoup damages caused by the wrongful acts of a third-party actor. For example, in the Virginia case of *Commonwealth v. City Bd.*, 217 Va. 558 (Va. Sup. Ct. 1977), the court considered whether "absent express statutory authority, a local governing body or school board can recognize a labor organization as the exclusive representative of a group of public employees and can negotiate and enter into binding contracts with the organization concerning the terms and conditions of employment of the employees." 217 Va. At 559. Virginia adheres to a strict construction of Dillon's Rule, so the court concluded that the school and City board did not have such authority absent express statutory authority language to that effect. *Id.* at 576-577; *but see Logie v. Town of Front Royal*, 58 Va. Cir. 527, 535 (Va. Cir. 2002) (where a statute explicitly confers a power upon a local government, the local government can use any reasonable method it deems appropriate to implement that power).[5]

Nevada's Supreme Court has not issued any opinion relying solely on Dillon's Rule to find that a municipality, city, or county lacked standing to bring any lawsuit. Instead, the Court has recognized that "under Dillon's Rule, a local government can exercise powers that are necessarily or fairly implied in or incident to the powers expressly granted by the Legislature." *Flores v. Las Vegas-Clark Cty. Library Dist.*, 432 P.3d 173, 178 n.7 (Nev. 2018).

Like Nevada, Utah is a Dillon's Rule state. However, in 1980, the Utah Supreme Court

[5] *See also Kansas-Lincoln, L.C. v. Arlington County Bd.*, 66 Va. Cir. 274 (Va. Cir. 2004) (case involves the plaintiff, Kansas-Lincoln, L.C.'s request for declaratory judgment against the County Board, declaring that amendments made by the board to a General Land Use Plan were invalid and unenforceable under Dillon's Rule); *Homebuilders Ass'n v. City of Charlotte*, 336 N.C. 37, 38 (N.C. Sup. Ct. 1994) (the homebuilders association requested an order declaring the city's imposition of user fees invalid because the city had not been explicitly granted the power to impose such fees and, thus, under Dillon's Rule, the fees were improper).

discussed the problems created by a strict construction of Dillon's Rule. *See State v. Hutchinson*, 624 P.2d 1116 (Ut. Sup. Ct. 1980). The *Hutchinson* case concerned the validity of a City ordinance requiring candidates for county commissioner to file campaign statements and report campaign contributions. *Id.*at 1117. The court provided a detailed history of Dillon's Rule and the growing criticism concerning the Rule, "[t]he rule was widely adopted during a period of great mistrust of municipal governments." *Id.*at 1119. As discussed, *supra*, the Rule came into effect in the 1870s and, thus, the "validity of the rule has changed," as has the nature of local government changed. *Id.* Specifically, the Court stated "[i]f there were once valid policy reasons supporting the rule, we think they have largely lost their force and that effective local self-government, as an important constitutent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal." *Id.* at 1120.

The discussion in the *Hutchinson* case focuses entirely on the impact of Dillon's Rule on a local government's ability to create ordinances, regulations, and requirements. The court acknowledged that local governments in Utah are prevented from passing any ordinance that conflicts with, or is prohibited by, the state law. *Id.* at 1121. But, the court also considered that it is more effective and efficient for a local government to address problems facing its constituents than it is for the state to do so. *Id.* Utah's statutes regarding a county's power includes what is known as a "general welfare provision," which permits the counties to "pass ordinances that are 'necessary and proper to provide for the safety, and preserve the health, promote the prosperity, improve the morals, peace and good order, comfort and convenience of the City and inhabitants thereof." *Id.* at 1122 (quoting §17-5-77 Utah Code Annotated). The court cited to cases from California, Kansas, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, and Washington that have all held that a general welfare clause "confers power in addition to and

beyond that granted by specific statutory grants." *Id.* at 1124.

Perhaps most applicable when considering the issues in this case, is the court's statement that, "[t]he wide diversity of problems encountered by county and municipal governments are not all, and cannot realistically be, effectively dealt with by a state legislature which sits for sixty days every two years to deal with matters of general importance." *Id.* at 1122. Moreover, the court found that the state constitution established the counties as governmental entities and, in doing so, placed certain aspects of county government beyond the reach of the state legislature. *Id.* It also concluded that neither the state nor the courts would interfere with any ordinance enacted by a local government so long as it is not arbitrary and is not directly prohibited by, or inconsistent with, state or federal laws. *Id.* at 1126.

The strict construction of Dillon's Rule is outdated, particularly where the complexities facing local governments differ in type and degree from county to county and city to city. *Id.* Nevada's Legislature also recognized the problems facing the strict construction of Dillon's Rule, leading to the drafting of NRS 244.137(5) and (6) providing county commissioners "with the appropriate authority to address matters of local concern for the effective operation of county government." Local concern in Nevada's statutes "includes, without limitation . . . [p]ublic health, safety and welfare in the City." NRS 244.143(2)(a).

Dillon's Rule does not prevent a county, city, or municipality from pursuing litigation seeking redress for injuries suffered by the governmental entity. So long as this litigation is not contrary to the laws of the state or federal government and so long as it does not infringe on any state regulations, there can be no reason to prevent the case from moving forward. There is no concern more "local," than that of the injuries caused to a local government by a third-party, which is why such an analysis is neither appropriate nor necessary when considering a city's right to

pursue litigation. Reno has standing to bring this lawsuit, regardless of whether the opioid crisis is a matter of local concern.

c. The "Statewide Concern" Doctrine Does Not Defeat the City's Standing Because Nevada Law Empowers Reno to Bring this Action.

Distributors argue that Reno lacks standing to bring this action because it involves a matter of "statewide concern." The "statewide concern" doctrine relates to the scope of authority granted to municipalities by the State. Whether styled as "standing" or otherwise, the "statewide concern" doctrine does not preclude Reno from pursuing its claims here because Reno has statutory authority to bring this action to address matters of public health and safety as well as matters of local concern that impact the effective operation of City government. *See* NRS 268.001(6). *See also* FAC at ¶ 45 ("Plaintiff has standing to bring this litigation to provide for the orderly government of Reno and to address matters of local concern including the public health, safety, prosperity, security, comfort, convenience and general welfare of its citizens."). The City's authority includes the ability to pursue this action.

In 2015 the Nevada Legislature expressed concern that existing Nevada law based upon the adoption of Dillon's Rule "unnecessarily restrict[ed]" city governments from taking actions deemed necessary to address matters of local concern. NRS 268.001(5). The Legislature addressed that concern in NRS 268.001(6), by modifying Dillon's rule as follows:

> To provide the governing body of an incorporated city with the appropriate authority to address matters of local concern for the effective operation of city government, the provisions of sections 2 to 7, inclusive, of this act:
>
> (a) Expressly grant and delegate the governing body of an incorporated city all powers necessary or proper to address matters of local concern so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government; and

> (b) Modify Dillon's Rule as applied to the governing body of an incorporated city so that if there is any fair or reasonable doubt concerning the existence of a power of the governing body **to address a matter of local concern, it must be presumed that the governing body has the power unless the presumption is rebutted by an evidence of a contrary intent by the Legislature.**

See NRS 268.001(6) (emphasis added).

Accordingly, the Nevada Legislature made clear its intent to provide cities with more authority by changing the presumption *against* finding that the City has power to act to a presumption *in favor of* finding such power. In doing so, the Legislature highlighted the City's need to take action to address, "matters of local concern for the effective operation of city government." *Id.*

Moreover, the Reno City Charter was created to "provide for the orderly government of the City of Reno and the general welfare of its citizens." Reno City Charter, Article 1. Section 1.010(1). The City Charter empowers Reno to adopt and enforce local health and safety measures. As such, the Nevada Legislature has expressly defined the term "local concerns" as including "without limitation, any of the following matters of local concern: "Public health, safety and welfare in the city" as well as "[n]uisances and graffiti in the City." *See* NRS 268.001(2) (a) and (c). This lawsuit directly addresses matters related to public health, the ongoing nuisance created by the Defendants in the City of Reno, and the devastating impact their misconduct has had on the City's government operations and resources. More importantly, this lawsuit does *not* "have a significant effect or impact on areas located in other cities or counties." *See* NRS 268.001(1)(a).

Here, Reno is bringing state law tort and nuisance claims. Specifically, the City seeks to recover damages, including:

- restitution and reimbursement for all the costs City of Reno has incurred in paying excessive and unnecessary prescription costs related to opioids;

- restitution and reimbursement for all the costs expended by City of Reno for health care services and programs associated with the diagnosis and treatment of adverse health consequences of opioids use, including but not limited to, addiction;

- restitution and reimbursement for all the costs consumers have incurred in excessive and unnecessary prescription costs related to opioids;

- all costs incurred and likely to be incurred in an effort to combat the abuse and diversion of opioids in the City of Reno;

- recovering damages incurred as costs associated with the harm done to the public health and safety.

See FAC at ¶ 40.

To perform its role to protect public health, welfare, and safety, Reno must effectively operate and manage its own agencies including: law enforcement, health districts, coroners, and emergency services. Because the Legislature has expressed its intent to provide the City with authority to sue entities who have injured Reno's local operations and depleted its resources, the City has standing to bring this action regardless of whether Defendants caused similar damage elsewhere.

5. Economic Loss Doctrine Does not Apply

Distributors' blanket assertion that the City cannot recover economic loss damages on any of the claims asserted in the FAC is unsupported by Nevada law. Pure economic loss is a legal term of art generally referring to the types of economic loss that would be recoverable as damages in a suit for breach of contract. *Giles v. GMAC*, 494 F. 3d 865, 878 (9th Cir. 2007) (relying upon *Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000) overruled on other*

grounds by Olson v. Richard, 120 Nev. 240, 89 P.3d 31 (2004). In *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 68 206 P.3d 81, 83 (2009), cited by Distributors, the Nevada Supreme Court described the economic loss doctrine as, "mark[ing] the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby generally encourages citizens to avoid causing physical harm to others." *Id.*

Nevada courts, however, have acknowledged exceptions to the economic loss rule. *Giles, Id.* at 878. The *Terracon* Court even referred to negligent misrepresentation as one such exception, and noted that, "exceptions to the doctrine apply in certain categories of cases when strong countervailing considerations weigh in favor of imposing liability." *Terracon*, 125 Nev. at 73, 79, 206 at 86, 89. Rather than providing an exhaustive list of claims subject to the economic loss doctrine, Nevada courts have adopted a "more reasoned method of analyzing the economic loss doctrine," which involves examining the policies in order to determine the boundary between the "duties that exist separately in contract and tort." *Calloway*, 116 Nev. 250 at fn 3.

Reno does not allege any breaches of contract between the parties and this is not a products liability case. This case involves claims for public nuisance (statutory and common law), negligence, negligent misrepresentation, and unjust enrichment - all based upon Defendants' deceptive and unlawful conduct in marketing, selling and distributing opioids in the City of Reno. Contrary to contract law, which enforces the expectancy interests of the party, "tort law is designed to secure the protection of all citizens from the danger of physical harm to their persons or to their property and seeks to enforce standards of conduct." *Calloway v. City of Reno*, 116 Nev. 250, 260 (Nev. 2000) (superseded by statute as it relates to construction defect

claims in *Olson v. Richard*, 120 Nev. 240 (Nev. 2004)). Such standards of conduct are created, and imposed, by society. *Id.* Further, tort law has historically provided individuals with the ability to pursue claims for wrongs even if they caused only economic damages. *Giles*, 494 F.3d at 875 (internal citations omitted). Nevada's economic loss doctrine does not apply to bar tort recovery "where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Id.* at 879.

Here, Reno has pled facts which, if proven, plausibly establish the existence of a common law tort duty. Reno alleges that Distributors committed, and continue to commit, numerous intentional and/or unlawful acts which resulted in the damages suffered by the City. As discussed above, the FAC contains sufficient allegations regarding Distributors' conduct to provide them with notice that Reno is seeking damages related to such actions. Given the nature of these claims, and given the broad extent of the damage inflicted by Distributors' conduct, "strong countervailing considerations weigh in favor of imposing liability." *Terracon*, 125 at 73, 206 at 86.

Finally, although the City is not asserting personal injury claims on behalf of individual residents, the City's tort and nuisance claims address the City's own past, present, and future expenditures to address drug and addiction-related injuries that have plagued county residents as a result of Defendants' conduct. *See* e.g. FAC ¶¶ 40, 181, 197, and 269 ("Plaintiff has incurred substantial costs including but not limited … addiction treatment, and other services necessary for the treatment of people addicted to prescription opioids."). The underlying physical harm and injuries Defendants caused to the public show that there is more at stake here than purely economic damages, and the economic loss doctrine should not be applied.

E. THE CITY'S UNJUST ENRICHMENT CLAIM IS ALSO PROPERLY PLED

The Distributors next assert that Reno's unjust enrichment claim should be dismissed because the City has not "conferred a benefit" on them. *See* Mot. at 21:16-17. However, as alleged in the FAC, "Plaintiff has conferred a benefit upon Defendants, by paying for what may be called Defendants' externalities- the costs of the harm caused by Defendants' negligent distribution and sales practices." *See* FAC ¶290 (emphasis added). In return, Distributors have made "substantial profits while fueling the prescription drug epidemic into Reno," and they continue to receive considerable profits from their sales in City. *Id.* at ¶¶ 292-293; *See also* ¶176. Meanwhile, Reno has been forced to carry the enormous costs of Distributors' misconduct. *Id.* at ¶¶28-29; 33.

The "externalities" specifically alleged in the City's Complaint constitute a benefit for purposes of an unjust enrichment claim. *See City of Los Angeles v. JPMorgan Chase & Co.*, 2014 WL 6453808, at *10 (C.D. Cal. Nov. 14, 2014) ("Here, the City contends that the benefits it conferred upon Chase are the so-called 'externalities'-the costs of harm caused by Chase's discriminatory lending that the City has had to shoulder....This Court, in line with similar decisions from trial courts across the country, finds that the City has properly alleged a benefit."); *See also City of Cleveland*, 97 F. Supp. 2d at 829 ("the City has paid for what may be called the Defendants' externalities—the costs of the harm caused by Defendants' failure"). *See also Beretta*, 768 N.E.2d at 1148 (complaint sufficiently alleged pecuniary harm in the form of increased municipal expenditures as a direct result of defendants' bad acts).[6]

[6] Other courts agree. *See City of L.A. v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1061 (C.D. Cal. 2014) (plaintiff's claim "that the benefits it conferred on Defendants are the so-called 'externalities'—the costs of harm caused by Defendants' discriminatory lending that the City has had to shoulder" states an unjust enrichment claim); *City of Boston v. Smith & Wesson Corp.*, *infra*, (sustaining unjust-enrichment claim at pleadings stage based on "externalities" that the city covered due to gun manufacturer's actions); *City of New York v. Lead Indus. Ass'n, Inc.*, 190 A.D.2d 173 (N.Y. App. Div. 1993) (allowing restitution claim for "reasonable costs of [lead] abatement" to survive motion to dismiss).

Moreover, in this case, the cost of Distributors' wrongful conduct in marketing opioids includes increased healthcare services and addiction treatment for opioid users, to name but a few categories. FAC at ¶ 35. These costs are part of Distributors' businesses, but they do not bear these costs. Indeed, Distributors essentially used the City and its resources to pay for their "negative externalities" – the cost of the harms caused by their wrongful practices. *McCloud v. Testa*, 97 F.3d 1536, 1551 n.21 (6th Cir. 1996)("Negative externalities occur when the private costs of some activity are less than the total costs to society of that activity," and thus the "private parties engaging in that activity essentially shift some of their costs onto society as a whole.")[7] Distributors therefore saved costs and expenses that allowed them to market and sell more opioids, and make more money, than if they had internalized the actual costs of their activities.

Although Distributors argue that there was "nothing inequitable or unconscionable" about its conduct in Reno, that argument raises issues of fact not appropriate for resolution at the pleading stage. Indeed, the MDL Court very recently ruled that an Ohio county properly pleaded a nearly identical claim for unjust enrichment, "Plaintiffs state a facially plausible unjust enrichment claim on the theory that they conferred a benefit upon all Defendants by alleging they paid for the cost of harm caused by defendant's conduct." *See* **Exhibit "3"** [*County of*

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[7] *See also Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co.*, 91 F. Supp. 3d 940, 986 (S.D. Ohio 2015) (a negative externality- under Ohio law a plaintiff whose property was used as a dumping site may plead unjust enrichment as an alternative theory of damages since "it would be unjust to allow Defendant to benefit from disposal of waste on a plaintiff's property without payment of any kind."). *See also Moore v. Texaco, Inc.*, 244 F.3d 1229, 1233 (10th Cir. 2001) ("The performance of another's statutory duty to remediate pollution can give rise to a claim for unjust enrichment."); *Evans v. City of Johnstown*, 96 Misc. 2d 755, 766-70 (N.Y. Sup. Ct. 1978) (holding that plaintiff could proceed on claim for unjust enrichment against municipalities for money saved by not properly disposing of waste materials); *United States v. Healy Tibbitts Const. Co., 607 F. Supp.* 540, 542-43 (N.D. Cal. 1985) (in case involving party refusing to clean up oil spill, court noted that the "portrait of [the defendant].

Summit, Ohio] at p.95; **Exhibit "5"** *[State of New Hampshire]* at p. 30. Accepting the allegations set forth in the FAC as true, and drawing every fair inference in favor of the City, as this Court must do, the City has properly alleged a claim for unjust enrichment.

F. RENO SHOULD BE GRANTED LEAVE TO AMEND

NRCP 15(a) provides that when a party seeks leave to amend a pleading after the initial responsive pleadings have been served, leave shall be freely given when justice so requires. *Nutton v. Sunset Station, Inc.*, 357 P.3d 966, 968, (Nev. App. 2015). "'[R]ule 15's policy of favoring amendments to pleadings should be applied with extreme liberality and amendment is to be liberally granted where ... the plaintiff may be able to state a claim'" *Select Portfolio Servicing, Inc. v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 385 P.3d 59 (Nev. 2016). Should this Court find any alleged deficiencies with the City's pleading, which it should not, such deficiencies could be cured by amending the FAC. Leave to amend is particularly appropriate because Reno has "not yet had the benefit of the Court's evaluation of the sufficiency of [its] claims." *Sathianathan v. Smith Barney*, 2004 WL 3607403 at *9 (N.D. Cal. June 6, 2005).

IV. CONCLUSION

Based on the foregoing, Reno respectfully requests the Distributors' Motion be denied in its entirety.

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AFFIRMATION

The undersigned affirms that the preceding document does not contain personal information as described in WDCR 8.

DATED this 26th day of April, 2019.

EGLET PRINCE

/s/ Robert T. Eglet, Esq.

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Attorneys for Plaintiff, the City of Reno

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on April 26th, 2019, I caused the foregoing document entitled **CITY OF RENO'S OPPOSITION TO DISTRIBUTOR DEFENDANTS' JOINT MOTION TO DISMISS AND ALL JOINDERS THERETO** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Second Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules and U.S. regular mail as follows:

Steven E. Guinn Ryan W. Leary LAXALT & NOMURA, LTD. 9790 Gateway Dr., Ste. 200 Reno, NV 89521 Rocky Tsai ROPES & GRAY LLP Three Embarcadero Center San Francisco, CA 94111-4006 William T. Davison ROPES & GRAY LLP Prudential Tower 800 Boylston Street Boston, MA 02199 *Attorneys for Mallinckrodt LLC; Mallinckrodt US Holdings, Inc.*	James J. Pisanelli Robert A. Ryan PISANELLI BICE 400 S. 7th Street, Ste. 300 Las Vegas, NV 89101 *Attorneys for AmerisourceBergen Drug Corp.*
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EGLET PRINCE

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Three Bryant Park, 1095 Ave of the Americas New York, New York 10036-6797 *Attorneys for Purdue Pharmaceuticals, L.P.; The Purdue Frederick Company, Inc.; Purdue Pharma, Inc.; Purdue Pharma, L.P.*	2300 U.S. Bancorp Tower 111 S.W. Fifth Ave Portland, Oregon 97204 *Attorneys for Insys Therapeutics, Inc.*
Lawrence Semenza III Christopher D. Kircher Jarrod Rickard Katie L. Cannata SEMENZA KIRCHER RICKARD 10161 Park Run Drive, Suite 150 Las Vegas, Nevada 89145 Scott D. Powers David Arlington BAKER BOTTS 98 San Jacinto Blvd Austin, Texas 78701 Kevin Sadler BAKER BOTTS 1001 Page Mill Road, Bldg. One, Ste. 200 Palo Alto, California 94304 *Attorneys for Assertio Therapeutics, Inc. fka Depomed, Inc.; Cardinal Health, Inc.; Mallinckrodt Brand Pharmaceuticals Inc.; Mallinckrodt, LLC; Ortho-McNeil-Janssen Pharmaceuticals, Inc. nka Janssen Pharmaceutica, Inc. nka Actavis, Inc, fka Watson Pharmaceuticals, Inc.; Abbvie, Inc.; Carindal Health 108 LLC dba Metro Medical Supply; Robert Gene Rand, MD; Rand Family Care, LLC*	Daniel F. Polsenberg J. Christopher Jorgensen LEWIS ROCA ROTHGERBER CHRISTIE LLP 3993 Howard Hughes Pkwy, Ste. 600 Las Vegas, Nevada 89169 *Attorneys for Cardinal Health, Inc., Cardinal Health 6, Inc.; Cardinal Health Technologies LLC; Cardinal Health 414 LLC; and Cardinal Health 200 LLC*
Philip M. Hymanson HYMANSON & HYMANSON PLLC 8816 Spanish Ridge Avenue Las Vegas, Nevada 89148 Steven A. Reed MORGAN, LEWIS & BOCKIUS LLP 1701 Market Street Philadelphia, Pennsylvania 19103	

Collie F. James, IV MORGAN, LEWIS & BOCKIUS LLP 600 Anton Blvd., Suite 1800 Costa Mesa, California 92626-7653 Brian M. Ercole MORGAN, LEWIS & BOCKIUS LLP 200 South Biscayne Blvd., Suite 5300 Miami, Florida 33131 *Attorneys for Teva Pharmaceuticals USA, Inc.; Cephalon, Inc; Watson Laboratories, Inc.; Actavis LLC; and Actavis Pharma, Inc. fka Watson Pharma, Inc.*	

/s/ Crystal Garcia
An Employee of EGLET PRINCE

EGLET PRINCE

INDEX OF EXHIBITS

Exhibit	Description	Pages
1	Order Regarding Defendants' Motion to Dismiss, *Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017)	5
2	Order *[New York Counties]* at pp. 27-28	45
3	Opinion and Order, *In Re National Prescription Opiate Litigation, The County of Summit, Ohio, et al. v. Purdue Pharma L.P., et al.* , United States District Court, District of Ohio Eastern Division Case No. 1:17-md-2804 (2017) (Doc. No. 1203)	39
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7	Order Granting In Part and Denying In Part Defendants' Motion to Dismiss *City of Everett v. Purdue Pharma L.P., et al.*, 2:17-cv-00209-RSM, U.S. Dist. LEXIS 156653 (W.D. Wa. Sep. 25, 2017) at p. 14	20

EGLET PRINCE

EXHIBIT 1

ORDR
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Attorneys for Plaintiff, Clark County

DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY, Plaintiff, v. PURDUE PHARMA, L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY, INC. d/b/a THE PURDUE FREDERICK COMPANY, INC.; PURDUE PHARMACEUTICALS, L.P.; ADARE PHARMACEUTICALS INC,; ABBVIE, INC.; ABBVIE US, LLC; MYLAN PHARMACEUTICALS, INC.; MYLAN TECHNOLOGIES, INC; DEPOMED, INC.; DAIICHI SANKYO, INC.; TEVA	Case No.: A-17-765828-C Dept No.: XVI **ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS**

03-08-19P1:30 RCVD

PHARMACEUTICALS USA, INC.; CEPHALON, INC.; JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEUTICA, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.; ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.; ENDO HEALTH SOLUTIONS INC.; ENDO PHARMACEUTICALS, INC.; ALLERGAN PLC f/k/a ACTAVIS PLC; ACTAVIS, INC. f/k/a WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; INSYS THERAPEUTICS, INC., MALLINCKRODT PLC, MALLINCKRODT LLC; ACTAVIS LLC; AND ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC.; AMERISOURCEBERGEN DRUG CORPORATION; CARDINAL HEALTH, INC.; CARDINAL HEALTH 6 INC.; CARDINAL HEALTH TECHNOLOGIES LLC; CARDINAL HEALTH 414 LLC; CARDINAL HEALTH 200 LLC; McKESSON CORPORATION; MASTERS PHARMACEUTICAL, LLC f/k/a MASTERS PHARMACEUTICAL, INC.; C & R PHARMACY d/b/a KEN'S PHARMACY f/k/a LAM'S PHARMACY, INC.; AIDA B MAXSAM; ALLISON FOSTER; JAMES KUMLE; STEVEN A HOLPER MD; STEVEN A. HOLPER, M.D., PROFESSIONAL CORPORATION; HOLPER OUT-PATIENTS MEDICAL CENTER, LTD.; DOES 1 through 100; ROE CORPORATIONS 1 through 100 and ZOE PHARMACIES 1 through 100, inclusive,

Defendants.

ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS

On February 26 and February 27, 2019, the following Motions to Dismiss and Joinders thereto came before the Court:

[redacted]

1. Manufacturers' Joint Motion to Dismiss;
2. Distributors' Joint Motion to Dismiss;
3. Mallinckrodt's Joinder to Manufacturers' Joint Motion to Dismiss;
4. Assertio Therapeutics, Inc. f/k/a Depomed, Inc.'s Motion to Dismiss;
5. Endo Health Solutions, Inc. and Endo Pharmaceuticals, Inc.'s Motion to Dismiss;
6. Janssen Pharmaceuticals, Inc. and Johnson & Johnson's Motion to Dismiss;
7. Insys Therapeutics, Inc.'s Motion to Dismiss;
8. Cephalon, Inc. and Teva Pharmaceuticals USA, Inc.'s Motion to Dismiss;
9. Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma's Motion to Dismiss;
10. Allergan Finance, LLC and Allergan PLC's Motion to Dismiss;
11. Aida Maxsam's Motion to Dismiss;
12. James Kumle's Motion to Dismiss; and
13. C&R Pharmacy d/b/a Ken's Pharmacy f/k/a Lam's Pharmacy, Inc.'s Motion to Dismiss.

Robert T. Eglet, Esq., Robert M. Adams, Esq., Cassandra S.M. Cummings, Esq., and Richard K. Hy, Esq. appeared on behalf of Plaintiff CLARK COUNTY, and all other appearances as noted on the record.[1]

The Court, having considered the papers and pleadings on file and argument of counsel, and good cause appearing, finds, concludes, and rules as follows:

THE COURT FINDS that it must regard all factual allegations in Plaintiff's First Amended Complaint as true when ruling upon a Motion to Dismiss for failure to state a claim under NRCP 12(b)(5).

THE COURT FINDS that this case involves matters of local concern.

THE COURT FINDS Clark County has standing to bring its causes of action against Defendants.

THE COURT FINDS that the facts of this case do not support any finding of federal preemption.

[1] *See* Relevant Excerpt of February 26, 2019 Transcript, pg. 1-14, and Excerpt of February 27, 2019 Transcript, pg. 1-13, attached collectively as Exhibit "1."

THE COURT FINDS that Clark County's claims are not barred by the Municipal Cost Recovery Rule, which has not been adopted in the state of Nevada.

THE COURT FINDS that Clark County has met the pleading standards set forth in NRCP 8.

THE COURT FINDS that Clark County is not required to meet heightened pleading standards in NRCP 9(b) because Clark County has not alleged any causes of action for fraud or mistake.

THE COURT FINDS that Clark County's claims for punitive damages are clearly set forth in the First Amended Complaint, but that a separate claim for relief for punitive damages is not necessary.

Based on the foregoing, **THE COURT HEREBY ORDERS:**

Each of the Motions to Dismiss and Joinders thereto listed above is **DENIED**, with the exception that Clark County is **ORDERED** to remove its Sixth Cause of Action for punitive damages against all Defendants.

IT IS FURTHER ORDERED that Clark County shall file and serve the Second Amended Complaint as soon as practicable following the February 27, 2019 hearing date.

IT IS FURTHER ORDERED that Defendants must file Answers to the Second Amended Complaint within ten (10) days of service of the same.

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IT IS FURTHER ORDERED that Counsel for Allergan PLC and Counsel for Clark County shall confer with each other for the purpose of reaching a stipulation to enter with the Court regarding substituting Allergan PLC with the correct Allergan entities./ / /

IT IS SO ORDERED.

DATED this 15 day of March, 2019.

DISTRICT COURT JUDGE

RESPECTFULLY SUBMITTED BY:

EGLET PRINCE

ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
Attorneys for Plaintiff, Clark County

EXHIBIT 2

SHORT FORM ORDER

INDEX No. 400000/2017

SUPREME COURT - STATE OF NEW YORK
NEW YORK STATE OPIOID LITIGATION PART 48 - SUFFOLK COUNTY

PRESENT:

E-FILE

Hon. JERRY GARGUILO
Justice of the Supreme Court

	:	MOTION DATE 2/7/18
	:	ADJ. DATE 3/21/18
	:	Mot. Seq. #001 - MD
	:	Mot. Seq. #002 - MD
IN RE OPIOID LITIGATION	:	Mot. Seq. #004 - MD
	:	Mot. Seq. #005 - MD
	:	Mot. Seq. #007 - MotD
	:	Mot. Seq. #018 - MD
	:	Mot. Seq. #019 - MD

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants Endo Health Solutions, Inc. and Endo Pharmaceuticals, Inc. (Mot. Seq. #001), dated November 10, 2017, and supporting papers (including Memorandum of Law); (2) Memorandum of Law in Opposition (Mot. Seq. #001), dated January 19, 2018; (3) Reply Memorandum of Law (Mot. Seq. #001), dated February 23, 2018; (4) Notice of Motion by defendants Purdue Pharma, L.P., Purdue Pharma, Inc., and the Purdue Frederick Company, Inc. (Mot. Seq. #002), dated November 10, 2017, and supporting papers (including Memorandum of Law); (5) Affidavit in Opposition by the plaintiffs (Mot. Seq. #002, #018, #019), dated January 18, 2018, and supporting papers (including Memorandum of Law); (6) Reply Memorandum of Law (Mot. Seq. #002), dated February 23, 2018; (7) Notice of Motion by defendants Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. (Mot. Seq. #004), dated November 10, 2017, and supporting papers (including Memorandum of Law); (8) Memorandum of Law in Opposition (Mot. Seq. #004), dated January 19, 2018; (9) Reply Memorandum of Law (Mot. Seq. #004), dated February 23, 2018; (10) Notice of Motion by defendants Cephalon, Inc. and Teva Pharmaceuticals USA, Inc. (Mot. Seq. #005), dated November 10, 2017, and supporting papers (including Memorandum of Law); (11) Memorandum of Law in Opposition (Mot. Seq. #005), dated January 19, 2018; (12) Reply Memorandum of Law (Mot. Seq. #005), dated February 23, 2018; (13) Notice of Motion by defendants Allergan plc and Actavis, Inc. (Mot. Seq. #007), dated November 10, 2017, and supporting papers (including Memorandum of Law); (14) Affidavit in Opposition by the plaintiffs (Mot. Seq. #007), dated January 19, 2018, and supporting papers (including Memorandum of Law); (15) Reply Memorandum of Law (Mot. Seq. #007), dated February 23, 2018; (16) Notice of Motion by defendants Purdue Pharma, L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Inc., Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Johnson & Johnson, Janssen Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., Endo Health Solutions, Inc., Endo Pharmaceuticals, Inc., Allergan plc, and Actavis, Inc. (Mot. Seq. #018), dated November 10, 2017, and supporting papers (including Memorandum of Law); (17) Memorandum of Law in Opposition (Mot. Seq. #018), dated January 19, 2018; (18) Reply Memorandum of Law (Mot. Seq. #018), dated February 23, 2018; (19) Notice of Motion by defendants Johnson & Johnson and Janssen Pharmaceuticals, Inc. (Mot. Seq. #019), dated November 10, 2017, and supporting papers (including Memorandum of Law); (20) Memorandum of Law in Opposition (Mot. Seq. #019), dated January 19, 2018; (21) Reply Memorandum of Law (Mot. Seq. #019), dated February 23, 2018; it is

ORDERED that the motion by defendants Endo Health Solutions, Inc. and Endo Pharmaceuticals, Inc., the motion by defendants Purdue Pharma, L.P., Purdue Pharma, Inc., and the

Purdue Frederick Company, Inc., the motion by defendants Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc., the motion by defendants Cephalon, Inc. and Teva Pharmaceuticals USA, Inc., the motion by defendants Allergan plc and Actavis, Inc., the motion by defendants Purdue Pharma, L.P., Purdue Pharma, Inc., The Purdue Frederick Company, Inc., Cephalon, Inc., Teva Pharmaceuticals USA, Inc., Johnson & Johnson, Janssen Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc., Endo Health Solutions, Inc., Endo Pharmaceuticals, Inc., Allergan plc, and Actavis, Inc., and the motion by defendants Johnson & Johnson and Janssen Pharmaceuticals, Inc., are hereby consolidated for purposes of this determination; and it is

ORDERED that defendants' motions for an order pursuant to CPLR 3211, dismissing as against each and all of them the master form long complaint filed in this action, are granted to the limited extent set forth below, and are otherwise denied.

The plaintiffs are counties within the State of New York that have commenced separate actions against certain pharmaceutical manufacturers for harm allegedly caused by false and misleading marketing campaigns promoting semi-synthetic, opium-like pharmaceutical pain relievers, including oxycodone, hydrocodone, oxymorphone, and tapentadol, as well as the synthetic opioid prescription pain medication fentanyl, as safe and effective for long-term treatment of chronic pain. Also named as defendants in those actions are certain pharmaceutical distributors that allegedly distributed those opium-like medications (hereinafter referred to as prescription opioids, pharmaceutical opioids, or opioids) to retail pharmacies and institutional health care providers for customers in such counties, and individual physicians allegedly "instrumental in promoting opioids for sale and distribution nationally" and in such counties. Briefly stated, the plaintiffs allege that tortious and illegal actions by the defendants fueled an opioid crisis within such counties, causing them to spend millions of dollars in payments for opioid prescriptions for employees and Medicaid beneficiaries that would have not been approved as necessary for treatment of chronic pain if the true risks and benefits associated with such medications had been known. They also allege that the defendants' actions have forced them to pay the costs of implementing opioid treatment programs for residents, purchasing prescriptions of naloxone to treat prescription opioid overdoses, combating opioid-related criminal activities, and other such expenses arising from the crisis.

One such lawsuit was commenced in August 2016 by Suffolk County and assigned to the Commercial Division of the Supreme Court. By order dated July 17, 2017, the Litigation Coordinating Panel of the Unified Court System of New York State directed the transfer of eight opioid-related actions brought by other counties, and any prospective opioid actions against the manufacturer, distributor, and individual defendants, to this court for pre-trial coordination. That same day, the undersigned issued a case management order reiterating that the individual actions are joined for coordination, not consolidated, and directing that a master file, known as "In re Opioid Litigation" and assigned index number 400000/2017, be established for the electronic filing of all documents related to the proceeding. The undersigned further directed the plaintiffs to file and serve a master long form complaint subsuming the causes of action alleged in the various complaints, and directed the manufacturer defendants, the distributor defendants, and the individual defendants to file joint motions pursuant to CPLR 3211, seeking dismissal of the master complaint, all by certain dates.

The master long form complaint filed by the plaintiffs names as defendants the pharmaceutical manufacturers Purdue Pharma L.P., Purdue Pharma, Inc., and The Purdue Frederick Company, Inc. (collectively referred to as Purdue), Teva Pharmaceuticals USA, Inc., and Cephalon, Inc. (collectively referred to as Cephalon), Johnson & Johnson, Janssen Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc., n/k/a Janssen Pharmaceuticals, Inc., and Ortho-McNeil-Janssen Pharmaceuticals, Inc., n/k/a Janssen Pharmaceuticals, Inc. (collectively referred to as Janssen), Endo Health Solutions, Inc., and Endo Pharmaceuticals, Inc. (collectively referred to as Endo), Allergan plc f/k/a Actavis plc, Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. f/k/a Watson Pharma, Inc. (collectively referred to as Actavis), and Insys Therapeutics, Inc. (referred to as Insys). Purdue allegedly manufactures, promotes, and sells various prescription opioids, including OxyContin and MS Contin, both of which are sold as extended release tablets and indicated for around-the-clock, long-term pain treatment, and Hysingla, which also is indicated for around-the-clock treatment of severe pain. Cephalon allegedly manufactures, promotes, and sells Actiq and Fentora, fentanyl drugs approved by the FDA for "breakthrough pain" in cancer patients who are tolerant to opioid therapy; it also allegedly sold generic opioids, including a version of OxyContin, from 2005 through 2009. Janssen allegedly manufactures, promotes, and sells Duragesic, a fentanyl drug approved for opioid-tolerant patients requiring around-the-clock opioid treatment, which is sold in the form of a transdermal patch. Until 2015, it also sold the prescription opioids Nucynta ER and Nucynta, both of which initially were approved for the management of moderate to severe pain, with Nucynta ER indicated for around-the-clock, long-term opioid treatment. Endo allegedly manufactures, markets, and sells the branded opioids Opana, Percodan, and Percocet, all three of which are marketed for moderate to severe pain, as well as generic opioids. Until June 2017, it also sold Opana ER, an oxymorphone drug in the form of an extended-release tablet, which was approved for around-the-clock treatment of moderate to severe pain, but it was removed from the market following a request by the FDA. Actavis allegedly markets and sells the branded drugs Kadian and Norco, and generic versions of Opana and Duragesic. Kadian, an extended-release morphine sulfate drug, allegedly is approved for the management of pain requiring around-the-clock, long-term treatment, and Norco is a generic version of Kadian. Insys allegedly develops, markets, and sells the branded prescription opioid Subsys, a sublingual spray of fentanyl.

As relevant to the motions that are the subject of this order, the master long form complaint (hereinafter the complaint) alleges that Purdue, Cephalon, Janssen, Endo, and Actavis (hereinafter collectively referred to as the manufacturer defendants), to maximize their profits, intentionally misrepresented to the public and the medical community the risks and benefits of opioids for the treatment of chronic pain. It alleges that to reverse the stigma historically associated with opioid use so that more patients would request opioids, more physicians would write prescriptions for them, and more healthcare insurers would pay for such treatment, the manufacturer defendants developed marketing campaigns, which included such strategies as branded and unbranded advertisements, educational programs and materials, and detailing of physicians, that overstated the benefits of prescription opioids for chronic pain (i.e., pain lasting three or more months) and misrepresented–even trivialized–the dangers associated with the long-term use of such medications. It further alleges that the defendants sold their pharmaceutical opioids to consumers within the plaintiffs' jurisdictions.

The complaint also names as defendants the pharmaceutical distributors McKesson Corporation, Cardinal Health, Inc., Amerisource Drug Corporation, American Medical Distributors, Inc., Bellco Drugs Ltd., Kinray, LLC, PSS World Medical, Inc., and Rochester Drug Cooperative, Inc., and alleges that such defendants distributed pharmaceuticals to pharmacies and institutional providers within plaintiff counties. In addition, it names the physicians Russell Portenoy, Perry Fine, Scott Fishman, and Lynn Webster as defendants. The court notes that a stipulation discontinuing the claims against Dr. Portenoy without prejudice to any related action was filed by plaintiffs on March 16, 2018.

The complaint sets forth seven causes of action against all defendants. The first cause of action alleges deceptive business practices in violation of General Business Law § 349, and the second cause of action alleges false advertising in violation of General Business Law § 350. The third cause of action asserts a common-law public nuisance claim, the fourth cause of action asserts a claim for violation of Social Services Law § 145-b, and the fifth cause of action asserts a claim for fraud. The sixth cause of action is for unjust enrichment, and the seventh cause of action is for negligence.

The manufacturer defendants now jointly and separately move, pre-answer, for an order dismissing the complaint pursuant to CPLR 3211 (a) (1), (5), (7), and (8). While the court recognizes that subdivision (e) of CPLR 3211 permits a defendant to make only one motion under subdivision (a), it also recognizes the complexity of this matter as well as its unusual procedural framework; as the plaintiffs have been afforded ample opportunity to respond and have, in fact, submitted substantive opposition to each of the motions, the court will, for current purposes, waive compliance with the single-motion rule.

Before addressing the more comprehensive issues raised by the defendants, the court notes, insofar as certain of the manufacturer defendants seek dismissal on the ground that they are mere affiliates, the lack of evidence in the record to support any such claims, and the motions are denied to that extent without prejudice to any motions for summary judgment after joinder of issue.

When considering a motion to dismiss, a court must give the pleading a liberal construction, presume the allegations of the complaint are true, afford the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; ***Leon v Martinez***, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). "Whether a plaintiff can ultimately establish [the] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d at 19, 799 NYS2d at 175).

Dismissal under CPLR 3211 (a) (1) may be granted only if the documentary evidence "utterly refutes plaintiff's factual allegations" and conclusively establishes a defense to the asserted claim as a matter of law (***Goshen v Mutual Life Ins. Co.***, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d at 88, 614 NYS2d at 972). A party seeking dismissal under CPLR 3211 (a) (5) based on the doctrine of res judicata must demonstrate that a final adjudication of a claim in a prior action between the parties on the merits by a court of competent jurisdiction precludes relitigation of that claim in the instant action (***Miller Mfg. Co. v Zeiler***, 45 NY2d 956, 958, 411 NYS2d 558 [1978]).

Likewise, a defendant raising a statute of limitations defense under CPLR 3211 (a) (5) bears the initial burden of establishing a prima facie case that the time to commence the cause of action expired (*see* ***Texeria v BAB Nuclear Radiology, P.C.***, 43 AD3d 403, 840 NYS2d 417 [2d Dept 2007]).

On a motion to dismiss under CPLR 3211 (a) (7), the initial test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; ***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). If documentary proof is submitted by a party seeking relief under CPLR 3211 (a) (7), the truthfulness of the pleadings need not be assumed. Instead, the test applied by the court is whether the plaintiff has a cause of action, not whether one is stated in the complaint (***Guggenheimer v Ginzburg***, 43 NY2d at 275, 401 NYS2d at 185; ***Peter F. Gaito Architecture, LLC v Simone Dev. Corp.***, 46 AD3d 530, 530, 846 NYS2d 368, 369 [2d Dept 2007]; ***Rappaport v International Playtex Corp.***, 43 AD2d 393, 395, 352 NYS2d 241, 243 [3d Dept 1974]).

If a defendant challenges the propriety or adequacy of service of a summons and complaint under CPLR 3211 (a) (8), it is the plaintiff's burden to prove, by a preponderance of the evidence, that jurisdiction over the defendant was obtained by proper service of process (*e.g.* ***Aurora Loan Servs., LLC v Gaines***, 104 AD3d 885, 962 NYS2d 316 [2d Dept 2013]). The plaintiff, however, is not required to allege in the complaint the basis for personal jurisdiction (***Fishman v Pocono Ski Rental***, 82 AD2d 906, 440 NYS2d 700 [2d Dept 1981]), and to withstand a pre-answer motion to dismiss, the plaintiff need only demonstrate that facts "may exist" to support the exercise of jurisdiction over the defendant (CPLR 3211 [d]; ***Peterson v Spartan Indus.***, 33 NY2d 463, 354 NYS2d 905 [1974]; ***Ying Jun Chen v Lei Shi***, 19 AD3d 407, 796 NYS2d 126 [2d Dept 2005]).

In the analysis that follows, the court will first discuss those issues bearing on multiple causes of action before examining each of the causes of action separately for legal sufficiency.

Preemption

The manufacturer defendants contend that many of the plaintiffs' claims concerning alleged misrepresentations are not actionable under federal preemption principals. They seek dismissal of the plaintiffs' claims to the extent that they challenge such defendants' promotion of opioid medications consistent with Food and Drug Administration ("FDA") approved indications. Purdue also seeks dismissal on the ground that the plaintiffs' claims are preempted by federal law. Purdue argues that the plaintiffs wrongfully demand that it unilaterally change the FDA-approved uses for its prescription opioid medications. It also contends that the plaintiffs' claims would prohibit it from marketing opioids for their FDA-approved uses and indications, and would impose a duty upon the manufacturer defendants to alter the labels of their drugs in a manner that conflicts with their duties under federal law. The manufacturer defendants collectively insist that their marketing of opioids is consistent with FDA-approved labeling; therefore, any state law that would require them to make statements that are inconsistent with existing labeling, would directly conflict with the FDA regulations.

The plaintiffs oppose the motion, arguing the United States Supreme Court has ruled that state tort claims do not stand as an obstacle to accomplishing the purposes of the Food, Drug, and Cosmetic Act (FDCA), 21 USC § 301 et seq., and FDA approval of a drug was not intended to displace state claims regarding the drug. The plaintiffs assert that despite FDA approval of the manufacturer defendants' opioid medications, such defendants were not required to repeat information they knew to be false in advertising and promoting their products after they became aware of new information that did not support their statements. The plaintiffs further assert that the manufacturer defendants failed to identify any federal obligations with which the plaintiffs' claims conflict, and that they ignore the plaintiffs' allegations that they engaged in off-label marketing and made representations designed to undermine information in drug labels.

The Supremacy Clause of the United States Constitution establishes that federal law "shall be the supreme Law of the Land" (US Const, art VI, cl 2). "A fundamental principle of the Constitution is that Congress has the power to preempt state law" through its enactments (***Crosby v National Foreign Trade Council***, 530 US 363, 372, 120 S Ct 2288, 2293 [2000]; *see* ***Lee v Astoria Generating Co., L.P.***, 13 NY3d 382, 892 NYS2d 294 [2009]; *see also* ***Doomes v Best Tr. Corp.***, 17 NY3d 594, 601, 935 NYS2d 268 [2011]; ***Balbuena v IDR Realty LLC***, 6 NY3d 338, 812 NYS2d 416 [2006]). In certain instances, Congress may expressly preempt the state law; however, even where federal law does not contain an express preemption provision, state law must still yield to federal law to the extent of any conflict therewith (*see* ***Warner v American Fluoride Corp.***, 204 AD2d 1, 616 NYS2d 534 [2d Dept 1994]). This doctrine of implied conflict preemption is generally found in two forms: impossibility preemption, which exists where "it is impossible for a private party to comply with both state and federal requirements," and obstacle preemption, which exists where "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (***Doomes v Best Tr. Corp.***, 17 NY3d at 603, 935 NYS2d at 273 [internal quotation marks omitted]; *see* ***Altria Group, Inc. v Good***, 555 US 70, 129 S Ct 538 [2008]; ***City of New York v Job-Lot Pushcart***, 88 NY2d 163, 643 NYS2d 944 [1996]). In making a determination whether conflict preemption applies to bar a cause of action, the court must consider congressional intent, i.e., whether Congress intended to set aside the laws of a state to achieve its objectives (***Barnett Bank of Marion County, NA v Nelson***, 517 US 25, 30, 116 S Ct 1103, 1107 [1996]; ***Louisiana Pub. Serv. Commn. v FCC***, 476 US 355, 369, 106 S Ct 1890, 1899 [1986]; ***Lee v Astoria Generating Co., L.P.***, 13 NY3d at 391, 892 NYS2d at 299). The Supreme Court has "observed repeatedly that pre-emption is ordinarily not to be implied absent an actual conflict" (***English v General Elec. Co.***, 496 US 72, 90, 110 S Ct 2270, 2281 [1990]; *see* ***Cipollone v Liggett Group, Inc.***, 505 US 504, 112 S Ct 2608 [1992]). "The mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power" (***Madeira v Affordable Hous. Found., Inc.***, 469 F3d 219, 241 [2d Cir 2006] [internal quotation marks omitted]).

It is well established that "the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (***Medtronic, Inc. v Lohr***, 518 US 470, 475, 116 S Ct 2240, 2245 [1996]; *see* ***Balbuena v IDR Realty LLC***, 6 NY3d 338, 812 NYS2d 416; ***Madeira v Affordable Hous. Found., Inc.***, 469 F3d at 241). The protection of consumers against deceptive business practices is one area traditionally regulated by the

states (*see* ***California v ARC Am. Corp.***, 490 US 93, 109 S Ct 1661 [1989]). With regard to a conflict preemption analysis, the United States Supreme Court dictates that if Congress has legislated in a field traditionally occupied by the states, courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (*id.* at 101, 109 S Ct at 1665; ***Lee v Astoria Generating Co., L.P.***, 13 NY3d at 391, 892 NYS2d at 299). Therefore, a strong "presumption against preemption applies in consumer protection cases" (***In re Ford Fusion & C-Max Fuel Econ. Litig.***, 2015 WL 7018369, *25 [SD NY 2015]).

Here, the question before the court is whether New York's consumer protection laws and traditional tort principals pose an obstacle to the FDA's regulation of prescription drug promotion and advertising or make it impossible for the manufacturer defendants herein to comply with those regulations as a matter of law. "The party arguing that federal law preempts a state law bears the burden of establishing preemption" (*id.* at *23).

In the 1930s, because of increased concern about the availability of unsafe drugs and fraudulent marketing of drugs, Congress enacted the FDCA, which authorized the FDA, among other things, to regulate the prescription drug industry (***Wyeth v Levine***, 555 US 555, 567, 129 S Ct 1187, 1196 [2009]; ***Medtronic, Inc. v Lohr***, 518 US at 475, 116 S Ct at 2246; ***Dobbs v Wyeth Pharm.***, 797 F Supp 2d 1264, 1270 [WD Okla 2011]). The legislation "enlarged the FDA's powers to protect the public health and assure the safety, effectiveness, and reliability of drugs" (***Wyeth v Levine***, 555 US at 567, 129 S Ct at 1195-1196). It required manufacturers to submit a new drug application–including proposed labeling–to the FDA for review prior to distribution of the drug, and the FDA could reject the application if it determined that the drug was not safe for use as labeled (*id.*). Under the FDCA, a drug's labeling is construed broadly, and includes "any article that supplements or explains the product even if the article is not physically attached to it" (***Sandoval v PharmaCare US, Inc.***, 2018 WL 1633011, *2 [9th Cir 2018] [internal quotation marks omitted]; *see* 21 USC § 321 [m]). Labeling also includes descriptions of a drug in brochures and through media, and references published for use by medical practitioners, which contain drug information supplied by the manufacturer, packer, or distributor of the drug (21 CFR § 202.1 [l] [2]). Thus, in many respects, opioid medication marketing and advertising materials perform the function of labeling (*see* ***Kordel v United States***, 335 US 345, 350, 69 S Ct 106, 110 [1948]; ***Sandoval v PharmaCare US, Inc.***, 2018 WL 1633011). The FDA, however, generally does not review unbranded promotional materials, i.e., materials that promote the use of a type of drug but do not identify any particular drug by name (*see* ***City of Chicago v Purdue Pharma L.P.***, 2015 WL 2208423, *2 [ND Ill 2015]).

FDA regulation provides that a manufacturer must seek approval from the FDA prior to making any change to its drug labeling by submitting a supplemental application for review; however, the FDA permits pre-approved changes by the manufacturer under certain circumstances (21 CFR § 314.70 [c]; ***Wyeth v Levine***, 555 US at 567, 129 S Ct at 1189; ***Dobbs v Wyeth Pharm.***, 797 F Supp at 1270). Pursuant to the "changes being effected" (CBE) regulation, a manufacturer is permitted to make a label change where the change is needed "to add or strengthen a contraindication, warning, [or] precaution . . . or to add or strengthen an instruction about dosage and administration that is intended to increase the

safe use of the drug product" (***PLIVA, Inc. v Mensing***, 564 US 604, 614, 131 S Ct 2567, 2575 [2011] [internal quotation marks omitted]; ***Dobbs v Wyeth Pharm.***, 797 F Supp at 1270). In the spirit of the FDCA to promote the safety, effectiveness, and reliability of drugs, Congress made it clear that despite FDA oversight, manufacturers were "responsible for updating their labels" at all times (***Wyeth v Levine***, 555 US at 567, 129 S Ct at 1195-1196; *see* ***Sullivan v Aventis, Inc.***, 2015 WL 4879112 [SD NY 2015]). "[T]he manufacturer is charged 'both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market' " (***Utts v Bristol-Myers Squibb Co.***, 251 F Supp 3d 644, 659 [SD NY 2017], quoting ***Wyeth v Levine***, 555 US at 571, 129 S Ct at 1197). Notwithstanding those obligations, if a manufacturer can show clear evidence that the FDA would not have approved a labeling change, the CBE exception does not apply (*id.*). Additionally, labeling changes pursuant to the CBE regulation may only be made on the basis of "newly acquired information" (***Utts v Bristol-Myers Squibb Co.***, 226 F Supp 3d 166, 177 [SD NY 2016]; *see* 21 CFR § 314.70 [c] [6] [iii]). If a claim against a manufacturer "addresses newly acquired information and addresses a design or labeling change that a manufacturer may unilaterally make without FDA approval, then there may be no preemption of the state law claim" (*id.* at 182; *see* ***Wyeth v Levine***, 555 US 569, 129 S Ct 1197; ***Utts v Bristol-Myers Squibb Co.***, 251 F Supp 3d 644).

The manufacturer defendants challenge the plaintiffs' claims on the ground that the plaintiffs seek to require such defendants to change the FDA-approved indications for their opioid medications. The manufacturer defendants assert that central to the plaintiffs' complaint are the allegations that such defendants fraudulently and improperly promoted opioids to treat chronic pain, and that such defendants failed to disclose that there was no evidence to support the long-term use of opioids. They contend that the plaintiffs' allegations go against the findings of the FDA, and that the FDA did not require them to make such disclosures. The manufacturer defendants further argue that the plaintiffs cannot show the existence of newly acquired information that would have required them to make unilateral changes to their product labeling.

There is no dispute that in the late 1980s and early 1990s, the FDA approved the prescription opioid medications at issue to treat chronic pain. FDA-approved labeling for these medications warned medical professionals and consumers about some of the risks associated with opioid use, and drug manufacturers provided educational materials to medical professionals on treatment guidelines. Nevertheless, the FDA's approval of opioids for consumption by the general public does not mean that states, and specifically, the plaintiffs herein, may not seek to protect their residents from the unlawful activities of defendants concerning those drugs (*see* ***Yugler v Pharmacia & Upjohn Co.***, 2001 WL 36387743 [Sup Ct, NY County 2001]; *see generally* ***English v General Elec. Co.***, 496 US 72, 87, 110 S Ct 2270 [1990] ["the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies"]). "[M]anufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly" (***Wyeth v Levine***, 555 US at 578-579, 129 S Ct at 1202).

On the face of the complaint, it does not appear that the plaintiffs seek to compel the manufacturer defendants to stop selling their medications (*see* ***Mutual Pharm. Co. v Bartlett***, 570 US

472, 133 S Ct 2466 [2013]), nor do the plaintiffs seek to challenge the FDA's approval of their products (*see* ***Buckman Co. v Plaintiffs' Legal Comm.***, 531 US 341, 121 S Ct 1012 [2001]; ***In re Celexa & Lexapro Mktg. & Sales Practices Litig.***, 779 F3d 34, 36 [1st Cir 2015]) or to enforce FDA regulations (*see* ***PDK Labs, Inc. v Friedlander***, 103 F3d 1105 [2d Cir 1997]; ***In re Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proceedings***, 2017 WL 1836443, *7 [ND Ill 2017]). The plaintiffs claim that the manufacturer defendants' business practices in promoting, advertising, and marketing their FDA-approved opioids have run afoul of New York law and traditional tort principals, and that they should be held liable.

The plaintiffs allege that when promoting prescription opioids, the manufacturer defendants made representations that were not supported by scientific studies, thus preventing clinicians and consumers from making informed decisions about whether to prescribe or to use opioids as a primary form of chronic pain treatment, that they used marketing strategies to evade consumer protection laws, and that they used front groups or third parties to promote opioids as superior pain relief medication through unbranded materials. The plaintiffs do not demand that the manufacturer defendants remove their products from the market as the defendants seem to suggest. Instead, the plaintiffs' claims are predicated "on a more general obligation–the duty not to deceive" their residents (***Cipollone v Liggett Group, Inc.***, 505 US 504, 528-529, 112 S Ct 2608, 2624 [1992]; *see* ***In re Ford Fusion & C-Max Fuel Econ. Litig.***, 2015 WL 7018369). As previously indicated, FDA approval of drug labeling does not necessarily mean that the FDA has authorized the manufacturer's marketing practices (*see generally* ***Kramer v Bausch & Lomb, Inc.***, 264 AD2d 596, 695 NYS2d 553 [1st Dept 1999]; ***City of Chicago v Purdue Pharma L.P.***, 2015 WL 2208423, *2 [ND Ill 2015]). The manufacturer defendants have failed to show that the FDA has approved their means, methods, and/or the content of their drug promotion to warrant a finding that the plaintiffs' claims are preempted by virtue of the FDA's approval of their drug.

With respect to information contained in the manufacturer defendants' drug labels, particularly concerning addiction and the long-term use of opioids, it is certainly a closer call whether preemption applies. The court finds that the plaintiffs' claims are not preempted under the circumstances.

There are two stages to the preemption inquiry before the court. The plaintiffs herein must show that newly acquired information exists such that the manufacturer could unilaterally change its label in accordance with the CBE regulation, and if the plaintiff can prove the existence of newly acquired information, "the manufacturer may [] establish an impossibility preemption defense by presenting clear evidence that the FDA would have exercised its authority to reject the labeling change" (***Utts v Bristol-Myers Squibb Co.***, 251 F Supp 3d 644, 672 [internal quotation marks omitted]). The plaintiffs allege that the manufacturer defendants acquired new information concerning addiction and the long-term use of opioids, which, if acted upon, would have strengthened instruction about dosing and administration of the drugs, yet defendants continued to market their products without disclosing such information to consumers or marketed their drugs by making statements that were contrary to the newly acquired information (*see* ***Wyeth v Levine***, 555 US at 578-579, 129 S Ct at 1202; *cf.* ***Utts v Bristol-Myers Squibb Co.***, 251 F Supp 3d 644, 672). The plaintiffs cite many studies that were conducted subsequent to the FDA's approval of the medications–studies that the manufacturer defendants allegedly knew about–which contradict such defendants' promotional statements and

materials. The plaintiffs also allege numerous instances where the manufacturer defendants suppressed or indirectly attempted to suppress information about the effects of their drugs that was contrary to their promotional statements. The court finds that at this stage of the proceedings the plaintiffs have satisfied their pleading burden with regard to newly acquired information (*see* CPLR 3211).

The manufacturer defendants further argue that the FDA has addressed the claims that plaintiffs now advance, and their marketing is consistent with FDA-approved labeling; therefore, preemption applies. In July 2012, Physicians for Responsible Opioid Prescribing (PROP), a coalition of concerned doctors, filed a citizen petition requesting that the FDA change some indications for opioid medications. PROP stated that clinicians were under the false impression that chronic opioid therapy was an evidence-based treatment for non-cancer pain, and asked the FDA to prohibit manufacturers from marketing opioids for conditions for which the use of opioids had not been proven safe and effective. In 2013, the FDA responded to the petition, granting it in part and rejecting it in part. Recognizing the grave risks associated with opioid use, the FDA required opioid manufacturers to include in their drug labels a warning that opioids should be used only when alternative treatments were inadequate. The FDA declined to recommend a daily maximum dose or the maximum duration of opioid treatment, and stated that more controlled studies were needed concerning long-term use of opioids. The agency acknowledged that high rates of addiction were concerning, and it ordered opioid manufacturers to conduct post-approval studies on the long-term use of the medications.

In ***Wyeth***, the United States Supreme Court articulated that "absent clear evidence that the FDA would not have approved a change to [the drug's] label" a court cannot conclude that it was impossible for the drug manufacturer to comply with both federal and state requirements (***Wyeth v Levine***, 555 US at 571, 129 S Ct at 1198). Citing ***Cerveny v Aventis, Inc.*** (855 F3d 1091, 1105 [10th Cir 2017]), the manufacturer defendants argue that the FDA's rejection of the PROP citizen petition constitutes "clear evidence" that the FDA would have rejected a labeling change concerning the long-term use of opioids, the concept of pseudoaddiction (a preoccupation with achieving adequate pain relief that leads to higher consumption levels of opioids), and addiction withdrawal. By way of background, in ***Cerveny***, the Tenth Circuit held that the FDA's rejection of a citizen petition, which made "arguments virtually identical" to the plaintiffs' claims, was clear evidence that the FDA would have rejected the plaintiffs' proposed change to a drug label (***Cerveny v Aventis, Inc.***, 855 F3d at 1105). The plaintiffs in that case admitted that their claims were "based on the same theories and scientific evidence presented in [the] citizen petition" (*id.* at 1101).

"[W]hen considering a preemption argument in the context of a motion to dismiss, the factual allegations relevant to preemption must be viewed in the light most favorable to the plaintiff. A [] court may find a claim preempted only if the facts alleged in the complaint do not plausibly give rise to a claim that is not preempted" (***Utts v Bristol-Myers Squibb Co.***, 251 F Supp 3d at 672 [internal quotation marks omitted]). The plaintiffs in this action allege that the manufacturer defendants made presentations to medical professionals and others about the efficacies of long-term use of opioids as though those statements were supported by substantial evidence. However, the manufacturer defendants acknowledge that the FDA found that there was an absence of well-controlled studies of opioid use longer than 12 weeks. The plaintiffs also allege that the manufacturer defendants knew about the addictive effects of

opioids many years before the FDA's 2013 response to the PROP petition, but minimized those effects when promoting, marketing, and advertising the drugs. For example, the plaintiffs allege that the manufacturer defendants used the concept of pseudoaddiction as an excuse to encourage medical professionals to prescribe more or higher doses of opioids despite knowledge of the high risk of abuse. The manufacturer defendants allegedly distributed treatment guidelines to professionals, which indicated that a clinicians' *first* response to treating pseudoaddiction was to increase dosing although other adequate treatment options were available. Additionally, unlike the plaintiffs in ***Cerveny***, the plaintiffs' allegations here are not based upon the same theories and scientific evidence presented in the PROP petition (*see* ***Cerveny v Aventis, Inc.***, 855 F3d at 1101). The plaintiffs herein make allegations concerning the defendants' business practices.

Moreover, the court concludes that, under the circumstances, the FDA's "less-than-definitive determination" concerning PROP's request for maximum dosage and treatment duration does not meet the ***Wyeth*** standard of clear evidence (*see* ***Amos v Biogen Idec Inc.***, 249 F Supp 3d 690, 699 [WD NY 2017] ["the Court compares the evidence presented with the evidence in *Wyeth*, to determine whether it is more or less compelling"]). In its response to PROP, the FDA stated that the petitioners did not present sufficient evidence to support their recommendations concerning the long-term use of opioids. However, in light of the concerning high rates of addiction, the FDA requested "further exploration" of the issues. Inasmuch as "manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge" this court cannot conclude as a matter of law that the agency would have rejected proposals from the drug manufacturers to change their labeling, which in effect would have strengthened dosing instruction and administration of the drugs (***Wyeth v Levine***, 555 US at 578-579, 129 S Ct at 1202; ***In re Testosterone Replacement Therapy Prod. Liab. Litig. Coordinated Pretrial Proceedings***, 2017 WL 1836443, *7). Accordingly, the court finds that the plaintiffs' state-law claims do not make it impossible for the manufacturer defendants to comply with the FDA's regulations; therefore, the manufacturer defendants' application to dismiss those claims on federal preemption grounds is denied (*see* CPLR 3211 [a] [7]; ***Wyeth v Levine***, 555 US 555, 129 S Ct 1187; ***Sullivan v Aventis, Inc.***, 2015 WL 4879112; *see generally* ***Feinberg v Colgate Palmolive Co.***, 34 Misc 3d 1243[A], 950 NYS2d 608 [Sup Ct, NY County 2012]).

Municipal Cost Recovery Rule

The manufacturer defendants' argument that the complaint does not allege a cognizable injury, i.e., that the plaintiffs are barred under the municipal cost recovery rule from recovering the costs of governmental services incurred in connection with the opioid crisis, is rejected. The municipal cost recovery rule, also known as the free public services doctrine, precludes municipalities from recovering as damages from a tortfeasor the cost of public services, such as police and fire protection, required as a consequence of an accident or emergency (*see* ***Koch v Consolidated Edison Co. of N.Y.***, 62 NY2d 548, 560, 479 NYS2d 163 [1984]; ***Austin v City of Buffalo***, 182 AD2d 1143, 586 NYS2d 841 [4th Dept 1992]; ***City of Buffalo v Wilson***, 179 AD2d 1079, 580 NYS2d 679 [4th Dept 1992]; *see also e.g.* ***County of Erie, New York v Colgan Air, Inc.***, 711 F3d 147 [2d Cir 2013]; ***City of Flagstaff v Atchison, Topeka & Santa Fe Ry. Co.***, 719 F2d 322 [9th Cir 1983]). In ***Koch***, the Court of Appeals held that New York City could not recover as damages from Consolidated Edison the costs it incurred "for wages,

salaries, overtime and other benefits of police, fire, sanitation and hospital personnel from whom services (in addition to those which would normally have been rendered) were required" as a consequence of a 25-hour blackout caused by the company's gross negligence, holding "[t]he general rule is that public expenditures made in the performance of governmental functions are not recoverable" (***Koch v Consolidated Edison Co. of N.Y.***, 62 NY2d at 560, 479 NYS2d at 170). And in ***City of Flagstaff***, a seminal case for the municipal cost recovery rule, the Court of Appeals held that the cost of providing police, fire and emergency services "from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the services," reasoning that a rule allocating such expenses to the tortfeasor who caused an accident or other public emergency would upset "[e]xpectations of individuals and businesses, as well as their insurers," and that the legislature, not the court, is the appropriate forum in which to address whether the costs related to public emergencies should be shifted to the responsible party (***City of Flagstaff v Atchison, Topeka & Santa Fe Ry. Co.***, 917 F2d at 323-324). The municipal cost recovery rule, however, does not bar a cause of action for public nuisance (*see* ***County of Erie, New York v Colgan Air, Inc.***, 711 F3d 147; *see also* ***State of New York v Schenectady Chems.***, 117 Misc 2d 960, 459 NYS2d 971 [Sup Ct, Rensselaer County 1983]), and an exception exists permitting recovery for public expenses authorized by statute or regulation (***Koch v Consolidated Edison Co. of N.Y.***, 62 NY2d at 561, 479 NYS2d at 170).

Here, the plaintiffs allege, among other things, they were harmed by having to pay the costs of prescription opioid therapy for employees and Medicaid beneficiaries complaining of chronic, non-cancer pain when such treatment was not medically necessary or reasonably required, and that, but for the misrepresentations made by the manufacturer defendants about the benefits and risks of long-term prescription opioid therapy, they would not have approved payment for such therapy. Moreover, a review of the current state of the law revealed no case law supporting the manufacturer defendants' contention that such rule bars recovery for municipal expenses incurred, not by reason of an accident or an emergency situation necessitating "the normal provision of police, fire and emergency services" (***City of Flagstaff v Atchison, Topeka & Santa Fe Ry. Co.***, 719 F2d at 324), but to remedy public harm caused by an intentional, persistent course of deceptive conduct. The manufacturer defendants' argument that, despite allegations they designed and implemented materially deceptive marketing campaigns to mislead the public and prescribers about the risks and benefits of prescription opioids, the municipal cost recovery rule forecloses the plaintiffs from recovering the costs for services to treat residents suffering from prescription opioid abuse, addiction or overdose, or for the increased costs of programs implemented to stem prescription opioid-related criminal activities, if accepted, would distort the doctrine beyond recognition.

Statute of Limitations

The manufacturer defendants also jointly contend that all of the plaintiffs' causes of action must be dismissed to the extent that they are predicated upon acts or omissions occurring outside the relevant limitations period, i.e., six years for the causes of action based in common-law fraud and unjust enrichment, and three years for the remaining causes of action. The manufacturer defendants further contend that the plaintiffs cannot rely on the two-year discovery period for assertion of a cause of action in fraud, because the allegations in the complaint confirm that they could have discovered the alleged

fraud from information publicly available well before August 31, 2014, and because the plaintiffs cannot demonstrate that they were unable to discover information pertaining to the prescriptions underlying their claims prior to that date.

Cephalon separately contends that, even if the six-year limitations period applied to all of the plaintiffs' claims, the plaintiffs failed to allege a single fraudulent act or omission on its part occurring after August 2010. Moreover, as the plaintiffs acknowledge that the false statements which they attribute to Cephalon were "available nationally" and "cited widely," and that the risks associated with opioids were clear as early as the 1970s and 1980s, the plaintiffs cannot rely on the two-year discovery period for assertion of a cause of action in fraud.

Purdue separately contends that OxyContin has only been sold in its current "reformulated," "abuse-deterrent" form since 2010–more than six years prior to the commencement of this action–and that the majority of statements attributed to it in the complaint are either undated or were made well outside the six-year statute of limitations.

Actavis separately contends that there are but a scant few paragraphs in the complaint containing allegations that plausibly fit within either of relevant three- or six-year limitations periods, and that even those allegations amount to little more than general observations describing lawful conduct, e.g., what Actavis spent on advertising.

The plaintiffs counter that their causes of action are timely, whether because they did not accrue until the plaintiffs either suffered injury or discovered the wrong, or by application of the "continuing wrong" doctrine, which serves to toll the running of a period of limitations to the date on which the last wrongful act is committed, or because the facts alleged in the complaint serve to toll the statute of limitations based on fraudulent concealment. As to Cephalon, the plaintiffs contend that the complaint does, in fact, allege statements made by or attributable to Cephalon that were made after 2010; additionally, to the extent the complaint alleges misrepresentations in written publications, the plaintiffs claim the date that those statements were first published is not determinative for statute of limitations purposes, as those materials continued to circulate and be relied on long after they were initially introduced. As to Purdue, the plaintiffs note that not all of their allegations relating to that manufacturer pertain to OxyContin. According to the plaintiffs, not only did Purdue deceptively promote its branded opioids but, through its direct marketing and unbranded materials, it also misrepresented the benefits and dangers of opioids generally.

"To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired. Only if such prima facie showing is made will the burden then shift to the plaintiff to aver evidentiary facts establishing that the case falls within an exception to the statute of limitations. In order to make a prima facie showing, the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (***Swift v New York Med. Coll.***, 25 AD3d 686, 687, 808 NYS2d 731, 732-733 [2d Dept 2006] [internal citations and quotation marks omitted]; *accord* ***Pace v Raisman & Assoc., Esqs., LLP***, 95 AD3d 1185, 945 NYS2d 118 [2d Dept 2012]).

"In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief" (***Gaidon v Guardian Life Ins. Co. of Am.***, 96 NY2d 201, 210, 727 NYS2d 30, 35 [2001]). While a claim for breach of contract accrues on the date of the breach, irrespective of the plaintiff's awareness of the breach (***Ely-Cruikshank Co. v Bank of Montreal***, 81 NY2d 399, 599 NYS2d 501 [1993]), a tort claim accrues only when it becomes enforceable, that is, when all the elements of the tort can be truthfully alleged in the complaint (***Kronos, Inc. v AVX Corp.***, 81 NY2d 90, 595 NYS2d 931 [1993]). When damage is an essential element of the tort, the claim is not enforceable until damages are sustained (***Kronos, Inc. v AVX Corp.***, 81 NY2d 90, 595 NYS2d 931). In an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim which must exist before the action accrues (***Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 214, 652 NYS2d 584 [1996]).

Here, it is evident that injury is an essential element of no fewer than four of the causes of action pleaded. To state a cause of action for deceptive acts and practices under General Business Law § 349, the plaintiffs were required to allege that the defendants engaged in consumer-oriented acts or practices that are "deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 25, 623 NYS2d 529, 532 [1995]). Similarly, a cause of action for false advertising pursuant to General Business Law § 350 is stated so long as it is pleaded that "the advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury" (***Andre Strishak & Assoc. v Hewlett Packard Co.***, 300 AD2d 608, 609, 752 NYS2d 400, 403 [2d Dept 2002]). The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (***Introna v Huntington Learning Ctrs.***, 78 AD3d 896, 911 NYS2d 442 [2d Dept 2010]); thus, a cause of action for fraud cannot accrue until every element of the claim, including injury, can truthfully be alleged (***Carbon Capital Mgt., LLC v American Express Co.***, 88 AD3d 933, 932 NYS2d 488 [2d Dept 2011]). And a cause of action sounding in negligence likewise accrues as soon as the claim becomes enforceable, that is, on the earliest date upon which the claimed negligence causes a plaintiff to sustain damages (*see* ***Brooks v AXA Advisors***, 104 AD3d 1178, 961 NYS2d 648 [4th Dept], *lv denied* 21 NY3d 858, 970 NYS2d 748 [2013]).

As to those causes of action, the manufacturer defendants have not identified any relevant date of injury but, rather, contend only that the acts and omissions on which they are based did not take place within the applicable limitations periods. Consequently, as it has not been established when any of those causes of action accrued, it cannot be said at this juncture that any of them is untimely–except to note, even assuming the applicability of the "continuing wrong" doctrine (*see generally* ***Affordable Hous. Assoc., Inc. v Town of Brookhaven***, 150 AD3d 800, 54 NYS3d 122 [2d Dept 2017]), that the plaintiffs may recover monetary damages only to the extent that they were sustained within the applicable limitations period immediately preceding the commencement of this action (*see* ***State of New York v Schenectady Chems.***, 103 AD2d 33, 479 NYS2d 1010 [3d Dept 1984]; ***Kearney v Atlantic Cement Co.***, 33 AD2d 848, 306 NYS2d 45 [3d Dept 1969]). And while some recovery of damages may be time-barred, dismissal–even partial dismissal–is not appropriate at this juncture, as the court is not yet able to

determine the precise nature and timing of the plaintiffs' respective claims (*see* ***Airco Alloys Div. v Niagara Mohawk Power Corp.***, 76 AD2d 68, 430 NYS2d 179 [4th Dept 1980]).

The manufacturer defendants have likewise failed to show that the cause of action alleging public nuisance is untimely. The rule with respect to nuisance or other continuing wrongs is that the action accrues anew on each day of the wrong, so that the right to maintain the cause of action continues as long as the nuisance exists (***Airco Alloys Div. v Niagara Mohawk Power Corp.***, 76 AD2d 68, 430 NYS2d 179; 17A Carmody-Wait 2d § 107:95). Here, the plaintiffs have alleged a continuing wrong, perpetrated by all the defendants, involving deceptive marketing practices that began over a decade ago and that have continued up to the time of commencement of this action. That such a nuisance may have existed for more than three years, then, does not bar the cause of action; as before, however, the court notes that damages are recoverable only to the extent they were sustained during the three years prior to the commencement of the action (CPLR 214; ***State of New York v Schenectady Chems.***, 103 AD2d 33, 479 NYS2d 1010; ***Kearney v Atlantic Cement Co.***, 33 AD2d 848, 306 NYS2d 45).

As to the cause of action pleaded under Social Services Law § 145-b, the analysis differs but the result is essentially the same. First, as to the applicable limitations period, the court notes that although fraud is a component of Social Services Law § 145-b, the remedy contemplated by the statute is at once broader and narrower than that in fraud; it serves not only to create a right on behalf of local social services districts and the State to sue for damages in cases of fraud and misrepresentation in connection with Medicaid reimbursement but also to provide a financial deterrent in the form of treble damages in order to curb such abuses (Legislative Mem, McKinney's Session Laws of NY at 1686-1687). Since this remedy did not exist at common law, the three-year statute of limitations for statutory causes of action applies (CPLR 214 [2]; *see* ***Gaidon v Guardian Life Ins. Co. of Am.***, 96 NY2d 201, 727 NYS2d 30). Second, as to date of accrual, it is clear that in an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim which must exist before the action accrues (***Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 214, ,652 NYS2d 584). Since it is unlawful under Social Services Law § 145-b even to attempt to obtain Medicaid reimbursement by fraudulent means, it is conceivable that a violation of the statute may occur without a plaintiff having sustained actual damages, in which case the statute provides for civil damages in the amount of $5,000.00. Thus, damages is not an element of the cause of action, and the manufacturer defendants are correct in asserting both that the three-year limitations period began to run upon the occurrence of the alleged misconduct, and that the plaintiffs may not recover damages based on alleged acts or omissions occurring more than three years prior to the commencement of this action. Since it is pleaded, however, that the fraudulent conduct underlying the cause of action continued up to the time that this action was commenced, and the manufacturer defendants having failed to demonstrate an earlier accrual date, the court will not dismiss it as time-barred.

Nor has it been demonstrated that the cause of action sounding in unjust enrichment is untimely. The plaintiffs allege, in relevant part, that the manufacturer defendants, as an expected and intended result of deceptive conduct intended to mislead the plaintiffs as to the risks and benefits of opioid use and encourage the plaintiffs to pay for long-term opioid prescriptions, were enriched from opioid purchases made by the plaintiffs and that it would be unjust and inequitable to permit them to enrich

themselves at the plaintiffs' expense. While there is no limitations period identified in the CPLR within which to bring a claim for unjust enrichment, it is recognized that the three-year statute of limitations governs where, as here, the claim arises from tortious conduct and monetary relief is sought (***DiMatteo v Cosentino***, 71 AD3d 1430, 896 NYS2d 778 [4th Dept 2010]; ***Ingrami v Rovner***, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]; ***Lambert v Sklar***, 30 AD3d 564, 817 NYS2d 378 [2d Dept 2006]). It is also recognized that the claim accrues "upon the occurrence of the wrongful act giving rise to the duty of restitution" (***Ingrami v Rovner***, 45 AD3d at 808, 847 NYS2d at 134). Here, as it is alleged that the wrongful conduct has continued through the time of commencement of this action, the statute of limitations does not operate as a complete defense to the cause of action as pleaded; as noted previously, however, damages may be recovered only to the extent the claim is based on conduct occurring within the three years prior to the commencement of this action.

In so ruling, the court does not reach the question of whether any cause of action is subject to either the discovery rule for actions based on fraud (CPLR 203 [g]; 213 [8]) or the doctrine of equitable estoppel.

Res Judicata

Endo's argument pursuant to CPLR 3211 (a) (5), that the plaintiffs' claims against it are barred by an assurance of discontinuance executed in March 2016 concerning its marketing of Opana ER, its branded version of the semi-synthetic, opioid analgesic oxymorphone, is rejected. It is fundamental that a final adjudication of a claim on the merits by a court of competent jurisdiction "is conclusive of the issues of fact and questions of law necessarily decided therein" and precludes relitigation of that claim by the parties and those in privity with them (***Gramatan Home Invs. Corp. v Lopez***, 46 NY2d 481, 485, 414 NYS2d 308, 311 [1979]; *see* ***Parker v Blauvelt Volunteer Fire Co.***, 93 NY2d 343, 690 NYS2d 478 [1999]; ***Matter of Hodes v Axelrod***, 70 NY2d 364, 520 NYS2d 933 [1987]). The doctrine of res judicata operates to preclude litigation of all other claims arising out of the same transaction or series of transactions that could have or should have been raised in the prior proceeding, even if such claims are based on different theories or seek a different remedy (*see* ***O'Brien v City of Syracuse***, 54 NY2d 353, 445 NYS2d 687 [1981]; ***Smith v Russell Sage Coll.***, 54 NY2d 185, 445 NYS2d 68 [1981]; ***Lasky v City of New York***, 281 AD2d 598, 722 NYS2d 391 [2d Dept 2001]). Collateral estoppel, a corollary to the doctrine of res judicata, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (***Ryan v New York Tel. Co.***, 62 NY2d 494, 500, 478 NYS2d 823, 826 [1984]). A party seeking to invoke the benefit of the collateral estoppel doctrine must demonstrate that the identical issue necessarily was decided in the prior action against the opposing party, or one in privity with such party, and is decisive of the present action (***Buechel v Bain***, 97 NY2d 295, 303-304, 740 NYS2d 252, 257 [2001]; *see* ***D'Arata v New York Cent. Mut. Fire Ins. Co.***, 76 NY2d 659, 563 NYS2d 24 [1990]; ***Kaufman v Eli Lilly & Co.***, 65 NY2d 449, 492 NYS2d 584 [1985]; ***David v State of New York***, 157 AD3d 764, 69 NYS3d 110 [2d Dept 2018]). It is noted that, except in rare circumstances, the defense of estoppel may not be invoked against the state or its political subdivisions to prevent a governmental body from enforcing the law or discharging its duties as a matter

of policy (***Matter of E.F.S. Ventures Corp. v Foster***, 71 NY2d 359, 370, 526 NYS2d 56, 61 [1988]; ***Matter of Hamptons Hosp. & Med. Ctr. v Moore***, 52 NY2d 88, 95, 436 NYS2d 239, 242 [1981]).

Further, Executive Law § 63 (12) authorizes the Attorney General to seek injunctive relief, restitution, and damages for repeated or persistent fraudulent or illegal acts in conducting business activities in New York. The Attorney General, however, may forgo litigation when a violation of a state law is discovered and instead enter into an "assurance of discontinuance of any act or practice in violation of such law" (Executive Law § 63 [15]).

It is undisputed that the Attorney General commenced an investigation in 2013 into Endo's marketing of Opana ER in New York. Years later, after obtaining documentary and testimonial evidence from Endo, the Attorney General determined that certain "practices, statements and omissions" by Endo and its employees in connection with the marketing of Opana ER, collectively referred to as the "covered conduct," violated General Business Law §§ 349 and 350 and Executive Law § 63 (12). The Attorney General, in an exercise of his discretion, decided to enter into an assurance of discontinuance with Endo in lieu of civil litigation. In March 2016, Endo and the Attorney General executed the assurance of discontinuance, wherein Endo agreed, among other things, not to make certain statements regarding the addictiveness of Opana ER or opioids, to provide "truthful and balanced summaries of the results of all Endo-sponsored studies regarding the purported tamper-resistant feature of Reformulated Opana ER," to require all authors of articles concerning Endo-sponsored studies to disclose any financial relationships with Endo, and to "maintain and enhance its program consisting of internal procedures designed to identify potential abuse, diversion or inappropriate prescribing of opioids." Endo also agreed to pay $200,000 as penalties, fees, and costs, and to submit to monitoring by the Office of the Attorney General. In addition, the assurance states that "[n]othing contained herein shall be construed to deprive any member or other person or entity of any private right under law or equity," and that it does not limit in any way the Attorney General's power to take actions against Endo for either noncompliance with its terms or noncompliance with any applicable law as to "with respect to any matters that are not part of the covered conduct." Significantly, Endo neither admitted nor denied the Attorney General's various findings of unlawful "practices, statements and omissions" under General Business Law §§ 349 and 350 regarding the marketing of Opana ER.

Contrary to the assertions by Endo's counsel, the March 2016 assurance of discontinuance does not constitute a stipulation of settlement that is binding on the plaintiffs. The settlement of an action prior to the entry of judgment operates to finalize the action without regard to the validity of the original claim, "and the action [is] accordingly considered, in contemplation of law, as if it had never begun" (***Peterson v Forkey***, 50 AD2d 774, 775, 376 NYS2d 560, 561-562 [1st Dept 1975]; *see* ***Ott v Barash***, 109 AD2d 254, 491 NYS2d 661 [2d Dept 1985]; *see generally* ***Yonkers Fur Dressing Co. v Royal Ins. Co.***, 247 NY 435 [1928]). When an action is discontinued, "it is as if it had never been; everything done in the action is annulled and all prior orders in the case are nullified" (***Newman v Newman***, 245 AD2d 353, 354, 665 NYS2d 423, 424 [2d Dept 1997]). By contrast, "a stipulation of discontinuance with prejudice without reservation of right or limitation of the claims disposed of is entitled to preclusive effect under the doctrine of res judicata" (***Liberty Assoc. v Etkin***, 69 AD3d 681, 682-683, 893 NYS2d 564, 565 [2d Dept 2010]), and bars future actions between the same parties or those in privity with them

(***Matter of Chiantella v Vishnick***, 84 AD3d 797, 798, 922 NYS2d 525, 527 [2d Dept 2011]; ***Abraham v Hermitage Ins. Co.***, 47 AD3d 855, 855, 851 NYS2d 608, 609 [2d Dept 2008]; ***Matter of State of New York v Seaport Manor A.C.F.***, 19 AD3d 609, 610, 797 NYS2d 538, 539 [2d Dept 2005]). Generally, to establish privity with a party to a prior action, "the connection . . . must be such that the interests of the nonparty can be said to have been represented in the prior proceeding" (***Green v Santa Fe Indus.***, 70 NY2d 244, 253, 519 NYS2d 793, 796 [1987]). As explained by the Court of Appeals, "those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action" may be found to be in privity with a party to a prior action (***Watts v Swiss Bank Corp.***, 27 NY2d 270, 277, 317 NYS2d 315, 320 [1970]).

There is no legal basis for Endo's argument that the assurance of discontinuance is the equivalent of a stipulation of discontinuance with prejudice. Clearly, the assurance is an enforceable contract between the Attorney General and Endo. By its terms, the Attorney General agreed, without litigation, to resolve the claims that Endo engaged in deceptive consumer practices in violation of General Business Law §§ 349 and 350 in marketing Opana ER in exchange for Endo altering certain business practices. In exercising his authority to enter the assurance, however, the Attorney General retained his right to subsequently commence civil litigation seeking damages, restitution, or injunctive relief against Endo for conduct violating the assurance (*see* Executive Law § 63 [15]), as well as for conduct violating any laws relating to "matters not part of the covered conduct." It is noted that while evidence of a violation of an assurance is prima facie evidence of a violation of the applicable law in a subsequent civil action or proceeding, it only constitutes such evidence in an action or proceeding brought by the Attorney General (Executive Law § 63 [15]). Moreover, the March 2016 assurance of discontinuance does not immunize Endo from civil actions for subsequent fraudulent activities within New York (*see* ***UBS Sec. LLC v Highland Capital Mgt., L.P.***, 86 AD3d 469, 927 NYS2d 59 [1st Dept 2011]; ***Matter of State of New York v Seaport Manor A.C.F.***, 19 AD3d 609, 797 NYS2d 538), or bar the counties from bringing law or equity claims against it for practices within their respective jurisdictions (*see* ***Jane St. Co. v Division of Hous. & Community Renewal***, 165 AD2d 758, 560 NYS2d 193 [1st Dept 1990]). Thus, the doctrine of res judicata does not bar the instant claims against Endo.

Personal Jurisdiction

Actavis contends that the complaint must be dismissed as to Allergan plc because the plaintiffs failed to serve that entity with process; irrespective of such failure, Actavis claims that Allergan plc, which is incorporated in the Republic of Ireland, lacks the necessary contacts with New York so as to permit this court to exercise personal jurisdiction over it. As to the latter point, Actavis alleges that Allergan plc is a holding company that has a headquarters in Dublin, Ireland and an administrative headquarters in Parsippany, New Jersey, that it does not manufacture, market, distribute, or sell any pharmaceutical products, that it is a distinct legal entity that is independent of and operates separately from the entities whose shares it owns, that it does not finance or control the daily affairs of those entities, that it has no corporate records on file in New York, that it has not designated an agent for service of process in New York, that it does not send agents to solicit or conduct business in New York, and that it has no officers or employees in New York.

The plaintiffs, for their part, acknowledge that Allergan plc was not served with process, but contend that service on Actavis, Inc., as a "mere department" of Allergan plc, was sufficient to support the exercise of jurisdiction over Allergan plc. The plaintiffs also contend that the exercise of personal jurisdiction over Allergan plc is proper because Actavis, Inc. directed its fraudulent marketing activities at New York residents, because Allergan plc is the successor-in-interest to Actavis, Inc. and, therefore, because the jurisdictional contacts of Actavis, Inc. are properly attributable to Allergan plc.

If a defendant challenges the validity of service of a summons and complaint, it is the plaintiff's burden to prove, by a preponderance of the evidence, that jurisdiction over the defendant was obtained by proper service of process (***Aurora Loan Servs. v Gaines***, 104 AD3d 885, 962 NYS2d 316 [2d Dept 2013]). Likewise, when a motion is made to dismiss an action for lack of personal jurisdiction, it is the plaintiff who bears the ultimate burden of proving a basis for such jurisdiction (***Carrs v Avco Corp.***, 124 AD3d 710, 2 NYS3d 533 [2d Dept 2015]).

Here, the court finds that the plaintiffs failed to meet their burden of establishing that jurisdiction was obtained over Allergan plc by proper service of process. Absent the usual presumption of proper service arising from the process server's affidavit (*see* ***Wells Fargo Bank, N.A. v Chaplin***, 65 AD3d 588, 884 NYS2d 254 [2d Dept 2009]), it was incumbent on the plaintiffs to produce new evidence to support a finding of jurisdiction. This they failed to do. Although they claim that Actavis, Inc. is a subsidiary "so dominated" by Allergan plc that service on the former was sufficient to base the exercise of jurisdiction over the latter (*see* ***Low v Bayerische Motoren Werke, AG.***, 88 AD2d 504, 449 NYS2d 733 [1st Dept 1982]), they cite as evidence of such domination only that "the headquarters of the two are the same" and that "the corporate officers are the same." The court finds this evidence insufficient. For effective service of process on a foreign corporation to be accomplished by delivery to a subsidiary, it must appear that the subsidiary is a mere department or arm of its corporate parent, such that the two "are really the same entities in different guises" (***Geffen Motors v Chrysler Corp.***, 54 Misc 2d 403, 404, 283 NYS2d 79, 81 [Sup Ct, Oneida County 1967]).

> In order for the subsidiary's activities to warrant the exercise of jurisdiction over the parent, the parent's control over the subsidiary's activities must be so complete that the subsidiary is, in fact, merely a department of the parent. A subsidiary will be considered a mere department only if the foreign parent's control of the subsidiary is so pervasive that the corporate separation is more formal than real. Generally, there are four factors used in determining whether a subsidiary is a mere department of the foreign parent: (1) common ownership and the presence of an interlocking directorate and executive staff; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of the parent's control of the subsidiary's marketing and operational policies.

(***Porter v LSB Indus.***, 192 AD2d 205, 213, 600 NYS2d 867, 872-873 [4th Dept 1993] [internal citations and quotation marks omitted]; *accord* ***Delagi v Volkswagenwerk AG of Wolfsburg, Germany***, 29 NY2d 426, 328 NY2d 653 [1972]). Here, apart from the sharing of corporate headquarters and officers, the

plaintiffs have not shown, by evidentiary proof, the level of pervasiveness or control necessary to establish prima facie that Actavis, Inc. was a "mere department" of Allergan plc (*cf.* ***Tuca Intl. Airlines, S.A. v Rolls-Royce of England***, 15 NY2d 97, 256 NYS2d 129 [1965]). Assuming further, as the plaintiffs theorize alternatively, that Allergan plc is "simply a successor entity to Actavis, Inc.," it does not appear under New York law that a party's status as a successor-in-interest to a person properly served will necessarily justify a court's exercise of personal jurisdiction over that party. Even the federal courts espousing the plaintiffs' theory recognize that the court obtains jurisdiction only after the plaintiff makes a prima facie showing of successor liability (*e.g.* ***Leon v Shmukler***, 992 F Supp 2d 179 [ED NY 2014]); here the plaintiffs have made no such showing (*see generally* ***Schumacher v Richards Shear Co.***, 59 NY2d 239, 464 NYS2d 437 [1983]). And while a party may withstand a motion to dismiss by demonstrating that essential jurisdictional facts "may exist but cannot then be stated" (CPLR 3211 [d]), here the plaintiffs do not claim that discovery on the issue of personal jurisdiction is necessary (*cf.* ***Goel v Ramachandran***, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]).

In light of the foregoing analysis, the court need not determine whether, had service been properly effected, it could exercise general (CPLR 301) or specific (CPLR 302) jurisdiction over Allergan plc.

The court now turns to an examination of the legal sufficiency of the plaintiffs' causes of action.

First Cause of Action/General Business Law § 349

General Business Law § 349 (a) provides that it is unlawful to perform "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." Although the statute's scope is broad, applying to virtually all types of economic activity (***Karlin v IVF Am., Inc.***, 93 NY2d 282, 290, 690 NYS2d 495, 498 [1999]), its application is strictly limited to deceptive acts or practices leading to consumer transactions in New York (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858 [2002]). Enacted in 1970 to protect New York consumers and to secure "'an honest market place where trust prevails between buyer and seller'" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 24-25, 623 NYS2d 529, 532 [1995], quoting Mem of Governor Rockefeller, 1970 Legis Ann, at 472), the statute initially was enforceable only by the Attorney General. Subsequently, recognizing that the Attorney General's resources only allowed for limited enforcement of the consumer protection provisions of General Business Law article 22-A, the Legislature amended the statute to allow private plaintiffs to bring consumer fraud actions (General Business Law § 349 [h]; ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 205, 785 NYS2d 399, 402 [2004]; ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 324, 746 NYS2d 858, 863; ***Karlin v IVF Am., Inc.***, 93 NY2d 282, 690 NYS2d 495, 499).

To state a cause of action under General Business Law § 349, a plaintiff must allege (1) that the defendant engaged in an act that was directed at consumers, (2) that the act engaged in was materially deceptive or misleading, and (3) that the plaintiff was injured as a result (***Stutman v Chemical Bank***, 95 NY2d 24, 29, 709 NYS2d 892, 895 [2000]; ***Oswego Laborers' Local 214 Pension Fund v Marine***

Midland Bank, 85 NY2d at 24-25, 623 NYS2d at 532). As to the first element, for pleading purposes, the claim of consumer-oriented conduct must be premised on allegations of facts sufficient to show the challenged acts or practices are "directed at the consuming public" (***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 343, 704 NYS2d 177, 182 [1999]) or have a broad impact on consumers at large (*see* ***Karlin v IVF Am., Inc.***, 93 NY2d 282, 690 NYS2d 495; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529). "Consumer-oriented conduct does not require a repetition or pattern of conduct" (*id.* at 25, 623 NYS2d at 533; *see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]). Sufficient consumer-oriented conduct has been found where a defendant employed "multi-media dissemination of information to the public" (***Karlin v IVF Am., Inc.***, 93 NY2d at 293, 690 NYS2d at 500), or employed an "extensive marketing scheme" that had a broad impact on consumers (***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d at 344, 704 NYS2d at 182). And though the term "consumers" has been construed to mean those who purchase goods and services for personal, family or household use (*see* ***Benetech, Inc. v Omni Fin. Group, Inc.***, 116 AD3d 1190, 984 NYS2d 186 [3d Dept 2014]), courts have recognized the standing of business entities and business-like entities to sue under General Business Law § 349 for actions and practices which were "directed at or had a broader impact on consumers at large" and caused them harm (*see* ***Accredited Aides Plus, Inc. v Program Risk Mgt., Inc.***, 147 AD3d 122, 46 NYS3d 246 [3d Dept 2017]; ***Pesce Bros., Inc. v Cover Me Ins. Agency of NJ, Inc.***, 144 AD3d 1120, 43 NYS3d 85 [2d Dept 2016]; ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96 [2d Dept 2012]; *see also* ***Securitron Magnalock Corp. v Schnabolk***, 65 F3d 256, 265 [2d Cir 1995]). "The critical question [] is whether the matter affects the public interest in New York, not whether the suit is brought by a consumer" (*id.* at 265; *see* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96).

As to the second element, a plaintiff must allege the challenged act or practice was "misleading in a material way" (***Stutman v Chemical Bank***, 95 NY2d at 29, 709 NYS2d at 895). "In determining whether a representation or omission is a deceptive act, the test is whether such act is 'likely to mislead a reasonable consumer acting reasonably under the circumstances'" (***Andre Strishak & Assoc. v Hewlett Packard Co.***, 300 AD2d 608, 609, 752 NYS2d 400, 402 [2d Dept 2002], quoting ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d at 26, 623 NYS2d at 533; *see* ***Amalfitano v NBTY, Inc.***, 128 AD3d 743, 9 NYS3d 372 [2d Dept 2015]). The statutory phrase "deceptive acts or practices" does not apply to "the mere invention of a scheme or marketing strategy, but [to] the actual misrepresentation or omission to a consumer" (***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d at 325, 746 NYS2d at 865). Thus, General Business Law § 349 is limited to conduct which undermines a consumer's ability "to evaluate his or her market options and to make a free and intelligent choice" in the marketplace (***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d at 13, 953 NYS2d at 102). And while businesses are not required to guarantee that a consumer has all the relevant information specific to its particular situation, an omission-based claim under section 349 is appropriate "where the business alone possesses material information that is relevant to the consumer and fails to provide this information" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d at 26, 623 NYS2d at 533; *see* ***Bildstein v Mastercard Intl., Inc.***, 2005 WL 1324972 [SD NY 2005]). Significantly, while the evidence must show a representation or omission by the offending party likely to mislead a reasonable consumer acting reasonably under the circumstances, the conduct need not

rise to the level of common-law fraud to be actionable (***Stutman v Chemical Bank***, 95 NY2d at 29, 709 NYS2d at 896; ***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d at 343, 704 NYS2d at 182;), and no proof of intent to defraud by the defendant or justifiable reliance by a consumer is required (*see* ***Koch v Acker, Merrall & Condit Co.***, 18 NY3d 940, 944 NYS2d 422 [2012]; ***Small v Lorillard Tobacco Co.***, 94 NY2d 43, 698 NYS2d 615 [1999]; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529; ***Valentine v Quincy Mut. Fire Ins. Co.***, 123 AD3d 1011, 1 NYS3d 161 [2d Dept 2014]).

As to the third element, a plaintiff is required to allege and prove "actual injury," though not necessarily pecuniary harm, to such plaintiff as a result of the defendant's deceptive act or practice (***City of New York v Smokes-Spirits.Com, Inc.***, 12 NY3d 616, 623, 883 NYS2d 772 [2009]; ***Stutman v Chemical Bank***, 95 NY2d at 29, 709 NYS2d at 896; ***Small v Lorillard Tobacco Co.***, 94 NY2d at 55-56, 698 NYS2d at 620; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d at 26, 623 NYS2d at 533; *see* ***Wilner v Allstate Ins. Co.***, 71 AD3d 155, 893 NYS2d 208 [2d Dept 2010]). A plaintiff need not quantify the amount of harm to the public at large or specify consumers who suffered pecuniary loss due to the defendant's alleged deceptive conduct (*see* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96). The courts, however, have rejected efforts to expand the scope of General Business Law § 349 to include recovery for derivative or indirect injuries, finding that a plaintiff asserting such a claim must establish an actual loss or harm that is separate from the deception (*see* ***City of New York v Smokes-Spirits.Com, Inc.***, 12 NY3d 616, 883 NYS2d 772; ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96; ***Smith v Chase Manhattan Bank, USA***, 293 AD2d 598, 741 NYS2d 100 [2d Dept 2002]). Stated differently, a plaintiff lacks standing to bring an action under General Business Law § 349 if the claimed loss "arises solely as a result of injuries sustained by another party" (***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 207, 785 NYS2d 399, 404 [2004]). Thus, an insurer or third-party payor of medical expenditures may not recover derivatively, but must proceed by way of an equitable subrogation action for injuries allegedly suffered by its insured due to a violation of General Business Law § 349 (*id.* at 206, 785 NYS2d at 403).

Initially, contrary to the assertions by the manufacturer defendants, the strict pleading requirements imposed by CPLR 3016 are inapplicable to a cause of action premised on General Business Law § 349 (*see* ***Joannou v Blue Ridge Ins. Co.***, 289 AD2d 531, 735 NYS2d 786 [2d Dept 2001]; ***McGill v General Motors Corp.***, 231 AD2d 449, 647 NYS2d 209 [1st Dept 1996]). Moreover, like its sister statute General Business Law § 350, General Business Law § 349 is a remedial statute (***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d at 207, 785 NYS2d at 403; *see* ***Morelli v Weider Nutrition Group***, 275 AD2d 607, 712 NYS2d 551 [1st Dept 2000]). Thus, it should be "liberally construed to carry out the reforms intended and to promote justice" (McKinney's Cons Laws of NY, Book 1, Statutes § 321).

The court finds the allegations in the complaint are legally sufficient to state a cause of action under General Business Law § 349 as against each of the manufacturer defendants. The plaintiffs allege the manufacturer defendants employed assiduously crafted, multi-pronged marketing strategies that targeted the general public through websites, print advertisements, and educational materials and

publications as part of their respective campaigns to change the perception of the risks associated with prescription opioids and to de-stigmatize and normalize the long-term use of opioids for chronic nonmalignant pain. According to the complaint, to perpetuate an increase in the amount and dosage of opioid prescriptions written for patients, and to optimize the market share for their respective products, the manufacturer defendants also aggressively targeted physicians and other prescribers, essential conduits in the sale of prescription opioids to the public, by having their sales representatives "detail" prescribers in face-to-face meetings, by inviting prescribers to attend informational programs, by hiring "product loyalists" to serve as paid speakers for such programs, and by using data mining to track opioid prescriptions and reward prolific prescribers of their products. Other alleged marketing strategies designed to affect physicians' prescribing practices included advertising in print journals and online, sponsoring continuing medical education courses, and hiring so-called "key opinion leaders" (KOLs) to act as consultants and serve as lecturers.

The plaintiffs further allege that the manufacturer defendants' marketing campaigns included funding so-called "front groups," such as the American Pain Foundation and the American Academy of Pain Medicine, which wrote and disseminated favorable educational materials, published "scientific literature" without scientific bases, and created opioid treatment guidelines supporting opioid therapy for chronic pain. According to the complaint, in addition to providing those groups with substantial funding, the manufacturer defendants exercised significant influence over the educational programs and written materials, such as journal articles and treatment guidelines, regarding opioids presented by front groups and KOLs. Moreover, the plaintiffs allege that the manufacturer defendants sponsored websites created by front groups and accessible by the public that promoted prescription opioids as a means for improving patients' normal daily functions and quality of life. Such allegations are sufficient to plead consumer-oriented conduct within the scope of General Business Law § 349 (*see* ***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 704 NYS2d 177; ***Karlin v IVF Am., Inc.***, 93 NY2d 282, 690 NYS2d 495; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529; ***Accredited Aides Plus, Inc. v Program Risk Mgt., Inc.***, 147 AD3d 122, 46 NYS3d 246 [3d Dept 2017]). The court rejects the manufacturer defendants' argument that, as only physicians and other medical providers can prescribe prescription drugs, misrepresentations concerning the risks and benefits of opioids made in connection with the their marketing campaigns cannot constitute "consumer-oriented" conduct under the informed or knowledgeable intermediary doctrine, a defense against a failure to warn claim (*see* ***Martin v Hacker***, 83 NY2d 1, 607 NYS2d 598 [1993]; *cf.* ***Amos v Biogen Idec Inc.***, 28 F Supp 3d 164 [WD NY 2014]).

The plaintiffs also sufficiently allege materially deceptive acts and practices by the manufacturer defendants that undermined consumers' ability to assess the benefits and dangers of prescription opioids and to make informed decisions as to the efficacy and safety of opioid therapy for chronic pain (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858; ***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 704 NYS2d 177; ***Goldman v Simon Prop. Group, Inc.***, 58 AD3d 208, 869 NYS2d 125 [2d Dept 2008]). Among the numerous allegations of materially deceptive practices set forth in the complaint are claims that the manufacturer defendants made and disseminated statements online, in personal presentations, in advertisements, in publications, and in educational materials that misrepresented the risks of opioid addiction and falsely portrayed prescription opioids as a preferred

treatment option for chronic pain, in particular by depicting such drugs as appropriate for long-term use and effective in improving patients' quality of life and ability to function on a day-to-day basis. The plaintiffs allege the manufacturer defendants fallaciously promoted the concept of pseudoaddiction to allay physicians' and patients' concerns about the addictiveness of prescription opioids and to de-stigmatize their use, and deliberately omitted information regarding potential adverse effects, including abuse and addiction, from promotional publications and presentations. They also allege that the manufacturer defendants employed front groups and KOLs to disseminate misleading information through educational forums, publications and websites that reinforced their marketing messages, and to deceive the medical community and the public about the effectiveness of opioids in treating chronic pain, the proper dosing and titration of opioids, and the danger of addiction. In addition, the plaintiffs allege that the misleading communications by the manufacturer defendants, the front groups, and the KOLs were made or disseminated within the plaintiff counties or were posted on public websites. The manufacturer defendants' argument that the plaintiffs must allege and prove a particular misstatement led a specific physician to write a particular opioid prescription for a patient is rejected (*see generally* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD2d 5, 953 NYS2d 96).

Moreover, the plaintiffs adequately allege that the plaintiffs suffered direct injuries as a result of the manufacturer defendants' alleged materially deceptive acts or practices (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858; ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD2d 5, 953 NYS2d 96; *see also* ***In re Pharm. Indus. Average Wholesale Price Litig.***, 2007 WL 1051642 [D Mass 2007]). Contrary to the assertions by the manufacturer defendants, it is sufficiently alleged that the plaintiffs, as a result of the manufacturer defendants' deceptive marketing campaigns regarding opioid effectiveness, misuse and addiction, paid for medications that were not medically necessary and that would not have been approved for the treatment of chronic, non-cancer pain if all the relevant facts about such medications had been known by them. The plaintiffs allege, for example, that they paid for brand-name opioid prescriptions, such as OxyContin, Opana, Nucynta, and Kadian, for employees covered by county-funded health insurance plans and for residents receiving Medicaid benefits based on material misrepresentations disseminated by the manufacturer defendants to the public and the health care community that such products had lower potential for abuse and addiction based on their supposed "long-acting" or "steady-state" properties, and that they paid for brand-name prescriptions of "rapid-onset" or short-acting opioids, such as Actiq, Fentora, and Duragesic, based on material misrepresentations that such medications are safe for treating non-cancer, chronic-pain patients complaining of "breakthrough" pain episodes (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858; *cf.* ***Baron v Pfizer, Inc.***, 42 AD3d 627, 840 NYS2d 445 [3d Dept 2007]). Similarly, the plaintiffs allege that they paid for prescriptions of OxyContin and Opana based on Purdue's and Endo's misrepresentations that such medications were tamper-resistant or crush-proof and, therefore, less likely to be abused (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858; *cf.* ***Baron v Pfizer, Inc.***, 42 AD3d 627, 840 NYS2d 445). It further can be inferred from the complaint that the plaintiffs, having been deceived by the defendant manufacturers about the risks associated with long-term prescription opioid use, were injured by having to pay for more prescriptions than would have otherwise been necessary as patients, particularly county employees and Medicaid beneficiaries, became addicted to such painkillers (*see* ***Wilner v Allstate Ins. Co.***, 71 AD3d 155, 893 NYS2d 208 [2d Dept 2010]). In addition, it is alleged that the manufacturer defendants' deceptive

marketing campaigns created a public health crisis within the plaintiff counties, leading to substantial increases in opioid addiction, abuse, overdose and death among residents, and that such crisis has forced the plaintiffs to allocate substantial resources to implement measures to reduce opioid abuse and opioid-related crimes, and to combat opioid addiction and overdoses with medications, such as naltrexone, naloxone, and buprenorphine, and with treatment programs. Thus, the plaintiffs here are not simply seeking to recoup medical and drug costs incurred by their employees and Medicaid beneficiaries (*cf.* ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 785 NYS2d 399).

Second Cause of Action/General Business Law § 350

Having a scope as broad as that of General Business Law § 349 (***Karlin v IVF Am., Inc.***, 93 NY2d at 290, 690 NYS2d at 498), the statute defines false advertising as "advertising, including labeling, of a commodity" which is "misleading in a material respect." As with a General Business Law § 349 claim, a plaintiff asserting a claim under this statute must establish that the alleged false advertisement had an impact on consumers at large, was deceptive or misleading in a material way, and caused injury (***Andre Strishak & Assoc. v Hewlett Packard Co.***, 300 AD2d at 609, 752 NYS2d at 402; ***Scott v Bell Atl. Corp.***, 282 AD2d 180, 183-184, 726 NYS2d 60, 63 [1st Dept 2001], *lv granted in part, dismissed in part* 97 NY2d 698, 739 NYS2d 95, *mod* 98 NY2d 314, 747 NYS2d 858 [2002]). General Business Law § 350-a (1) provides that, in determining whether advertising is misleading, "there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal [material facts] in the light of such representations with respect to the commodity . . . to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." The defendant's conduct need not rise to the level of a fraud to be actionable (***Matter of People v Applied Card Sys., Inc.***, 27 AD3d 104, 107, 805 NYS2d 175, 178 [3d Dept 2005]). Further, a claim of false advertising must be premised on an advertisement published within the state that "is likely to mislead a reasonable consumer acting reasonably under the circumstances" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d at 26, 623 NYS2d at 533). Reliance by the plaintiff on an advertisement is not a required element of a General Business Law § 350 claim (***Koch v Acker, Merrall & Condit Co.***, 18 NY3d 940, 941, 944 NYS2d 452, 453 [2012]; ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d at 324 n. 1, 746 NYS2d 858, 865; *but see* ***Pesce Bros., Inc. v Cover Me Ins. Agency of NJ, Inc.***, 144 AD3d 1120, 43 NYS3d 85); rather, the plaintiff must show the false advertisement caused it to suffer injury or loss (*cf.* ***Stutman v Chemical Bank***, 95 NY2d 24, 709 NYS2d 892).

Here, the plaintiffs sufficiently allege that the manufacturer defendants, through branded and unbranded print advertisements, public websites, and patient education materials, as well as through one-on-one contacts between sales representatives and physicians, made materially misleading statements regarding the benefits of prescription opioid therapy for chronic pain and the risks associated with opioid use, particularly the potential for abuse (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858; ***Karlin v IVF Am., Inc.***, 93 NY2d 282, 290, 690 NYS2d 495). It is alleged, among other things, that, as marketing research showed physicians are more likely to prescribe a drug if specifically requested by a patient, the manufacturer defendants published misleading advertisements for both the

general consuming public and prescribers. According to the complaint, false advertising was conducted by the manufacturer defendants directly, through branded print and online advertisements and through detailing, and indirectly, through unbranded advertisements, public websites, and various publications issued by front groups funded and controlled by such defendants. The plaintiffs allege, for example, that Purdue and Endo falsely advertised OxyContin and Opana as tamper-resistant and less prone to abuse; that Purdue, Endo, Janssen, and Actavis falsely advertised their respective brand drugs, namely OxyContin, MS Contin, Nucynta ER, Duragesic, Opana ER, and Kadian, as providing up to 12 hours of pain relief; and that Cephalon falsely advertised Actiq and Fentora as appropriate treatment for all cancer patients suffering from breakthrough pain, not only those who were opioid tolerant; and all defendants failed to reveal the substantial dangers associated with long-term use of such potent drugs. It is alleged the manufacturer defendants falsely represented on public websites aimed at patients and prescribers that warnings about the risks of opioid addiction were "overstated," and promoted the concept of pseudoaddiction, for which there is no scientific basis. Further, the plaintiffs allege that the false advertisements materially misled consumers and prescribers about the benefits and risks of prescription opioid therapy for chronic pain, including by failing to reveal that opioids pose a higher risk of abuse and addiction than other analgesics and that there was no scientific basis for many of the claims contained therein.

As to the "impact on consumers" element of General Business Law § 350, the allegations in the complaint are sufficient to infer that false advertising by the manufacturer defendants dramatically increased consumer demand for and consumption of prescription opioids, and that it created public misperception about the safety and efficacy of such prescription drugs. As to the causation element, the allegations in the complaint are sufficient to infer that the opioid epidemic allegedly spawned in part by the manufacturer defendants' false advertising caused the plaintiffs to suffer extraordinary losses, including the costs related to the care and treatment of residents suffering from prescription opioid addiction, and the costs of opioid prescriptions for employees receiving county-funded health insurance benefits and residents receiving Medicaid benefits that would not have been approved had the risks associated with long-term opioid therapy for chronic, non-cancer related pain been known (*see* ***Karlin v IVF Am., Inc.***, 93 NY2d 282, 690 NYS2d 495; *cf.* ***Stutman v Chemical Bank***, 95 NY2d 24, 709 NYS2d 892).

Third Cause of Action/Public Nuisance

The manufacturer defendants jointly contend that the plaintiffs' third cause of action, alleging public nuisance, is deficient as a matter of law for failure to plead either proximate causation or substantial interference with a public right. As to proximate causation, they contend that the alleged causal link between their conduct and the plaintiffs' injury is too attenuated to state a valid claim. As to substantial interference with a public right, they contend that their production, promotion, and marketing of lawful, FDA-approved medications is not "interference," and that the concept of "public right" is not so broad as to include a right to be free of the threat that some individuals might use the product in a way that might create a risk of harm.

A public or "common" nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency (***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]). It consists of conduct or omissions which offend, interfere with, or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place, or endanger or injure the property, health, safety or comfort of a considerable number of persons (*id.*).

Section 821B of Restatement (Second) of Torts provides:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

© whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

The manufacturer defendants' arguments are insufficient to warrant dismissal. Addressing first the claimed lack of proximate causation, the defendants rely heavily on ***People v Sturm, Ruger & Co.*** (309 AD2d 91, 761 NYS2d 192, *lv denied* 100 NY2d 514, 769 NYS2d 200 [2003]), a case involving public nuisance claims against handgun manufacturers, wholesalers, and retailers. There, the plaintiff alleged, in part, that despite the defendants having been placed on notice that the guns sold, distributed, and marketed by them were being used in crimes, they were deliberately designing and marketing their product in a way that placed a disproportionate number of guns in the possession of people who use them unlawfully. In dismissing the public nuisance claims, the court, based on its reading of ***Hamilton v Beretta U.S.A. Corp.*** (96 NY2d 222, 727 NYS2d 7 [2002] [involving a negligent marketing claim against handgun makers]), relied primarily on a proximate cause analysis, noting that the harms alleged were too indirect and remote from the defendants' conduct and expressing a general reluctance to "open the courthouse doors to a flood of limitless, similar theories of public nuisance" in matters involving commercial activity (***People v Sturm, Ruger & Co.***, 309 AD2d at 96, 761 NYS2d at 196). The court did, however, recognize that public nuisance might be an appropriate tool, in other contexts, to address consequential harm from commercial activity. And the court also noted, as in ***Hamilton***, a break in the causative chain by the criminal activity of intervening third parties, i.e., that the parties most directly responsible for the unlawful use of handguns were the individuals unlawfully using them.

Here, by contrast, it is alleged that the plaintiffs have been damaged not only by the illegal use of opioids but also by their legal use, consistent with the manufacturer defendants' marketing and promoting. As to such legal use, it is at least arguable that the manufacturer defendants were in a position to anticipate or prevent the claimed injuries; it does not seem unfair, therefore, to hold them potentially accountable. The court is doubtful, in any event, whether a discussion of proximate cause in a case based on negligence should even apply in a case based on public nuisance. "[W]here the welfare and safety of an entire community is at stake, the cause need not be so proximate as in individual negligence cases" (***City of New York v A-1 Jewelry & Pawn***, 247 FRD 296, 347-348 [ED NY 2007]). As for the manufacturer defendants' claim that the plaintiffs have failed to plead substantial interference with a public right, it suffices to note the defendants' failure to establish why public health is not a right common to the general public, nor why such continuing, deceptive conduct as alleged would not amount to interference; it can scarcely be disputed, moreover, that the conduct at the heart of this litigation, alleged to have created or contributed to a crisis of epidemic proportions, has affected "a considerable number of persons" (***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d at 568, 394 NYS2d at 172).

Fourth Cause of Action/Social Services Law § 145-b

The manufacturer defendants jointly contend that the plaintiffs' fourth cause of action, alleging violation of Social Services Law § 145-b, must be dismissed for failure to state a cause of action. The manufacturer defendants claim that the plaintiffs failed to plead facts showing that any defendant "attempt[ed] to obtain" or "obtain[ed] payment from public funds," or that they made any "false statement or representation." As to the pleading requirement with respect to false statements or representations, the manufacturer defendants note the plaintiffs' failure to identify any "claim for payment" made to the plaintiffs by any defendant or any specific "acknowledgment, certification, claim, ratification or report of data which serve[d] as the basis for a claim," or to allege that any such statement or representation was materially or knowingly false. Although the plaintiffs duly recite the elements of the cause of action in their complaint, the manufacturer defendants claim that such formulaic recitation is insufficient to withstand dismissal. The manufacturer defendants further claim that Social Services Law § 145-b applies only to providers and not to parties who, like the defendants, do not directly receive public funds.

The plaintiffs counter that their complaint does, in fact, plead each of the required elements, and that a cause of action alleging a violation of Social Services Law § 145-b need not be pleaded with the same degree of detail as a cause of action in fraud. The plaintiffs also contend that the statute is not limited in its application to Medicaid providers who receive direct payments of public funds but applies to any person who makes fraudulent statements to obtain such funds, whether directly or indirectly.

Social Services Law § 145-b states that "[i]t shall be unlawful for any person, firm or corporation knowingly by means of false statement or representation, or by deliberate concealment of any material fact, or other fraudulent scheme or device, on behalf of himself or others, to attempt to obtain or to obtain payment from public funds for services or supplies furnished or purportedly furnished" under the Social Services Law. A "statement or representation" includes, but is not limited to

> a claim for payment submitted to the State, a political subdivision of the state, or an entity performing services under contract to the state or a political subdivision of the state; an acknowledgment, certification, claim, ratification or report of data which serves as the basis for a claim or a rate of payment[;] financial information whether in a cost report or otherwise[;] health care services available or rendered[;] and the qualifications of a person that is or has rendered health care services.

(Social Services Law § 145-b [1] [b]; *see generally* ***State of New York v Lutheran Ctr. for the Aging***, 957 F Supp 393 [ED NY 1997]). A person, firm or corporation "has attempted to obtain or has obtained" payment from public funds "when any portion of the funds from which payment was attempted or obtained are public funds, or any public funds are used to reimburse or make prospective payment to an entity from which payment was attempted or obtained" (Social Services Law § 145-b [1] [c]). The statute vests the local social services district or the State the right to recover civil damages for Medicaid and Medicare fraud equal to "three times the amount by which any figure is falsely overstated or in the case of non-monetary false statements or representations, three times the amount of damages which the state, political subdivision of the state, or entity performing services under contract to the state or political subdivision of the state sustain as a result of the violation or five thousand dollars, whichever is greater" (Social Services Law § 145-b [2]).

The manufacturer defendants' claims are rejected. To the extent they contend that this cause of action is deficient due to lack of factual specificity, the court is constrained to disagree. Even assuming the applicability of CPLR 3016 (b), which requires that causes of action based in fraud be pleaded with particularity, the pleading is sufficient. As discussed elsewhere in this order, the complaint adequately alleges the fraudulent and deceptive practices underlying the causes of action alleging violations of General Business Law §§ 349 and 350, as well as the cause of action for fraud; it is enough, therefore, for purposes of CPLR 3016 (b), to allege, as the plaintiffs have done, that the manufacturer defendants employed those practices to obtain or attempt to obtain public funds for themselves or others. "[T]he purpose underlying [CPLR 3016 (b)] is to inform a defendant of the complained-of incidents . . . CPLR 3016 (b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct" (***Eurycleia Partners v Seward & Kissel***, 12 NY3d 553, 559, 883 NYS2d 147, 150 [2009] [internal quotation marks omitted]). Nor, contrary to the manufacturer defendants' argument, is there any pleading requirement that the plaintiffs allege facts showing that the defendants obtained or attempted to obtain public funds directly from the plaintiffs. Under subdivision (1) (a), it is unlawful for a person to fraudulently obtain or attempt to obtain public funds, whether "on behalf of himself or others"; under subdivision (1) ©, a person has obtained or attempted to obtain public funds when such funds "are used to reimburse or make prospective payment to an entity from which payment was obtained or attempted." If, then, a defendant indirectly receives public funds by making a fraudulent statement to assist a Medicaid provider in procuring such funds, such conduct would seem to fall within the ambit of the statute (*cf.* ***In re Pharm. Indus. Average Wholesale Price Litig.***, 339 F Supp 2d 165 [D Mass 2004]). Even if ***People v Pharmacia Corp.*** (2004 WL 5841904 [Sup Ct, Albany County 2004]), cited by the manufacturer defendants, may be to the contrary–and this court is not persuaded that it is–it suffices to

note at this juncture that a decision of a court of equal jurisdiction, though entitled to respectful consideration, is not controlling (McKinney's Cons Laws of NY, Book 1, Statutes § 72 [b]). Likewise, it cannot be said that the plaintiffs failed to plead a "false statement or representation." While the manufacturer defendants correctly note that a "statement or representation" within the definition of the statute may include a "claim for payment" or an "acknowledgment, certification, claim, ratification or report of data" which serves as the basis for such a claim, the statute does not exclude, by its terms, statements and representations which are just that–statements and representations–and the defendants do not explain why the allegedly false statements and representations underlying the plaintiffs' other causes of action based in fraud and deceit would not serve to support this cause of action as well. Whether, then, the plaintiffs may have failed to identify specifically any "claim for payment" made to a county or any "acknowledgment, certification, claim, ratification or report of data" serving as the basis for such a claim is immaterial for purposes of this determination.

Fifth Cause of Action/Fraud

The manufacturer defendants move to dismiss the plaintiffs' fifth cause of action for fraud on the grounds, among other things, that the complaint does not conform to the pleading requirements of CPLR 3013 and CPLR 3016 (b). CPLR 3013 provides that the "[s]tatements in a pleading shall be sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Here, the manufacturer defendants have not indicated that the complaint fails to give them adequate notice of the transactions, occurrences, or series of transactions or occurrences which the plaintiffs intend to prove regarding their fifth cause of action, or that they are unable to frame an answer to the allegations in the complaint.

CPLR 3016 (b) requires that in an action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" in the pleading. Bare allegations of fraud without any allegation of the details constituting the wrong are not sufficient to sustain such a cause of action (CPLR 3016 [b]; *see* ***Kline v Taukpoint Realty Corp.***, 302 AD2d 433, 754 NYS2d 899 [2d Dept 2003]; ***Gill v Caribbean Home Remodeling***, 73 AD2d 609, 422 NYS2d 448 [2d Dept 1979]; ***Biggar v Buteau***, 51 AD2d 601, 377 NYS2d 788 [3d Dept 1976]). However, the statute "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of" (***Lanzi v Brooks***, 43 NY2d 778, 780, 402 NYS2d 384, 385 [1978]; *see also* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]; ***Mikulski v Battaglia***, 112 AD3d 1355, 977 NYS2d 839 [4th Dept 2013]). In addition, when the operative facts are "peculiarly within the knowledge of the party" alleged to have committed the fraud, it may not be possible at the pleading stage of the proceeding for the plaintiff to detail all the circumstances constituting the fraud (***Jered Contr. Corp. v New York City Tr. Auth.***, 22 NY2d 187, 194, 292 NYS2d 98, 104 [1968]; *see also* ***Pludeman v Northern Leasing Sys., Inc.***, 10 NY3d 486, 860 NYS2d 422 [2008]). It has been held that CPLR 3016 (b) is satisfied when the facts suffice to permit a "reasonable inference" of the alleged misconduct (***Eurycleia Partners, LP v Seward & Kissel, LLP***, 12 NY3d 553, 883 NYS2d 147 [2009], citing ***Pludeman v Northern Leasing Sys., Inc.***, 10 NY3d 486, 860 NYS2d 422).

The elements of a cause of action for fraud are (1) a misrepresentation of fact, (2) which was false and known to be false by the defendant, (3) made for the purpose of deceiving the plaintiff, (4) upon which the plaintiff justifiably relied, (5) causing injury (*e.g.* ***Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.***, 88 AD2d 461, 453 NYS2d 750 [2d Dept 1982]; *see also* ***Ozelkan v Tyree Bros. Envtl. Servs.***, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]). Thus, a plaintiff seeking to recover for fraud must establish that the defendant knowingly made a false representation (*see e.g.* ***Wilson v Neighborhood Restore Hous.***, 129 AD3d 948, 12 NYS3d 166 [2d Dept 2015]; ***Miller v Livingstone***, 25 AD2d 106, 267 NYS2d 249 [1st Dept], *affd* 18 NY2d 967, 278 NYS2d 206 [1966]), that the defendant made such misrepresentation with an intent to defraud (***Marine Midland Bank v Russo Produce Co., Inc.***, 50 NY2d 31, 427 NYS2d 961 [1980]), and that the misrepresentation was false in a material and substantial respect (*see* ***Ozelkan v Tyree Bros. Envtl. Servs., Inc.***, 29 AD3d 877, 815 NYS2d 265). A plaintiff alleging fraud also must prove that it relied on the alleged misrepresentation and that such misrepresentation was a substantial factor in inducing it to act (*see* ***Ginsburg Dev. Cos., LLC v Carbone***, 134 AD3d 890, 22 NYS3d 485 [2d Dept 2015]). Significantly, the plaintiff's reliance on the misrepresentation must have been reasonable or justified under the circumstances (*see* ***McDonald v McBain***, 99 AD3d 436, 952 NYS2d 486 [1st Dept 2012]; ***East End Cement & Stone, Inc. v Carnevale***, 73 AD3d 974, 903 NYS2d 420 [2d Dept 2010]). Reliance will not be justified if the plaintiff could have discovered the truth through due diligence (*see* ***Wildenstein v 5H&Co., Inc.***, 97 AD3d 488, 950 NYS2d 3 [1st Dept 2012]).

The plaintiffs have pled a cognizable cause of action for fraud. The plaintiffs allege that the manufacturer defendants purposefully misrepresented that opioids improve function and quality of life, that addiction risks can be managed, that withdrawal is easily managed, that higher doses of opioids pose no greater risks to patients, and that they deceptively mininized the adverse effects of opioids while overstating the risks of NSAIDs (nonsteroidal anti-inflammatory drugs). The plaintiffs further allege that the manufacturer defendants created a body of false, misleading, and unsupported medical and popular literature about opioids, that they disguised their own roles in the deceptive marketing of chronic opioid therapy by funding and working through patient advocacy and professional front organizations, and that they spent "hundreds of millions of dollars" in this false and misleading marketing campaign to improperly influence individual prescribers. The plaintiffs allege that the strategies employed by the manufacturer defendants "were intended to, and did, knowingly and intentionally distort the truth regarding the risks, benefits and superiority of opioids for chronic pain relief resulting in distorted prescribing patterns."

The plaintiffs also allege that the manufacturer defendants' "misrepresentations were material to, and influenced, the plaintiffs' decisions to pay claims for opioids for chronic pain (and, therefore, to bear its consequential costs in treating overdose, addiction, and other side effects of opioid use)," and that the plaintiffs have taken "steps to ensure that the opioids are only prescribed and covered when medically necessary or reasonably required." Thus, the plaintiffs allege that the manufacturer defendants intended that the plaintiffs, physicians, patients, and others would rely on their misrepresentations and omissions, and that the plaintiffs reasonably relied upon said misrepresentations and omissions.

Finally, the plaintiffs allege that the manufacturer defendants' misrepresentations caused them direct injury as they have incurred costs related to opioid addiction and abuse, including health care costs, criminal justice and victimization costs, social costs, and lost productivity costs. As discussed above, to the extent the manufacturer defendants urge the application of the rule barring recovery of indirect or derivative injuries sustained by others, the court notes that the plaintiffs are not simply seeking to recoup medical and drug costs incurred by their employees and Medicaid beneficiaries (*cf.* ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 205, 785 NYS2d 399 [2004]).

Sixth Cause of Action/Unjust Enrichment

The manufacturer defendants contend that the plaintiffs' sixth cause of action, sounding in unjust enrichment, must be dismissed because it is derivative and duplicative of their other claims, and because the plaintiffs have failed to allege facts showing that the defendants were enriched, that such enrichment was unjust and at the plaintiffs' expense, that the plaintiffs suffered any cognizable loss, or that it would be against equity or good conscience to permit the manufacturer defendants to retain what it sought to be recovered. The manufacturer defendants also contend that the parties lack a sufficiently close relationship to support a cause of action for unjust enrichment.

In order to adequately plead a cause of action for unjust enrichment, it must be alleged that the defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (***Mandarin Trading v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]). The theory of unjust enrichment "lies as a quasi-contract claim" and contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (***Georgia Malone & Co. v Rieder***, 19 NY3d 511, 516, 950 NYS2d 333, 336 [2012] [internal quotation marks omitted]). "Although privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (***Mandarin Trading v Wildenstein***, 16 NY3d at 182, 919 NYS2d at 472; *accord* ***Sperry v Crompton Corp.***, 8 NY3d 204, 831 NYS2d 760 [2007]).

Here, the plaintiffs plead that the manufacturer defendants, as an expected and intended result of their conscious wrongdoing alleged elsewhere in the complaint, were enriched from opioid purchases made by the plaintiffs and that it would be unjust and inequitable to permit them to enrich themselves at the plaintiffs' expense.

The court finds the pleading sufficient to withstand the manufacturer defendants' claims. It does not appear, for purposes of this determination, that this cause of action is either derivative or duplicative of any other cause of action. As pleaded, it is the only cause of action by which the plaintiff seek disgorgement of profits and other monetary benefits resulting from the manufacturer defendants' alleged misconduct; moreover, as New York law specifically allows for the pleading of alternative causes of action and alternative forms of relief (CPLR 3014, 3017), the plaintiffs need not elect any theory over another at this preliminary stage. To the extent the manufacturer defendants urge the application of the rule barring recovery of indirect or derivative injuries sustained by others, the court notes, as before, that

the plaintiffs here are not simply seeking to recoup medical and drug costs incurred by their employees and Medicaid beneficiaries (*cf.* ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 785 NYS2d 399 [2004]). The manufacturer defendants have also failed to explain why, as a pleading matter, the retention of profits wrongfully obtained would not be unjust. As for the relationship between and among the parties, the plaintiffs allege, in relevant part, that the manufacturer defendants created a body of false and misleading literature intended to shape the perceptions of third-party payors such as the plaintiffs, encouraging them to pay for long-term opioid prescriptions and effectively depriving them of the chance to exercise informed judgment; implicit in those allegations is that the manufacturer defendants knew the plaintiffs were to be the source of a significant portion of their profits. Accepting those facts as true and according the plaintiffs the benefit of every favorable inference (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]), it is evident that the plaintiffs have pleaded a relationship–or "at least an awareness" by the manufacturer defendants of the plaintiffs' existence (***Mandarin Trading v Wildenstein***, 16 NY3d at 182, 919 NYS2d at 472)–sufficient to maintain their cause of action.

Seventh Cause of Action/Negligence

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *see also* ***Pasquaretto v Long Is. Univ.***, 106 AD3d 794, 964 NYS2d 599 [2d Dept 2013]; ***Schindler v Ahearn***, 69 AD3d 837, 894 NYS2d 462 [2d Dept 2010]). A duty of reasonable care owed by the alleged tortfeasor to the plaintiff is essential to any recovery in negligence (***Eiseman v State of New York***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 728 NYS2d 731 [2001]; ***Waters v New York City Hous. Auth.***, 69 NY2d 225, 513 NYS2d 356 [1987]).

The manufacturer defendants contend that the plaintiffs' cause of action for negligence must be dismissed because New York does not impose a duty upon manufacturers to refrain from the lawful distribution of a non-defective product. Citing ***Hamilton v Beretta U.S.A. Corp.***, 96 NY2d 222, 727 NYS2d 7 (2001), they also argue that they do not owe the plaintiffs a duty to protect against the misconduct of third parties, that New York does not impose a legal duty on manufacturers to control the distribution of potentially dangerous products, and that "the alleged foreseeability of injuries is not a reason to find that a duty exists" herein. They further contend that the plaintiffs must allege a "specific duty" is owed to them, and that they may not rely upon a "general duty to society" to support their cause of action for negligence.

"A critical consideration in determining whether a duty exists is whether 'the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm'" (***Davis v South Nassau Communities Hosp.***, 26 NY3d 563, 572, 26 NYS2d 231 [2015], quoting ***Hamilton v Beretta U.S.A. Corp.***, 96 NY2d 222, 233, 727 NYS2d 7 [2001]).

Unlike ***Hamilton***, where the Court of Appeals found that gun manufacturers were not in the best position to protect against the risk of harm from the misuse of its product by third parties, here the plaintiffs allege facts sufficient to support the existence of a duty of care. Specifically, the plaintiffs allege that because the manufacturer defendants had knowledge of the actual risks and benefits of their products, including their addictive nature, which they did not disclose, they were in the best position to protect the plaintiffs against the expenses incurred for opioids prescribed for their employees and for Medicaid beneficiaries that would not have been approved for payment, and against the extraordinary amounts expended to combat the opioid crisis allegedly caused by the deceptive marketing campaigns.

Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public polices affecting the expansion or limitation of new channels of liability" (***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 586, 611 NYS2d 817, 821 [1994]; *see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]). In balancing these factors, the plaintiffs have adequately pled that their expectations and those of society would require different behaviors on the part of the manufacturer defendants, that there is a finite number of counties in the State of New York with potential claims against said defendants, that the allegedly negligent acts and omissions of said defendants do not create unlimited liability, that the risks allegedly created by said defendants do not disproportionally outweigh the possible reparations to be awarded herein, and that public policy must address the issues raised in the complaint. It is noted that New York courts have recognized a cause of action for negligent marketing of prescription drugs (*see* ***Bikowicz v Sterling Drug, Inc.***, 161 AD2d 982, 557 NYS2d 551 [3d Dept 1990]).

The plaintiffs also allege sufficient facts to support a separate duty not to deceive (*see e.g.* ***Cipollone v Liggett Group, Inc.***, 505 US 504, 112 S Ct 2608 [1992]; ***In re Ford Fusion & C-Max Fuel Econ. Litig.***, 2015 WL 7018369 [SD NY 2015]; *see also* ***Tomasino v American Tobacco Co.***, 23 AD3d 546, 807 NYS2d 603 [2d Dept 2005]). The plaintiffs allege that the manufacturer defendants failed to comply with 10 NYCRR 80.22, which requires manufacturers of controlled substances to "establish and operate a system to disclose to the licensee suspicious orders for controlled substances and inform the department of such suspicious orders. Suspicious orders shall include, but not be limited to, orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency." It is well settled that a violation of a regulation or ordinance constitutes some evidence of negligence (*see* ***Bauer v Female Academy of Sacred Heart***, 97 NY2d 445, 741 NYS2d 491 [2002]; ***March Assoc. Constr., Inc. v CMC Masonry Constr.***, 151 AD3d 1050, 58 NYS3d 423 [2d Dept 2017]). A "violation of the statute's implementing rules and regulations . . . constitutes some evidence of negligence" (***Watral & Sons, Inc. v OC Riverhead 58, LLC***, 34 AD3d 560, 567, 824 NYS2d 392, 398 [2d Dept 2006], *revd on other grounds* 10 NY3d 180, 855 NYS2d 49 [2008]).

Moreover, the manufacturer defendants' contention that the plaintiffs have failed to adequately allege "but for" causation is without merit, as the test for legal causation is proximate cause (*see* ***Burlington Ins. Co. v NYC Tr. Auth.***, 29 NY3d 313, 57 NYS3d 85 [2017]). Similarly, the manufacturer defendants' contention that plaintiffs have failed to adequately allege causation in a general sense is not dispositive herein. "Generally, issues of proximate cause are for the fact finder to

resolve" (***Gray v Amerada Hess Corp.***, 48 AD3d 747, 748, 853 NYS2d 157 [2d Dept 2008], quoting ***Adams v Lemberg Enters., Inc.***, 44 AD3d 694, 695, 843 NYS2d 432 [2d Dept 2007]). Even at the more advanced stage of litigation, "the absence of direct evidence of causation [does] not necessarily compel a grant of summary judgment in favor of the defendant, as proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone" (***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 570, 754 NYS2d 31, 32 [2003]; *see also* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Mitchell v Mongoose, Inc.***, 19 AD3d 380, 796 NYS2d 421 [2d Dept 2005]). Here, the plaintiffs have adequately pled that the alleged breach of the manufacturer defendants' duty herein was a proximate cause of their injuries.

Finally, the manufacturer defendants contend that the economic-loss doctrine bars the plaintiffs' cause of action for negligence. The economic loss doctrine provides that economic losses with respect to a product and consequential damages resulting from an alleged defect in that product are not recoverable in a cause of action for strict products liability and negligence against a manufacturer (*New York Methodist Hosp. v Carrier Corp.*, 68 AD3d 830, 892 NYS2d 110 [2d Dept 2009]). A product may be defective due to a mistake in the manufacturing process, a negligent design, or a failure to provide adequate warnings regarding the use of the product (***Sprung v MTR Ravensburg***, 99 NY2d 468, 758 NYS2d 271 [2003]; ***Gebo v Black Clawson***, 92 NY2d 387, 392, 681 NYS2d 221 [1998]; ***Voss v Black & Decker Mfg. Co.***, 59 NY2d 102, 463 NYS2d 398 [1983]). "The rationale behind the economic loss doctrine is that economic losses resulting from a defective product are best treated under the law of contracts, not tort" (***Shema Kolainu-Hear Our Voices v ProviderSoft, LLC***, 832 F Supp 2d 194 [ED NY 2010]; *see also* ***Hydro Invs., Inc. v Trafalgar Power Inc.***, 227 F3d 8, 16 [2d Cir 2000]). "This is because '[t]he particular seller and purchaser are in the best position to allocate risk at the time of their sale and purchase, and this risk allocation is usually manifested in the selling price'" (***Shema Kolainu-Hear Our Voices v ProviderSoft, LLC***, 832 F Supp 2d at 205, quoting ***Bocre Leasing Corp. v General Motors Corp.***, 84 NY2d 685, 688, 621 NYS2d 497, 498 [1995] [internal citations omitted]).

"New York does not permit recovery through tort actions for damages that result from the poor performance of a contracted-for product" (***Shema Kolainu-Hear Our Voices v ProviderSoft, LLC***, 832 F Supp 2d at 205 [internal citations omitted]). It is well settled that a simple breach of contract is not considered a tort unless a legal duty independent of the contract has been violated (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389, 521 NYS2d 653, 656 [1987]; *see New York Univ. v* ***Continental Ins. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]; ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 583 NYS2d 957 [1992]). Here, the plaintiffs have not asserted a cause of action against the manufacturer defendants for breach of contract or an alleged defect in the product produced by said defendants. In addition, the plaintiffs' allegations indicate that the relevant transactions between the parties were not contractual, that they did not afford the plaintiffs the opportunity to allocate the attendant risks associated with the alleged improper acts and omissions of the manufacturer defendants, and that this is more than a "case of economic disappointment" which would make the economic-loss doctrine applicable herein (*see* ***Bellevue S. Assoc. v HRH Constr. Corp.***, 78 NY2d 282, 294, 574 NYS2d 165, 170 [1991]; *see e.g.* ***Hydro Invs., Inc. v Trafalgar Power Inc.***, 227 F3d 8; ***Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.***, 80 AD3d 293, 915 NYS2d 7 [1st Dept 2010]). Accordingly,

that branch of the manufacturer defendants' motion which seeks to dismiss the plaintiffs' seventh cause of action for negligence is denied.

Conclusion

In accordance with the foregoing analysis, the manufacturer defendants' motions are denied, except to the extent that the complaint against Allergan plc is dismissed for lack of personal jurisdiction. As to any contentions by the manufacturer defendants not specifically addressed above, the court finds that they lack merit or that they state defenses more appropriately considered on a motion for summary judgment or at the trial of this action.

The manufacturer defendants shall serve their answer(s) to the complaint within 10 days after the date on which this order is uploaded on the NYSCEF site (*see* CPLR 3211 [f]).

Dated: June 18, 2018

J.S.C.
HON. JERRY GARGUILO

SHORT FORM ORDER

INDEX No. 400000/2017

SUPREME COURT - STATE OF NEW YORK
NEW YORK STATE OPIOID LITIGATION PART 48 - SUFFOLK COUNTY

PRESENT:

E-FILE

Hon. JERRY GARGUILO
Justice of the Supreme Court

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IN RE OPIOID LITIGATION

MOTION DATE 2/7/18
ADJ. DATE 3/21/18
Mot. Seq. #009 - MD

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Upon the reading and filing of the following papers in this matter (1) Notice of Motion by defendan Insys Therapeutics, Inc. (Mot. Seq. #009), dated November 10, 2017, and supporting papers (including Memorandum of Law); (2) Memorandum of Law in Opposition (Mot. Seq. #009), dated January 19, 2018; (3) Reply Memorandum of Law (Mot. Seq. #001), dated February 23, 2018;

ORDERED that the motion by defendant Insys Therapeutics, Inc. for an order pursuant to CPLR 3211, dismissing the master long form complaint against it is denied.

The plaintiffs are counties within the State of New York that have commenced separate actions against certain pharmaceutical manufacturers for harm allegedly caused by false and misleading marketing campaigns promoting semi-synthetic, opium-like pharmaceutical pain relievers, including oxycodone, hydrocodone, oxymorphone, and tapentadol, as well as the synthetic opioid prescription pain medication fentanyl, as safe and effective for long-term treatment of chronic pain. Also named as defendants in those actions are certain pharmaceutical distributors that allegedly distributed those opium-like medications (hereinafter referred to as prescription opioids or opioids) to retail pharmacies and institutional health care providers for customers in such counties, and individual physicians allegedly "instrumental in promoting opioids for sale and distribution nationally" and in such counties. Briefly stated, the plaintiffs allege that tortious and illegal actions by the defendants fueled an opioid crisis within such counties, causing them to spend millions of dollars in payments for opioid prescriptions for employees and Medicaid beneficiaries that would have not been approved as necessary for treatment of chronic pain if the true risks and benefits associated with such medications had been known. They also allege that the defendants' actions have forced them to pay the costs of implementing opioid treatment programs for residents, purchasing prescriptions of naloxone to treat prescription opioid overdoses, combating opioid-related criminal activities, and other such expenses arising from the crisis.

One such lawsuit was commenced in August 2016 by Suffolk County and assigned to the Commercial Division of the Supreme Court. By order dated July 17, 2017, the Litigation Coordinating Panel of the Unified Court System of New York State directed the transfer of eight opioid-related actions brought by other counties, and any prospective opioid actions against the manufacturer, distributor, and individual defendants, be transferred to this court for pre-trial coordination. That same day, the

undersigned issued a case management order reiterating that the individual actions are joined for coordination, not consolidated, and directing that a master file, known as "In re Opioid Litigation," assigned index number 400000/2017, be established for the electronic filing of all documents related to the proceeding. The undersigned further directed the plaintiffs to file and serve a master long form complaint subsuming the causes of action alleged in the various complaints, and directed the manufacturer defendants, the distributor defendants, and the individual defendants to file joint motions pursuant to CPLR 3211, seeking dismissal of the master complaint, all by certain dates.

The plaintiffs have adopted the master long form complaint (hereinafter the complaint) in accordance with the court's directive. In response, the defendant manufacturers and distributors have submitted numerous motions, individually and jointly, for dismissal of the complaint. Among the motions submitted to the court is a joint motion by the defendant manufacturers seeking dismissal of the long form complaint. Defendant Insys Therapeutics, Inc. (herein referred to as "Insys"), the lone defendant manufacturer not listed as a party to the joint motion, now moves, individually, for an "[order, pursuant to CPLR 3211, dismissing the Complaint . . . in its entirety." In seeking judgment in its favor, Insys purports to adopt and incorporate by reference the arguments and authorities set forth in the abovementioned joint motion by the remaining defendant manufacturers. Additionally, Insys asserts that the plaintiffs failed to state viable causes of action against it, because the sales of its drug "Subsist accounted] for approximately .01% of opioids prescribed in New York in the last 10 years, and less than approximately .03% of opioids prescribed in New York since the beginning of 2012." Insys argues, in connection with this assertion, that the allegations against it in the complaint are general in nature and lack any specific facts to suggest that Subsist was prescribed in the plaintiff counties, that the plaintiff counties ever paid for Subsist prescriptions, or that Subsist either caused harm to a single person in any of the counties or caused such persons to become addicted to opioids.

In addition, Insys argues that the allegations contained in the complaint relating to the harm sustained by to the residents of Nassau, Niagara, Rensselaer, and Schoharie counties are general in nature and implausible on their face when applied to Insys, and that they are impermissibly based upon national rather than county specific data. To this end, Insys asserts that the complaint is devoid of a single fact about any false advertising or misrepresentation it allegedly conducted within the confines of the plaintiff counties. Insys further asserts that the plaintiffs erroneously allege that it was responsible for fraudulent marketing that allegedly took place in the year 2000, when, in fact, its drug was not introduced to the New York market until 2012. Insys then makes a final generalized argument that the complaint contains "myriad other defects, such as impermissible group pleading, a wholesale failure to plead damage causation, and others, which are addressed in detail by the primary motion."

The plaintiffs oppose Insys' motion on three grounds. The plaintiffs reject Insys' argument that they cannot adequately allege causation or harm because the sales of Insys' drug accounted for only a "minuscule" percentage of all the opioids sold in New York, arguing that even if there was a minuscule number of Subsist sales within the counties, the court may determine Insys' liability for such sales in proportion to its market share of all the opioids sold in the New York market generally. Alternatively, the plaintiffs contend that dismissal based on this argument would be inappropriate where, as in this case, there has been no discovery and additional facts may be later discovered showing that the volume

of Subsist sales within the state is much larger than indicated in Insys' moving papers. As to Insys' argument that plaintiffs will be unable to establish a cause of action against it for alleged fraudulent marketing that took place prior to 2012 when Subsist allegedly entered the New York market, plaintiffs assert that Insys may nonetheless be held liable for the prior conduct of other drug manufacturers or suppliers with whom Insys acted with as a co-conspirator when it later adopted their common scheme. To substantiate their claim of a conspiracy between Insys and some of the other drug manufacturers, plaintiffs point to the specific allegations made in the complaint that detail how ex-employees of Cephalon, Inc., another defendant drug manufacturer named in the complaint, became employed by Insys and participated in the rollout of a scheme substantially similar to the one utilized by their prior employer to deceptively market Subsist to county residents for off-label use.

As to Insys' general assertion that the complaint lacks specific allegations concerning its alleged deceptive practices within the plaintiff counties, the plaintiffs assert that the complaint provides detailed allegations describing deceptive and fraudulent marketing tactics deployed by Insys to avoid prior authorization from insurance companies, their creation of a fraudulent speakers program used to bribe doctors to write numerous off-label prescriptions for Subsist , and Insys' wilful failure to impose sufficient compliance procedures to prevent prescription fraud and to audit interactions between their employees and outside entities. Finally, plaintiffs request, should the court deem the complaint deficient in any way, that they be granted leave to amend the pleading pursuant to CPLR 3025 (b).

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Antoine v Kalandrishvili***, 150 AD3d 941, 941, 56 NYS3d 142 [2d Dept 2017]; *see* ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; *see* ***Kaplan v New York City Dept. of Health and Mental Hygiene***, 142 AD3d 1050, 38 NYS3d 563 [2d Dept 2016]), and a plaintiff is not obligated to demonstrate the existence of evidentiary facts to support the allegations contained in the complaint (*see* ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314 [1976]; ***Stuart Realty Co. v Rye Country Store***, 296 AD2d 455, 745 NYS2d 72 [2d Dept 2002]). Indeed, when determining a motion to dismiss pursuant to CPLR 3211(a) (7) an assessment of the "relative merits of the complaint's allegations against the defendant's contrary assertions" is not authorized (***Salles v Chase Manhattan Bank***, 300 AD2d 226, 228, 754 NYS2d 236 [1st Dept 2002]), and the burden never shifts to the nonmoving party to rebut a defense asserted by the movant (*see* ***E & D Group, LLC v Vialet***, 134 AD3d 981, 21 NYS3d 691 [2d Dept 2015]; ***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). The sufficiency of a complaint need only be measured against what the law requires of the pleadings in a particular case, and will be met so long as they give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action (*see* CPLR 3013; ***East Hampton Union Free Sch. Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]). Moreover, it is well established that a motion to dismiss made pursuant to CPLR 3211 (a) (7) "'will be denied in its entirety where the complaint asserts several causes of action, at least one of

which is legally sufficient, and . . . the motion [wa]s aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed'" (***Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assoc.***, 215 AD2d 450, 452, 626 NYS2d 828, 829 [2d Dept 1995], quoting ***Martirano Constr. Corp. v Briar Contr. Corp.***, 104 AD2d 1028, 481 NYS2d 105 [2d Dept 1984]; *see* ***Advance Music Corp. v American Tobacco Co.***, 296 NY 79 [1946]; ***Chase v Town of Camillus***, 247 AD2d 851, 668 NYS2d 830 [4th Dept 1998]; ***Great N. Assoc. v Continental Cas. Co.***, 192 AD2d 976, 596 NYS2d 938 [3d Dept 1993]).

Initially, the court notes that Insys' motion, which is aimed at the pleadings as a whole, fails to particularize which of the seven causes of action contained in the complaint it wishes to be dismissed, or which one of the many arguments contained in the joint motion it wishes to adopt and deploy against the unique set of allegations made against it in the complaint. Indeed, Insys failed to identify what section of CPLR 3211 it intends to rely upon in support of its application to dismiss the complaint. The court, therefore, is left in the untenable position of having to speculate which arguments relate to the unique set of allegations made against Insys, and how such arguments should be applied to the particular causes of action. As a result, the court concludes that Insys has not only failed to meet its initial burden of demonstrating entitlement to judgment in its favor pursuant to CPLR 3211, but the motion, which was addressed to the long form master complaint as a whole, must be denied in its entirety, since the court finds, as discussed below, that the plaintiff counties have sufficiently pleaded a cognizable claim pursuant to section 349 of the General Business Law (*see* ***Advance Music Corp. v American Tobacco Co.***, 296 NY 79; ***Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assoc.***, 215 AD2d 450, 626 NYS2d 828; ***Great N. Assoc. v Continental Cas. Co.***, 192 AD2d 976, 596 NYS2d 938; ***Elias v Handler***, 155 AD2d 583, 548 NYS2d 33 [2d Dept 1989]; ***Gedan v Home Ins. Co.***, 144 AD2d 338, 533 NYS2d 945 [2d Dept 1988]; ***Wright v County of Nassau***, 81 AD2d 864, 438 NYS2d 875 [2d Dept 1981]).

General Business Law § 349 (a) provides that it is unlawful to perform "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The statute is "meant to curtail deceptive acts and practices – willful or otherwise – directed at the consuming public" (***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 704 NYS2d 177 [1999]). Although the statute as originally enacted was only enforceable by the Attorney General, it was amended in 1980 to allow actions by private plaintiffs, including corporate entities, injured by such illegal conduct (*see* General Business Law § 349 [h]; ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 205, 785 NYS2d 399 [2004]; ***Karlin v IVF Am., Inc.***, 93 NY2d 282, 290, 690 NYS2d 495 [1999]; ***Blue Cross & Blue Shield of N.J., Inc. v Phillips Morris USA Inc.***, 344 F3d 211 [2003] [a party has standing under General Business Law § 349 when its complaint alleges a consumer injury or harm to the public interest, regardless of whether the plaintiff is a consumer]). To state a cause of action under General Business Law § 349, a plaintiff must allege that a defendant engaged in consumer-oriented conduct, that the conduct was materially deceptive or misleading, and that the plaintiff suffered injury as a result of such conduct (*see* ***Stutman v Chemical Bank***, 95 NY2d 24, 29, 709 NYS2d 892 [2000]; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529 [1995]). The court notes that, for the reasons set forth in the related order

issued today, the court has determined that the General Business Law § 349 cause of action alleged by the plaintiff counties is not preempted by the Food Drug and Cosmetic Act (21 USC § 301 et seq.).

For pleading purposes, the claim of consumer-oriented conduct must be premised on allegations of facts sufficient to show that the challenged acts or practices were "directed at the consuming public" (***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 343, 704 NYS2d 177), had a broad impact on consumers at large (***Karlin v IVF Am.***, 93 NY2d 282, 290, 690 NYS2d 495), or was harmful to the general public interest (*see* ***Securitron Magnalock Corp. v Schnabolk***, 65 F3d 256 [SD NY 1995]; ***Azby Brokerage, Inc. v Allstate Ins. Co.***, 681 F Supp 1084, 1089 [SD NY 1988]). The element of pleading consumer-oriented conduct may also be satisfied where the plaintiff alleges facts demonstrating that the deceptive acts were standardized such that "they potentially affect[ed] similarly situated consumers" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 27, 623 NYS2d 529; *see* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***,102 AD3d 5, 14, 953 NYS2d 96 [2d Dept 2012]). Sufficient consumer-oriented conduct has been found where a defendant employed "multimedia dissemination of information to the public" (***Karlin v IVF Am.***, 93 NY2d 282, 293, 690 NYS2d 495), or employed an "extensive marketing scheme" that had a broad impact on consumers (***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 343, 704 NYS2d 177).

With respect to the second element of misleading or deceptive conduct, a plaintiff must allege that the challenged act or practice was "misleading in a material way" (***Stutman v Chemical Bank***, 95 NY2d at 30, 709 NYS2d at 895). "In determining whether a representation or omission is a deceptive act, the test is whether such act is 'likely to mislead a reasonable consumer acting reasonably under the circumstances'"(***Andre Strishak & Assoc. v Hewlett Packard Co.***, 300 AD2d 608, 609, 752 NYS2d 400, 402 [2d Dept 2015], quoting ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d at 26, 623 NYS2d at 533). The statute is aimed at addressing those omissions or misrepresentations "which undermine a consumer's ability to evaluate his or her market options and to make a free and intelligent choice" (***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d at 26, 953 NYS2d at 102). Furthermore, the deceptive representation or omission in question need not arise to the level of common-law fraud to be actionable (*see* ***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 704 NYS2d 177), and no proof of intent to defraud by the defendant or justifiable reliance by the consumer is required (*see* ***Small v Lorillard Tobacco Co.***, 94 NY2d 43, 698 NYS2d 615 [1999]; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529). As a result, courts have determined that the strict pleading requirements imposed by CPLR 3016 are inapplicable to a cause of action predicated on General Business Law § 349 (*see* ***Joannou v Blue Ridge Ins. Co.***, 289 AD2d 531, 735 NYS2d 786 [2d Dept 2001]; ***McGill v General Motors Corp.***, 231 AD2d 449, 647 NYS2d 209 [1st Dept 1996]).

As to the third element relating to injury, a plaintiff is required to allege "actual injury," though not necessarily pecuniary harm, that results from a defendant's deceptive act or practice (***City of New York v Smokers-Spirits.Com, Inc.***, 12 NY3d 616, 623, 883 NYS2d 772 [2009]; ***Stutman v Chemical Bank***, 95 NY2d 24, 709 NYS2d 892; ***Small v Lorillard Tobacco Co.***, 94 NY2d 43, 698 NYS2d 615). A plaintiff need not quantify the amount of harm to the public at large or specify consumers who suffered

pecuniary loss due to the defendant's alleged deceptive conduct (*see* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96). While courts have rejected General Business Law § 349 actions predicated on derivative claims that "arise[ ] solely as a result of injuries sustained by another party" (***Blue Cross & Blue Shield of N.J., Inc. v Phillip Morris USA Inc.***, 3 NY3d 200, 206, 785 NYS2d 399; *see* ***City of New York v Smokers-Spirits.Com, Inc.***, 12 NY3d 616, 883 NYS2d 772), they have repeatedly held that a cause of action under the statute has been adequately stated where the plaintiff has alleged that it suffered direct loss of its own as a result of a defendant's deceptive or misleading conduct (*see* ***M.V.B. Collision, Inc. v Allstate Ins. Co.***, 728 F Supp 2d 205, 217-218 [ED NY 2010]; ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96; ***In re Pharm. Indus. Average Wholesale Price Lithog.***, 2007 WL 1051642 [D Mass 2007]). General Business Law § 349 claim by New York City and a number of New York State counties alleging that drug manufacturers deceptively raised their prices on consumers was found to not be derivative in nature where the court found that the plaintiffs, which had an independent duty to pay for medicaid reimbursement costs, were directly harmed in having to overpay for such prescriptions]).

Here, a review of the complaint reveals that plaintiffs pleaded specific conduct by Insys sufficient to meet all of the elements required to state a cognizable claim under section 349 of the General Business Law (*see* ***Karlin v IVF Am.***, 93 NY2d 282, 293, 690 NYS2d 495; ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96; ***Wilner v Allstate Ins. Co.***, 71 AD3d 155, 893 NYS2d 208 [2d Dept 2010]; ***In re Pharm. Indus. Average Wholesale Price Lithog.***, 2007 WL 1051642; *compare* ***Small v Lorillard Tobacco Co.***, *supra*; ***Baron v Pfizer, Inc.***, 94 NY2d 43, 698 NYS2d 615). Significantly, the plaintiffs allege that despite the limited approval by the Food and Drug Administration ("FDA") for the sale of Subsist, a fentanyl sublingual spray, only to treat opioid tolerant cancer patients experiencing breakthrough pain, Insys conducted an extensive and sophisticated public marketing scheme meant to exploit a loophole in the FDA guidelines which permitted physicians to make numerous "off-label" prescription of the drug to treat chronic pain in patients who had neither developed a tolerance to opioid pain killers or who had experienced the same grade of pain as end-stage cancer patients. According to the complaint, Insys' marketing scheme aimed to change the institutional and public perception of the risk-benefit assessment of the utilization of its drug for the treatment of non-cancer related chronic pain and, by doing so, enabling it to market an addictive drug to residents of the counties for uses, and in volumes, that precipitated the opioid epidemic. The complaint describes in detail how Insys engaged in acts and practices which were either directed at the consuming public or had a broad impact on consumers at large, and how such practices were harmful to the overall public interest. In particular, the plaintiffs allege that Insys formed an entity known as the Insys Reimbursement Center ("IRC"), which served as a liaison between the members of the public, their doctors, their insurers, and prescriptions managers, for the purpose of maximizing the volume of Subsist dispensations. According to the complaint, employees of the IRC would do whatever it took, including misrepresenting medical conditions and impersonating patients and doctors, to obviate the practice of prior authorization, whereby insurers or their pharmacy benefit managers assessed the appropriateness of the prescription before authorizing the dispensation of powerful drugs like Subsist.

In addition, the plaintiffs allege that Insys published "education articles" to the public which falsely praised Subsist as non-addictive, and funded public patient advocacy groups which unwittingly promoted the manufacturer's agenda of raising the overall profile of pain to justify the use of powerful opioids like Subsist to treat chronic pain. The plaintiffs allege that Insys simultaneously created a scam "legal speakers program" meant to disseminate information convincing a broad range of physicians – other than oncologists – about the benefits of making off-label Subsist prescriptions to non-cancer patients, and lauding the drug's nonaddictive nature. It is alleged that the speakers program not only sought to leverage the scientific reputation of Insys to the physicians in order to persuade them to make off-label prescriptions, but that the manufacturer, who paid doctors attendance fees, routinely forged attendance sheets and paid bribes to top prescribers. In this way, Insys allegedly deceived consumers, and the doctors to whom they looked for confirmation, into accepting as a new norm the practice of using Subsist as a legitimate option for treating comparatively low-grade chronic pain. Further explaining the deliberate and serious nature of Insys' deceptive marketing scheme, the plaintiffs allege that the manufacturer complimented its external acts and practices with internal strategic maneuvers, such as building an infrastructure to train and assist employees in obtaining prior authorization on behalf of the public and establishing an internal 1-800 reimbursement assistance hotline for those who failed to procure prior authorization.

Moreover, a review of the allegations contained in the complaint reveals the plaintiffs' description of the very type of materially misleading conduct aimed at the public General Business Law § 349 was meant to proscribe; the plaintiffs allege a scheme of practices and conduct meant to undermine the ability of members of the public "to evaluate [their] market options and to make a free and intelligent choice" regarding the use of a powerful and addictive drug (***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 13, 953 NYS2d 96). Insys allegedly accomplished this erosion of free and intelligent choice through a series of misrepresentations and omissions meant not only to change ordinary consumer "perception of the risk-benefit assessment" of using Subsist to treat chronic pain, but by facilitating the dispensation of a drug – known to be up to 50 times stronger and more addictive than heroine – that would likely alter the decision-making apparatus of members of the public who became addicted to opioids. And by discussing an internal compliance review conducted by Insys, the allegations in the complaint reveals the manufacturer's knowledge of the potential legal problems with the content of IRC employees' communications with the public and health care professionals regarding prior authorizations for Subsist. Despite such knowledge, the plaintiffs allege that the IRC staff continued to flout Insys' own internal compliance guidelines so much so that within a year of the compliance review, an IRC employee allegedly misled a pharmacy benefit manager about his or her affiliation to Insys and the diagnosis of a patient requesting dispensation of Subsist.

The allegations contained in the complaint also include numerous examples of direct pecuniary harm sustained by the plaintiff counties. The plaintiffs allege that, as mandated payors of a portion of the state's medicaid expenses, the counties suffered direct financial loss as a result of the explosion of long term and emergency care costs which accompanied the burgeoning opioid epidemic. The complaint also identifies other forms of direct pecuniary harm incurred by the counties that correlate with the growth of the opioid epidemic. The complaint lists, among others, direct financial losses the counties allegedly

incurred in having to increase their expenditures on social services, drug addiction treatment and diversion programs, additional policing and criminal justice costs, as well as expenditures associated with the purchase of Narcan and the implementation of programs to train the public and public personnel in its use. In addition, the allegations in the complaint delineates how the plaintiff counties, which provide both full and partial medical insurance and workers' compensation insurance coverage to their employees, suffered direct harm when they were made to pay the cost of excessive claims for Subsist or other opioid prescriptions made by their employees, who were either deceived or addicted, to the powerful drugs. Affording the plaintiffs the benefit of every possible inference, as the court is required to do when determining a motion to dismiss, the court finds neither of the aforementioned alleged categories of pecuniary harm to be derivative in nature, as such harm was directly incurred by the counties because they bore independent duties, whether as municipalities constitutionally and statutorily mandated to protect the welfare, safety, and public health of their citizens or as self-funded health and workers' compensation insurance providers, to make the expenditures necessary to meet such obligations (*see* ***M.V.B. Collision, Inc. v Allstate Ins. Co.***, 728 F Supp 2d 205; ***In re Pharm. Indus. Average Wholesale Price Litiog.***, 2007 WL 1051642; *compare* ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 785 NYS2d 399; ***Small v Lorillard Tobacco Co.***, 94 NY2d 43, 698 NYS2d 615). Furthermore, unlike insurers or third-party payors who may seek to recover indirect losses via the equitable remedy of subrogation, the plaintiff counties have no other means of seeking compensation for the pecuniary harms they allegedly suffered as a result of Insys' conduct (*compare* ***Blue Cross & Blue Shield of N.J., Inc. v Phillip Morris USA Inc.***, 3 NY3d 200, 785 NYS2d 399).

Finally, the court rejects Insys' arguments that the plaintiff counties will be unable to show causation in connection with their General Business Law § 349 claim because Subsist accounted for approximately .01% of opioids prescribed in New York in the last 10 years, and less than approximately .03% of opioids prescribed in the State since the beginning of 2012. Insys' assertion is erroneous. Causation, in the context of a General Business Law §349 action, merely refers to the link between an alleged deceptive practice and the actual injury sustained by a plaintiff (*see* ***Stutman v Chemical Bank***, 95 NY2d 24, 30, 709 NYS2d 892). Thus, the plaintiffs will be deemed to have adequately pleaded causation where, as here, they have alleged a causal connection between a defendant's deceptive conduct and the actual harm they suffered as a result of such conduct (*see* ***Stutman v Chemical Bank***, 95 NY2d 24,709 NYS2d 892). Indeed, a defendant's harmful conduct need not be repetitive or recurring to come within the purview of the statute (*see* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 14, 953 NYS2d 96). With regards to Insys' assertion that the complaint lacks specificity as to the number of prescriptions made in the counties or whether Subsist caused harm to any individual or the counties themselves, as noted above, the strict pleading requirements imposed by CPLR 3016 are inapplicable to a cause of action predicated on the violation of General Business Law § 349 (*see* ***Joannou v Blue Ridge Ins. Co.***, 289 AD2d 531, 735 NYS2d 786; ***McGill v General Motors Corp.***, 231 AD2d 449, 647 NYS2d 209). Rather, the pleading requirements will be met where, as in this case, they have set forth the material elements of the cause of action and given the court and the parties involved notice of the series of transactions or occurrences intended to be proved (*see* CPLR 3013; ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94). Furthermore, the court need not address the parties' relative arguments concerning conspiracy or the proposed use of the

"market share theory" to determine the quantum of Insys' liability, as such a discussion is inapposite as to whether the plaintiff counties have met their pleading requirements (*see* ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 799 NYS2d 170; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314) and is not authorised in the context of a CPLR 3211 (a) (7) motion to dismiss the complaint (*see* ***Salles v Chase Manhattan Bank***, 300 AD2d 226, 754 NYS2d 236; ***E & D Group, LLC v Vialet***, 134 AD3d 981, 21 NYS3d 691).

Accordingly, the motion by defendant Insys Therapeutics, Inc. for an order pursuant to CPLR 3211, dismissing the complaint against it is denied.

Dated: June 18, 2018

Jerry Garguilo
J.S.C.
HON. JERRY GARGUILO

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	**MDL 2804**
	)	
THIS DOCUMENT RELATES TO:	)	**Case No. 1:17-md-2804**
	)	
The County of Summit, Ohio, et al. v. Purdue Pharma L.P., et al., Case No. 18-op-45090	)	**Judge Dan Aaron Polster**
	)	
	)	**OPINION AND ORDER**

This matter is before the Court upon the Report and Recommendation ("R&R") of the United States Magistrate Judge. **Doc. #: 1025** (hereinafter cited as "R&R"). On November 2, 2018 Manufacturer,[1] Distributor, and Retail Pharmacy Defendants and Plaintiffs all filed Objections to various portions of the R&R. Doc. ##: 1082, 1079, 1078, and 1080. On November 12, 2018 Plaintiffs and Defendants filed Responses to the Objections. Doc. ##: 1115 and 1116. Upon a *de novo* review of the record, and for the reasons set forth below, the Court **ADOPTS IN PART** and **REJECTS IN PART** the Report and Recommendation.

I.

The District Court reviews proper objections pursuant to its duty under Federal Rule of Civil Procedure 72(b). Fed. R. Civ. P. 72(b) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to.") In a footnote, Manufacturer Defendants purport to object to "the entirety of the R&R." Doc #: 1082 at n.1. This

[1] Defendant Noramco, Inc. states that it joined in Manufacturers' Motion to Dismiss "to the extent applicable," Doc. #: 499-1 at 1 n.2, and requests clarification that it is included among the moving Manufacturer Defendants and is entitled to all applicable relief. Doc. #: 1082 at 1 n.1. The Court clarifies that Noramco is included among the moving Manufacturer Defendants and is entitled to all applicable relief.

objection is not proper insofar as it does not include any bases in or support from legal authority. Therefore, as there are no proper objections to the facts or procedural history, the Court adopts the facts and procedural history as stated in the R&R. Further, there are no objections to the R&R with respect to the following sections:

- Section III.B. Preemption
- Section III.H. Count Eight: Fraud
- Section III.L. Statewide Concern Doctrine
- Section III.M. Article III Standing[2]

The Court presumes the parties are satisfied with these determinations and adopts the R&R with respect to these sections. "Any further review by this Court would be a duplicative and inefficient use of the Court's limited resources." *Graziano v. Nesco Serv. Co.*, No. 1:09 CV 2661, 2011 WL 1131557, at *1 (N.D. Ohio Mar. 29, 2011) (citing *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health and Human Services*, 932 F.2d 505 (6th Cir.1991); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981)).

II.

As an initial matter, Retail Pharmacy Defendants have asked the Court to clarify that the claims brought against them are only brought in their capacity as distributors, not as dispensers. *See* Doc. #: 1078 at 2. The Court understands that Plaintiffs have disclaimed any cause of action against Retail Pharmacies in their capacity as retailers or dispensers of opioids, *see* Doc. #: 654 at 75 n.47, and thus considers the parties' arguments while keeping in mind that the Retail Pharmacies may only be held liable as distributors.

[2] Pharmacy Defendants, in their objections, mention Article III standing only briefly in a section dedicated to the RICO claims. *See* Doc. #: 1078 at 2-3. They mischaracterize the R&R's analysis of the Article III standing directness requirement, rehash arguments already made in their motion to dismiss, and then move on to address their RICO analysis concerns. The Court finds this objection without merit, and therefore it is overruled.

A. Tolling of the Statute of Limitations

The R&R concluded that Plaintiffs have alleged sufficient facts "to raise a plausible inference that the applicable limitations periods are subject to tolling." R&R at 55-56. Manufacturer Defendants object, stating that Plaintiffs' Complaint indicates that they knew or should have known of both the Manufacturers' marketing practices and the costs Plaintiffs were incurring. Defendants argue that it follows that Plaintiffs, by their own allegations, did not act with sufficient diligence to support a fraudulent concealment theory. In addition to tolling under a fraudulent concealment theory, Plaintiffs also assert that the continuing violations doctrine should be applied to save their claims from the relevant statute of limitations.

1. Fraudulent Concealment

The R&R correctly states that "resolving a motion to dismiss based on statute-of-limitations grounds is appropriate when the undisputed facts 'conclusively establish' the defense as a matter of law." R&R at 54 (citing *Estate of Barney v. PNC Bank*, 714 F.3d 920, 926 (6th Cir. 2013); *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012), *cert. denied*, 568 U.S. 1157 (2013)). "In order for Plaintiff's delay in filing to be excused due to Defendants' fraudulent concealment, Plaintiff must affirmatively plead with particularity: '(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.'" *Reid v. Baker*, 499 F. App'x 520, 527 (6th Cir. 2012) (quoting *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975)). However, as the R&R also points out, "courts should not dismiss complaints on statute-of-limitations grounds when there are disputed factual questions relating to the accrual date." *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 839 F.3d 458, 464 (6th Cir. 2016) (citing as examples of disputed factual questions, "claims that the defendant fraudulently concealed facts, thereby preventing the plaintiff

from learning of its injury . . . and complex issues about whether information in the plaintiff's possession sufficed to alert it of the claim").

Defendants' assertions that Plaintiffs were aware, at least since 2007, of their marketing practices and knew about the effects of the opioid crisis, effectively admitted in the Complaint,[3] are insufficient to *conclusively establish* that any of Plaintiffs' claims are time-barred by the statute of limitations. If Plaintiffs relied solely on Defendants' concealment of their marketing practices, Plaintiffs' assertion that the statutes of limitation were tolled due to fraudulent concealment would fail. However, Plaintiffs' allegations of fraudulent concealment do not rely solely on Defendants' alleged concealment of their marketing practices. Plaintiffs also allege that Defendants concealed their lack of cooperation with law enforcement and that they affirmatively misrepresented that they had satisfied their duty to report suspicious orders, concealing the fact that they had not done so. *See* Doc. #: 514 at 232-33 (hereinafter cited as "SAC").

Plaintiffs additionally point out that they could not have discovered "the nature, scope, and magnitude of Defendants' misconduct, and its full impact on Plaintiffs, and could not have acquired such knowledge earlier through the exercise of reasonable diligence," because until this Court ordered production of the ARCOS database in this litigation, Plaintiffs did not have access to that information. *Id.* at 233 (citing Doc. #: 233 at 6-7). Without access to the ARCOS data, Plaintiffs were forced to take Defendants at their word that they were complying with their obligations under consent decrees, statutes, and regulations. Plaintiffs inarguably knew about Defendants' marketing practices, but whether they had sufficient information, in the absence of

[3] *See, e.g.*, Doc. #: 514 at 238 ("In May 2007, Purdue and three of its executives pled guilty to federal charges of misbranding OxyContin in what the company acknowledged was an attempt to mislead doctors about the risks of addiction."); *see also Id.* at 212 ("the increase in fatal overdoses from prescription opioids has been widely publicized for years.").

the ARCOS data, to identify Defendants' alleged concealment and thus the scope or magnitude of Defendants' alleged misconduct is a disputed factual question.

2. Continuing Violations

Plaintiffs also assert that the applicable statute of limitations should be tolled under the continuing violations doctrine. *Id.* at 231. In the Sixth Circuit, a "'continuous violation' exists if: (1) the defendants engage in continuing wrongful conduct; (2) injury to the plaintiffs accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided." *Hensley v. City of Columbus*, 557 F.3d 693, 697 (6th Cir. 2009) (citing *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 521 (6th Cir.1997)). Although Ohio courts are generally reluctant to apply the doctrine outside the Title VII context, "this doctrine is rooted in general principles of common law and is independent of any specific action." *Id.* Further, the Sixth Circuit has noted that "no opinion has articulated a principled reason why the continuing-violation doctrine should be limited to claims for deprivations of civil rights and employment discrimination." *Nat'l Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 480 F.3d 410, 416–17 (6th Cir. 2007). "Courts have allowed the statute of limitations to be tolled [under the continuing violations framework] when . . . there is a 'longstanding and demonstrable policy' of the forbidden activity." *Ohio Midland, Inc. v. Ohio Dep't of Transp*, 286 F. App'x 905, 912 (6th Cir. 2008) (citing *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 857 (6th Cir.2003).).

Here, taking the factual allegations in the Complaint as true, Plaintiffs have alleged a longstanding and demonstrable policy of misrepresentations and omissions on the part of Defendants sufficient to demonstrate their engagement in continuing wrongful conduct. In addition, whether further injury could have been avoided had Defendants ceased this conduct is another disputed factual question. Therefore, the Court finds that Plaintiffs have alleged facts sufficient to raise a plausible inference that the applicable limitations periods are subject to

tolling—under either a fraudulent concealment theory or a continuing violation theory—and that no claims should be dismissed on statute of limitations grounds at this early stage in the litigation.

B. RICO

After a lengthy discussion of RICO, the R&R concluded that Plaintiffs' RICO claims should survive Defendants' motions to dismiss. R&R at 11-44. "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985) (citing *Russello v. United States*, 464 U.S. 16, 26-29 (1983)). In *Sedima*, the Supreme Court acknowledged the Second Circuit's distress over the "extraordinary, if not outrageous," uses to which civil RICO claims had been applied. *Id.* at 499. "Instead of being used against mobsters and organized criminals, it had become a tool for everyday fraud cases brought against respected and legitimate enterprises." *Id.* However, in reversing the 2nd Circuit, the *Sedima* Court observed:

> . . . Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *United States v. Turkette*, [452 U.S. 576 (1981)]. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, [747 F.2d 384, 398 (1984)].

Id.

The RICO analysis is complicated because, "RICO's civil-suit provision imposes two distinct but overlapping limitations on claimants—standing and proximate cause . . . [a]nd as a matter of RICO law, the two concepts overlap." *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 613 (6th Cir. 2004). Defendants object to the R&R's conclusions regarding both "overlapping" limitations. Regarding standing, Defendants argue that Plaintiffs' injuries are 1) not to Plaintiffs'

"business or property" as required by the statute, and 2) derivative of a third-party's injuries (i.e. not direct). Regarding proximate cause, Defendants argue that Plaintiffs' injuries are too remote to hold Defendants liable under RICO (i.e. not direct). Manufacturing Defendants succinctly summarize the way "directness" applies to RICO analysis.

> For standing to exist, an injury must be "direct" in the sense of being both (1) non-derivative of some third party's injury (***the standing analysis***), *see Trollinger*, 370 F.3d at 614; and (2) having an uninterrupted, direct, and not overly attenuated causal chain from conduct to injury (***the proximate cause analysis***), *see Anza*, 547 U.S. at 457.

Doc. #: 1082 at 3 (citing *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006)) (emphasis in original). "Because Congress modeled [the RICO] provision on similar language in the antitrust laws (§ 4 of the Clayton Act and § 7 the Sherman Act) and because the antitrust laws have been interpreted to require that a private plaintiff show proximate cause in order to have standing to sue, RICO civil claims also require proximate cause. *Trollinger*, 370 F.3d at 612 (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267-68 (1992); *Sedima*, 473 U.S. at 496). Thus, although standing is a threshold issue, because proximate cause analysis is necessarily incorporated within the standing analysis, the Court begins with proximate cause.

1. Proximate Cause

In *Holmes*, the Supreme Court described proximate cause as "the judicial tools used to limit a person's responsibility for the consequences of that person's own act," and further stated "the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" 503 U.S. at 268 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984)). In a RICO claim, "[t]he proximate-cause inquiry . . . requires careful consideration of the 'relation between the injury asserted and the injurious conduct alleged.'" *Anza*, 547 U.S. at 462 (quoting *Holmes*, 503 U.S. at 268). "Though foreseeability is an element of the proximate cause analysis, it is distinct from the

requirement of a direct injury." *Perry v. Am. Tobacco Co.*, 324 F.3d 845, 850 (6th Cir. 2003) (citing *Holmes*, 503 U.S. at 268-69.). Additionally, the *Holmes* Court provided several reasons why "some direct relation between the injury asserted and the injurious conduct alleged" is so important to the proximate cause analysis. *Holmes*, 503 U.S. at 268. The Court stated:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Id. at 269–70 (internal citations omitted). Thus, it is important to first carefully consider the relationship between the injury asserted by Plaintiffs and the alleged injurious conduct of Defendants and then further consider whether that relationship implicates any of the concerns highlighted by the *Holmes* Court.

Plaintiffs allege that "RICO Marketing Defendants . . . conducted an association-in-fact enterprise . . . to unlawfully increase profits and revenues from the continued prescription and use of opioids for long-term chronic pain" thereby creating the opioid epidemic.[4] SAC at 270. Plaintiffs further allege that RICO Supply Chain Defendants . . . formed an association-in-fact enterprise . . . for the purpose of increasing the quota for and profiting from the increased volume of opioid sales in the United States" thereby creating the opioid epidemic.[5] It is important to note that Plaintiffs never expressly define what they mean by the term "opioid epidemic." The term

[4] According to the Complaint, the RICO Marketing Defendants are "Purdue, Cephalon, Janssen, Endo, and Mallinckrodt." *See* Doc. #: 514 at 270.
[5] According to the Complaint, the RICO Supply Chain Defendants are "Purdue, Cephalon, Endo, Mallinckrodt, Actavis, McKesson, Cardinal, and AmerisourceBergen" *See* Doc. #:514 at 279.

may reasonably refer to the massive rate of addiction, overdose, and death associated with taking opioids. *See, e.g., id.* at 214-15 ("Ohio is among the states hardest hit by the opioid epidemic. . . . Overdose deaths have become the leading cause of death for Ohioans under the age of 55.").

However, the term "opioid epidemic" may just as reasonably include black markets for diverted opioids. *See, e.g., id.* at 284 ("[Defendants' violations] allowed the widespread diversion of prescription opioids out of appropriate medical channels and into the illicit drug market—causing the opioid epidemic."); *see also id.* at 7 ("The increased volume of opioid prescribing correlates directly to skyrocketing addiction, overdose and death [and] black markets for diverted prescription opioids.). Regarding their asserted injuries, however, Plaintiffs are more explicit. Plaintiffs expressly assert thirteen categories of damages. *See id.* at 285-86. Among these is, for example, the "costs associated with . . . attempts to stop the flow of opioids into local communities." *Id.*

Manufacturer Defendants argue that the chain of causation from conduct to injury is as follows:

> (i) a Manufacturer made deceptive claims in promoting its opioids (***the conduct***); (ii) some physicians were exposed to that Manufacturer's claims; (iii) which caused some of those physicians to write medically inappropriate opioid prescriptions they would not have otherwise written; (iv) which caused some of their patients to decide to take opioids; (v) which caused some of those individuals to become addicted to opioids; (vi) which caused some of those addicted individuals to need additional medical treatment, to neglect or abuse their families, to lose their jobs, and/or to commit crimes; (vii) which caused Plaintiffs to expend additional resources on emergency services, and to lose revenue from a decreased working population and/or diminished property values (***the injury***).

Doc. #: 1082 at 9-10 (emphasis in original). However, Plaintiffs have alleged sufficient facts to support a far more direct chain of causation: (i) RICO Marketing Defendants made deceptive claims in promoting their opioids in order to sell more opioids than the legitimate medical market could support (***the conduct***); (ii) the excess opioids marketed by the RICO Marketing Defendants

and distributed by the RICO Supply Chain Defendants were then diverted into an illicit, black market; (iii) Plaintiffs were forced to expend resources beyond what they had budgeted to attempt to stop the flow of the excess opioids into local communities and to bear the costs associated with cleaning them up. Under this potential chain of causation, the relationship between Plaintiffs' injury and Defendants' alleged conduct is less remote than prior Sixth Circuit precedent finding proximate cause, and is not too remote to support a finding of proximate cause here. *See, e.g.*, *Trollinger*, 370 F.3d at 619 (finding proximate cause where Tyson "hired sufficient numbers of illegal aliens to impact the legal employees' wages," having an "impact on the bargained-for wage-scale," which "allowed Tyson not to compete with other businesses for unskilled labor," and finally where "Tyson's legal workers did not 'choose' to remain at Tyson for less money than other businesses offered").

Thus, it is incumbent upon the Court to consider whether any of the *Holmes* Court's reasons for requiring directness are implicated. Here, Plaintiffs' alleged damages are not speculative, but concrete and ascertainable. No other party can vindicate the law and deter Defendants' alleged conduct because Plaintiffs' asserted damages are not recoverable by any other party. Finally, there is no potential for—and thus no reason for the Court to have to adopt complicated rules to prevent—duplicative recoveries. As none of the *Holmes* concerns are implicated in this case, the Court finds that Plaintiffs have sufficiently alleged proximate cause for their RICO claims.

2. Standing

Having determined that Plaintiffs have alleged sufficient facts to find that they do not stand at too remote a distance to recover, the Court now turns to standing. Title 18 of the U.S. Code, section 1964(c), has been deemed the standing provision of RICO. It provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including

reasonable attorney's fee." 18 U.S.C. § 1964(c). The two operative portions of this section are the "business or property" limitation and the "by reason of" limitation.

"The 'by reason of' limitation . . . bundles together a variety of 'judicial tools,' some of which are traditionally employed to decide causation questions and some of which are employed to decide standing questions." *Trollinger*, 370 F.3d at 613 (citing *Holmes*, 503 U.S. at 268.). As it pertains to standing, the "by reason of" limitation is used to analyze whether a plaintiff is asserting an injury that was borne directly by that plaintiff or whether the injury was "derivative or passed-on" to the plaintiff by some intermediate party. *See id.* at 614.

a. The "by reason of" Limitation (Direct Versus Passed-On Injury)

Defendants claim that Plaintiffs' asserted injuries are "necessarily derivative of harms to individual opioid users." Doc. #: 1082 at 4. They state that "it is the opioid user who (if anyone) was directly harmed, and it is only as a result of this harm—in the aggregate—that Plaintiffs can claim to have experienced additional public expenditures, lost tax revenue, and diminished property values." *Id.* Defendants cite *Perry* as a paradigmatic example from the Sixth Circuit of the distinction between derivative and non-derivative injuries. Defendants characterize *Perry* as follows: "Plaintiffs [in *Perry*] were individual insurance plan subscribers who alleged that because of the tobacco manufacturers' conduct, they paid increased premiums to account for medical care provided to smokers in the same insurance pool." *Id.* at 4-5 (citing *Perry*, 324 F.3d at 847) (internal citations omitted).

Defendants' characterization of *Perry* is correct, but *Perry* is factually distinct from this case. In *Perry*, tobacco users suffered smoking-related injuries which increased healthcare costs. That is where the similarities with the present case end. In *Perry*, the increased healthcare costs were borne by insurance companies who then passed-on those costs to individual insurance plan subscribers in the form of higher insurance premiums. The non-smoking individual subscribers

then sued the tobacco companies for the costs passed-on to them by the insurance companies. *See Perry*, 324 F.3d at 847. Thus, *Perry* represents a classic case of "passed-on" economic injury. Here, as described above, Plaintiffs have alleged a plausible claim that their injuries are the direct result of Defendants' creation of an illicit opioid market within their communities.[6] Plaintiffs' asserted economic injuries are borne by them and not passed-on by any intermediate party standing less removed from Defendants' actions.

The tobacco cases, in general, are factually distinct from the present case for an additional reason. In the tobacco cases, no one asserted, nor could they have, that tobacco defendants created an "illicit cigarette market" the attendant consequences of which might have caused the government plaintiffs to expend their limited financial resources to mitigate. This "opioid epidemic as an illicit market" concept is an important distinction underlying many of Plaintiffs' allegations. *See, e.g.*, SAC at 150-51. Therefore, assuming as it must that Plaintiffs can prove their allegations, the Court finds it plausible that Plaintiffs' asserted injuries were directly caused "by reason of" Defendants' injurious conduct.

b. The "business or property" Limitation

Even if Plaintiffs' asserted injuries were proximately and directly caused "by reason of" Defendants' alleged injurious conduct, Plaintiffs still may not bring a RICO claim if the injuries asserted were not to their "business or property." 18 U.S.C. § 1964(c). As a general principal, "money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). It is also true that, "[a] person whose property is diminished by a payment of money wrongfully

[6] Plaintiffs allege that "Congress specifically designed the closed chain of distribution to prevent the diversion of legally produced controlled substances into the illicit market.. . . All registrants—which includes all manufacturers and distributors of controlled substances—must adhere to the specific security, recordkeeping, monitoring and reporting requirements that are designed to identify or prevent diversion." Doc. #: 514 at 150-51 (citing 21 U.S.C. § 823(a)-(b); 21 C.F.R. § 1301.74).

induced is injured in his property." *County of Oakland v. City of Detroit*, 866 F.2d 839, 845 (6th Cir. 1989) (quoting *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906)). Plaintiffs assert thirteen categories of expenditures that they contend represent a substantial monetary loss, and are therefore an injury to their property. *See* SAC at 285. Defendants contend that none of the monetary costs asserted by Plaintiffs are the type of property injury anticipated (and thus permitted) by the RICO statute.

(i) Personal Injuries

The Sixth Circuit has held that "personal injuries and pecuniary losses flowing from those personal injuries fail to confer relief under § 1964(c)." *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 565-66 (6th Cir. 2013). "Courts interpreting RICO have remained faithful to this distinction [between non-redressable personal injury and redressable injury to property] by excluding damages '*arising directly out of*' a personal injury, even though personal injuries often lead to monetary damages that would be sufficient to establish standing if the plaintiff alleged a non-personal injury." *Id.* (emphasis added).

The *Jackson* court's holding that RICO claims that allege damages "arising directly out of a personal injury" are not redressable adds another layer to the "directness" requirement summarized by Defendants above. As stated previously, Defendants explained two ways in which RICO allegations must be sufficiently direct to maintain a RICO claim. First, the relationship between the asserted injury and the alleged injurious conduct must have a *direct* causal connection. (the proximate cause analysis). And second, the asserted injury must also be borne *directly* by Plaintiffs and not passed-on to them by intermediate parties (the standing "by reason of" analysis). Under *Jackson*, there is an additional element of *directness* to consider—whether Plaintiffs' alleged injury arises *directly* out of a personal injury. While the first two analyses require closeness

of the relationship between injury and injurious conduct, the *Jackson* analysis requires separation between personal injury and pecuniary losses that arise therefrom.

To determine what type of pecuniary losses arise directly out of personal injury, the Court first looks to the facts of *Jackson* itself. In *Jackson*, former employees who suffered personal injuries at work sued their employer for a RICO violation. They alleged that their employer's workers' compensation administrator and physician engaged in a fraudulent scheme to avoid paying workers' compensation benefits to them, causing them to suffer monetary losses (i.e. receiving less money from their personal injury claim than they felt they were entitled to). *See id.* at 561-62. The *Jackson* court rejected the plaintiffs' theory that their workers' compensation benefits created an intervening legal entitlement to money, which is property under RICO. *See id.* at 566. The *Jackson* court also cites several examples where other circuits have considered when a pecuniary harm arises directly out of a personal injury. *See, e.g., id.* at 564 n.4. Reviewing these cases, the Court determines that their unifying character is that pecuniary losses "arise directly out of" a personal injury when the alleged RICO injury merely acts as an alternate theory for recovering damages otherwise available in a tort claim for personal injury and is asserted by the plaintiff him- or herself.[7]

In other words, damages that result from a personal injury to a plaintiff (such as attorney fees, lost wages, lost workers' compensation benefits, or medical expenses), that are recoverable

[7] Footnote 4 of the *Jackson* opinion cites the following exemplary cases: *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir.2006) (false imprisonment causing loss of income not an injury to "business or property"); *Diaz v. Gates*, 420 F.3d 897 (9th Cir.2005) (*en banc*) (false imprisonment causing loss of employment and employment opportunity *is* an injury to "business or property"); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417 (5th Cir.2001) (assault claim against tobacco company causing wrongful death of smoker not an injury to "business or property"); *Hamm v. Rhone–Poulenc Rorer Pharm., Inc.*, 187 F.3d 941 (8th Cir.1999) (retaliatory firing causing damage to reputation not an injury to "business or property"); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir.1995) (surreptitiously recorded phone calls causing mental anguish not an injury to "business or property"); *Doe v. Roe*, 958 F.2d 763 (7th Cir.1992) (coercion into sexual relationship by attorney causing emotional harm not an injury to "business or property"); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir.1986) (exposure to toxic chemicals during employment with defendant causing personal injuries not an injury to "business or property").

in a typical tort action are not recoverable in RICO, even if caused by a defendant's racketeering activity. These are costs that arise directly out of the plaintiff's personal injury, and are not injuries to plaintiff's "business or property" under the statute.

Defendants contend that Plaintiffs are attempting to recover the pecuniary losses resulting directly from their addicted residents' physical injuries, citing *Jackson*. Plaintiffs respond that their economic losses are not pecuniary losses resulting from their addicted residents' personal injuries; rather, they are concrete economic losses to the cities and counties resulting directly from Defendants' relinquishment of their responsibility to maintain effective controls against diversion of Schedule II narcotics. *See, e.g.*, 21 U.S.C. § 823(a)-(b).

Plaintiffs have the better argument. None of Plaintiffs' thirteen categories of costs arise directly out of a personal injury to Plaintiffs themselves. *See* Doc. #: 654 at 36-37 ("Plaintiffs' damages claims are not for personal injuries, but police and fire services, lost taxes, revenue and funding."). Even if *Jackson* can be read to preclude a RICO claim by a plaintiff who is tasked to protect the well-being of a third-party where the asserted economic harm is created by a personal injury to that third-party, it still does not follow that all thirteen categories of damages asserted by Plaintiffs arise directly out of such personal injuries. In that scenario, it would still be crucial to determine whether Plaintiffs' alleged injuries result directly from the personal injuries sustained by their citizens.

Plaintiffs assert the following injuries:

> a. Losses caused by the decrease in funding available for Plaintiffs' public services for which funding was lost because it was diverted to other public services designed to address the opioid epidemic;
>
> b. Costs for providing healthcare and medical care, additional therapeutic, and prescription drug purchases, and other treatments for patients suffering from opioid-related addiction or disease, including overdoses and deaths;

> c. Costs of training emergency and/or first responders in the proper treatment of drug overdoses;
>
> d. Costs associated with providing police officers, firefighters, and emergency and/or first responders with naloxone—an opioid antagonist used to block the deadly effects of opioids in the context of overdose;
>
> e. Costs associated with emergency responses by police officers, firefighters, and emergency and/or first responders to opioid overdoses;
>
> f. Costs for providing mental-health services, treatment, counseling, rehabilitation services, and social services to victims of the opioid epidemic and their families;
>
> g. Costs for providing treatment of infants born with opioid-related medical conditions, or born dependent on opioids due to drug use by mother during pregnancy;
>
> h. Costs associated with law enforcement and public safety relating to the opioid epidemic, including but not limited to attempts to stop the flow of opioids into local communities, to arrest and prosecute street-level dealers, to prevent the current opioid epidemic from spreading and worsening, and to deal with the increased levels of crimes that have directly resulted from the increased homeless and drug-addicted population;
>
> i. Costs associated with increased burden on Plaintiffs' judicial systems, including increased security, increased staff, and the increased cost of adjudicating criminal matters due to the increase in crime directly resulting from opioid addiction;
>
> j. Costs associated with providing care for children whose parents suffer from opioid-related disability or incapacitation;
>
> k. Loss of tax revenue due to the decreased efficiency and size of the working population in Plaintiffs' communities;
>
> l. Losses caused by diminished property values in neighborhoods where the opioid epidemic has taken root; and
>
> m. Losses caused by diminished property values in the form of decreased business investment and tax revenue.

SAC at 285-286. Perhaps it can be said that items b and e above (the provision of medical treatment and emergency response services) arise directly out of the personal injury of the citizens because they are effectively claims to recoup the costs of medical expenses. However, there are other categories of costs, for example item h (the costs associated with "attempts to stop the flow of

opioids into [Plaintiffs'] communities . . . [and] prevent the current opioid epidemic from spreading and worsening"), that cannot be said to arise directly out of Plaintiffs' residents' personal injuries. *Id.* Thus, under no reading of *Jackson* can it be maintained that *all* of Plaintiffs' asserted injuries arise directly out of a personal injury, and it is more likely, in this Court's opinion, that most do not.

(ii) Sovereign Capacity

Finally, Defendants argue that regardless of the above, Plaintiffs cannot recover injury to their property to the extent they seek to recover costs associated with services provided in Plaintiffs' sovereign or quasi-sovereign capacities, which Defendants argue, accounts for the entirety of Plaintiffs' claimed injuries. Doc. #: 1082 at 6-7. Defendants implore the Court to follow the Ninth Circuit's holding in *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008). Defendants claim that *Canyon County's* holding that "money 'expended on public health care and law enforcement services' by a city or county does not constitute injury to 'business or property' under RICO" is applicable to the present case. *See* Doc. #: 1079 at 6 (quoting *Canyon County*, 519 F.3d at 971). Defendants point out that the Sixth Circuit has previously relied on *Canyon County* (albeit for its analysis of the proximate cause requirement of RICO and not for its "business or property" analysis) in *City of Cleveland v. Ameriquest Mort. Sec., Inc.*, 615 F.3d 496 (6th Cir. 2010). The R&R declined to follow *Canyon County*, however, stating that, "Defendants . . . have not identified any Supreme Court or Sixth Circuit case directly on point with the facts of this case."

The R&R is correct because there has never been a case with facts analogous to those alleged by Plaintiffs here. It cannot be stressed strongly enough that the prescription opiates at