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 VII

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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
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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
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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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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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3/5/2019	Distributors' Joint Motion to Dismiss First Amended Complaint	III	PA00265	PA00386
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 VII does not contain the social security number of any person.

Dated this 1st day of May, 2020.

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By: */s/Pat Lundvall*

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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 VII 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 VII was served upon the Honorable Barry Breslow, District Judge via electronic service and email to Christine.Kuhl@washoecourts.us.

By: /s/ Pat Lundvall
An Employee of McDonald Carano LLP

issue in this case ***are Schedule II controlled substances***.[8] Plaintiffs have alleged a wanton disregard for public health and safety exhibited by Defendants with respect to their legal duty to try to prevent the diversion of prescription opioids. With the privilege of lawfully manufacturing and distributing Schedule II narcotics—and thus enjoying the profits therefrom—comes the obligation to monitor, report, and prevent downstream diversion of those drugs. *See* 21 U.S.C. § 823(a)-(b). Plaintiffs allege that Defendants have intentionally turned a blind eye to orders of opiates they knew were suspicious, thereby flooding the legitimate medical market and creating a secondary "black" market at great profit to Defendants and at great cost to Plaintiffs.[9] Plaintiffs must shoulder the responsibility for attempting to clean up the mess allegedly created by Defendants' misconduct.

In *Canyon County*, the County brought a RICO claim against four defendant companies for "knowingly employ[ing] and/or harbor[ing] large numbers of illegal immigrants within Canyon County, in an 'Illegal Immigrant Hiring Scheme.'" *Canyon County*, 519 F.3d at 972. The County claimed that it "paid millions of dollars for health care services and criminal justice services for the illegal immigrants who [were] employed by the defendants in violation of federal law." *Id.* Based on these facts, the Ninth Circuit concluded that "when a governmental body acts in its sovereign or quasi-sovereign capacity, seeking to enforce the laws or promote the public well-

[8] "Since passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* ("CSA" or "Controlled Substances Act"), opioids have been regulated as controlled substances. As controlled substances, they are categorized in five schedules, ranked in order of their potential for abuse, with Schedule I being the most dangerous. The CSA imposes a hierarchy of restrictions on prescribing and dispensing drugs based on their medicinal value, likelihood of addiction or abuse, and safety. Opioids generally had been categorized as Schedule II or Schedule III drugs; hydrocodone and tapentadol were recently reclassified from Schedule III to Schedule II. Schedule II drugs have a high potential for abuse, and may lead to severe psychological or physical dependence. Schedule III drugs are deemed to have a lower potential for abuse, but their abuse still may lead to moderate or low physical dependence or high psychological dependence." SAC at 16 n.5.

[9] For example, Plaintiffs allege that "between 2012 and 2016, Summit County estimates that it spent roughly $66 million on costs tied to the opioid crisis. Those costs are projected to add up to another $89 million over the next five years, representing a total cost to the County of $155 million over the ten year period "simply trying to keep up with the epidemic.'" Doc. #: 514 at 226.

being, it cannot claim to have been 'injured in [its] . . . property' for RICO purposes based *solely* on the fact that it has spent money in order to act governmentally." *Canyon County*, 519 F.3d at 976 (emphasis added). As stated above, neither the Sixth Circuit nor the Supreme Court have adopted the holding in *Canyon County*, and certainly not for the broad proposition that governmental entities are *barred* from seeking RICO claims for services provided in their sovereign or quasi-sovereign capacities. Not even *Canyon County* established such a bright-line rule. The *Canyon County* court held that governmental entities are not injured in their property based *solely* on the expenditure of money to act governmentally. Use of the word "solely" implies that governmental entities might be able to assert an injury to their property based on the expenditure of money plus something else, perhaps, for example, the assumption of a statutory burden relinquished by a defendant.

In this case, the scope and magnitude of the opioid crisis—the illicit drug market and attendant human suffering—allegedly created by Defendants have forced Plaintiffs to go far beyond what a governmental entity might ordinarily be expected to pay to enforce the laws or promote the general welfare. Plaintiffs have been forced to expend vast sums of money far exceeding their budgets to attempt to combat the opioid epidemic. The Court thus concludes that while Cities and Counties cannot recover ordinary costs of services provided in their capacity as a sovereign, Cities and Counties should be able to recover costs greatly in excess of the norm, so long as they can prove the costs were incurred due to Defendants' alleged RICO violations.

Additionally, the Ninth Circuit held in *Canyon County* that governmental entities can, in fact, recover in RICO for the costs associated with doing business in the marketplace. *See, e.g., id.* ("government entities that have been overcharged in commercial transactions and thus deprived of their money can claim injury to their property.").

It is Defendants' position that *all* of Plaintiffs' costs responding to Defendants' alleged misconduct are sovereign or quasi-sovereign public services derivative of their residents' opioid problems, for which they cannot recover. *See* Doc. #: 1082 at 7. The Court disagrees. Certainly, some of Plaintiffs' alleged costs are costs associated with the ordinary provision of services to their constituents in their capacity as sovereigns. *See, e.g.*, SAC at 285 (asserting injury due to the provision of emergency first responder services). These costs cannot be recovered unless Plaintiffs can prove they go beyond the ordinary provision of those services. However, some of Plaintiffs' alleged costs are clearly associated with Plaintiffs' *participation in the marketplace*, and for those costs, Plaintiffs can undoubtedly recover. *See, e.g.*, *id.* (asserting injury due to the costs associated with purchasing naloxone to prevent future fatal overdoses).

Therefore, under the broadest reading of Sixth Circuit precedent, the Court finds that Plaintiffs may recover damages based on the provision of governmental services in their capacity as a sovereign to the extent they can prove the asserted costs go beyond the ordinary cost of providing those services and are attributable to the alleged injurious conduct of Defendants. Under a more restrictive reading of *Jackson*, Plaintiffs still may recover those costs associated with preventing the flood of these narcotics into their communities, which do not directly arise from the personal injuries of their citizens (e.g. providing medical care, addiction treatment, etc.). Lastly, Plaintiffs have sufficiently alleged that at least some of their claimed injuries are recoverable under RICO due to Plaintiffs' participation in the marketplace. Thus, the Court concludes that it is not appropriate to dismiss the RICO claims at this early stage in the litigation.

C. Civil Conspiracy

The R&R concluded that Plaintiffs sufficiently pled a claim for civil conspiracy. R&R at 95-98. Distributor Defendants object, stating that the Complaint "alleges no facts to support the assertion that Distributors participated in the marketing of opioids [or] . . . in applying or lobbying

for increased opioid production quotas from DEA, . . . [and] no facts to support the claim that Distributors conspired not to report the unlawful distribution practices of their competitors to the authorities." Doc. #: 1079 at 2-3 (emphasis removed). Pharmacy Defendants also object, arguing that to the extent a civil conspiracy is alleged through Defendants' participation in industry groups, the Complaint is deficient with respect to the Retail Pharmacies, because it does not allege their participation in those groups.

The R&R correctly identifies the elements of a cognizable conspiracy claim as: "(1) a malicious combination; (2) two or more persons; (3) injury to person or property; and (4) existence of an unlawful act independent from the actual conspiracy") *Hale v. Enerco Grp., Inc.*, 2011 WL 49545, at *5 (N.D. Ohio Jan. 5, 2011) (citation and internal quotation marks omitted). Distributor Defendants take exception to the R&R's finding of independent unlawful acts. Pharmacy Defendants object to the R&R's finding of a malicious combination. Defendants miss the forest for the trees.

Distributor Defendants characterize the R&R's finding of unlawful acts as "(1) fraudulently marketing opioids; (2) fraudulently increasing the supply of opioids by seeking increased quotas; and (3) failing to report suspicious orders." Doc #: 1079 at 2. This mischaracterizes the R&R's actual finding that "the statutory public nuisance, Ohio RICO, and injury through criminal acts claims" would all suffice to "fulfill the underlying unlawful act element." R&R at 96. The Court agrees that any of these claims is sufficient to satisfy the underlying unlawful act element.

Pharmacy Defendants assert that, because the Complaint fails to expressly allege their participation in industry groups such as the Healthcare Distribution Alliance and Pain Care Forum, that Plaintiffs failed to adequately plead a civil conspiracy claim, at least regarding them. However,

the R&R did not rely on industry group participation to find a malicious combination. The R&R concluded that:

> Pleading the existence of a malicious conspiracy requires "only a common understanding or design, even if tacit, to commit an unlawful act." *Gosden v. Louis*, 687 N.E.2d 481, 496-98 (Ohio Ct. App. 1996). "All that must be shown is that . . . the alleged coconspirator shared in the general conspiratorial objective." *Aetna Cas. & Sur. Co. v. Leahey Const. Co., Inc.*, 219 F.3d 519, 538 (6th Cir. 2000) (citation and internal quotation marks omitted).

Id. at 97. In other words, the R&R concluded that even absent evidence of participation in industry groups, alleging a "shared conspiratorial objective" is sufficient to demonstrate a "malicious combination" and thus survive Pharmacy Defendants' motion to dismiss. Plaintiffs allege "*all Defendants* took advantage of the industry structure, including end-running its internal checks and balances, to their collective advantage." SAC at 229 (emphasis added). Additionally, with respect to Retail Pharmacy Defendants specifically, Plaintiffs assert, "instead of taking any meaningful action to stem the flow of opioids into communities, they continued to participate in the oversupply and profit from it." *Id.* at 184. Thus, the R&R concluded, and this Court agrees, that Plaintiffs adequately pled that Defendants shared a general conspiratorial objective of expanding the opioid market and that there was a common understanding between all Defendants to disregard drug reporting obligations to effectuate that goal. Therefore, the Court adopts the R&R with respect to section III.K.

D. Abrogation of Common Law Claims Under the Ohio Products Liability Act

The R&R concluded that Plaintiffs' Statutory Public Nuisance and Negligence Claims are not abrogated by the Ohio Product Liability Act ("OPLA").[10] R&R at 58-60, 61-62. As further

[10] Pharmacy Defendants argue, without any legal analysis, that Plaintiffs' Unjust Enrichment Claim is abrogated by the OPLA. Doc. #: 1078 at 11. The R&R does not address whether Plaintiffs' Unjust Enrichment Claim is abrogated by the OPLA, likely because the Pharmacies merely made a similarly undeveloped argument in their motion to dismiss, and only rehash them here. Due to the conspicuous lack of legal development in either Pharmacy Defendants' Motion to Dismiss or Objections to the R&R, the Court finds this objection improper. Regardless, per the analysis below, the Court finds that Plaintiffs' Unjust Enrichment Claim is not abrogated by the OPLA.

discussed below, the Court concurs with and adopts the R&R's recommendation and reasoning with respect to these findings. However, the R&R also concluded that Plaintiffs' Common Law Absolute Public Nuisance Claim is abrogated by the OPLA. *Id.* at 62-65. The Court disagrees.

1. Abrogation of the Common Law Public Nuisance Claims

The Ohio Product Liability Act, Ohio Rev. Code § 2307.71 *et seq.*, was enacted in 1988. It was amended in 2005 and amended again in 2007. Despite the General Assembly's attempts to clarify the language and intent of the statute's definition of "product liability claim," the Court finds that the definition remains ambiguous, and thus reviews the legislative history pursuant to Ohio Rev. Code § 1.49(C) ("If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: . . . The legislative history.").

The OPLA, at the time of its enactment, did not explicitly state that it was intended to supersede all common law theories of product liability. It was also ambiguous regarding whether it superseded common law claims seeking only economic loss damages. The Ohio Supreme Court attempted to clarify these ambiguities in two cases, *Carrel v. Allied Prods. Corp.*, 677 N.E.2d 795, 799 (1997) (holding that "the common-law action of negligent design survives the enactment of the Ohio Products Liability Act.") and *LaPuma v. Collinwood Concrete*, 661 N.E.2d 714, 716 (Ohio 1996) (holding that "although a cause of action may concern a product, it is not a product liability claim within the purview of Ohio's product liability statutes unless it alleges damages other than economic ones, and that a failure to allege other than economic damages does not destroy the claim, but rather removes it from the purview of those statutes.").

In 2005, the General Assembly added the following provision to the OPLA ("the 2005 Amendment"): "Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability causes of action." 2004 Ohio Laws File 144 (Am. Sub. S.B. 80)

(codified at Ohio Rev. Code § 2307.71(B)). The associated legislative history of the 2005 Amendment states:

> The General Assembly declares its intent that the amendment made by this act to section 2307.71 of the Revised Code is ***intended to supersede the holding of the Ohio Supreme Court in Carrel v. Allied Products Corp.*** (1997), 78 Ohio St.3d 284, that the common law product liability cause of action of negligent design survives the enactment of the Ohio Product Liability Act, sections 2307.71 to 2307.80 of the Revised Code, and to abrogate all common law product liability causes of action.

Id. (emphasis added). Notably, the General Assembly cited the *Carrel* holding while conspicuously omitting the contemporary *LaPuma* holding. The Court therefore interprets the General Assembly's inclusion of *Carrel* to imply the intentional exclusion and therefore the tacit acceptance of the Ohio Supreme Court's holding in *LaPuma*.

In 2007, the Ohio Legislature further amended section 2307.71(A)(13) of the OPLA ("the 2007 Amendment") to add the following to the definition of "product liability claim:"

> "Product liability claim" ***also includes*** any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.

2006 Ohio Laws File 198 (Am. Sub. S.B. 117) (emphasis added). The associated legislative history of the 2007 Amendment further states:

> The General Assembly declares its intent that the amendments made by this act to sections 2307.71 and 2307.73 of the Revised Code are ***not intended to be substantive but are intended to clarify the General Assembly's original intent*** in enacting the Ohio Product Liability Act, sections 2307.71 to 2307.80 of the Revised Code, as initially expressed in Section 3 of Am. Sub. S.B. 80 of the 125th General Assembly, to abrogate all common law product liability causes of action ***including*** common law public nuisance causes of action, regardless of how the claim is described, styled, captioned, characterized, or designated, including claims against a manufacturer or supplier for a public nuisance allegedly caused by a manufacturer's or supplier's product.

Id. (emphasis added). Senate Bill 80 of the 125th General Assembly (the 2005 Amendment) was a "tort reform" bill that was enacted to create limitations on various types of non-economic

damages. *See* 2004 Ohio Laws File 144 (Am. Sub. S.B. 80). Both the 2005 and 2007 Amendments demonstrate the General Assembly's intent to limit non-economic damages on all common law theories of product liability regardless of how the claim was characterized.

Throughout these amendments, however, the overarching substantive definition of a "product liability claim" has not changed much from the original 1988 OPLA definition. To fall within the statute's definition a plaintiff's product liability claim must 1) seek to recover compensatory damages 2) for death, physical injury to a person, emotional distress, or physical damage to property other than the product in question (*i.e.* "harm" as defined by the statute).[11] The subsequent amendments make clear that any civil action concerning liability for a product due to a defect in design, warning, or conformity—including any common law public nuisance or common law negligence claim, regardless of how styled—that 1) seeks to recover compensatory damages 2) for "harm" is abrogated by the OPLA. Conversely, a claim *not* seeking to recover compensatory damages or seeking to recover solely for "economic loss" (*i.e. not* "harm") does not meet the definition of a product liability claim and is not abrogated by the OPLA. The OPLA is explicit that "Harm is not 'economic loss,'" and "Economic Loss is not 'harm.'" Ohio Rev. Code § 2307.71(A)(2) and (7). This reading of § 2307.71(A)(13) is consistent with the legislative intent, the holding in *LaPuma*, and with § 2307.72(C) which states:

> Any recovery of compensatory damages for economic loss based on a claim that is asserted in a civil action, other than a product liability claim, is not subject to sections 2307.71 to 2307.79 of the Revised Code, but may occur under the common law of this state or other applicable sections of the Revised Code.

Ohio Rev. Code § 2307.72(C).

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[11] Section 2307.71(A)(13) of the OPLA also requires that the claim allegedly arise from any of:

(a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
(b) Any warning or instruction, or lack of warning or instruction, associated with that product;
(c) Any failure of that product to conform to any relevant representation or warranty.

Ohio Rev. Code § 2307.71(A)(13).

Further, by defining a "product liability claim" in terms of damages, the OPLA does not provide for any form of equitable remedy.[12] To conclude that all public nuisance claims, including those seeking equitable remedies, are subsumed by the OPLA would effectively be a substantive change in the law in contravention of the General Assembly's express intent that the amendment *not* be substantive. In other words, if all public nuisance claims, including those only seeking equitable relief, were abrogated by the OPLA, a party merely seeking an equitable remedy to stop a public nuisance would be forced instead to sue for compensatory damages under the OPLA, a result that appears completely at odds with the legislative intent to limit non-economic compensatory damages. Therefore, a claim seeking only equitable relief is not abrogated by the OPLA.

The R&R concluded that the 2007 Amendment added public nuisance claims as a second category of actions that fall under the definition of a product liability claim. *See* R&R at 58 n.37. In support of this conclusion, Defendants cite *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018). *See* Doc. #: 1116 at 3. In *Mount Lemmon*, the Supreme Court interpreted Congress' addition of a second sentence to the definition of "employer" under the ADEA.[13] The Supreme Court held that the phrase "also means" adds a new category of employers to the ADEA's reach. *Mount Lemmon* is factually inapposite, and the R&R's conclusion is incorrect for two reasons. First, there is a substantive difference between the phrases "also means" and "also includes." The term "means" is definitional, while "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *In re Hartman*, 443 N.E.2d

[12] Defendants identify section 2307.72(D)(1) as expressly carving out abatement relief for contamination of the environment as an indication that the OPLA supersedes all other forms of equitable relief. *See* Doc. #: 1116 at 4. However, a far more natural reading of this section is the carving out of all forms of relief for pollution of the environment from preemption by federal environmental protection laws and regulations.

[13] Under the ADEA, "the term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term *also means* (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." 29 U.S.C. § 630(b) (emphasis added).

516, 517–18 (Ohio 1983) (quoting *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)). In this case, the general principal is that to be a product liability claim, a plaintiff's cause of action must seek compensatory damages for harm. Thus, a public nuisance claim—to be "also include[d]" as a "product liability claim" under the OPLA—must likewise seek compensatory damages for harm. Ohio Rev. Code § 2307.71(A)(13).

Second, as the *Mount Lemmon* opinion points out, "Congress amended the ADEA to cover state and local governments." *Mount Lemmon*, 139 S. Ct. at 23. This amendment to the ADEA certainly amounts to—and was intended to be—an intentional, substantive change in the law. As highlighted above, however, the 2007 Amendment to the OPLA was not intended to be a substantive change.

Therefore, in light of the legislative history, the Court finds it at least plausible, if not likely, that the 2005 and 2007 Amendments to the OPLA intended to clarify the definition of "product liability claim" to mean "a claim or cause of action [*including* any common law negligence or public nuisance theory of product liability . . .] that is asserted in a civil action . . . that seeks to recover compensatory damages . . . for [harm] . . . ." This definition is the most consistent with the statute, the legislative history, and the caselaw. *See LaPuma v. Collinwood Concrete*, 661 N.E.2d 714, 716 (Ohio 1996) ("Failure to allege other than economic damages . . . removes it from the purview of [the OPLA].") (intentionally not overruled by the 125th General Assembly); *Volovetz v. Tremco Barrier Sols., Inc.*, 74 N.E.3d 743, 753 n.4 (Ohio Ct. App. Nov. 16, 2016) ("We recognize that a claim for purely economic loss is not included in the statutory definition of 'product liability claim,' and, consequently, a plaintiff with such a claim may pursue a common-law remedy."); *Ohio v. Purdue Pharma*, Case No. 17 CI 261 (Ohio C.P. Aug. 22, 2018) (finding that the Plaintiff's common law nuisance claim not seeking compensatory damages is not

abrogated under the OPLA.); *see also*, 76 Ohio Jur. 3d Claims Within Scope of Product Liability Act § 1 ("Ohio's products liability statutes, by their plain language, neither cover nor abolish claims for purely economic loss caused by defective products.").

Using this definition, Plaintiffs' absolute public nuisance claim, at least insofar as it does not seek damages for harm,[14] is not abrogated by the OPLA. Section III.E of the R&R is rejected to the extent it held that Plaintiffs' absolute public nuisance claim is abrogated by the OPLA.

2. City of Akron's Ability to Bring a Statutory Public Nuisance Claim

The R&R concluded that Plaintiffs' statutory public nuisance claim was not abrogated. R&R at 62. No party objected to this conclusion, therefore the Court adopts the R&R with respect to this finding. The R&R further concluded that the City of Akron lacked standing to bring a statutory public nuisance claim, and that the County of Summit, which had standing, was not limited only to injunctive relief under the statute. The Pharmacy Defendants object to the R&R's conclusion that § 4729.35 of the Ohio Revised Code does not limit the remedy that can be sought under the statute to an injunction, and Plaintiffs object to the R&R's conclusion that § 4729.35 limits who may maintain a nuisance action. The issue then, is whether § 4729.35 is limiting and if so, to what extent.

The operative statutes involved in Plaintiffs' Statutory Public Nuisance Claim are:

Ohio Rev. Code § 715.44(A) (emphasis added):[15]

> A municipal corporation may abate ***any nuisance*** and prosecute ***in any court of competent jurisdiction***, any person who creates, continues, contributes to, or suffers such nuisance to exist.

[14] "'Harm' means death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not 'harm.'" Ohio Rev. Code § 2307.71(A)(2).
[15] Page's Ohio Revised Code Annotated, Title 7: *Municipal Corporations*, Chapter 715: *General Powers*, §§715.37-715.44: Health and Sanitation, §715.44: Power to abate nuisance and prevent injury.

Ohio Rev. Code § 3767.03 (emphasis added):[16]

> ***Whenever a nuisance exists***, the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation ***in which the nuisance exists***; the prosecuting attorney of the county in which the nuisance exists; the law director of a township that has adopted a limited home rule government under Chapter 504. of the Revised Code; or any person who is a citizen of the county in which the nuisance exists may bring an action in equity in the name of the state, upon the relation of the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; the prosecuting attorney; the township law director; or the person, to abate the nuisance and to perpetually enjoin the person maintaining the nuisance from further maintaining it.

Ohio Rev. Code § 4729.35 (emphasis added):[17]

> The violation . . . of any laws of Ohio or of the United States of America or of any rule of the board of pharmacy controlling the distribution of a drug of abuse . . . is hereby declared to . . . constitute a public nuisance. The attorney general, the prosecuting attorney of any county in which the offense was committed or in which the person committing the offense resides, or the state board of pharmacy may maintain an action in the name of the state ***to enjoin such person*** from engaging in such violation. Any action under this section shall be brought ***in the common pleas court of the county where the offense occurred or the county where the alleged offender resides***.

If § 4729.35 had ended after the first sentence, there would be no question as among the three statutes that the City of Akron would have the authority to bring an action to abate a nuisance caused by the violation of applicable drug laws. However, the subsequent sentences of § 4729.35 can be read as either limiting or expanding (or both). Section 4729.35 is potentially limiting, for example, in that it does not also list city directors of law, chief legal officers of municipal corporation, or law directors of townships as parties that may maintain a nuisance action. It is also potentially limiting in that it only mentions injunctive relief rather than (or in addition to) relief in the form of abatement (or equitable relief generally). However, as Plaintiffs point out, § 4729.35

[16] Page's Ohio Revised Code Annotated, Title 37: Health-Safety-Morals, Chapter 3767: Nuisances, §§3767.01-3767.11: Disorderly houses, §3767.03: Abatement of nuisance; bond.
[17] Page's Ohio Revised Code Annotated, Title 47: Occupations-Professions, Chapter 4729: Pharmacists; Dangerous Drugs, §§4729.27-4729.46: Prohibitions, §4729.35: Violations of drug laws as public nuisance.

might be read as an expansion of § 3767.03 in that it additionally allows the state board of pharmacy and the prosecuting attorney of the county in which the alleged offender resides to maintain a nuisance action.[18] It also provides jurisdiction in either the county where the offense occurred or the county where the alleged offender resides.

The R&R succinctly summarizes the applicable Ohio rule of statutory construction, "a court should construe various statutes in harmony unless their provisions are irreconcilably in conflict." R&R at 65 (citing Ohio Rev. Code § 1.51; *United Tel. Co. v. Limbach*, 643 N.E.2d 1129, 1131 (Ohio 1994)). In the event statutory provisions are irreconcilable, the special or local provision prevails. *See id.* Additionally, as before, the Court interprets the inclusion of certain elements in a statute to imply the intentional exclusion of others.

Here, § 4729.35 is a special or local provision. It is irreconcilable with §§ 715.44(A) and 3767.03 because the plain language of these sections explicitly allows the chief legal officer of ***any*** municipal corporation, for example a city law director, to bring an action for abatement of ***any*** nuisance, whereas § 4729.35—at least implicitly—excludes a city law director from bringing a nuisance action for violations of the drug laws. Further, even a statutorily authorized party may only bring an action to enjoin such violations, not one for abatement.

Thus, the Court concludes, as the R&R did, that the General Assembly's inclusion of the attorney general, county prosecuting attorney, and state board of pharmacy in § 4729.35 implies the intentional exclusion of a city law director. Similarly, the Court concludes, though the R&R did not, that the General Assembly's reference to "an action . . . to enjoin such person from engaging in such violation" implies the exclusion of other forms of relief. Ohio Rev. Code § 4729.35.

[18] As opposed to only the county prosecuting attorney in which the nuisance exists as allowed by section 3767.03.

While it may not have been the General Assembly's intent to limit the parties who can maintain a nuisance action or to limit the available relief, the Court declines to second guess the unambiguous text of the General Assembly's statute. Further, because § 4729.35 is a special or local provision, irreconcilable with the more general provision, the Court reads § 4729.35 as an exception to the general provision. Therefore, the Court adopts the R&R's conclusion that the City of Akron lacks standing to bring a statutory public nuisance claim but rejects the R&R's conclusion that Ohio Rev. Code § 4729.35 does not expressly limit the categories of relief available for a nuisance claim to an injunction.

3. Abrogation of the Negligence Claim

The R&R concluded that the OPLA does not abrogate Plaintiffs' negligence claims. R&R at 60. Distributor Defendants object to that determination. *See* Doc. #: 1079 at 12. As discussed above, the OPLA only abrogates civil actions that seek to recover compensatory damages for death, physical injury, or physical damage to property caused by a product. Distributor Defendants do not meaningfully develop any argument with respect to Plaintiffs' negligence claim other than to cite several cases where courts purportedly dismissed various tort claims as preempted by the OPLA. The cases are all distinguishable.

Defendants cite *Chem. Solvents, Inc. v. Advantage Eng'g, Inc.*, 2011 WL 1326034 (N.D. Ohio Apr. 6, 2011). Regarding the plaintiff's negligence claim, the *Chem. Solvents* court first determined that "the Plaintiff [was] not saying that the product itself was defective." *Id.* at *13. The court then held, "Thus, this is not a 'products liability' claim, but a claim premised upon subsequent negligent actions by Advantage. Accordingly, the Court finds this claim is not preempted by the OPLA." *Id.* (citing *CCB Ohio LLC v. Chemque, Inc.*, 649 F. Supp. 2d 757, 763–64 (S.D. Ohio 2009) ("Similarly, the Court finds actions for fraud and negligent misrepresentation as outside the scope of the OPLA's abrogation, as neither fit neatly into the definition of a

'common law product liability claim.'")). Here, Plaintiffs likewise are not asserting that the opioid products themselves are defective, rather that Defendants negligently permitted (or even encouraged) diversion of those products.

Defendants also cite *McKinney v. Microsoft Corp.*, No. 1:10-CV-354, 2011 WL 13228141 (S.D. Ohio May 12, 2011). *McKinney* is a traditional products liability case where the plaintiff, in addition to his products liability claim under the OPLA, asserted a claim for negligent manufacture (i.e. a defective product claim), the exact type of claim considered by the General Assembly when it overruled *Carrel*. Plaintiffs' negligence claim in this case, again, does not assert that Defendants' opioids were defective.

Finally, Defendants turn to *Leen v. Wright Med. Tech., Inc.*, 2015 WL 5545064, at *2 (S.D. Ohio Sept. 18, 2015). In *Leen*, the plaintiff did not oppose the defendant's abrogation arguments in the motion to dismiss, so the court dismissed the common law negligence claim without considering the merits. *See id.* Therefore, based on this Court's analysis of the OPLA and the cases cited by Defendants, the Court adopts the R&R's conclusion that Plaintiffs' negligence claim is not abrogated.

Defendants also assert that the R&R's reliance on *Cincinnati v. Beretta U.S.A. Corp.* is misplaced because, they claim, it was effectively overruled by the General Assembly's amendments to the OPLA. 768 N.E.2d 1136 (Ohio 2002); *see* Doc. #: 1079 at 14. Whether and to what extent the OPLA abrogates negligence claims is a separate and distinct question from whether there is a common law duty to prevent or attempt to prevent the alleged negligent creation of an illicit secondary market.

As previously stated, the OPLA does not abrogate Plaintiffs' negligence claim, which seeks only relief from economic losses. However, even if the Court had found that Plaintiffs' negligence

claim was abrogated, it does not follow that *Beretta's* analysis of what constitutes a legal duty in Ohio is somehow flawed.[19] Thus, *Beretta's* discussion of Ohio common law duty is still relevant to the present case and is analyzed further below.

E. Negligence

The R&R concluded that Plaintiffs have pled sufficient facts to plausibly support their claims that Defendants owed them a duty of care, that their injuries were proximately and foreseeably caused by Defendants' failure to take reasonable steps to prevent the oversupply of opioids into Plaintiffs' communities, and that their claim is not barred by the economic loss doctrine. R&R at 74-85. Defendants object to the finding that they owed Plaintiffs any duty and the conclusion that the economic loss doctrine does not bar Plaintiffs' claim.

1. Duty of Care

Defendants make several objections to the R&R's analysis regarding the duty of care. "The existence of a duty of care, as an element of a negligence claim under Ohio law, depends on the foreseeability of the injury, and an injury is 'foreseeable' if the defendant knew or should have known that his act was likely to result in harm to someone." 70 Ohio Jur. 3d Negligence § 11 (citing *Bailey v. U.S.*, 115 F. Supp. 3d 882, 893 (N.D. Ohio 2015)). The R&R concluded that "it was reasonably foreseeable that [Plaintiffs] would be forced to bear the public costs of increased harm from the over-prescription and oversupply of opioids in their communities if Defendants failed to implement and/or follow adequate controls in their marketing, distribution, and dispensing of opioids," and therefore, that "Plaintiffs have plausibly pleaded facts sufficient to establish that Defendants owed them a common law duty." R&R at 78-79.

[19] The *Beretta* court determined that the defendants' negligent manufacturing, marketing, and distributing, and failure to exercise adequate control over the distribution of their products created an illegal, secondary market resulting in foreseeable injury and that from Defendants' perspective, the City of Cincinnati was a foreseeable plaintiff. *See Beretta*, 768 N.E.2d at 1144.

First, Manufacturer Defendants assert that to the extent they owe a statutory duty, it is owed to the U.S. Drug Enforcement Agency, not to plaintiffs. Doc. #: 1082 at 14. They also assert that they have no legal duty under 21 U.S.C. § 827 or 21 C.F.R. § 1301.74(b) to monitor, report, or prevent downstream diversion. *Id.* These objections are not well-taken. The R&R expressly did not reach whether any Defendant owed a duty to Plaintiffs under the statutes or regulations. R&R at 79. It also did not address whether the statutes or regulations create a common law duty under a negligence *per se* theory. *Id.* at n.49. The R&R instead concluded that the common law duty pled by Plaintiffs was sufficient to support a negligence claim. *See* R&R at 79. This Court agrees.

Distributor Defendants assert that the R&R "refus[ed] to confront a key duty question [(whether a duty, if one exists, flows to the County)] head on." Doc. #:1079 at 14. They assert that "the R&R identified no Ohio case recognizing a common-law duty to *report or halt suspicious orders of controlled substances*," and "even if there were a common-law duty to *report or halt suspicious orders*, no authority suggests that such a duty runs to the cities or counties." *Id.* (emphasis added). The duty that Plaintiffs allege is not so narrow. Plaintiffs allege that Defendants, like all reasonably prudent persons, have a duty "to not expose Plaintiffs to an unreasonable risk of harm." SAC at 312.

In reaching its conclusion on the duty of care, the R&R relies on *Cincinnati v. Beretta*. The R&R provides this summary:

> In *Cincinnati v. Beretta*, the Ohio Supreme Court addressed the question of whether gun manufacturers owed a duty of care to a local government concerning harms caused by negligent manufacturing, marketing and distributing of firearms. *Beretta* involved allegations that the defendants failed to exercise sufficient control over the distribution of their guns, thereby creating an illegal secondary market in the weapons. The *Beretta* court concluded that the harms that resulted from selling these weapons were foreseeable—that Cincinnati was a foreseeable plaintiff. 768 N.E.2d at 1144. Plaintiffs argue that the harm caused by the marketing and distribution of opioids are similarly foreseeable.

R&R at 75-76. Here, taking Plaintiffs' allegations as true, by failing to administer responsible distribution practices (many required by law), Defendants not only failed to prevent diversion, but affirmatively created an illegal, secondary opioid market. Opioids are Schedule II drugs. Despite Manufacturer Defendants' marketing campaign to the contrary it is well known that opioids are highly addictive. When there is a flood of highly addictive drugs into a community it is foreseeable—to the point of being a foregone conclusion—that there will be a secondary, "black" market created for those drugs. It is also foreseeable that local governments will be responsible for combatting the creation of that market and mitigating its effects. Thus, the Court affirms the R&R's conclusion that Defendants owe Plaintiffs a common law duty of care.

2. Economic Loss Doctrine

Defendants also object to the R&Rs conclusion that Plaintiffs' negligence claim is not precluded by the economic loss doctrine. Defendants' objections merely rehash arguments already made in their motions to dismiss. The R&R does a thorough analysis of the application of the economic loss rule, and this Court finds no fault with it. The R&R states:

> The economic loss rule recognizes that the risk of consequential economic loss is something that the parties can allocate by agreement when they enter into a contract. This allocation of risk is not possible where, as here, the harm alleged is caused by involuntary interactions between a tortfeasor and a plaintiff. Thus, courts have noted that in cases involving only economic loss, the rule "will bar the tort claim if the duty arose only by contract." *Campbell v. Krupp*, 961 N.E.2d 205, 211 (Ohio Ct. App. 2011). By contrast, "the economic loss rule does not apply—and the plaintiff who suffered only economic damages can proceed in tort—if the defendant breached a duty that did not arise solely from a contract." *Id.*; *see also Corporex*, 835 N.E.2d. at 705 ("When a duty in tort exists, a party may recover in tort. When a duty is premised entirely upon the terms of a contract, a party may recover based upon breach of contract."); *Ineos USA LLC v. Furmanite Am., Inc.*, 2014 WL 5803042, at *6 (Ohio Ct. App. Nov. 10, 2014) ("[W]here a tort claim alleges that a duty was breached independent of the contract, the economic loss rule does not apply.").

R&R at 84 (citing *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 835 N.E.2d 701 (Ohio 2005)). Thus, the Court concurs with and affirms the R&R's analysis of the economic loss rule and its conclusion that it is not applicable to Plaintiffs' tort claims.

F. The Injury Through Criminal Acts Objections

The R&R concluded that Defendants' motion to dismiss Plaintiffs' Injury Through Criminal Acts Claim should not be dismissed. R&R at 88-90. Defendants' primary objection to this conclusion merely rehashes the argument initially made in their motions to dismiss: that they have not been convicted of a crime. Their objection cites no new facts or case law that were not already presented to and considered by Magistrate Judge Ruiz. Whether Ohio Rev. Code § 2307.60(A)(1) requires an underlying conviction is a question this Court recently certified to the Ohio Supreme Court in *Buddenberg v. Weisdack*, Case No. 1:18-cv-00522, 2018 WL 3159052 (N.D. Ohio June 28, 2018) (Polster, J.); *see also* 10/24/2018 Case Announcements, 2018-Ohio-4288 (available at http://www.supremecourt.ohio.gov/ROD/docs/) (accepting the certified question). In *Buddenberg*, this Court denied the defendants' motion to dismiss and ordered, "Defendants may renew their challenge in the form of a motion for summary judgment after discovery and further research." *Buddenberg*, 2018 WL 3159052 at *6. Nothing in any Defendants' briefing convinces this Court that the same approach is not appropriate here. Therefore, the Court adopts the R&R with respect to Section III.I. Defendants' objections are overruled.[20]

G. Unjust Enrichment

The R&R concluded that Defendants' motion to dismiss Plaintiffs' Unjust Enrichment Claim should be denied. *See* R&R at 91-95. The issue at the heart of Defendants' objections to the

[20] Should the Ohio Supreme Court rule that a criminal conviction is required, this claim will of course be dismissed.

R&R's conclusion is whether Plaintiffs conferred a benefit upon the Defendants. Defendants argue that "the rule in Ohio is that to show that a plaintiff conferred a benefit upon a defendant, an economic transaction must exist between the parties." Doc. #: 1078 at 13 (internal quotations omitted) (citing *Ohio Edison Co. v. Direct Energy Bus.*, LLC, No. 5:17-cv-746, 2017 WL 3174347 (N.D. Ohio July 26, 2017); *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Sons Enters., Inc.*, 50 N.E.3d 955 (Ohio Ct. App. 2015); *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 684 F. Supp. 2d 942 (N.D. Ohio 2009)).

This is not the rule in Ohio. All the cases cited by Defendants refer back to one sentence in *Johnson v. Microsoft Corp.*: "*The facts in this case* demonstrate that no economic transaction occurred between Johnson and Microsoft, and, therefore, Johnson cannot establish that Microsoft retained any benefit 'to which it is not justly entitled.'" 834 N.E.2d 791, 799 (Ohio 2005) (emphasis added) (citing *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 141 N.E.2d 465 (Ohio 1957)). This holding is expressly limited to the facts of that case. *Johnson* does state the rule in Ohio, however. It provides: "The rule of law is that an *indirect purchaser* cannot assert a common-law claim for restitution and unjust enrichment against a defendant without establishing that a benefit had been conferred upon that defendant by the purchaser." *Id.* (emphasis added).

As Defendants are quick to point out, Plaintiffs do not claim to be purchasers of opioids, indirect or otherwise. *See, e.g.*, Doc. #: 1078 at 11 ("Plaintiffs do not allege that *they* purchased opioids from the Pharmacy Defendants."). As such, the R&R rightly concludes that "Plaintiffs' theory of recovery is not based on a financial transaction, therefore the claim is not barred by *Johnson's* limiting indirect purchasers from maintaining unjust enrichment claims against parties other than those with whom they dealt directly." R&R at 92.

Plaintiffs' claim is that "Plaintiffs have conferred a benefit upon Defendants by paying for Defendants' externalities: the cost of the harms caused by Defendants' improper distribution

practices." SAC at 328. According to Plaintiffs, Defendants' conduct allowed the diversion of opioids and thereby created a black market for their drugs. *See id.* at 7. This black market allowed Defendants to continue to ship large volumes of opioids into Plaintiffs' communities at great profit to Defendants and great expense to Plaintiffs. *See id.* at 328. Under Ohio law, "one is unjustly enriched if the retention of a benefit would be unjust, and one should not be allowed to profit or enrich himself or herself inequitably at another's expense." 18 Ohio Jur. 3d Contracts § 279. Therefore, for the reasons stated, Defendants' objections are overruled. The Court adopts Section III.J of the R&R.

III.

Having considered Plaintiffs' Second Amended Complaint, Defendants' Motions to Dismiss, Plaintiffs' Omnibus Response, Defendants' Replies, Magistrate Judge Ruiz's Report and Recommendation, the parties' Objections to the R&R, and their Responses, Defendants' Motions to Dismiss, Doc. ##: 491, 497, 499, are **DENIED** with the following exception: The City of Akron's Statutory Public Nuisance claim is dismissed for lack of standing under Ohio Rev. Code § 4729.35. The County of Summit's Statutory Public Nuisance claim is limited to seeking injunctive relief.

It is accurate to describe the opioid epidemic as a man-made plague, twenty years in the making. The pain, death, and heartache it has wrought cannot be overstated. As this Court has previously stated, it is hard to find anyone in Ohio who does not have a family member, a friend, a parent of a friend, or a child of a friend who has not been affected.

Plaintiffs have made very serious accusations, alleging that each of the defendant Manufacturers, Distributors, and Pharmacies bear part of the responsibility for this plague because of their action and inaction in manufacturing and distributing prescription opioids. Plaintiffs allege that Defendants have contributed to the addiction of millions of Americans to these prescription opioids and to the foreseeable result that many of those addicted would turn to street drugs.

While these allegations do not fit neatly into the legal theories chosen by Plaintiffs, they fit nevertheless. Whether Plaintiffs can prove any of these allegations remains to be seen, but this Court holds that they will have that opportunity.

The Court, thus having ruled on all of Defendants' Motions to Dismiss, orders Defendants to file their Answers to Plaintiffs' Corrected Second Amended Complaint, Doc. #: 514, no later than January 15, 2019.

IT IS SO ORDERED.

/s/ Dan Aaron Polster December 19, 2018
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

EXHIBIT 4

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IN THE COURT OF COMMON PLEAS

ROSS COUNTY, OHIO

STATE OF OHIO, EX REL.
MIKE DEWINE, OHIO ATTORNEY GENERAL,

PLAINTIFF,

CASE NO. 17 CI 261

VS

DECISION AND ENTRY

PURDUE PHARMA L.P., ET AL,

DEFENDANT.

* * * * * *

This action came on for hearing on the Defendants' various motions to dismiss, Defendant Endo's motion to strike, certain defendants' motion for judicial notice, Defendants' motion to stay, Plaintiff's responses, and the Defendants' replies thereto. All parties were represented and heard through counsel.

The Plaintiff's Complaint alleges that Defendants misrepresented to the general public, physicians, and the State of Ohio the effectiveness of opioids for the treatment of chronic pain and the dangers of opioid addiction. Plaintiff alleges that these misrepresentations were directly and indirectly communicated by the Defendants, their representatives, and various third parties. The Complaint alleges the following claims:

1. Public nuisance under the Ohio Product Liability Act, 2307.71 ORC.
2. Public nuisance – common law.
3. Ohio Consumer Sales Practices Act, 1345.02 ORC et seq.
4. Medicaid Fraud, 2913.40/2307.60 ORC.
5. Common Law Fraud.

6. Ohio Corrupt Practices Act, 2923.31 ORC et seq.

Plaintiff seeks declaratory judgment, injunctive relief, compensatory damages, punitive damages, civil penalties, pre and post-judgment interest, and attorney fees.

Defendants argue that all of Plaintiff's claims fail for a multitude of reasons and that the Complaint should be dismissed.

STANDARD

A motion to dismiss for failure to state a claim is procedural and tests the sufficiency of the complaint. A trial court reviews only the complaint and accepts all factual allegations as true. Every reasonable inference is made in favor of the non-moving party. This Court must assume the Plaintiff's allegations are true. However, the unsupported conclusions of the Complaint are not sufficient to withstand a motion to dismiss the complaint. The Complaint must be construed as a whole within the four corners of the Complaint. A trial court may not dismiss a complaint "unless it appears **beyond doubt** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (Emphasis added) O'Brien v Univ. Community Tenants Union, Inc., 42 Ohio State 2d, 242 (1975). (Emphasis added). Gannett GP Media, Inc. v Chillicothe, Ohio Police Department, 2018 Ohio 1552; State, ex rel. Hanson v Guernsey Cty. Bd. of Commrs., 65 Ohio State 3d 545 (1992); Struckman v Bd. of Edn. of Teays Valley Local Sch. Dist., 2017 Ohio 1177; Martin v. Lamrite W., Inc., 2015 Ohio 3585.

Ohio remains a notice pleading state. Civil Rule 8(A) requires only the following:

"(1) A short and plain statement of the claim showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled."

Ohio courts have rejected the heightened federal pleading standard set forth in Bell Atlantic Corp. v Twombly, 550 U.S. 544, and have acknowledged that Ohio remains a notice pleading state. Smiley v City of Cleveland, 2016-Ohio 7711; Mangelluuzzi v Morley, 2015 Ohio 3143. This Court notes the language of the Eighth District Court of Appeals in Smiley, supra wherein the court stated that "(the) motion to dismiss is viewed with disfavor and should rarely be granted" and that "few complaints fail to meet the liberal (pleading) standards of Rule 8 and become subject to dismissal,".

Civil Rule 9(B) does impose upon a plaintiff a heightened standard of pleading in cases of fraud.

"(B) **Fraud, mistake, condition of mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity..."

In Ohio, a complaint alleging fraud must allege with particularity the "circumstances constituting fraud." The complaint must assert "the time, place, and content of the false representation; the fact misrepresented; the identification of the individual giving the false representation; and the nature of what was obtained or given as a consequence of a fraud." Aluminum Line Prods. Co. v Brad Smith Roofing Co., 109 Ohio App. 3d 246 (1996); Dottore v Vorys, Sater, Seymour & Pease, LLP. 2014 Ohio 25; First-Knox Nat'l Bank v MSD Props., Ltd., 2015 Ohio 4574.

Civil Rule 9(B) should be read in conjunction with the general directive of Civil Rule 8, that pleadings should be "simple, concise, and direct." Even if the pleadings are vague, so long as defendants have been placed on notice of the claims, a strict application is not necessary. Aluminum Line Prods. Co., supra; F&J Roofing Co. v

McGinley & Sons, Inc., 35 Ohio App. 3d 16 (1987). This Court notes that the Complaint in Aluminum Line Prods. Co., supra, asserted that the fraud occurred over the course of several years. There was no specific assertion of the date of the fraud. Similarly, the Ninth District Court of Appeals found that a complaint alleging fraud within a six year period did not violate the requirements of Civil Rule 9(B). Bear v Bear, 2014 Ohio 2919. See also Pierce v Apple Valley, Inc., 597 F. Supp. 1480.

A determination whether a complaint satisfies the heightened pleading standards of Civil Rule 9(B) should be made on a case by case basis depending upon the facts of each case. City of Chicago v Purdue Pharma L.P., et al, 14C4361211 F. Supp. 3d. 1058 (N.D. Ill. 2016).

The heightened pleading standards of Civil Rule 9(B) may also be relaxed in circumstances where relevant facts lie exclusively within the control of the opposing party. Wilkins, ex rel. U.S. v State of Ohio, 885 F. Supp. 1055; Craighead v E.F. Hutton and Co., 899 F. 2d. 485.

GROUP PLEADING

In State of Missouri, ex rel. Joshua D. Hawley v Purdue Pharma, LP, Case No. 1722-CC10626, the 22nd Circuit Court of the State of Missouri found that there was no rule against "group pleading" in Missouri. Similarly, this Court finds that there is no specific rule against "group pleading" in the state of Ohio. The Dottore case cited by the Defendants, does not mention "group pleading" and more specifically addresses the heightened pleading requirements of Civil Rule 9(B) in mail fraud cases. The Plaintiff's 101 page Complaint sufficiently asserts that all defendants engaged in conduct which would constitute a claim under the pleading rules in the State of Ohio.

CIVIL RULE 9(B)

In the case at bar, the prima facia case for fraud is:

(1) A representation or concealment of a fact;

(2) Material to the transaction at hand;

(3) Made falsely with knowledge of its falsity;

(4) Intent to mislead another into relying upon it;

(5) Justifiable reliance;

(6) Injury proximately caused by the reliance.
Marjul, LLC v. Hurst, 2013 Ohio 479.

As previously stated, this Court will examine the Plaintiff's compliance with Civil Rule 9(B) under the Ohio pleading standards. The Plaintiff's complaint must assert the time, place, and content of the false representation; the fact misrepresented; the identification of the individual giving the false representation; and the nature of what was obtained or given as a consequence of a fraud. Aluminum Line Prods. Co., supra.

The Plaintiff's complaint adequately identifies the Defendants and their actions and representations. The complaint sufficiently asserts the time frame which in the representations were made and that they were made in the state of Ohio. The complaint sufficiently identifies that the representations were made by representatives of the Defendants and various groups and third parties sponsored by the Defendants.

The complaint contains over 40 pages which explain in detail the marketing tactics utilized by Defendants, their representatives, and various groups connected to Defendants. Similarly, the complaint adequately sets forth the representations made, how these representations were distributed to physicians and citizens of Ohio, that the representations were false and that the Defendants knew the falsity of the representations.

Under Ohio pleading standards, it is not necessary for the complaint to identify physicians who relied upon the misrepresentations of the Defendants. Even so, as argued by Plaintiff, the identification of prescribing physicians is solely within the knowledge of Defendants and can be obtained through discovery. Further, the complaint adequately states that the Plaintiff specifically relied upon the misrepresentations in issuing reimbursement payments under the Medicaid program. Further, reliance is a question of fact or appropriately addressed in a motion for summary judgment. Kelly v. Georgia-Pac. Corp., 46 Ohio St. 3d 134. Lastly, the Plaintiff has sufficiently pled causation in compliance with City of Cincinnati v. Beretta USA Corp., 95 Ohio St. 3d 416 and the damages suffered by the state of Ohio. In summary, this Court finds that Plaintiff has sufficiently pled the fraud related claims under Civil Rule 9(B).

PREEMPTION/FDA APPROVAL

The parties agree that the FDA approved the labeling for opioids for long-term treatment. However, it is evident in the Plaintiff's complaint that its claims are based upon misrepresentations made by the Defendants concerning the use and safety of opioids which go far beyond the labeling. As noted by the court in City of Chicago v. Purdue Pharma LP, supra, the allegations of the Plaintiff's complaint primarily sound in fraud and not the propriety of the labeling of opioids. The Chicago court also concluded that drug labeling does not preclude fraud claims. See also Wyeth v. Levine, 555 U.S. (2009).

The claims set forth in Plaintiff's complaint are not barred by the FDA's approval of labeling or the doctrine of preemption as to Defendants' branded or unbranded labeling.

PUBLIC NUISANCE

This Court finds that Cincinnati vs Beretta, 95 Ohio St. 3d 416, is not substantially distinguishable and applies to the case at bar. In Beretta, supra, the Ohio Supreme Court adopted a broader definition of public nuisance. The court determined that the restatement of the law of torts (2nd) sets forth a broad definition of public nuisance allowing an action to be maintained "for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unnecessarily interferes with a right common to the general public." Under the broad definition of public nuisance and the liberal pleading rules of the state of Ohio, this Court finds that the Plaintiff has adequately pled public nuisance under Ohio common law and the Ohio Product Liability Act.

OHIO CONSUMER SALES PRACTICES ACT

Section 1345.07 ORC specifically authorizes the Ohio Attorney General to initiate an action under the OSCPA. The statute also sets forth the remedies which the Attorney General can seek: declaratory judgment; injunction; and civil penalties. The provisions of the OSCPA must be liberally construed. State, ex rel Celebreeze v. Hughes, 58 Ohio St. 3rd 273. The complaint sets forth a "consumer transaction" as defined by the statute. The complaint need not, at this stage, identify an Ohio citizen as a consumer. A consumer action is alleged by the complaint regardless of whether the plaintiff is an actual consumer. The complaint, as previously stated, sets forth in detail over 40 pages of allegations which are prohibited by Sections 1345.02 and 1345.03 and the administrative regulations promulgated thereunder. Plaintiff's prayer for civil penalties should not be stricken, at this stage, because they are statutorily authorized.

It is premature at this time to determine whether the plaintiff's OSCPA claim is time barred. Savoi v. Univ. of Akron, 2012 Ohio 1962; The complaint alleges a continuing course of conduct by the defendants. Where a plaintiff alleges a continuing violation of the OSCPA, the statute of limitations does not begin to run until the date when the violation ceases. Roelle v. Orkan Exterminating Co., 2000 WL 1664865; Martin v. Servs. Corp. Int'l, 2001 WL 68896.

ABROGATION

Section 2307.72(C) ORC specifically exempts claims for economic loss from abrogation under the Ohio Products Liability Act. Further, "product liability claim" is statutorily defined as a claim seeking "compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress or physical damage to property." Reviewing the four corners of the complaint, it does not appear that the plaintiff is seeking these types of damages. The plaintiff's common law nuisance claim, OSCPA claim, and fraud claims are not abrogated under the OPLA. See Catepillar Fin. Servs. Corp. v. Harold Tatman and Sons Ents., Inc., 2015 Ohio 4884.

MEDICAID FRAUD

Section 2901.23 ORC provides that a corporation may be criminally liable if it meets one of the criteria set forth in subsection (A)(1)-(4). Section 2913.40(B) provides:

> "No person shall knowingly make or cause to be made a false or misleading statement or representation for use in obtaining reimbursement from the Medicaid program."

This language clearly includes persons who cause false or misleading statements or representations to be made for the purpose of reimbursement for the Medicaid program. The complaint adequately sets forth that defendants, their employees or agents and third parties under defendant's control knowingly made or caused to be

made false or misleading statements for the purpose of obtaining for defendants reimbursement under the Medicaid program. These allegations meet the requirements of the liberal pleading rules in the state of Ohio.

Section 2307.60(A)(1) ORC provides:

> "Anyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law,..."

This Court construes this section liberally to include the state of Ohio. To construe this section to exclude a state from seeking damages from criminal actions would prohibit the state from initiating litigation to collect damages from persons who have been convicted of causing damage to public property. This Court finds that at this juncture, the plaintiff is not barred by this section from pursuing an action for damages caused as the result of the commission of Medicaid fraud. See Jacobson v. Kaforey, 149 Ohio St. 3rd 398.

The plaintiff's Medicaid fraud claim is not time barred. There is no specific statutory provision which imposes a time bar against the state in this case. The only time bar is set forth in a generally worded statute, 2305.11(A) ORC. As stated in State, Dep't. of Transp. v. Sullivan, 38 Ohio St. 3d (1988), the Ohio Supreme Court approved the continued exception of the state from generally worded statutes of limitation.

OHIO CORRUPT PRACTICES ACT

Section 2929.32(A)(1) ORC states:

> "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity..."

Section 2923.31(C) defines "Enterprise" as follows:

> "Any individual, sole proprietorship, partnership, limited partnership, corporation..."

"Enterprise" includes an illicit or licit enterprises. "Person" includes a corporation.

Section 2923.31(E) ORC defines "Pattern of corrupt activity" as:

> "Two or more incidents of corrupt activity whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event."

A prima facia case for a civil claim under the OCPA requires:

(1)"(v)" Conduct of the defendant involves the commission of two or more specifically prohibited state or federal offenses;

(2) The prohibited criminal conduct of the defendant constitutes a pattern;

(3) The defendant has participated in the affairs of an enterprise or has acquired and maintained an interest in or control of an enterprise." Morrow v. Reminger & Reminger Co. L.P.A., 2009 Ohio 2665.

The plaintiff's complaint sets forth in detail the conduct of the defendants in violating federal mail fraud provisions (18 U.S.C. 1341), federal wire fraud (18 U.S.C. 1343), and telecommunications fraud in violation of Section 2913.05 ORC. This Court has previously determined that the plaintiff has met the particularity requirements of Civil Rule 9(B) in pleading fraud and similarly finds that the plaintiff has met these particularity requirements in pleading the predicate acts of federal mail fraud and wire fraud and telecommunications fraud under the Ohio Revised Code. This Court finds that the liberal pleading rules in Ohio do not require the plaintiff to set forth specific communications and identify senders and recipients and their locations. Further, this specific information would be within the defendants' knowledge and not available to plaintiff. Further, the plaintiff's complaint sets forth the defendants' intent in committing various criminal acts. Wilkins, supra; Swanson v. McKenzie (4th District Scioto County) 1988 WL 50478.

Section 2923.31 defines "Enterprise" as **any** corporation which may engage in illicit or licit conduct. As stated by plaintiff, the definition of an enterprise is "open-ended" and "should be interpreted broadly." State vs Beverly, 143 Ohio St. 3d, 2015 Ohio 219; CSAHA/UHHS-Canton, Inc. v Aultman Health Found., 2012-Ohio-897. At the pleading stage, the complaint adequately sets forth the purpose of defendants in engaging in a loosely structured hierarchy to achieve a stated purpose. Further, the complaint sets forth in detail the pattern of criminal conduct in violating federal and state laws. The plaintiff's complaint adequately pleads a violation of Ohio's Corrupt Practices Act.

ENDO'S MOTION TO STRIKE

Civil Rule 12(F) allows a party to move for an order striking language from a pleading that is redundant, immaterial, impertinent, or scandalous. Although this Court questions the inclusion of the New York settlement in the complaint, this Court cannot find that it is immaterial, impertinent, or scandalous. Endo's Motion to Strike is overruled.

JANSSEN PHARMACEUTICALS, INC. AND JOHNSON & JOHNSON

The allegations in plaintiff's complaint are very similar to the allegations contained in the complaint considered by the United States District Court, Northern Division, Illinois, Eastern Division. City of Chicago v Purdue Pharma LLP, 211 F. Supp. 3d. Plaintiff's complaint does not seek to pierce the corporate veil of Janssen but rather to hold Johnson & Johnson liable under agency doctrines. The court, in City of Chicago, found that for the purposes of a motion to dismiss, the plaintiff's complaint had sufficient allegations to infer an agency relationship between Johnson & Johnson and Janssen and to assert vicarious liability for Janssen's conduct. This

Court adopts that reasoning and the Motion of Janssen and Johnson & Johnson is overruled.

JURISDICTION ALLERGAN PLC

The parties agree upon the law which this Court must employ in determining jurisdiction over Allergan PLC. The Plaintiff must show that the exercise of jurisdiction complies with Ohio's long-arm statute, Section 2307.382, and the related Civil Rule 4.3(A). U.S. Sprint Commc,n Co. Ltd. P'ship v. Mr. K's Foods, Inc., 3d 181, 1994 Ohio 504. This Court must go further and determine whether the grant of jurisdiction under the long-arm statute and civil rule comports with due process under the 14th Amendment to the United States Constitution. Goldstein v. Christiansen, 70 Ohio St. 3d 232, 1994 Ohio 229; Joffe v. Cable Tech., Inc., 163 Ohio App. 3d 479, 2005 Ohio 4930.

Section 2307.382(A) provides in pertinent part:

> "(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state
> (2) Contracting to supply services or goods in this state
> (3) Causing tortious injury by an act or omission in this state
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;"

In the case at bar, the Plaintiff must establish a prima facia showing that jurisdiction exists over Allergan PLC. The Court must consider the "allegations in the pleadings and documentary evidence in a light most favorable to the Plaintiff and resolving all reasonable competing inferences in favor of the Plaintiff." Kauffman Racing Equip., L.L.C. v. Roberts, 126 Ohio St. 3d 81, 210 Ohio 2551; Fallang v. Hickey, 40 Ohio St. 3d 106.

In determining whether this Court has jurisdiction over Allergan PLC, this Court must consider whether there are minimum contacts with the state of Ohio so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice under Goldstein v. Christiansen supra. The Court must employ a tri-partite test to establish minimum contacts.

"1. The defendant must purposefully avail himself of the privilege of acting in the foreign state or causing a consequence in the foreign state.

2. The cause of action must arise from the defendant's activities there.

3. The acts of the defendant or consequences caused by the defendant must have a substantial connection with the foreign state to make the exercise of jurisdiction over the defendant reasonable." Kauffman, supra.

This Court has considered the affidavits submitted by the parties on this issue and the request by Plaintiff for this Court to take judicial notice of the Plaintiff's exhibits 40-49 attached to the Troutman affidavit. The Court takes judicial notice of these filings.

These filings establish, by the requisite degree of proof necessary on a motion to dismiss for lack of jurisdiction, the following: Actavis, Inc. and Actavis PLC are predecessors to Allergan PLC. Both entities referenced the United States as it's "largest commercial market." Allergan PLC maintains a "major manufacturing" site in Cincinnati, Ohio. All three entities maintain that they are engaged in the "global market." This Court also adopts the reasoning of the court in City of Chicago v. Purdue Pharma L.P.N.D. Ill. No. 14C4361, 215 WL 2208423, finding the evidence sufficient at the stage of a motion to dismiss that Actavis PLC is the successor to Actavis, Inc. The same reasoning applies that Allergan PLC is the successor to Actavis PLC and Actavis, Inc.

This Court finds that the Plaintiff has established a prima facia case for jurisdiction over Allergan PLC under the long-arm statute, Section 2307.382(A) ORC. Further, this Court finds that the Plaintiff has established by the requisite degree of proof that the defendant, Allergan PLC, acted and caused consequences in the state of Ohio. This Defendant's actions and the consequences therefrom alleged by the Plaintiff create a sufficient substantial connection with Ohio and allow the assertion of personal jurisdiction over this Defendant to be reasonable.

ACQUIRED ACTAVIS ENTITIES

As already set forth in this opinion, this Court finds that the Complaint meets the relaxed pleading requirements of Ohio set forth in Civil Rules 8 and 9. This applies also to the "Acquired Actavis Entities." The Complaint in Section III(B) sufficiently identifies the entities and sets forth allegations concerning the individual entities and their representation/misrepresentations and actions concerning opioid uses and dangers. These entities are placed on notice, like all of the other defendants, of the claims against them. This is sufficient to overcome the challenges at the pleading stage. However, it might be a different story under different standards in dispositive motion practice.

JURISDICTION-TEVA PHARMACEUTICAL INDUSTRIES LTD.

This Court has in the previous section has set forth the law which governs the analysis concerning jurisdiction under Ohio's Long-arm Statute, the Ohio Civil Rules, and due process under the 14th Amendment to the United States Constitution. This Court takes judicial notice of exhibits 50-59 attached to the Troutman affidavit as requested by the Plaintiff under Evidence Rule 201(B). This Court notes that Teva Ltd. published its "2016 Social Impact Report" stating that the company had 10,855 employees employed in the United States and Canada. Exhibit #50 at #12, Exhibit

#51 to the Troutman affidavit is Teva Limited's filing with the United States Securities and Exchange Commission. This filing states:

> "The specialty business may continue to be affected by price reforms and changes in the political landscape, following recent public debate in the U.S. We believe that our primary competitive advantages include our commercial marketing teams,..."

This filing further states:

> "Our U.S. specialty medicines revenues were 6.7 billion in 2016, comprising the most significant part of our specialty business."

The Court notes that Teva's specialty medicines revenues in the U.S. were almost six times that of its revenue in the European market. Page 46 of Exhibit #51 states that Teva Limited's "worldwide operations are conducted through a network of global subsidiaries." Teva Pharmaceuticals USA, Inc. is listed as a subsidiary in the United States which is owned by Teva Limited. Exhibit #54 to the Troutman affidavit lists Teva USA as the North American headquarters of Teva Limited.

As stated in the previous section, the Plaintiff is required only to make a prima facia showing of jurisdiction. This Court must view the pleadings and documentary evidence in a light most favorable to Plaintiff. At this point in the litigation, the evidentiary materials support the Plaintiff's prima facia showing of personal jurisdiction under 2307.382 ORC, Civil Rule 4.3(a) and the due process clause of the 14th Amendment to the United States Constitution.

All Defendants' Motions to Dismiss are overruled.

JUDICIAL NOTICE

Pursuant to Ohio Evidence Rule 201, the Motions of all parties for judicial notice are granted. The Court takes judicial notice of all materials filed by the moving parties with their Motions.

MOTION TO STAY

The Defendants have filed a joint Motion to Stay this litigation pursuant to the doctrine of primary jurisdiction and this Court's inherent power to control litigation pending in its court. State, ex rel Banc One Corp. v. Rocker, 86 Ohio St. 3d 169 (1999); United States v. W. Pacific R.R. Co., 352 U.S. 59 (1956); Lazarus v. Ohio Cas. Group, 144 Ohio App. 3d 716 (2001); Pacific Chem. Prods. Co. v. Teletronics Servs., Inc., 29 Ohio App. 3 45 (1985). Defendants claim that a stay of litigation should be enacted when claims are pending in a court and the resolution of issues pertaining to the claims are also before the special expertise of an administrative body. A trial court should defer action on an issue when there are administrative proceedings pending before a government regulatory agency which can resolve the lawsuit. The claims pending in the court must require a body of experts capable of handling the complex facts of the case before the court. The stay of litigation under the primary jurisdiction doctrine or the inherent authority of the court rests with the sound discretion of the trial court.

Article VII of the Ohio Rules of Evidence provides for and governs the presentation of evidence by expert witnesses in litigation. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, establishes that the trial court is the gatekeeper in determining what expert testimony from witnesses is admissible at trial. The Daubert Court sets forth numerous factors to consider in evaluating the reliability of scientific evidence. The Supreme Court expressed confidence in the ability of trial courts to evaluate complicated scientific evidence.

Defendants are correct that the FDA currently has pending before it numerous complex issues concerning the application of opioids and the addictive nature of

opioids. There is no guarantee when the FDA will complete its review of the numerous complex issues before it.

This Court agrees with the United States District Court in City of Chicago v. Purdue Pharma LP, supra, that the issue before this Court is whether opioids were marketed truthfully in the state of Ohio and whether Defendants misrepresented the risks, benefits, and superiority of opioids to treat long-term chronic pain. This Court agrees with the district court that federal and state courts are equipped to adjudicate these types of claims. See also State of Missouri v. Purdue Pharma, LP, Missouri Circuit Court, 22nd Judicial Circuit, Case No. 1722-CC10626. This Court is not aware of any pending stay order in any state or federal court concerning these issues. The Court further finds that the Plaintiff would be unduly prejudiced by an open-ended court order which stays these proceedings pending the determination of the FDA. This Court is equipped to handle the issues raised in this litigation. A stay order would unduly prejudice the Plaintiff. The Motion to Stay is overruled. The stay on discovery is vacated. Discovery in this action may commence forthwith.

DATE: 8/24/18

Scott W. Nusbaum

SCOTT W. NUSBAUM, JUDGE
COMMON PLEAS COURT #2
ROSS COUNTY, OHIO
SITTING BY ASSIGNMENT

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EXHIBIT 5

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

MERRIMACK, SS. **No. 217-2017-CV-00402**

State of New Hampshire

v.

Purdue Pharma Inc., Purdue Pharma L.P.,
and The Purdue Frederick Company

ORDER

The State of New Hampshire (the "State") alleges Purdue Pharma Inc., Purdue Pharma L.P., and The Purdue Frederick Company (collectively "Purdue") are culpable for the deleterious effects of widespread opioid abuse within the State and asserts the following claims: Count I, deceptive and unfair acts and practices contrary to the Consumer Protection Act; Count II, unfair competition contrary to the Consumer Protection Act; Count III, false claims in violation of the Medicaid Fraud and False Claims Act; Count IV, public nuisance; Count V unjust enrichment; and Count VI, fraudulent or negligent misrepresentation. Purdue moves to dismiss all claims and the State objects. The Court held a hearing on this matter on April 24, 2018. For the following reasons, Purdue's motion to dismiss is DENIED regarding Counts I, II, III, IV, and VI, and GRANTED regarding Count V.

I. Background

Prescription opioids are derived from and possess properties similar to opium and heroin and, by binding to receptors on the spinal cord and brain, they dampen the

perception of pain following absorption. (Compl. ¶ 2.) Opioids can also be addictive, produce euphoria, and, in high doses, slow a user's breathing and possibly cause death. (Id.) Withdrawal symptoms such as anxiety, nausea, headaches, tremors, delirium, and pain often result if sustained opioid use is discontinued or interrupted, and users generally grow tolerant of opioids' analgesic effects after extended continuous use, thereby necessitating progressively higher doses. (Id.) Purdue manufactures, advertises, and sells prescription opioid medications, including the brand-name drug OxyContin. (Id. ¶ 1.)

Due to the drugs' downsides, the State maintains that before the 1990s opioids were generally used only to treat short-term acute pain and during end-of-life care. (Id. ¶ 3.) At odds with this understanding, however, Purdue developed OxyContin in the mid-1990s to treat chronic long-term pain. (Id. ¶ 4.) To foster the drug's market for this then unconventional use, the State alleges Purdue instigated a deceptive multidimensional marketing effort to unlawfully alter the public's and the medical community's perception of the risks, benefits, and efficacy of opioids for treating chronic pain. (E.g., id. ¶¶ 4–41.)

The State claims Purdue's efforts resulted in a dramatic increase in ill-advised or unlawful opioid prescriptions and, correspondingly, in pervasive opioid abuse. (E.g., id. ¶¶ 168–86.) The State further claims that Purdue's manipulative conduct wrongfully caused the State's Medicaid program to pay for opioid prescriptions it would have otherwise not or sought to avoid, (e.g., id. ¶ 248), necessitated that the State implement costly social, law enforcement, and emergency services to support, police, and treat those impacted by opioid abuse, (e.g., id. ¶ 261), and generally hampered the wellbeing

and productivity of many individuals, families, and businesses within New Hampshire, (e.g., id. ¶ 261).

II. Analysis

Purdue raises three categories of arguments in favor of dismissal. Initially, Purdue contends that federal law preempts all the State's claims. Next, Purdue argues that, to the extent causation is a necessary element of the State's legal theories, the State has failed to sufficiently plead that Purdue proximately caused the harms for which the State seeks to hold Purdue responsible. Lastly, Purdue raises a series of claim specific arguments. The Court will address these matters in turn.

i. Preemption

Article VI, Clause 2 of the Federal Constitution provides that federal law "shall be the supreme Law of the Land." The Federal Constitution, therefore, "preempts state laws that interfere with, or are contrary to, federal law." In re Fosamax (Alendronate Sodium) Prod. Liab. Litig., 852 F.3d 268, 282 (3d Cir. 2017) (quotations omitted). There are three general varieties of preemption:

> (1) express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law; (2) field preemption, which occurs when the federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a State to supplement it; and (3) conflict preemption, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Cerveny v. Aventis, Inc., 855 F.3d 1091, 1097–98 (10th Cir. 2017) (quotation and ellipsis omitted).

Purdue raises only a conflict preemption theory. Specifically, Purdue argues that the United States Food and Drug Administration's (the "FDA") various decisions

regarding OxyContin's risks and medically appropriate uses conflict with the State's claims that Purdue improperly promoted its opioid medications because "[a] plaintiff cannot maintain a claim that a prescription medicine's . . . marketing consistent with the [drug's FDA sanctioned] labeling is inadequate or misleading unless the manufacturer could have unilaterally changed the labeling — that is, changed the labeling without first obtaining FDA approval." (Defs.' Mem. of Law and Authorities in Support of Mot. to Dismiss [hereinafter "Mot. to Dismiss"] at 10.)

Purdue is correct that numerous courts have concluded that state law claims involving an FDA approved prescription drug are preempted when a plaintiff asserts that a defendant unlawfully included misleading information, or failed to include important warnings, in the drug's "label"[1] and where the defendant could not unilaterally alter the drug's label and/or there is "clear evidence" that the FDA would not approve a change to the label if sought by the defendant. See, e.g., PLIVA, Inc. v. Mensing, 564 U.S. 604, 623 (2011); Wyeth v. Levine, 555 U.S. 555, 571 (2009); Cerveny v. Aventis, Inc., 855 F.3d 1091, 1095 (10th Cir. 2017); In re Celexa & Lexapro Mktg. & Sales Practices Litig., 779 F.3d 34, 38 (1st Cir. 2015); Seufert v. Merck Sharp & Dohme Corp., 187 F. Supp. 3d 1163, 1165–66 (S.D. Cal. 2016); Dobbs v. Wyeth Pharm., 797 F. Supp. 2d 1264, 1266 (W.D. Okla. 2011).

[1] The federal Food, Drug, and Cosmetic Act requires that drug manufacturers obtain FDA approval prior to marketing or selling a drug in interstate commerce. 21 U.S.C. § 355(a). The FDA only approves a drug if the manufacturer demonstrates "substantial evidence that the drug will have the effect it purports or is represented to have." 21 U.S.C. § 355(d)(5). A drug manufacture must also submit for approval "the labeling proposed to be used for [a] drug." 21 U.S.C. § 355(b)(1)(F); 21 C.F.R. § 314.50(c)(2)(i). The FDA will approve a proposed label if, "based on a fair evaluation of all material facts," it is not "false or misleading in any particular." 21 U.S.C. § 355(d)(7); 21 C.F.R. § 314.125(b)(6). Once approved, a manufacturer may distribute a drug without violating federal law as long as it uses the approved labeling. See 21 U.S.C. §§ 331(c), 333(a), and 352(a), (c). Pursuant to 21 U.S.C. § 321(m), a drug's "labeling" means "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

Notably, these cases involved purported misrepresentations within, or material omissions from, a drug's label; meaning to ameliorate the wrongdoing alleged under state law, the drug manufacturer defendants would have been required to alter their product's FDA approved label. In this instance, however, the State maintains that it "does not seek a change to the FDA-approved labeling of Purdue's drugs," but rather that the State "contend[s] that Purdue aggressively marketed its opioids for long-term use to treat chronic pain through misrepresentations that were intended to lead doctors to prescribe the drugs even in circumstances where they were inappropriate, *i.e.*, to disregard cautions that the FDA itself has recognized as appropriate and necessary." (Pl.'s Resp. in Opp'n to Purdue Defs.' Mot. to Dismiss Pl.'s Compl. [hereinafter "Obj."] at 8.) In other words, the State alleges "Purdue marketed opioids in a manner that *is contrary to, inconsistent with, or outside of* their FDA-approved labels." (Id. at 10 (emphasis in original).)

Notwithstanding the State's characterization of its claims, Purdue insists it is nevertheless entitled to dismissal because "each of the . . . alleged misrepresentations the State has identified involves statements or conduct that *are consistent* with the FDA-approved labeling for its medications or with other regulatory decisions of the FDA." (Defs.' Reply in Supp. of Mot. to Dismiss [hereinafter "Reply"] at 7 (emphasis added).) Thus, at bottom, Purdue grounds its preemption argument on the notion that the Court should decide that Purdue's marketing of its opioid medications was consistent, as opposed to inconsistent, with FDA decisions relating to the drugs' labeling. Even assuming it is proper to take up such a necessarily fact intensive inquiry in a motion to dismiss, it is reasonable to construe Purdue's purported marketing efforts as

inconsistent with the FDA's approvals when drawing all inferences in the State's favor. See Tessier v. Rockefeller, 162 N.H. 324, 330 (2011) (setting forth the Court's standard for reviewing motions to dismiss).

For example, beginning sometime in the mid-2000s, Purdue updated OxyContin to include a new coating designed to make the drug difficult to crush and added certain elements intended to make the drug unsuitable for injection. (Compl. ¶ 110.) These changes were purportedly meant to deter OxyContin abuse via snorting and injection. The State alleges, however, that evidence shows, and "Purdue knew or should have known," that the "reformulated OxyContin is not better at tamper resistance than the original OxyContin and is still regularly tampered with and abused," (id. ¶ 114 (quotation omitted)), because the abuse-deterrent "properties can be defeated" and the drug "can be abused orally notwithstanding their abuse-deterrent properties," (id. ¶ 113). Therefore, the State claims Purdue deceptively marketed OxyContin, considering its "sales representatives regularly use the so-called abuse-deterrent properties . . . as a primary selling point" to differentiate the drug from its competitors, (id. ¶ 112), and, more specifically, that Purdue's sale representatives:

> (1) claim that Purdue's [abuse-deterrent] formulation *prevents* tampering and that its [abuse-deterrent] products *cannot be* crushed or snorted; (2) claim that Purdue's [abuse-deterrent] opioids *prevent or reduce* opioid abuse, diversion, and addiction; (3) assert or suggest that Purdue's [abuse-deterrent] opioids are "safer" than other opioids; and (4) fail to disclosed that Purdue's [abuse-deterrent] opioids do not impact oral abuse or misuse and that its [abuse-deterrent] properties are and can be easily overcome.

(Id. (emphasis in original as well as added).)

Purdue counters that these allegations are "consistent with FDA-approved labeling," (Mot. to Dismiss at 17), because, in 2013, the FDA approved a change to

OxyContin's label, stating "OXYCONTIN is formulated with inactive ingredients intended to make the tablet more difficult to manipulate for misuse and abuse." (Mot. to Dismiss, Ex. 6 § 9.2.)

Drawing all inferences in the State's favor, statements to the effect that OxyContin's abuse-deterrent properties "*prevent* tampering," result in a drug that "*cannot* be crushed or snorted," and in practice "*prevent or reduce* opioid abuse" may reasonably be read as attributing more significance to the abuse-deterrent properties than the FDA intended when it seemingly found the abuse-deterrent properties merely make the drug somewhat "more difficult to manipulate." In this way, Purdue's alleged conduct could be found materially inconsistent with FDA approved labeling.

The parties' dispute over the proper inferences to draw from the State's claims regarding OxyContin's abuse-deterrent properties relates to only one of many allegations of wrongdoing raised in the complaint. It is inappropriate at this stage to comprehensively parse each of the remaining allegations in writing. However, having thoroughly reviewed the complaint and its many allegations, and considered the parties' voluminous filings relevant to Purdue's motion and their accompanying exhibits, the Court concludes Purdue has not shown that the State's allegations wholly reflect conduct consistent with FDA approved labeling. Accordingly, because Purdue's conflict preemption theory presupposes its alleged marketing efforts were consistent with its drugs' labeling, Purdue's motion is DENIED to the extent it raises preemption.

ii. *Causation*

Next, Purdue maintains that the State has not properly pled causation for three general reasons. First, Purdue argues that "the State fails to adequately allege a causal

connection between any misrepresentation by Purdue and any reimbursement decision by, or other alleged harm to, the State." (Mot. to Dismiss at 19.) Second, Purdue contends that, even if the State has articulated a "causal connection," independent acts and actors necessarily intervened such as to "break any connection between any alleged misrepresentation by Purdue and the litany of alleged harms." (Id. at 3.) Lastly, Purdue asserts that "[e]ven if the State had alleged a causal chain linking any alleged wrongdoing with any alleged harm . . . its claims would still fail because any such chain would be far too attenuated as a matter of law." (Id. at 3–4.)

a. *Alleged Causal Connection*

As a preliminary matter:

> It is axiomatic that in order to prove actionable negligence,[2] a plaintiff must establish that the defendant['s wrongdoing] proximately caused the claimed injury. The proximate cause element involves both cause-in-fact and legal cause. Cause-in-fact requires the plaintiff to establish that the injury would not have occurred without the negligent conduct. The plaintiff must produce evidence sufficient to warrant a reasonable juror's conclusion that the causal link between the negligence and the injury probably existed.

Estate of Joshua T., 150 N.H. 405, 407–08 (2003) (citations and quotations omitted).

Contrary to Purdue's position, the State has in fact articulated a causal connection linking Purdue's purported misconduct to the State's alleged harms. For example, the State asserts that, beginning in approximately 2011, an "increase in prescribing opioids correspond[ed] with [a] Purdue[] marketing push." (Compl. ¶ 171.) Allegedly, "the largest component of this [marketing push] was sale representative visits to individual prescribers," (id.), because Purdue "knows that in-person marketing works,"

[2] The parties dispute to what extent causation is an element of all or some of the State's claims. However, given the Court's conclusion that the State has sufficiently pled causation, it need not reach these issues.

(id. ¶ 173.) Indeed, an Amherst, New Hampshire, physician opines in the complaint that Purdue's in-person sales representatives impact prescribing behavior because, "[i]f it didn't, they wouldn't do it." (Id. ¶ 176.) Furthermore, as detailed in the previous section, the State alleges Purdue's sale representatives misleadingly marketed OxyContin. (See also, e.g., id. ¶ 30 ("To spread its false and misleading messages supporting chronic opioid therapy, Purdue marketed its opioids directly to health care providers and patients . . . in New Hampshire. It did so principally through its sales force . . . who made in-person sales calls to prescribers in which they misleadingly portrayed chronic opioid therapy.").)

The State also alleges that

> Purdue buttressed its direct promotion of its opioids with an array of marketing approaches that bolstered the same deceptive messages by filtering them through seemingly independent and objective sources. Purdue recruited and paid physician speakers to present talks on opioids to their peers at lunch and dinner events. It funded biased research and sponsored [continuing medical education ("CME")] that misleadingly portrayed the risks and benefits of chronic opioid therapy. It collaborated with professional associations and pain advocacy organizations, such as the American Pain Foundation ("APF"), to develop and disseminate pro-opioid educational materials and guidelines for prescribing opioids. And it created "unbranded" websites and materials, copyrighted by Purdue but implied to be the work of separate organizations, that echoed Purdue's branded marketing. Among these tactics, all of which organized in the late 1990s and early 2000s, three stand out for their lasting influence on opioid prescribing nationwide and in New Hampshire: Purdue's capture, for its own ends, of physicians' increased focus on pain treatment; its efforts to seed the scientific literature on chronic opioid therapy; and its corrupting influence on authoritative treatment guidelines issued by professional associations.[3]

(Id. ¶¶ 40–41.)

[3] Purdue argues that the State has failed, as a matter of law, to allege that Purdue "controlled" these third-parties. (Mot. to Dismiss at 25–26.) Taking all reasonable inferences in the State's favor, the Court disagrees.

Considering the State claims that "[s]cientific evidence demonstrates a close link between opioid prescriptions and opioid abuse,"[4] and because the allegations outlined above indicate Purdue successfully increased opioid prescriptions using misleading methods, the complaint asserts a prima facie causal connection between Purdue's purported wrongdoing and increased opioid prescriptions and abuse.[5]

Nevertheless, Purdue contends that the State's supposedly "general allegations do not satisfy the State's burden to plead the essential element of a causal connection between an actual alleged fraudulent or improper statement or action by Purdue and an actual alleged injury to the State" and that the State cannot "avoid its pleading obligation by arguing that it will be able to rely on statistical evidence and extrapolation to prove causation and injury at trial." (Reply at 10 (quotation omitted).) In other words, Purdue seemingly maintains that to satisfy its burden the State must principally rely upon individualized evidence, *i.e.* evidence that specific doctors were influenced by specific Purdue misconduct and that any alleged injury to the State must be tied directly to these specific incidents.

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[4] For example, the State cites a 2007 study that found "a very strong correlation between therapeutic exposure to opioid analgesics, as measured by prescriptions filled, and their abuse, with particularly compelling data for . . . OxyContin." (Id. (quotation omitted).) The State also relies upon a 2016 letter issued by the then United States Surgeon General opining "that the push to aggressively treat pain, and the devastating results that followed, had coincided with heavy marketing to doctors many of whom were even taught — incorrectly — that opioids are not addictive when prescribed for legitimate pain." (Id. ¶ 182 (quotations, ellipsis, and brackets omitted).)

[5] Additionally, the State provides numerous examples of expenditures, *i.e.* harms, it has borne in combating opioid abuse. (E.g., id. ¶ 191 ("The number of children removed from homes with substance abuse problems went from 85 in 2010 to 329 in 2015 — a 387% increase."); ¶ 192 ("From 2007–2013 . . . state Medicaid spending on drugs to counter overdose or addiction increased six-fold."). As another example, the State maintains "damages from false claims submitted, or caused to be submitted, by [Purdue]," and indicates that "[f]rom 2011-2015, the State's Medicaid program spent $3.5 million to pay for some 7, 886 prescriptions and suffered additional damages for the costs of providing and using opioids long-term to treat chronic pain." (Id. ¶ 254.)

Purdue, however, cites no authority mandating such a standard.[6] Conversely, the First Circuit found "aggregate" evidence of the sort the State apparently intends to rely sufficient to prove wrongdoing on the part of a different drug manufacturer alleged to have undertaken comparable deceptive marketing efforts. See In re Neurontin Mktg. & Sales Practices Litig., 712 F.3d 21, 46 (1st Cir. 2013); State v. Exxon Mobil Corp., 168 N.H. 211, 255–56 (2015) ("[T]he trial court's determination that the use of statistical evidence and extrapolation to prove injury-in-fact was proper was not an unsustainable exercise of discretion." (Citing Neurontin, 712 F.3d at 42 ("[C]ourts have long permitted parties to use statistical data to establish causal relationships."))). Accordingly, the Court is not persuaded that the State has insufficiently articulated a causal connection nor that it has referenced inadequate factual support for its assertions at this stage.

b. Intervening Acts or Actors

Purdue next argues that "any connection between Purdue's alleged misconduct and the State's alleged injuries depends on multiple independent, intervening events and actors." (Mot. to Dismiss at 21.) Specifically, Purdue maintains that, in New Hampshire, individuals may only legally obtain opioids via a prescription following an in-person doctor's visit and, therefore, "the role of the prescribing physician as a 'learned intermediary' breaks the causal chain that the State attempts to use to connect Purdue to the State's payments for prescriptions." (Id.)

"The 'learned intermediary' doctrine creates an exception to the general rule that one who markets goods must warn foreseeable ultimate users about the inherent risks

[6] For example, Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 25 (1st Cir. 2016), is easily distinguishable, considering the court in that case found the plaintiffs' allegations insufficient not because they were based upon aggregate or statistical analysis, but rather because they were wholly lacking in *any* factual support and were, therefore, "mere conjecture."

of his products" and, in the prescription drug context, "provides that a drug manufacturer's duty is limited to the obligation to advise the prescribing physician of any potential dangers that may result from the use of the drug." Bodie v. Purdue Pharma Co., 236 F. App'x 511, 519 (11th Cir. 2007) (emphasis omitted). In other words, "application of the 'learned intermediary doctrine' may have the effect of destroying the causal link between the allegedly defective product, and the plaintiff's claimed injury." Id.

Under the doctrine, however, a drug manufacturer's duty is only fulfilled "once it *adequately* warns the physician." Garside v. Osco Drug, Inc., 976 F.2d 77, 80 (1st Cir. 1992) (emphasis added). The State argues that "the adequacy of any warning provided by Purdue is an issue of fact that cannot be resolved on a motion to dismiss." (Obj. at 19.) Given the fact intensive nature of such an inquiry, the Court agrees. See McNeil v. Wyeth, 462 F.3d 364, 368 (5th Cir. 2006) (reasoning that where, as here, the plaintiff's claim is not whether a prescription drug warning "is inadequate because [certain dangers were] not mentioned" but, "[r]ather, [that the warning was] misleading as to the risk level [of those dangers]," the "adequacy questions [should] go to the jury"); see generally Carignan v. New Hampshire Int'l Speedway, Inc., 151 N.H. 409, 414 (2004) ("Proximate cause is generally for the trier of fact to resolve.").

Moreover, "[o]ne escape hatch from the application of the learned intermediary rule is if the Plaintiff can demonstrate it was reasonably foreseeable that physicians, despite awareness of the dangers of [the drug], would be consciously or subconsciously *induced* to prescribe the drug when it was not warranted." Doe v. Solvay Pharm., Inc., 350 F. Supp. 2d 257, 272 (D. Me. 2004) (quotation omitted) (emphasis added). Indeed,

the court attributed as the first to formulate the doctrine[7] only did so after making the following observation:

> it is difficult to see on what basis this defendant can be liable to plaintiff. It made no representation to plaintiff, nor did it hold out its product to plaintiff as having any properties whatsover. To physicians it did make representations. *And should any of these be false it might be claimed with propriety that they were made for the benefit of the ultimate consumers.* But there is no such claim.

Marcus v. Specific Pharm., 77 N.Y.S.2d 508, 509 (N.Y. Spe. Term 1948) (emphasis added).

The State alleges here that Purdue's purported deceptive marketing efforts were "intended to lead doctors to prescribe [opioids] even in circumstances where they were inappropriate, *i.e.*, to disregard cautions that the FDA itself has recognized as appropriate and necessary." (Obj. at 8.) Thus, because the State maintains that Purdue sought to induce physicians to ignore or rely less heavily on the well understood risks of opioid use when making prescribing decisions, the learned intermediary doctrine may offer no safe harbor notwithstanding Purdue's contention that "it is beyond dispute that FDA-approved labeling for Purdue's opioid products discloses [the drugs'] risks prominently." (Mot. to Dismiss at 22.)

This conclusion finds support in jurisdictions that have considered the issue. As referenced in the previous section, several years ago the First Circuit considered comparable claims of wrongdoing on the part of a different drug manufacturer. In re Neurontin Mktg. & Sales Practices Litig., 712 F.3d 21 (1st Cir. 2013).[8] Like Purdue, that

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[7] See Larkin v. Pfizer, Inc., 153 S.W.3d 758, 762 (Ky. 2004).

[8] The court in that case summarized the defendant's purported misconduct as a "fraudulent marketing" scheme, which "included, but was not limited to, three strategies, each of which included subcomponents: (1) direct marketing . . . to doctors, which misrepresented [the relevant prescription drug's] effectiveness for off-label indications; (2) sponsoring misleading informational supplements and continuing medical education ("CME") programs; and (3) suppressing negative information about [the drug] while publishing

drug manufacturer "agrue[d] that because doctors exercise independent medical judgment in making decisions about prescriptions, the actions of these doctors are independent intervening causes." Id. at 39. The Neurontin court rejected this argument, concluding that the defendant's "scheme relied on the expectation that physicians would base their prescribing decisions in part on [its] fraudulent marketing" and "[t]he fact that some physicians may have considered factors other than [the defendant's] detailing materials in making their prescribing decisions does not add such attenuation to the causal chain as to eliminate proximate cause." Id.

More recently, the District of California also addressed claims akin to the State's. U.S. ex rel. Brown v. Celgene Corp., No. CV 10-3165-GHK SSX, 2014 WL 3605896 (C.D. Cal. July 10, 2014). In that case, the drug manufacturer defendant similarly argued that the court should "presume that physicians based their prescription decisions on their own independent medical judgment and the needs of their patients." Id. at *8. That court likewise rejected this argument, reasoning that "[t]o suggest that [the defendant's] alleged expansive, multi-faceted efforts to create an off-label market for [certain relevant drugs] did not cause physicians to prescribe [the drugs] for [those] uses strains credulity. It is implausible that a fraudulent scheme on the scope of that alleged . . . would be entirely feckless." Id.; see also U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc., No. 1:09-CV-1086 AJT, 2011 WL 3911095, at *5 (E.D. Va. Sept. 6, 2011) (remarking that causation will be sufficiently pled, notwithstanding the learned intermediary doctrine, where there are "allegations that the judgment of a physician was altered or affected by the defendant's fraudulent activities"); see generally Stevens v.

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articles in medical journals that reported positive information about [the drug's] off-label effectiveness." Id. at 28.

Parke, Davis & Co., 507 P.2d 653, 661 (Cal.1973) ("[A]n adequate warning to the profession may be eroded or even nullified by overpromotion of the drug through a vigorous sales program which may have the effect of persuading the prescribing doctor to disregard the warnings given.").

c. Attenuation

Lastly on the topic of causation, Purdue cites cases from other jurisdictions it contends demonstrate that claims founded upon overly attenuated and/or indirect chains of causation may be dismissed as a matter of law and that the rationales of these cases demand such a result in this instance. (See Motion to Dismiss at 23–26; Reply at 11–13.) The Court finds Purdue's argument unavailing.

Purdue principally relies on Bank of America Corporation v. City of Miami, Florida, 137 S. Ct. 1296, 1305 (2017), in which the City of Miami accused certain banks of unlawfully "lending to minority borrowers on worse terms than equally creditworthy nonminority borrowers and inducing defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms." Miami asserted that this "misconduct led to a disproportionate number of foreclosures and vacancies in specific Miami neighborhoods," causing Miami to "lose property-tax revenue when the value of the properties in those neighborhoods fell and [forced it] to spend more on municipal services in the affected areas." Id. In that case, the United States Supreme Court concluded that the Eleventh Circuit erred in solely considering the foreseeability of the City's alleged injury when determining whether the City had adequately pled causation. Id. at 1306. Citing Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 268 (1992), the United States Supreme Court reasoned that the Eleventh Circuit should

have also examined whether "some direct relation between the injury asserted and the injurious conduct alleged" existed and remanded the issue for further deliberation. City of Miami at 137 S. Ct. at 1306.

In Holmes, the plaintiff brought a statutory action against a defendant it claimed participated in a scheme to manipulate prices of certain stocks, which the plaintiff alleged ultimately necessitated its payment of claims to the clients of various broker-dealers who became insolvent as a result of the defendant's fraud. 503 U.S. at 262–63. The United States Supreme Court concluded that the relevant statute only conferred the plaintiff standing under the circumstances if the defendant's fraud was the "proximate cause" of the plaintiff's injury. Id. at 268. The United State Supreme Court employed "proximate cause" in this context as a stand-in for the common law "judicial tools used to limit a person's responsibility for the consequences of that person's own acts," and noted that, "[a]t bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient." Id. (quotation omitted). Further gleaning that "among the many shapes this concept [has taken] at common law, [is] a demand for some direct relation between the injury asserted and the injurious conduct alleged," the United States Supreme Court summarized that "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." Id. at 268–69 (citation omitted); see also generally Perry v. Am. Tobacco Co., 324 F.3d 845, 850 (6th Cir. 2003) ("Because the Holmes Court emphasized that the RICO statute incorporates general common law principles of proximate causation, remoteness principles are not limited to cases involving the RICO statute." (Citation omitted)).

Applying this standard, the United States Supreme Court held that, even assuming the plaintiff in that case could "stand in the shoes" of the clients injured as a result of the broker-dealers' insolvency, such a "link . . . between the stock manipulation alleged and the customers' harm" was nonetheless "too remote" because it was "purely contingent on the harm suffered by the broker-dealers." Id. at 271. That is, the alleged wrongdoers "injured the[] customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims." Id.

Relying upon this line of authority, Purdue now maintains that, "[g]iven the series of intervening acts and actors involved in the State's allegations, including the independent decisions and actions of prescribing physicians, patients, and even criminals, there is no 'direct relation' between Purdue's alleged marketing statements and the injuries alleged by the State" and, therefore, "[t]he State fails to plead facts showing how Purdue — as opposed to the various superseding actors at issue here — proximately caused the injuries it alleged." (Mot. to Dismiss at 25.)

To properly consider this challenge, it is necessary to further construe the United States Supreme Court's basis in Holmes for holding that proximate cause ordinarily demands a direct relation between the alleged wrongdoing and the plaintiff's injury. To that end, the United State Supreme Court articulated three policy rationales justifying its conclusion:

> 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.

Holmes, 503 U.S. at 269–70.

It is equally necessary to differentiate the State's two general alleged chains of causation, *i.e.* that Purdue's purportedly deceptive marketing efforts resulted in the State: (1) paying for or reimbursing the costs of medically unnecessary and/or improper opioid prescriptions; and (2) bearing the costs of responding to societal strife wrought by increased opioid abuse.

Regarding the first chain, Purdue emphasizes that the "Complaint does not allege any facts that would support a conclusion that the State or any of its agents was ever exposed to or relied on any alleged misrepresentation when reimbursing opioid prescriptions." (Reply at 12.) Indeed, "[c]ourts considering [third-party payor]'s off-label . . . claims have reached differing conclusions as to whether the link between the alleged misrepresentations made by pharmaceutical company defendants and the ultimate injury suffered by [the third-party payor] plaintiffs is sufficiently direct to meet [the] proximate cause requirement," and "[o]ne key distinction between the facts in these . . . cases is whether the defendant pharmaceutical companies made the alleged misrepresentations directly to the [third-party payor] or indirectly to physicians who then prescribed the drugs that the [third-party payor] covered." Sidney Hillman Health Ctr. of Rochester v. Abbott Labs. & Abbvie Inc., 192 F. Supp. 3d 963, 968–69 (N.D. Ill. 2016).

The First Circuit's reasoning on this issue in In re Neurontin Marketing & Sales Practices Litigation., 712 F.3d 21 (1st Cir. 2013) is persuasive. Comparable to the State's allegations here, in that case a healthcare third-party payor ("TPP") alleged a pharmaceutical company's deceptive marketing efforts had resulted in the TPP wrongly

reimbursing prescriptions. Also like this case, the pharmaceutical company argued "that its supposed misrepresentations went [only] to prescribing doctors, and so the causal link to [the TPP] must have been broken." Id. at 37.

The Neurontin court rejected this argument, finding that proximate cause's direct relation mandate does not impose a "direct reliance requirement." Id.; accord Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., 873 F.3d 574, 576 (7th Cir. 2017). This conclusion was influenced by Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 657–58 (2008), which expressly held that "first-party reliance [is not] necessary to ensure that there is a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the proximate-cause principles articulated in Holmes."

The Neurontin court next went on to apply the three Holmes factors laid-out above, ultimately concluding that they did not demand dismissal because "the causal chain [was] anything but attenuated," considering the defendant's "fraudulent marketing plan, meant to increase its revenues and profits, only became successful once [the defendant] received payments for the additional . . . prescriptions it induced" and that "[t]hose payments came from [the plaintiff] and other TPPs." Neurontin, 712 F.3d at 38–39. Thus, the court reasoned, "the adoption of [the defendant's] view would undercut the core proximate causation principle of allowing compensation for those who are directly injured, whose injury was plainly foreseeable and was in fact foreseen, and who were the intended victims of a defendant's wrongful conduct." Id. at 38.

This reasoning resonates here. Because at least some doctors presumably exercised independent medical judgment in choosing to prescribe Purdue's opioids and

some patients prescribed these medications for long-term chronic pain likely benefited, the State will seemingly shoulder a heavy burden at trial. The Court is aware that other jurisdictions consider these impediments as proximate cause maladies demanding dismissal. See Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., 873 F.3d 574, 578 (7th Cir. 2017) (collecting cases and noting that the First Circuit's stance is unique among the Federal Courts of Appeals to consider the issue). The Court nevertheless adopts the First Circuit's view that, "[r]ather than showing a lack of proximate causation, this [issue] presents a question of proof regarding the total number of prescriptions that were attributable to [the defendant's] actions" and that, ultimately, "[t]his is a damages question." Neurontin, 712 F.3d at 39.

The Court next turns to the State's second general chain of causation, which alleges Purdue is culpable, *inter alia*, for "high rates of opioid abuse, injury, overdose, and death, and their impacts on New Hampshire families and communities; lost employee productivity; the creation and maintenance of a secondary, criminal market for opioids; greater demand for emergency services, law enforcement, addiction treatment, and social services; and increased health care costs for individuals, families, and the State." (Compl. ¶ 261 (list-headings omitted).) Purdue contends that "[t]hese are serious challenges facing the State, fueled by any number of third-party actions, both innocent and criminal, but they are too remote from Purdue's alleged marketing activity to satisfy the proximate cause requirement." (Mot. to Dismiss at 24.)

Some of these alleged injuries are less remote from Purdue's purportedly deceptive marketing efforts than others, considering a significant percentage of the State's claims are not necessarily derivative of harm suffered by third parties. For

instance, where municipalities accuse gun manufacturers of fostering illicit firearm markets, courts often reason that, "[e]ven if no individual is harmed, [the municipalities] sustain many of the damages they allege," including "costs for law enforcement, increased security, prison expenses and youth intervention services," and that the municipalities' claims, therefore, do not fail for lack of a direct relation to the gun manufacturers' alleged wrongdoing. City of Boston v. Smith & Wesson Corp., No. 199902590, 2000 WL 1473568, at *6 (Mass. Super. July 13, 2000); accord, e.g., Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1148 (Ohio 2002) ("The complaint in this case alleged that as a *direct* result of the misconduct of appellees, appellant has suffered actual injury and damages including, but not limited to, significant expenses for police, emergency, health, prosecution, corrections and other services." (Emphasis added and quotation omitted)).[9] This reasoning is applicable here because, for example, the State's law enforcement efforts to combat the illegal distribution and possession of opioids are not purely contingent on harm from opioid abuse to any third party.

Moreover, although some of the State's supposed damages — for example the costs of administering emergency medical services to overdose victims — are contingent on the injuries of third persons, the Court is simply not persuaded that application of the Holmes factors to this case demands dismissal.[10]

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[9] The court in City of Boston illustrated this point with the following example:

> Plaintiffs allege that Defendants' conduct places firearms in the hands of juveniles causing Plaintiffs to incur increased costs to provide more security at Boston public schools. Thus, wholly apart from any harm to the juvenile (who may even believe himself to be benefited by acquisition of a firearm), and regardless whether any firearm is actually discharged at a school, to ensure school safety Plaintiffs sustain injury to respond to Defendants' conduct.

[10] Separately, the Court is not bound by the United States Supreme Court's judgment on these issues, nor has Purdue cited New Hampshire authority explicitly echoing Holmes's reasoning. Indeed, Purdue's

Regarding the first factor — which concerns the difficulty of ascertaining what percentage of the plaintiff's damages are attributable to the defendant — given the preliminary stage of this litigation, the Court does not yet fully grasp the State's trial strategy and the precise manner it hopes to prove its allegations. It is, therefore, premature to foreclose the State's endeavor purely on the assumption that the scope of its allegations and the harms for which it seeks to hold Purdue accountable are so expansive that its efforts may hypothetically prove too complex for the Court to oversee.

The second factor considers the difficulty of forestalling multiple recoveries. In light of the multitudes seemingly implicated within the State's allegations, there is likely some risk of multiple recoveries. Nevertheless, for many of these individuals — such as those who abused opioids via illegal means or with sufficient understanding of the drug's harmful effects — it is possible their conduct and/or knowledge precludes their right to seek redress. As well, many of the State's alleged injuries, although contingent on the harm to third parties, are easily distinguishable from such wrongs. For example, the State claims that "[f]rom 2007–2013 [its] Medicaid spending on drugs to counter overdose or addiction increased six-fold." (Compl. ¶ 192.) Should the State prove this increase is sufficiently attributable to Purdue's alleged wrongdoing and should the State recover damages in the amount of this increase, there would be little apparent risk that

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briefing on this issue (and the State's for that matter) does not even directly address the Holmes factors. Considering, moreover, that the New Hampshire Supreme Court maintains that legal cause simply "requires the plaintiff to establish that the negligent conduct was a *substantial factor* in bringing about the harm" and that this requirement does not demand that "[t]he negligent conduct . . . be the sole cause of the injury," but rather merely a "contribut[ion]," the Court is not inclined to adopt Holmes at this time. Carignan v. New Hampshire Int'l Speedway, Inc., 151 N.H. 409, 414 (2004) (emphasis added); Young v. Clogston, 127 N.H. 340, 342 (1985) ("The jury determines the facts, *i.e.* . . . whether the defendant's conduct is a legal cause of the plaintiff's injuries, [and] the trial judge's discretion to remove questions of fact from the jury is very limited."); see also City of Boston v. Smith & Wesson Corp., No. 199902590, 2000 WL 1473568, at *6 (Mass. Super. July 13, 2000) (discussing exceptions to the direct relation requirement that may be applicable to this case).

an individual who received such drugs at the State's expense would herself recover damages based on the costs of their administration.

The third factor asks whether deterring wrongdoing justifies grappling with the difficulties covered by the first two factors. It is no secret that opioid abuse is a particularly pernicious problem in New Hampshire. The State alleges Purdue shoulders significant blame for this reality. Considering the gravity of this matter and the scope of Purdue's alleged wrongdoing, the Court is not convinced there are parties other than the State better suited to litigate these issues and that the interests of justice weigh in favor of dismissal.

Accordingly, Purdue's motion to dismiss is DENIED to the extent it raises lack of causation.[11]

iii. Claim Specific Arguments

a. Consumer Protection Act

Purdue challenges the State's Consumer Protection Act ("CPA") claims on several grounds. First, Purdue maintains that statements and transactions before August 6, 2012, cannot form the basis of a CPA claim. Pursuant to RSA 358-A:3, IV-a "transactions . . . exempt from the provisions of [the CPA]" include

> [t]ransactions entered into more than 3 years prior to the time the plaintiff knew, or reasonably should have known, of the conduct alleged to be in violation of this chapter; provided, however, that this section shall not ban the introduction of evidence of unfair trade practices and deceptive acts prior to the 3-year period in any action under this chapter.

[11] The Court's conclusion is in keeping with those of recent trial courts across the country that have considered similar claims against Purdue. See, e.g., State v. Purdue Pharma L.P., No-3AN-17-09966CI (Alaska Super. Ct. July 12, 2018); In re Opioid Litigation, Index No. 400000/2017 (N.Y. Sup. Ct. March 21, 2018).

Relying on this provision, Purdue contends that "the latest the State knew or reasonably should have known of the [complaint's allegations] is August 6, 2015," because, "[o]n that date, the State served Purdue with a subpoena" relating to the State's investigation into these matters, and, therefore, all alleged statements and transactions attributed to Purdue more than three years prior to that date, *i.e.* August 6, 2012, are exempt from the CPA's ambit. (Mot. to Dismiss at 28.) The State counters that the date it knew or should have known of Purdue's actions is a question of fact not appropriate for resolution at this time. The Court agrees.[12]

Next Purdue argues that neither the State's allegation that Purdue failed to report its knowledge of suspicious opioid prescriptions nor its assertion that Purdue should be held accountable for unbranded publications properly state a CPA claim. (Mot. to Dismiss at 26–27, 29–30.) Purdue's positions are both unavailing. The former issue requires little analysis considering the State acknowledges — contrary to Purdue's characterization — that it does not premise its CPA claim on Purdue's purported failure to comply with the federal Controlled Substances Act and associated regulations. (See Obj. at 23.) The Court finds the State's stance is fairly reflected in the complaint. Regarding its latter position, Purdue cites Green Mountain Realty Corporation v. Fifth Estate Tower, LLC, 161 N.H. 78 (2010) seemingly for the proposition that marketing efforts that do not directly include offers to sell or distribute a product as part of an entity's day-to-day business are not actionable under the CPA. Green Mountain,

[12] Although the State raises additional counterarguments for the proposition that RSA 358-A:3, IV-a's exception provision does not apply to the State at all pursuant to the doctrine of *nullum tempus* (see Index # 29 at 1–2; Defs.' Reply to Pl.'s Supp. Oppo. to Mot. to Dismiss at 1–3) and that, in any case, the provision is inapplicable to "misleading marketing statements," (Obj. at 24), the Court need not reach these issues at this time as it is undisputed, even crediting Purdue's August 6, 2012, cutoff, that the State's CPA claims do not wholly rely on exempted transactions.

however, offers no such support, considering the New Hampshire Supreme Court in that case merely concluded that "a publicity campaign directed at a general electorate" for the purpose of influencing "the passage of . . . warrant articles does not violate the CPA" and the New Hampshire Supreme Court did not contemplate whether all marketing efforts presented in not-strictly-business arenas fall outside the CPA's scope. 161 N.H. at 87. Because Purdue offers no additional support, the Court will not consider the issue further.

Lastly, Purdue seeks to strike the State's request — pursuant to RSA 358-A:4, III(b) — of "an order assessing a civil penalty of $10,000 against Purdue for each violation of the [CPA]." (Compl. ¶ 225; Mot. to Dismiss at 30–31.) Purdue maintains that, although New Hampshire courts have yet to consider the issue, some jurisdictions apply an "individualized proof rule" to statutes comparable to the CPA and that this rule purportedly "prevents civil penalties where calculating them would require individualized proof as to each transaction at issue." (Mot. to Dismiss at 30 (citing In re Zyprexa Prods. Liab. Litig., 671 F. Supp. 2d 397, 456, 458–59 (E.D.N.Y. 2009)).) Purdue argues that the State cannot sustain such a burden and, therefore, its request for civil penalties must be stricken. Even assuming that it is appropriate to adopt an individualize proof rule with regards to the CPA (notwithstanding the New Hampshire Supreme Court's holding in Exxon Mobil that it is otherwise proper to employ "statistical evidence and extrapolation to prove injury-in-fact"), it is nevertheless inappropriate to strike the State's request at this time as discovery could provide the State the individualize proof it may ultimately require. 168 N.H. at 255–56.

b. Medicaid Fraud and False Claims Act

Purdue advocates for the complete dismissal of the State's Medicaid Fraud and False Claims Act ("FCA") count for two alternative reasons. Initially, Purdue reiterates its position that the State's claims, including its FCA count, demand individualized proof. In the FCA context, Purdue contends this proof must at least comprise specifically identified instances of "a physician or pharmacy submitting a claim for reimbursement for opioid medications to New Hampshire's Medicaid program." (Mot. to Dismiss at 32.) The Court disagrees. Even assuming Purdue is correct that the pleading requirements imposed by some federal jurisdictions on claims implicating the federal analogue to the FCA equally apply in this matter, where, as here, "the defendant allegedly induced third parties to file false claims with the government" the plaintiff can satisfy these requirements merely "by providing factual or statistical evidence to strengthen the inference of fraud . . . without necessarily providing details as to each false claim." United States ex rel. Nargol v. DePuy Orthopaedics, Inc., 865 F.3d 29, 39 (1st Cir. 2017) (quotations, emphasis, and ellipsis omitted). The State's allegations satisfy this standard and contain "reliable indicia that lead to a strong inference that [false] claims were actually submitted for . . . reimbursement" despite the absence of any specific claim for reimbursement being described in the complaint. Id. at 41 (quotation and citation omitted).

Purdue also argues that, because the State supposedly "admits that it continues to pay for opioid medications prescribed for chronic pain, despite the Attorney General's belief that Purdue has been falsely marketing opioid medications for years," the State does not sufficiently plead that Purdue's alleged wrongdoing was "material" to the

State's purported reimbursement decisions. (Mot. to Dismiss at 33 (citing Compl. ¶ 254).) These are issues of fact not amenable for consideration at this stage. See generally Ellis v. Candia Trailers & Snow Equip., Inc., 164 N.H. 457, 466 (2012) ("[M]aterial[ity] is a question of fact . . . .").

c. Public Nuisance

Regarding the State's public nuisance claim, Purdue contends that such a cause of action must "arise from the active or passive use of real property, whereas the State challenges only manufacturing and marketing activity." (Mot. to Dismiss at 33.) In Robie v. Lillis, 112 N.H. 492, 495 (1972), the New Hampshire Supreme Court explained that "[a] public nuisance . . . is 'an unreasonable interference with a right common to the general public'" and "is *behavior* which unreasonably interferes with the health, safety, peace, comfort or convenience of the general community." (Quoting Restatement (Second) of Torts § 821B(1)) (emphasis added). The use of "behavior" in this context suggests Purdue's position, *i.e.* that the origin of a public nuisance must arise from the use of real property, is a too narrow reading of the law. Indeed, numerous other jurisdictions that, like the New Hampshire Supreme Court, look to the Restatement (Second) of Torts to guide their analysis of public nuisance claims have expressly concluded that "[a]n action for public nuisance may lie even though neither the plaintiff nor the defendant acts in the exercise of private property rights." Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 315 (3d Cir. 1985) (reasoning further that "'[a] public nuisance is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure.'" (Quoting Prosser,

Private Action for Public Nuisance, 52 Va. L. Rev. 997, 999 (1966))); see, e.g., Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1142 (Ohio 2002) ("[T]here need not be injury to real property in order for there to be a public nuisance."); City of Boston v. Smith & Wesson Corp., No. 199902590, 2000 WL 1473568, at *14 (Mass. Super. July 13, 2000) ("[A] public nuisance is not necessarily one related to property."); Restatement (Second) of Torts §821B, Comment h ("Unlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land.").

Purdue also maintains that the State's claim fails because "the alleged public nuisance identified in the complaint is not reasonably subject to abatement." (Mot. to Dismiss at 33.) This issue demands little consideration as it is a question of fact whether Purdue can abate the alleged public nuisance for which the State seeks to hold it liable and, drawing all inferences in the State's favor, the complaint adequately alleges that Purdue is in fact capable of doing so. (See Compl. ¶ 266 ("This public nuisance can be abated through health care provider and consumer education on appropriate prescribing, honest marketing of the risks and benefits of long-term opioid use, addiction treatment, disposal of unused opioids, and other means.").)

d. Unjust Enrichment

Purdue argues that the State's claim for unjust enrichment must be dismissed because "unjust enrichment generally does not form an independent basis for a cause of action." (Mot. to Dismiss at 35 (quoting Gen. Insulation Co. v. Eckman Const., 159 N.H. 601, 611 (2010)).) The New Hampshire Supreme Court has not categorically barred independent unjust enrichment claims, however, it has made clear that such claims are predominately rooted in quasi-contract theory. See Gen. Insulation, 159

N.H. at 611 ("[U]njust enrichment [is] allowed by the courts as [an] alternative remed[y] to an action for damages for breach of contract." (Quotation omitted)). Although a fair reading of the complaint is that Purdue may have enriched itself via "deceptive and illegal acts," (Compl. ¶ 272), this inference alone is insufficient to state a claim. See Clapp v. Goffstown Sch. Dist., 159 N.H. 206, 210 (2009) ("Unjust enrichment is not a boundless doctrine, but is, instead, narrower, more predictable, and more objectively determined than the implications of the words 'unjust enrichment.'" (Quotation omitted)); Am. Univ. v. Forbes, 88 N.H. 17, 19 (1936) ("The doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity. While it is said that a defendant is liable if 'equity and good conscience' requires, this does not mean that a moral duty meets the demands of equity. There must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of the doctrine."). Considering the State has not articulate an underlying "specific legal principle" nor cited authority allowing an unjust enrichment claim to proceed under comparable circumstances, the Court must agree with Purdue on this issue.

e. Fraudulent or Negligent Misrepresentation

Finally, Purdue argues that the State's fraudulent and negligent misrepresentation claim demands dismissal "because the State fails to allege that it justifiably relied on any statement made by, or attributable to, Purdue." (Mot. to Dismiss at 35; see also Reply at 12.) The Court disagrees. The United States Supreme Court in Bridge considered and rejected a similar argument, finding that "while it may be that first-party reliance is an element of a common-law fraud claim, there is no general

common-law principle holding that a fraudulent misrepresentation can cause legal injury only to those who rely on it. . . . And any such notion would be contradicted by the long line of cases in which courts have permitted a plaintiff directly injured by a fraudulent misrepresentation to recover even though it was a third party, and not the plaintiff, who relied on the defendant's misrepresentation." 553 U.S. at 656–57 (citing Restatement (Second) of Torts §§ 435A, 548A, 870).

Likewise, the New Hampshire Supreme Court has relied upon the Restatement (Second) of Torts to conclude that "[t]he fact that [an] alleged misrepresentation was not made directly to the plaintiff does not defeat [the] cause of action." Tessier v. Rockefeller, 162 N.H. 324, 333 (2011) (citing Restatement (Second) of Torts § 533 ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved."[13])).

In light of this authority, the State's claim — which, *inter alia*, alleges that Purdue made misrepresentations to health care providers and patients for the purpose of inducing opioid prescriptions, along with the common sense understanding that some would in turn seek reimbursements from the State for these opioid prescriptions — is satisfactory.

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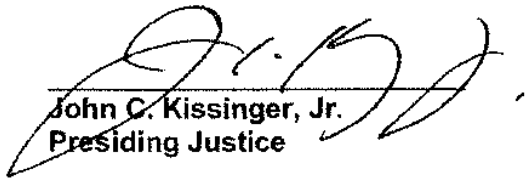
[13] This rule "is applicable not only when the effect of the misrepresentation is to induce the other to enter into a transaction with the maker, but also when he is induced to enter into a transaction with a third person." Restatement (Second) of Torts § 533, Comment c.

Conclusion

For the foregoing reasons, Purdue's Motion to Dismiss is DENIED as it pertains to Count I (deceptive and unfair acts and practices contrary to the Consumer Protection Act), Count II (unfair competition contrary to the Consumer Protection Act), Count III (false claims in violation of the Medicaid Fraud and False Claims Act), Count IV (public nuisance), and Court VI (fraudulent or negligent misrepresentation), and GRANTED as it relates to Count V (unjust enrichment).

SO ORDERED.

9/18/18
Date



John C. Kissinger, Jr.
Presiding Justice

EXHIBIT 6

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
ex rel. **PATRICK MORRISEY,**
Attorney General, **JOSEPH THORNTON,**
in his capacity as the Secretary of the
WEST VIRGINIA DEPARTMENT
OF MILITARY AFFAIRS AND PUBLIC SAFETY,
an agency of the State of West Virginia, and the
KAREN BOWLING, in her capacity as the Secretary
of the **WEST VIRGINIA DEPARTMENT OF**
HEALTH & HUMAN RESOURCES, an agency
of the State of West Virginia,

Plaintiffs,

v.

CARDINAL HEALTH, INC.
an Ohio corporation doing business in
West Virginia,

Defendant.

Civil Action No. 12-C-140
(Hon. William S. Thompson, Judge)

ORDER DENYING CARDINAL' HEALTH, INC.'S
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

By Order entered on April 17, 2015, the Court denied Cardinal Health Inc.'s ("Cardinal") first Motion to Dismiss. Thereafter, on August 11, 2015, the State filed a Second Amended Complaint, adding additional factual allegations and a claim for unjust enrichment. On September 10, 2015 came the Defendant, Cardinal Health, Inc. ("Cardinal"), and moved to dismiss the Plaintiffs' Second Amended Complaint. Thereafter on October 15, 2015, came the Plaintiff State of West Virginia and two of its agencies, the West Virginia Department of Military Affairs and Public Safety ("DMAPS"), and the West Virginia Department of Health & Human Resources ("DHHR") (collectively, "the State"), and responded in opposition to Cardinal's motion to dismiss. On November 3, 2015, Cardinal filed a reply to the State's

response. The parties agreed to submit this motion to the Court for decision without oral argument.

In ruling on the first Motion to Dismiss, the Court rejected many of the same arguments Cardinal resubmits in the motion to dismiss the State's Second Amended Complaint. In denying Cardinal's first Motion to Dismiss, the Court specifically concluded the State's allegations, as then pled, "put Defendant on fair notice of the claims being pled against it, is pled sufficiently, and satisfies the notice pleading standard." April 17, 2015 Order ¶ 20. The Order rejected the legal arguments made by Cardinal (many of which adopted the identical arguments earlier made by the defendants in the *AmerisourceBergen* case, Boone County Civil Action No. 12-C-141) regarding standing (*Id.* ¶¶ 21-30), *parens patriae* standing (*Id.* ¶¶ 31-34), the Attorney General's common law powers (*Id.* ¶¶ 35-39), "valid causes of action" (*Id.* ¶¶ 40-44), private cause of action under the Controlled Substances Act (*Id.* ¶¶ 45-53), public nuisance (*Id.* ¶¶ 54-63), proximate cause (*Id.* ¶ 64), foreseeable criminal acts (*Id.* ¶¶ 65-73), the *Arbaugh* case (*Id.* ¶¶ 74-78), the WVCCPA claim (*Id.* ¶¶ 79-84), exhaustion of administrative remedies (*Id.* ¶¶ 85-94), the municipal cost recovery doctrine (*Id.* ¶¶ 95-98), and the economic loss doctrine (*Id.* ¶¶ 99-103).

In ¶¶ 6 through 20 of its Order denying Cardinal's first Motion to Dismiss, the Court summarized the State's core allegations. April 17, 2015 Order at ¶¶ 8-23. The Second Amended Complaint includes the same allegations as those referenced in the April 17, 2015 Order, and added additional factual allegations, including specifying the large volumes of West Virginia distributions of hydrocodone and oxycodone and other addictive controlled substances, and gave specific examples of other alleged wrongful acts the State contends Cardinal committed

in the course of distributing controlled substances to specific pharmacies and locales in West Virginia. Second Amended Complaint at ¶¶ 16-21.

The gist of the State Plaintiffs' claims as alleged in the Second Amended Complaint is that Cardinal and others distributed unusually large quantities of addictive controlled substances to West Virginia pill mill pharmacies, and regularly filled and failed to report "suspicious orders," proximately causing tremendous damage to the State of West Virginia. As alleged by the State, Cardinal distributed much of the fuel for an "epidemic" prescription drug problem in West Virginia. According to the State Plaintiffs, DEA records indicate that in the 5 years beginning January, 2007 and ending December 2012, Cardinal distributed as much as 155,629,101 hydrocodone and 85,493,140 oxycodone pills to West Virginia customers. Second Amended Complaint at ¶16. The Second Amended Complaint specifies amounts of distributions to identified counties and Pill Mill pharmacies.

Thus, as compared to the First Amended Complaint, which the Court found in its April 17, 2015 Order denying Cardinal's Motion to Dismiss to be sufficiently pled in terms of the requirements of *W.Va. R.Civ.P.* 12, the primary difference is that the State has added more specificity to its allegations, and added a claim for unjust enrichment. Cardinal, in turn, has moved to dismiss the Second Amended Complaint largely based on the same grounds previously denied by this Court in the April 17, 2015 Order and/or in the orders denying the motions to dismiss in the *AmerisourceBergen* matter. As explained more fully below, the Court has carefully considered the pleadings, arguments and briefing of the parties, and concludes Cardinal's motion to dismiss the State's Second Amended Complaint meets the State's pleading burden under Rule 12, and **ORDERS** the Motion to Dismiss be **DENIED.**

I FACTS ALLEGED BY THE STATE

1. The State alleges in the Second Amended Complaint that, "Cardinal is the largest distributor of controlled substances to West Virginia customers. Many of these customers are located in rural or low population areas and order such large quantities that are so much greater than the population that those orders are, at the very least, suspicious. Many of these pharmacies are 'pill mills.'" *Id.* at ¶ 3. According to the State, Cardinal, "inserted itself as an integral part of the Pill Mill process." *Id.* at ¶ 4.

2. It is alleged prescription drug abuse is widespread and costs the State hundreds of millions of dollars annually, devastates West Virginia communities and families, reduces the State's economic productivity, adversely affects West Virginia's hospitals, schools, courts, social service agencies, jails and prisons as well as diminishing the quality of life in the State's cities and towns. (*Id.* ¶¶ 1, 6).

3. The State alleges information Cardinal supplied to the DEA shows, "in the 5 years beginning January 2007 and ending December 2012 Defendant Cardinal Health, Inc. distributed at least 155,629,101 hydrocodone and 85,493,140 oxycodone pills to West Virginia customers. . . . the counties most effected by the prescription drug epidemic received large quantities of controlled substances from Cardinal [including] a huge amount of distribution of controlled substances beyond what the local population legitimated could be expected to need that one amount of distributions should have been identified as suspicious, but were not." *Id.* at ¶ 16.

4. The State alleges in the Second Amended Complaint that during the 2007-2012 time period, Cardinal distributed *1,042,090* hydrocodone and *431,120* oxycodone to Boone

County, *8,863,310* hydrocodone and *1,844,000* oxycodone to Logan County, *2,382,9900* hydrocodone and *117,400* oxycodone to Mingo County, and *3,052,370* hydrocodone and *1,492,960* oxycodone to McDowell County. *Id.* "Statewide the foregoing figures reflect Cardinal alone distributed 154.39 hydrocodone for each man, woman and child in West Virginia over 5 years, and also 84.81 oxycodone for every person in the State. Considering the populations of Logan County (36,743) that amounts to 241.22 hydrocodone for every person in the county and 50.19 oxycodone for each person. For McDowell County (population 22,113) it is 138.04 per person for hydrocodone and 67.52 per person for oxycodone consumption." *Id.* The Second Amended Complaint identifies specific West Virginia locales and Pill Mills to which Cardinal distributed suspicious orders of controlled substances. *Id.* at ¶¶ 16 - 20.

5. In paragraph 34 of the Second Amended Complaint, the State alleges Cardinal's conduct violates industry customs and standards:

> "Defendant Cardinal is a distributor of controlled substances and must comply both with the laws of the State into which it distributes controlled substances and with industry custom and standards. In the instant case, the standard of conduct for Defendant's industry requires that it know its customers, which includes, *inter alia,* an awareness of its customer base (including but not limited to population levels of the immediate area), knowledge of the average prescriptions filled each day, the percentage of diverted and/or abused controlled substances distributed as compared to overall purchases, a description of how the dispenser fulfills its responsibility to ensure that prescriptions filled are for legitimate medical purposes, and identification of physicians and bogus centers for the alleged treatment of pain that are the dispenser's most frequent prescribers."

6. In paragraph 35 of the Second Amended Complaint, the State claims:

> "Defendant Cardinal has willfully turned a blind eye towards the foregoing factors by regularly distributing large quantities of commonly-abused

> controlled substances to clients who are serving a customer base comprised of individuals who are themselves abusing prescription medications, many of whom are addicted and who reasonably can be expected to become addicted or to engage in illicit drug transactions. The Defendant's negligent acts and omissions in violation of West Virginia's drug laws have led to the dispensing of controlled substances for non-legitimate medical purposes of epidemic proportions, including the operation of bogus pain clinics that do little more than provide prescriptions for addictive controlled substances, thereby creating and continuing addictions to prescription medications."

7. The State asserts Cardinal was aware of this epidemic of prescription drug abuse in West Virginia, but it nevertheless persisted in a pattern of distributing commonly abused and diverted controlled substances in geographic areas, and in such quantities and with such frequency, that Cardinal knew or should have known these commonly abused controlled substances were not being prescribed and consumed for legitimate medical purposes. *Id.* ¶ 55.

8. The State alleges that regulations promulgated pursuant to the West Virginia Controlled Substances Act require Cardinal to do the following:

- "All registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances [. . . .]" 15 W.Va.C.S.R. § 2-4.2.1.
- "The registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances. The registrant shall inform the Office of the West Virginia Board of Pharmacy of suspicious orders when discovered by the registrant. Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency." 15 W.Va.C.S.R. § 2-4.4.

Id. ¶ 25.

9. The State further alleges Cardinal has not complied with the requirements in the foregoing regulations (*Id.* ¶¶ 26-27), and that by distributing excessive amounts of

controlled substances, Cardinal has violated West Virginia law (15 *WVCSR* § 2-4.2.1 and 15 *WVCSR* § 2-4.4) by failing to implement effective controls to guard against prescription drug diversion and by failing to effectively monitor, enforce and/or disclose suspicious orders they fill. *Id.* ¶ 8.

10. The State claims Cardinal profits from the prescription drug epidemic in West Virginia by distributing controlled substances in amounts in excess of the amount of controlled substances legitimately medically required. By distributing these excessive amounts of controlled substances, it is alleged Cardinal violates West Virginia law by failing to implement or more particularly to follow and adhere to effective controls to guard against prescription drug diversion and by failing to effectively monitor, enforce and/or disclose suspicious orders they fill. *Id.* ¶ 8.

11. The State claims damages and losses related to the prescription drug epidemic in West Virginia contributed to by Cardinal include costs to the State of as much as $430 Million annually as of the year 2010, with those costs incurred by the State projected to increase to as much as $695 Million annually by 2017. *Id.* ¶ 6(a).

12. The problems related to the prescription drug epidemic in West Virginia alleged by the State to have been caused by Cardinal and others includes a *per capita* death rate from prescription drug overdose that has been either the highest or the second highest of all the States. *Id.* ¶ 6(b).

13. The State asserts that between 2001 and 2008, deaths in West Virginia from overdoses involving prescription drugs quadrupled from 5.1 deaths per 100,000 residents to 21.5. *Id.* ¶ 6(c).

14. The State asserts the alleged wrongful distribution practices of Cardinal and others contributes to the fact that thirty-five (35) percent of babies born in West Virginia are born drug-addicted because their mothers are using drugs. *Id.* ¶ 6(l).

15. Additionally, the State alleges the problems caused by the prescription drug epidemic in West Virginia contributed by Cardinal includes the fact that twenty (20) percent of patients admitted to Charleston Area Medical Center's hospital trauma service have narcotic usage that contributed to their injuries. *Id.* ¶ 6(d).

16. The State alleges West Virginia Prosecuting Attorneys and Judges have estimated that as much as 90% of their criminal docket regularly is made up of matters that are either directly or indirectly related to prescription drug abuse. *Id.* ¶ 6(h).

17. The State alleges in ¶¶ 56 - 58 of the Second Amended Complaint that,

> "56. As the result of the above-described conduct the Defendant negligently, recklessly and/or intentionally, and acting with blind indifference to the facts, created and continued propagate a public nuisance. More particularly, the public nuisance so created, injuriously, and in many areas pervasively, affects West Virginia communities and the State, and endangers the public health and safety and inconveniences the citizens of the State, *inter alia,* in the following ways:
>
> - Areas in certain communities have become congested with persons who gather in large groups outside of "clinics, pharmacies and physician offices" that in fact are component parts of Pill Mills that exist only to prescribe and deliver drugs for illicit, non-medical purposes;
>
> - Crimes and other dangerous activities committed by those addicted to controlled substances have increased dramatically;
>
> - Hospital services, especially those services provided by emergency rooms, are being consumed by persons with prescription drug abuse issues;

- Law enforcement and prosecutorial resources are being exhausted and consumed by having to address prescription drug abuse issues to the exclusion of other matters;

- Public resources are being unreasonably consumed in efforts to address the prescription drug abuse epidemic, thereby eliminating available resources which could be used to benefit the public at large;

- Court dockets are congested by prescription drug-related cases as well as by crimes committed by addicts, thereby diminishing access to our courts by others;

- Jails and prisons suffer from overcrowding.

57. As a direct result of the acts and omissions of Defendant in creating, perpetuating substantially contributing to and maintaining the public nuisance herein above described, the public nuisance described herein has damaged the health and safety of West Virginia citizens in the past and will continue to do so in the future unless the nuisance is abated.

58. The State has sustained economic harm in the expenditure of massive sums of monies and will in the future continue to suffer economic harm unless the above-described public nuisance is abated."

18. The State alleges also that , "[i]n 2008 Cardinal paid a $34 million to the DEA to resolve allegations that Cardinal failed to notify the DEA about suspicious orders it filled. In 2012 Cardinal agreed to a two-year suspension of its license to ship controlled substances from its Lakeland, Florida operation for having improperly distributed prescription pain pills." *Id.* at ¶ 9.

II THE MOTION-TO-DISMISS STANDARD

19. "A complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief.'" *Conrad v. ARA Szabo*, 198 W. Va. 362, 369–70, 480 S.E.2d 801, 808–09 (1996).

20. "Although entitlement to relief must be shown, a plaintiff is not required to set out facts upon which the claim is based." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995).

21. "In view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it." *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159 (1978).

22. "Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 227, 488 S.E.2d 901, 907 (1997) (quoting *Scott Runyan*, 194 W.Va. at 776, 461 S.E.2d at 522).

23. "In reviewing a motion to dismiss, this Court is required to accept all the well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996).

24. A complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief."

Syl. Pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977), citing *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957).

25. For the reasons stated herein, the Court concludes application of the appropriate standards recited above leads to the conclusion that Cardinal's motion to dismiss the Second Amended Complaint should be denied.

III LAW AND ANALYSIS

26. In its motion to dismiss the Second Amended Complaint, Cardinal re-argues its earlier motion to dismiss on the following topics: 1) The Board of Pharmacy's allegedly "exclusive" jurisdiction to bring the State's claims; 2) the application of the so-called "free public services doctrine"; 3) unjust enrichment; and 4) whether the Complaint meets the notice pleading requirement of Rule 8 of the *W.Va. Rules of Civil Procedure*. The Court addressed these arguments in its April 17, 2015 Order denying Cardinal's first motion to dismiss and concludes there is no reason to change the previous holding.

1 This Court Already Has Held the State Has Authority to Bring the Instant Claims

27. The Court previously addressed the issue of the State's authority to bring the instant claims in its April 17, 2015 Order. Cardinal reargues its earlier position that the statute establishing the West Virginia Board of Pharmacy bars the State from bringing suit for damages against Cardinal. In the April 17, 2015 Order, this Court held that the Board of Pharmacy does not have "exclusive jurisdiction" such that the State's claims are barred, and that the State was not required to "exhaust administrative remedies." *Id.* at ¶¶ 85-94.

A The West Virginia Board of Pharmacy Does Not Have Exclusive Authority Over the CSA

28. This Court already has held that, "Article 5 [of the CSA] explicitly recognizes the Board of Pharmacy is not the exclusive administrative body charged with enforcement of the CSA." *Id.* at ¶ 86.

29. While the BOP generally oversees the licensing requirements in Article 8, Article 5 of the West Virginia Controlled Substances Act, entitled "Enforcement and Administrative Provisions," requires the Attorney General to "assist in the enforcement of the act" and "cooperate with all agencies charged with the enforcement of the laws . . . of this state[.]" *W.Va. Code* § 60A-5-501(c).

30. The full text of the statutory subsection is as follows:

> "[T]he attorney general, or any of their assistants, shall assist in the enforcement of all provisions of this act and shall cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to controlled substances."

Id. The Attorney General "shall" assist and cooperate with "*all* agencies" charged with the enforcement of West Virginia law. Here, Plaintiffs DHHR and DMAPS are charged with enforcement of West Virginia law. When DHHR and DMAPS, at the request of the Governor, joined the lawsuit and are seeking the assistance and cooperation of the Attorney General, he, as the State's lawyer, has authority to bring this lawsuit on their behalf.[1]

[1]In the April 17, 2015 Order this Court further noted, "[t]he fact that West Virginia Governor Earl Ray Tomblin requested and authorized the State's claims on behalf of the

31. This Court also held in the April 17, 2015 Order that: "because there is no express statutory restriction or limitation on the Attorney General's common law powers, the Attorney General has standing to bring the instant claims on behalf of the State[.]" *Id.* at ¶ 39; see also *id.* ¶¶ 35-38, citing, *inter alia*, Syl. Pt. 3, *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W.Va. 227, 744 S.E.2d 625 (2013).

32. The Court finds that Article 5 of the Controlled Substances Act confers enforcement authority and various other responsibilities upon the State Police (a subdivision of Plaintiff DMAPS). *W.Va. Code* § 60A-5-501(a)(5), *W.Va. Code* § 60A-5-501(c)(3)-(6).

33. The Court further finds Article 5 provides a judicial remedy. *Id.* § 60A-5-503(a). Article 5 does not limit this judicial remedy to actions brought by the BOP. *Id.*

34. The Court concludes the West Virginia Board of Pharmacy does not have "exclusive authority" over the Controlled Substances Act.

B The State is Not Required to "Exhaust Administrative Remedies"

35. This Court held in the April 17, 2015 Order that, "the State Plaintiffs were not required to exhaust any administrative remedies before filing this case in circuit court." *Id.* at ¶ 94. This Court already has addressed and rejected that argument made here again by Cardinal, and sees no reason to change those holdings.

36. The Court's rationale earlier stated in paragraphs 85-94 of the April 17, 2015 Order continues to apply to Cardinal's arguments: [1] "there is no administrative remedy available to the State Plaintiffs in this case"; [2] "if these sections in Article 8 somehow

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Department of Military Affairs and Public Safety and the Department of Health and Human Resources in writing confirms the named Plaintiffs are authorized to bring the instant claims in the name of the State." *Id.* ¶ 27.

can be construed to allow for an administrative remedy for the Attorney General, DMAPS, and/or DHHR, it would be (at most) *permissive, not mandatory or exclusive*"; [3] "there can be no exhaustion requirement, absent an express statement by the Legislature," (of which there is none) where, as here, there is a judicial remedy available; [4] "the inadequacy exception to the doctrine applies"; and [5] "the futility exception to the doctrine applies as well." *Id.* ¶¶ 88-93 (emphasis in original).

37. As for Cardinal's contention that this lawsuit impermissibly interferes with the Board of Pharmacy's enforcement of the Controlled Substances Act, that argument was addressed previously. The Court previously found and concludes again that the State Plaintiffs are not barred from bringing the claims in the Second Amended Complaint as a result of the Board of Pharmacy's power to regulate the licensing of the drug distributors.

38. Cardinal also argues the fact that the Board of Pharmacy renewed its distribution license bars the State's claims. Again, that same argument was rejected in the April 17, 2015 Order:

> "Defendants also contend that because W. Va. Code § 60A-8-7(b)(3) indicates the Board of Pharmacy may not issue a license to a drug distributor "unless the distributor operates in a manner prescribed by law," their licenses issued by the Board somehow amounts to conclusive proof that Defendants have complied with all laws. While Defendants offer the Board of Pharmacy's renewal of their licenses as having some sort of res judicata or collateral estoppel effect, the Court concludes the renewals are not conclusive proof that Defendants have complied with all laws and regulations for all of time which or warrant dismissal of the case. The Amended Complaint alleges Defendants violated state law, and the Court must accept those allegations as true at this stage of litigation."

April 17, 2015 Order at p. 31, n. 18. In its reply, Cardinal acknowledges it is not arguing that the BOP's renewal of its license "proves that Cardinal Health has 'complied with *all*

laws and regulations *for all of time*.'" Cardinal Reply at 3.

39. For the reasons stated in the April 17, 2015 Order denying Cardinal's first motion to dismiss based on the alleged failure to exhaust administrative remedies, the Court concludes Cardinal's exhaustion of administrative remedies argument in its motion to dismiss the Second Amended Complaint likewise should be **DENIED**.[2]

40. Cardinal also reargues its assertion from the first motion to dismiss that the State is powerless to bring any of the claims asserted (except for the WVCCPA claim). This Court rejected those same arguments in the April 17, 2015 Order (¶¶ 35-44) as follows:

> "35. In *Syllabus* Point 3 of *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625, 627 (2013), the Supreme Court of Appeals affirmed that the Office of Attorney General retains inherent common law powers:
>
> > "The Office of Attorney General retains inherent common law powers, when not expressly restricted or limited by statute. The extent of those powers is to be determined on a case-by-case basis. Insofar as the decision in *Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982), is inconsistent with this holding, it is expressly overruled."
>
> 36. "Under the common law, the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest, a broad grant of authority which includes the power to enforce the state's statutes. In the exercise of these common law powers, an attorney general may [] control and manage all litigation on behalf of the state[.]" 7 Am.Jur.2d *Attorney General* § 6 at 11 (2007).
>
> 37. "Pursuant to his or her statutory, constitutional, or common-law powers as the chief law officer of the state, the attorney general may institute,

[2]Cardinal further reargues the case must be dispensed if the Board of Pharmacy is not the plaintiff for the State. The Court rejected this same argument made by Miami-Luken in the *AmerisourceBergen* case. See Civil Action No. 12-C-141 September 8, 2015 Order at ¶¶ 50-52. Again, the Court concludes there is no new case law or argument cited that warrants reversal of the previous holding.

conduct and maintain all such suits and proceedings as he or she deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights." *Id.* § 21 at 26.

38. It is acknowledged generally an attorney general is the proper party to determine the necessity and advisability of undertaking or prosecuting actions on the part of the state[.]" *Id.* § 23 at 27.

39. Defendants do not argue the Attorney General's common law power to bring this suit is "expressly restricted or limited by statute," as required by *State ex rel. Discover Fin. Servs., Inc. v. Nibert, supra.* Instead, they assert the Attorney General's common law authority has been limited *impliedly*. The Court concludes that because there is no *express* statutory restriction or limitation on the Attorney General's common law powers, the Attorney General has standing to bring the instant claims on behalf of the State, and Defendants' arguments to the contrary fail."

41. The Court further concludes there is no "plainly manifested legislative intent" that might allow any statute to be construed as altering or changing the Attorney General's common law authority to bring these claims. Unlike the inapposite *SER. Morrisey v. West Va. O.D.C.*, 234 W.Va. 238, 764 S.E.2d 769 (2014)(*W.Va. Constitution* and statute abolished AG's common law authority to prosecute criminal cases), neither the *W.Va. Constitution* nor any legislation empowers the BOP to bring the instant claims for the State and its agencies.

42. In the April 17, 2015 Order this Court addressed the other arguments of Cardinal that the State lacks authority to bring common law claims:

"40. The State asserts claims for, *inter alia*, negligence.

41. "'The liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another.'" *Syllabus* Point 1, *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983) (internal citation omitted).

42. "One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." *Id. Syl.* Pt. 2.

43. The Court concludes the State's negligence claims constitute valid claims. The State alleges Defendants engaged in affirmative conduct, that is, the heavy distribution and sale of addictive controlled substances to Pill Mill pharmacies in unusually large amounts for the population base, when they knew or should have known that the distribution of addictive controlled substances in such amounts in such areas would be diverted and/or improperly used thereby creating an unreasonable risk of harm and damage to others, in the form of increased crimes and other public health and safety dangers in West Virginia communities. (*See, e.g.*, Am. Compl. ¶¶ 3, 29). *Syl. Pts.* 1 and 2, *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983).

44. Moreover, questions of negligence are for the jury, not for the Court on a motion to dismiss. "'The questions of negligence and contributory negligence are for the jury when the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them.'" *Id. Syl.* Pt. 5 (internal citation omitted). Thus, questions of negligence presented by the State's Amended Complaint are for a jury, not for a court on a motion to dismiss."

43. For the same reasons stated in the April 17, 2015 Order, then, the Court concludes the State has authority to bring the instant claims.

2 Separation of Powers

44. Cardinal next argues the instant lawsuit constitutes a violation of "separation of powers" clause of Article V, § 1 of the *West Virginia Constitution*. This argument was not made in its first motion to dismiss. Cardinal now argues that by filing of the State's lawsuit, the plaintiffs have unconstitutionally encroached upon the powers of the West Virginia Legislature. Memo. at 9. The State plaintiffs have not passed any legislation or rewritten any laws as Cardinal asserts. The Court disagrees that the filing of the instant

lawsuit violates the "separation of powers" clause of Article V, § 1 of the *West Virginia Constitution*, and concludes the State plaintiffs have brought a lawsuit on behalf of the State, as this Court previously determined they have the right to do:

> "36. "Under the common law, the attorney general has the power to bring any action which he or she thinks necessary to protect the public interest, a broad grant of authority which includes the power to enforce the state's statutes. In the exercise of these common law powers, an attorney general may [] control and manage all litigation on behalf of the state[.]" 7 Am.Jur.2d *Attorney General* § 6 at 11 (2007).
>
> 37. "Pursuant to his or her statutory, constitutional, or common-law powers as the chief law officer of the state, the attorney general may institute, conduct and maintain all such suits and proceedings as he or she deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights." *Id.* § 21 at 26.
>
> 38. It is acknowledged generally an attorney general is the proper party to determine the necessity and advisability of undertaking or prosecuting actions on the part of the state[.]" *Id.* § 23 at 27."

April 17, 2015 Order at ¶¶ 21 - 39. This Court further found that, "[e]ven if the Attorney General lacked common law authority, he would have standing under *W.Va. Code* § 60A-5-501(c), both independently and pursuant to the request of the State Police – he is not expressly restricted to taking only such actions on behalf of the State as requested by the Board of Pharmacy, as asserted by Defendants." *Id.* at p. 11, n.4.

45. The Court concludes the filing of the State's lawsuit is not an invasion of Legislative powers, and does not violate the separation of powers clause. The State by filing suit against Cardinal is not rewriting laws, it is asserting its legal claims as sovereign, something well within the powers of the state agencies and the Attorney General in this

case. *See supra.* Cardinal's "separation of powers" argument cites no caselaw suggesting the filing of a lawsuit by a State's Attorney General or state agencies violates the separation of powers clause of the West Virginia *Constitution*. Because the Court finds no merit to Cardinal's argument in this regard, its motion to dismiss the Second Amended Complaint based upon Article V, § 1 of the *West Virginia Constitution* is **DENIED**.

3 The State's Claims satisfy the *Hurley* standard

46 Cardinal reargues its position from the first motion to dismiss that the State cannot pursue a cause of action under the Controlled Substances Act by virtue of *Hurley v. Allied Chemical Corp.*, 262 S.E.2d 757 (W.Va. 1980). The Court concluded as follows in the April 17, 2015 Order denying the same argument:

> "45. *West Virginia Code* § 55-7-9 permits the recovery of damages stemming from a violation of a statute:
>
> > "Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages."
>
> 46. A violation of a statute or ordinance can constitute actionable negligence. *Syllabus* Point 4, *State Rd. Comm'n v. Ball,* 138 W. Va. 349, 350, 76 S.E.2d 55 (1953) ("The violation of a statute or ordinance, which is the proximate cause of an injury or contributed thereto, constitutes actionable negligence.").
>
> 47. Even if the State had not presented valid negligence claims pursuant to *Robertson v. LeMaster, supra,* the violation of a statute also is *prima facie* evidence of negligence, provided such violation is the proximate cause of injury. *See, e.g., Powell v. Mitchell,* 120 W.Va. 9, 196 S.E. 153 (1938); *Porterfield v. Sudduth,* 117 W.Va. 231, 185 S.E. 209 (1936). *See also Syl.* Pt. 1,

Anderson v. Moulder, 183 W.Va. 77, 394 S.E.2d 61 (1990) ("Violation of a statute is *prima facie* evidence of negligence.").

48. Whether a private cause of action exists based on a violation of a statute is determined by applying the four-part test set forth in *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980). *Syllabus* Point 1 of *Hurley, supra,* states:

> "The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government."

49. The Court concludes the State and its agencies are Plaintiffs in this case as representatives of the State and the public, for whose benefit the statute and accompanying regulations was enacted, so the first prong of the *Hurley* test is satisfied.

50. As for the second factor of "legislative intent," our Supreme Court has cautioned that, "state statutes often have sparse legislative history or none at all . . . and in its absence, a state court would be unable to utilize the second factor. *Hurley, supra*, 262 S.E.2d at 762. Such is the case here, as no "legislative history" exists.

51. As for the third *Hurley* factor, it has been held that, "a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute. *Hurley*, 262 at 762, *quoting Cort v Ash*, 441 U.S. at 703. The Court concludes the State's causes of action are helpful to the statutory purpose – it is alleged by the State that there is an epidemic of prescription drug abuse in West Virginia, and that the Defendants put their desire for profits above and beyond their duty to put in place effective controls and procedures to prevent diversion of controlled substances and

> wholly failed in their duties to design and implement a system to disclose suspicious orders. The Court agrees the remedies sought by the State here, including damages, will be "helpful" to accomplish the statutory purposes of putting in effective controls against controlled substance diversions and reporting suspicious orders. Therefore, the Court concludes the third prong of *Hurley* is satisfied.
>
> 52. As to the fourth factor, the pending matter is not an area delegated exclusively to the federal government; thus, the factor is satisfied.
>
> 53. On balance under *Hurley*, the private cause of action plead by the State exists."

April 17, 2015 Order, ¶¶ 45 - 53 (footnotes omitted.).

47. For the same reasons the Court articulated in the April 17, 2015 Order denying Cardinal's first Motion to Dismiss based on *Hurley, supra*, the Court concludes the motion to dismiss the Second Amended Complaint also should be, and hereby is, **DENIED**.

48. Cardinal's citation to *General Pipeline Constr., Inc. v. Hairston,* 765 S.E.2d 163 (W.Va. 2014) does not change the Court's earlier conclusion. The Supreme Court in *General Pipeline* reiterated that,"'[i]t is a firmly established rule in West Virginia that a defendant's disregard of a statute is *prima facie* negligence.' *Hersh v. E-T Enterprises Ltd. Partnership,* 232 S.E.2d 305, 311, 752 S.E.2d 336, 343 (2013)[.]" That firmly-established rule applies here. *General Pipeline* is inapposite because it is a case wherein the Supreme Court found no private cause of action on behalf of the next of kin for a statutory claim of "grave desecration[,]" and (unlike the CSA) the grave desecration statute speaks explicitly to protecting the interests of those who are engaged in the scientific study of ancient historic graves, not next of kin, so it clearly was not meant to create a private cause of action for next of kin. Unlike the CSA, the grave desecration

statute vests recovery of civil damages in the Director of the Historic Preservation Section, and how such damages may be used. The CSA has no similar provision, and thus the *General Pipeline* case is inapposite and does not change the Court's conclusion in its April 17, 2015 Order.

4 The Municipal Cost Recovery Doctrine[3]

49. In this Court's Order denying the first motion to dismiss, this Court previously concluded "the 'municipal cost recovery doctrine' does not bar any of the State's claims as alleged." 4-17-15 Order ¶ 98.

50. This Court adopts its rationale in paragraphs 95-98 of its previous order, where it was noted the doctrine [1] has "never before been extended to claims made by a State"; [2] has never been recognized by any court in West Virginia, [3] has been altogether rejected as a doctrine by courts in, at least, Indiana and New Jersey, and [4] when applied, has been, by and large, applied only to discrete, one-time events and not to ongoing public problems. *Id.* ¶¶ 95-98 (citing, *inter alia*, *State v. Lead Ind. Assn., Inc.*, 99-5226, 2001 WL 345830, *5 (R.I. Super. Apr. 2, 2001) (unpublished) ("To adopt the free public services rule and dismiss this action thereby, particularly in the absence of controlling case law requiring such a rule, would ignore existing authority of the Attorney General [to redress public wrongs]. . . ."); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243 (Ind. 2003); *James v. Arms Tech., Inc.*, 359 N.J.Super. 291, 820 A.2d 27, 49 (N.J. App.Div.2003); *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 428,

[3]The common law "municipal cost recovery doctrine" is also referred to as the "free public services doctrine."

768 N.E.2d 1136, 1149-50 (Ohio 2002);*City of Boston v. Smith & Wesson Corp.*, 199902590, 2000 WL 1473568 (Mass. Super. July 13, 2000)).

51. Moreover, the courts that have engaged in significant analysis of the issue have rejected the doctrine outright for policy reasons. The Indiana Supreme Court found:

> "[T]he mere fact that the City provides services as part of its governmental function does not render the costs of those services unrecoverable as a matter of law. We do not agree that the City . . . is necessarily disabled from recovering costs from tortious activity. Rather, we agree with those courts that have rejected the municipal cost doctrine as a complete bar to recovery."

City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1243 (Ind. 2003) (citing, *inter alia*, *James v. Arms Tech., Inc.*, 820 A.2d 27, 49 (N.J. App.Div.2003)). The New Jersey Appellate Court explained that the doctrine is misguided and rejected it altogether for the following policy reasons: (1) it shields tortfeasors from liability and thus constitutes a tort subsidy to defendants and shifts burden onto taxpayers; (2) it favors tortfeasors who harm government as compared to those who harm private parties; (3) it is inequitable and fundamentally unfair to the municipality with an otherwise worthy claim because they are then without a remedy; and (4) it provides no incentives for potential tortfeasors to obtain liability insurance or take reasonable measures to eliminate or reduce the risk of harm. *James*, 359 N.J. Super. at 326-28, 820 A.2d at 48-49.

52. Lastly, this case fits into the two exceptions to the doctrine – first, where the acts of Cardinal are alleged to have created a public nuisance which the State seeks to abate, and second, there is statutory authority for recovery of the losses alleged. 4-17-15 Order at 34, n. 21, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 428, 768 N.E.2d

1136, 1149-50 (Ohio 2002)); *see also* W. Va. Code §§ 60A-5-501(c), 60a-5-503(a), 46A-7-108, 46A-7-110, 46A-7-111(2).

53. The West Virginia cases cited by Cardinal are inapposite. Based upon readings of the applicable statutes, namely W.Va.Code § 62-5-7 and its predecessor, the West Virginia Supreme Court concluded that a county could not charge room-and-board to a convicted criminal for time he/she spent previously awaiting trial "as a cost incident to the prosecution." Syl. Pt., *State v. St. Clair*, 177 W. Va. 629, 355 S.E.2d 418 (1987); *State v. Chanze*, 178 W. Va. 309, 310, 359 S.E.2d 142, 143 (1987)(*per curiam*); *Sears v. Fisher*, 101 W. Va. 157, 158 (1926). That issue of statutory interpretation has nothing to do with this common law doctrine or whether it may bar the State's claims in this case.[4]

5 Unjust Enrichment

54. The Court previously denied the companion drug distributor defendants' attempt in the *AmerisourceBergen* case to dismiss the Unjust Enrichment claim. *See* 9-8-15 *AmerisourceBergen* Order ¶¶ 20-23.

55. In doing so, this Court noted the elements of a claim for unjust enrichment in West Virginia are articulated in *Shanks v. Wilson*, 86 F.Supp. 789 (E.D.Va. 1949), a diversity case in which the federal court applied West Virginia law. 9-8-15 *AmerisourceBergen* Order ¶ 20. The *Shanks* court stated:

"As to unjust enrichment, this principle is applicable only in those cases in

[4]For the first time in this litigation, Cardinal also cites to *United States v. Standard Oil of Cal.*, 332 U.S. 301, 314-15 (1947). It does not change the Court's previous analysis. In *Standard Oil*, the Court noted that Congress had not conferred power on the governmental plaintiff to sue as the West Virginia Legislature has done here. The Court refused to exercise its power to establish new liability. *Id.* at 316. It does not even mention the doctrine of the "municipal cost recovery" doctrine.

> which one person has in his possession money or property which has come into his hands under circumstances which make it unjust for him to retain it, and which in equity and good conscience belongs to some other person."

Id. at 794 (citing *Johnson v. National Bank of Wheeling*, 124 W.Va. 157, 19 S.E.2d 441 (1942) and *Lockard v. City of Salem*, 130 W.Va. 287, 43 S.E.2d 239 (1947)).

56. As this Court noted, *Shanks*'s explication of the elements of a claim for unjust enrichment is echoed in *Annon v. Lucas*, 155 W.Va. 368, 185 S.E.2d 343 (1971), where the Supreme Court of Appeals of West Virginia stated:

> "A constructive trust is substantially an appropriate remedy against unjust enrichment. It is raised by equity in respect of property which has been acquired by fraud, or where, although acquired originally without fraud, it is against equity that it should be retained by the person holding it. The availability of a constructive trust as a mode of relief against unjust enrichment is not, in general, affected by the fact that the plaintiff has a cause of action at law, as distinguished from equity, for damages or other relief. Generally, any transaction may be the basis for creating a constructive trust where for any reason the defendant holds funds which in equity and good conscience should be possessed by the plaintiff."

9-8-15 *AmerisourceBergen* Order ¶ 21, quoting *Annon.* at 382, 185 S.E.2d at 352.

57. The Court again concludes that in order to properly plead a claim for unjust enrichment against the defendants, the State must plead that (1) Defendants have in their possession money (2) that in equity or good conscience (3) belongs to (or should be possessed by) the State or other party. 9-8-15 *AmerisourceBergen* Order ¶ 22, citing *Annon v. Lucas*, 155 W. Va. 368, 185 S.E.2d 343 (1971); *Shanks v. Wilson*, 86 F. Supp. 789, 794 (E.D. Va. 1949) (applying West Virginia law and citing *Johnson v. National Bank of Wheeling*, 124 W. Va. 157, 19 S.E.2d 441 (1942); *Lockard v. City of Salem*, 130 W. Va. 287, 43 S.E.2d 239 (1947)). Nothing more is required to properly state a claim under West

Virginia law.[5] *Id.*

58. The Court concludes the Second Amended Complaint sufficiently pleads a "constructive trust" unjust enrichment theory of relief as provided for in *Annon* and *Shanks*, as the State Plaintiffs seek their share of allegedly ill-gotten gains of Cardinal from unlawful distributions of controlled substances. 9-8-15 *AmerisourceBergen* Order ¶ 23. The Court thus concludes the State Plaintiffs' claim for unjust enrichment is sufficiently pleaded and is an unjust enrichment claim recognized in West Virginia. Therefore, the Motions to Dismiss the State Plaintiffs' unjust enrichment claim is again **DENIED**.

6 The State has pled facts entitling it to relief

59. In denying Cardinal's first Motion to Dismiss, the Court concluded that, "the State has met its pleading burden and its claims satisfy Rule 12. The Amended Complaint's allegations put Defendants on fair notice of the claims being pled against them, is pled sufficiently and satisfies the notice pleading standard." April 17, 2015 Order at ¶¶ 6 - 17, 20. The Court finds the Second Amended Complaint has added factual allegations to the State's claims – allegations the Court already determined were sufficient to meet the

[5]None of the cases cited by Cardinal overrule *Shanks* or *Annon* or otherwise change the law in West Virginia and thus do not change the analysis this Court conducted previously in the companion *AmerisourceBergen* case. Cardinal relies on *Hill v. Stowers*, 224 W. Va. 51, 60, 680 S.E.2d 66, 75 (2009)(*per curiam*) where the plaintiff-loser in an election for Circuit Court Clerk sued the defendant-winner after the winner was found guilty of vote buying. Unlike the State here, the plaintiff in that case did not pay any money as a result of the defendant's misconduct. Cardinal selectively quotes from *Am. Heartland Port, Inc. v. Am. Port Holdings, Inc.*, 53 F. Supp. 3d 871, 879 (N.D. W.Va. 2014), which, in fact, relies on *Annon*. Nor does Cardinal mention in *Johnson v. Ross*, 419 Fed. App'x 357, *6-7 (4th Cir. 2011) (unpublished), that the decision was based on the failure to pierce the corporate veil rather than on the scope of an Unjust Enrichment claim. Last, the case of *Ashley County Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665-666 (8th Cir. 2009) implicated Arkansas law, not West Virginia law.

requirements of Rule 8 by putting Cardinal on fair notice of the claims against it.

60. In the April 17, 2015 Order denying the first Motions to Dismiss, the Court found the State sufficiently stated claims for Counts I (Injunctive Relief for Violations of CSA), II (Damages for Negligence and Violations of CSA), III (WVCCPA), IV (Public Nuisance) and V (Negligence). (*See, e.g.*, 4-17-15 Order ¶¶ 43, 53, 59, 84b). In terms of its argument on Rule 12(b)(6), Cardinal offers nothing new. For the same reasons the Court rejected first motion to dismiss in the April 17, 2015 Order, the motion to dismiss the Second Amended Complaint on that basis is **DENIED** here as well.

61. Cardinal argues the State's claims "include no factual allegations." Memo. at 18. The Court concludes the State has included numerous material factual allegations at, *inter alia*, ¶¶ 1 - 10, 14, 16 - 21, 53 - 58 of the Second Amended Complaint. The State's allegations are not general or conclusory allegations, and they exceed the requirements of West Virginia's notice pleading standard. The Court concludes the State's Second Amended Complaint is sufficiently pled and meets the requirements of Rule 8.

62. In regard to the issue of proximate cause and damages, the Court previously ruled on this issue and rejected Cardinal's argument that the State has not pleaded proximate causation sufficiently:

> "Under West Virginia law, questions of negligence and proximate cause are questions of fact for a jury to determine. *Aikens v. Debow*, 541 S.E.2d 576, 580 (W.Va. 2001); *Wehner v. Weinstein*, 444 S.E.2d 27, 32 (W.Va. 1994); *see Chapman*, 236 S.E.2d at 211-212. "A party in a tort action is not required to prove that the negligence of one sought to be charged with an injury was the sole proximate cause of an injury." *Syllabus* Point 2, in part, *Everly v. Columbia Gas of West Virginia, Inc.*, 171 W.Va. 534, 301 S.E.2d 165 (1982). Defendants' argument for dismissal on this basis is denied."

April 17, 2015 Order at ¶ 64.

63. The Court concludes proximate cause is a jury issue. *Aikens v. Debow*, 541 S.E.2d 576, 580 (W.Va. 2001); *Wehner v. Weinstein*, 444 S.E.2d 27, 32 (W.Va. 1994); *see Chapman*, 236 S.E.2d at 211-212. Cardinal has not provided anything new on this issue in its motion to dismiss the Second Amended Complaint, the State has pled facts sufficient to show Cardinal's alleged wrongful conduct proximately caused it damage, and for the same reason the Court rejected Cardinal's first motion to dismiss concerning the State's allegations of proximate cause in its April 17, 2015 Order, the instant motion on that basis is **DENIED**.

64. To the extent Cardinal argues Rule 9(g) is unsatisfied by the State's Second Amended Complaint, Memo. at 20, the Court finds this same argument was made by Defendant J.M. Smith in the *AmerisourceBergen* matter. The Court rejected that argument in its September 8, 2015 Order, as follows:

> "32. Defendant J.M. Smith argues it should be dismissed because the State has not suffered actionable damages. The State Plaintiffs assert that all they must do at this pleading stage of the litigation is allege they have suffered damages, as they have alleged in the Second Amended Complaint. The State Plaintiffs further assert they have a variety of potential damage models available, including for statutory penalties under the WVCCPA.
>
> 33. The Court concludes that at this stage of the litigation the State has sufficiently pled the existence of damages. *See, e.g., Associated Mut. Hosp. Serv. of Michigan v. Health Care Serv. Corp. of Illinois*, 71 F. Supp. 2d 750, 754 (W.D. Mich. 1999). The State has so alleged. (*See, e.g.*, 2nd Am. Compl. ¶¶ 1, 6-8, 24-25, 32, 39-40, 44-53, 57). Therefore, the Court concludes J.M. Smith's Motion to Dismiss based on a lack of actionable "damages" should be and hereby is **DENIED**."

65. For the same reasons here, the Court concludes Cardinal's motion made on the same grounds should be denied. The State's damages are not unusual for the type of claim made and a jury reasonably may conclude that the damages pled were foreseeable. Even if Rule 9(g) applied to the State's claims, which the Court concludes it does not, the State only would be obliged to adequately notify Cardinal of the nature of its alleged damages, which it has done. ("Rule 9(g) is satisfied if the complaint adequately notifies the defendant and the court of the nature of the claimed damages in order to avoid surprise.") *Shoshone Indian Tribe of Wind River Reservation, Wyoming v. United States*, 52 Fed. Cl. 614, 627 (2002). The Court concludes Cardinal is able to prepare its responsive pleading, and thus Rule 9(g) would not be violated even if it applied. Therefore, Cardinal's motion to dismiss the Second Amended Complaint based upon Rule 9(g) is **DENIED**.

IV CONCLUSION

For all of the foregoing reasons, the Cardinal's motion to dismiss the State's Second Amended Complaint is **DENIED**.

ENTERED: February 19, 2018

Hon. William S. Thompson, Judge

EXHIBIT 7

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EVERETT, a Washington municipal corporation,

Plaintiff,

v.

PURDUE PHARMA L.P., a Delaware limited partnership; PURDUE PHARMA, INC., a New York corporation; THE PURDUE FREDERICK COMPANY, INC., a New York corporation; and JOHN AND JANE DOES 1 THROUGH 10, individuals who are executives, officers, and/or directors of Purdue,

Defendants.

Case No. C17-209RSM

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on Defendants Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc. (collectively, "Purdue")'s Motion to Dismiss, brought under Rule 12(b)(6). Dkt. #8. Defendants argue that all of the City of Everett's claims must be dismissed on, *inter alia*, proximate cause and statute of limitations grounds, and that certain other claims should be dismissed for failing to state a claim. In Response, Plaintiffs

argue that the Complaint adequately satisfies the Rule 12(b)(6) standard for each claim. Dkt. #16. The Court heard oral argument on September 18, 2017. Dkt. #26. For the reasons stated below, the Court disagrees with Purdue that Everett's claims suffer from a lack of proximate cause or violate the statute of limitations, and GRANTS IN PART AND DENIES IN PART Defendants' Motion.

II. BACKGROUND[1]

Plaintiff City of Everett, located in Snohomish County, Washington and incorporated pursuant to RCW 35.22, brings this action "in its sovereign capacity and for the benefit of the public, pursuant to powers delegated by the State of Washington..." Dkt. #1-1 at ¶ 12.

Defendant Purdue companies are in the business of manufacturing, selling, promoting, and/or distributing OxyContin, a pharmaceutical medication approved by the Food and Drug Administration ("FDA") for the treatment of chronic pain when prescribed by a licensed physician. *Id.* at ¶¶ 13-15, 23, 25. OxyContin is classified as a Schedule II narcotic under the Controlled Substances Act (the "CSA"), 21 U.S.C. § 823 *et. seq.*, and subject to extensive federal regulation by FDA and DEA. *Id.* at ¶¶ 21, 25.

In 2007, Purdue and several of its executives pled guilty to federal criminal charges that they misled regulators, doctors, and patients about OxyContin's risk of addiction and its potential to be abused. *Id.* at ¶ 29. Purdue also acknowledged that it marketed and promoted OxyContin "with the intent to defraud or mislead." *Id.* To resolve criminal and civil charges regarding the mislabeling and deceptive marketing of OxyContin, Purdue agreed to pay fines and fees in excess of $600 million. *Id.*

[1] The following background facts are taken from Plaintiff's Complaint, Dkt. #1-1, and accepted as true for purposes of ruling on Defendants' Rule 12(b)(6) Motion to Dismiss. The Court need not discuss all facts presented in the Complaint, and will focus on those facts relevant to the instant Motion.

That same year, Purdue was sued by several states, including the State of Washington, over similar claims. *Id.* at ¶ 30. Purdue ultimately agreed to pay $19.5 million as a multi-state settlement and also settled with Washington pursuant to a Consent Judgment. *Id.* In the Consent Judgment, among other obligations, Purdue agreed to enact safeguards to protect against the diversion of OxyContin. *Id.* In any event, Purdue was already required by federal law to alert the DEA of suspicious orders under 21 U.S.C. § 823 and regulations promulgated by the DEA. *Id.* at ¶¶ 34-35.

The City of Everett alleges, on information and belief, that Purdue "knowingly, recklessly, and/or negligently supplied suspicious quantities of OxyContin to obviously suspicious physicians and pharmacies in Everett... for the illegal diversion of OxyContin within Everett, without disclosing suspicious orders as required by regulations." *Id.* at ¶ 40.

The City of Everett brings this action in an attempt to hold Purdue liable for illegal drug trafficking of OxyContin by gang members and the "heroin crisis in Everett." *Id.* at ¶¶ 7-10, 66-67. The City seeks to recover "sizeable" social and economic costs, including "costs for law enforcement, prosecution, emergency medical services, prisons and jails, probation and public works . . . addiction treatment, detox and rehabilitation facilities, social services and housing, and prevention and education programs." *Id.* at ¶¶ 7-10, 66-67.

The Complaint alleges that Purdue should be held liable for the City's municipal costs because it failed to disclose to law enforcement information regarding "suspicious orders" of OxyContin placed with certain pharmacies in the Los Angeles area, and that such failures to report evidence of illegal diversion led to "huge quantities of OxyContin" being dispersed "into the black market within Everett," resulting in "drug abuse, addiction and crime." *Id.* at ¶¶ 3-7.

The City alleges that Purdue's failure to advise law enforcement of the "suspicious orders" of OxyContin were in violation of (1) a 2007 Consent Judgment entered between

Purdue and the State of Washington (the "Consent Judgment"), *id.* at ¶¶ 29-33, and (2) monitoring and reporting obligations under the CSA, 21 U.S.C. § 823, *id.* ¶¶ at 34-38.

The Complaint references a criminal drug ring formed in Los Angeles "in approximately 2008" that "formed a clinic called Lake Medical to use as a front for its racketeering operation." *Id.* at ¶ 41. The Complaint further alleges that "a drug dealer named Jevon Lawson ('Lawson'), who had moved to Everett from Southern California, acquired substantial quantities of OxyContin from the drug ring" and "disseminated" the illicit OxyContin to "drug abusers in Everett." *Id.* at ¶ 44. The Complaint sets forth Purdue emails from September 2009 addressing the particular pharmacies and physicians associated with Lake Medical, where a Purdue employee noted that this was "clearly diversion," saw with her own eyes "people who looked like gang members" at the clinic, and felt "very certain that this is an organized drug ring." *Id.* at ¶¶ 47-55. Everett alleges that Purdue "waited to provide information to authorities only after Lake Medical was shut down in 2010" and that "[a]s a direct result of Purdue's misconduct . . . destructive quantities of OxyContin were illegally distributed in Everett through the Lake Medical drug ring." *Id.* at ¶¶ 55-57. Although the City fails to provide any specific factual basis, it also alleges "[o]n information and belief' that Purdue also "supplied suspicious quantities of OxyContin to obviously suspicious physicians and pharmacies in Everett (and other areas within the State of Washington), without disclosing suspicious orders as required by regulations and otherwise circumventing Purdue's obligations." *Id.* at ¶ 59. The Complaint alleges that, "for several years, Purdue collected, tracked, and monitored extensive data evidencing the illegal trafficking of OxyContin." *Id.* at ¶5. Everett alleges that Purdue "failed to disclose such data to enforcement authorities or stop the flow of OxyContin into the black market." *Id.* at ¶¶5, 55, 60-61. Purdue then "continued to supply massive and disturbing

quantities of OxyContin pills to the drug ring" to "maximize its profits." *Id.* at ¶¶4, 72, 76, 81, 90.

Based on these allegations, Everett advances six causes of action: (1) gross negligence; (2) negligence; (3) public nuisance; (4) violation of the Washington Consumer Protection Act (the "CPA"), RCW 19.86, *et seq.*; (5) unjust enrichment; and (6) punitive damages under the laws of Connecticut and/or California. *Id.* at ¶¶ 69-102.

III. DISCUSSION

Purdue argues in the instant Motion that Everett's claims should be dismissed under Rule 12(b)(6) for lack of a cognizable legal duty, for failing to adequately plead proximate cause, for lack of a cognizable injury, and for violating applicable statutes of limitation. Purdue also argues that Everett's public nuisance claim, unjust enrichment claim, and claim for punitive damages cannot proceed. The Court will deal with each issue in turn.

A. Legal Standard

In making a 12(b)(6) assessment, the court accepts all facts alleged in the complaint as true, and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted). However, the court is not required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678. This requirement is met when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The complaint need not include detailed allegations, but it must have "more than labels and conclusions, and a formulaic

recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Absent facial plausibility, a plaintiff's claims must be dismissed. *Id.* at 570.

B. A Basis for Legal Duty

Purdue argues that, under Washington law, "there is no duty to prevent a third-party from intentionally harming another unless 'a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct.'" Dkt. #8 at 14 (citing *Boy 1 v. Boy Scouts of Am.*, 832 F. Supp. 2d 1282, 1286 (W.D. Wash. 2011)). Speaking about the case generally, Purdue argues that a special relationship has not been established here, thus no legal duty and no liability exist. Purdue also argues that liability cannot arise under the Consent Judgment entered between Purdue and the State of Washington in 2007, Dkt. #9-1. Dkt. #8 at 14-15. Purdue argues that the Consent Judgment, incorporated by reference in the Complaint, provides that enforcement of its obligations is vested with the state Attorney General only. *Id.* at 15. Purdue argues that "[t]o allow municipalities within the State to bring their own actions predicated on purported failures to comply with the Consent Judgment would be inconsistent with the Consent Judgment itself and would upset the careful balance required to ensure that the State and parties with whom the State has conducted investigations can reach final, appropriate, and binding resolutions of their disputes." *Id.* Purdue also argues that the Controlled Substances Act, 21 U.S.C. § 823, cannot create a private cause of action. *Id.* at 16 (citing, e.g., *Safe Sts. Alliance v. Alternative Holistic Healing, LLC*, No. 1:15-cv-00349-REB-CBS, 2016 WL 223815, at *3 (D. Colo. Jan. 19, 2016)).

In Response, Everett notes that prior Washington cases have established tort liability under factual circumstances similar to this case. Washington has adopted Section 302B of the Restatement (Second) of Torts, which provides as follows:

> An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

See Washburn v. City of Fed. Way, 178 Wn.2d 732, 757 (2013) ("we have adopted Restatement § 302B"). In *City of Spokane v. Monsanto Co.*, 2016 WL 6275164, *9 (E.D. Wash. Oct. 26, 2016), Monsanto argued "that it did not owe any duty to Spokane because manufacturers have a duty only to the consumer for the foreseeable harm from the use of a product." But the court found "no legitimate question of duty," holding that a "manufacturer's duty of care extends to the foreseeable range of danger created by its product." 2016 WL 6275164 at *9. Everett argues that the Complaint sufficiently alleges Purdue engaged in affirmative conduct to trigger a duty under Section 302B. Dkt. #16 at 21 ("But Everett alleges much more than Purdue's undisputed "failure to report," because the Complaint is replete with allegations that Purdue "***supplied*** OxyContin to obviously suspicious physicians and pharmacies;" "***enabled*** the illegal diversion;" "***aid[ed]*** criminal activity;" and "***disseminated*** massive quantities of OxyContin...into the black market." Complaint at ¶¶ 1-7, 40-44, 60, 72, 76, 81-82, 90, 100.") (emphasis in original). Everett argues it is not actually bringing its claims under the Consent Judgment or Controlled Substances Act, but rather those sources of law are submitted as "evidence of Purdue's knowledge of the foreseeable risks and... prior admissions..." and "additional and independent grounds for denying dismissal..." Dkt. #16 at 22–23.

Purdue argues in its Reply that Section 302B should not apply because Everett has not alleged that there was an "affirmative" act of Purdue that caused the harm, *i.e.* malfeasance, as opposed to an omission, *i.e.* nonfeasance, and that this distinction is dispositive under Comment e which states that an actor "is required to anticipate and guard against the intentional, or even criminal, misconduct of others" where there is a "special responsibility" or where "the actor's

own affirmative act has created or exposed the other to a... high degree of risk of harm..." Dkt. #20 at 15 (citing *Robb v. City of Seattle*, 176 Wn.2d 427, 433 (2013)).

Taking all reasonable inferences in favor of the nonmoving party, Everett does not allege mere nonfeasance. The Court finds that Everett has adequately pled that Purdue engaged in an affirmative act which created or exposed Everett to a high degree of risk of harm. If Everett is able to prove these allegations, they trigger a legal duty under Section 302B and Washington law. In other words, Everett's claims present a facially plausible basis for legal duty under *Twombly/Iqbal, supra*. Having so found a basis for duty under common law, the Court need not determine whether a duty independently arises under the Consent Judgment or Controlled Substances Act.

C. Proximate Cause

Purdue next argues that all of Everett's claims require proximate cause as an element, but that the Complaint fails to set forth a claim "plausible on its face" that Purdue's conduct was the proximate cause of the alleged injuries. Dkt. #8 at 18.

Washington courts have defined proximate cause as a cause that "in a direct sequence unbroken by any new independent cause, produces the injury complained of, and without which such injury would not have happened." *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 706-07 (9th Cir. 2001) (citing *Fisher v. Parkview Props., Inc.*, 71 Wn. App. 468, 859 P.2d 77, 82 (Wash. Ct. App. 1993)). Under Washington law, proximate cause requires both that the defendant's act not be "too remote and insubstantial to impose liability" and that there is no superseding cause sufficient to break the chain of causation. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 257 P.3d 532, 544-45 (2011); *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 558 P.2d 811, 816 (Wash. App. 1976). "Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can

reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes." *Micro Enhancement Intern., Inc. v. Coopers & Lybrand*, LLP, 110 Wn. App. 412, 40 P.3d 1206, 1216 (Wash. Ct. App. 2002) (quoting *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 739 P.2d 1177 (Wash. Ct. App. 1987)). "Whether an intervening act breaks the chain of causation is a question for the trier of fact." *Michaels*, 257 P.3d at 545.

Purdue's arguments can generally be boiled down into three theories. First, that there are too many links in the chain of causation to establish a "direct relationship between the injury and the alleged wrongdoing." Dkt. #8 at 19 (citing, *inter alia*, *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 701). Purdue lists nine links in the chain of causation between its actions and the harm alleged:

> (i) Purdue's conduct as the manufacturer of OxyContin®,
>
> (ii) the later distribution of OxyContin® by wholesale distributors pursuant to 21 U.S.C. § 823(b),
>
> (iii) the further wrongful acts of multiple prescribers in Los Angeles engaged in writing medically inappropriate prescriptions of OxyContin®,
>
> (iv) the still further wrongful conduct of retail pharmacies in Los Angeles filling those "suspicious orders" of OxyContin®,
>
> (v) the separate criminal acts of a drug ring in Los Angeles obtaining illicit prescriptions of OxyContin® for illegal drug trafficking,
>
> (vi) the subsequent unlawful transportation of illicitly procured OxyContin® to Everett,
>
> (vii) the later unlawful sale and purchase of OxyContin® in Everett through an illegal "black market,"
>
> (viii) the misuse and abuse of OxyContin® by those obtaining it illegally, and

> (ix) the "expenses" incurred by Everett as a result of "individuals within Everett [who] became addicted to OxyContin" or to "heroin."

Id. at 18–19. These nine links featured prominently in Purdue's oral presentation. For Purdue's second theory, Purdue cites to *Canyon Cty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 980-83 (9th Cir. 2008) where the Ninth Circuit found that a local government entity seeking to recover increased expenditures "for health care services and criminal justice services" based on alleged conduct that "is not itself the immediate cause of the plaintiff's injury" did not satisfy the requirement of proximate cause as a matter of law. *Id.* at 20. Purdue also cites to *Ass'n of Wash. Pub. Hosp. Dists.* for support that injuries that are "entirely derivative in nature," are not recoverable. *Id.* These cases applied a three-factor test for determining whether an injury is "too remote" to allow recovery: "(1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 701. Purdue's third theory is that the facts of the Complaint and judicially noticeable documents indicate that "Purdue cannot have been a proximate cause for not advising law enforcement what the public filings demonstrate law enforcement already knew." *Id.* at 21–23.

In Response, Everett highlights the importance of foreseeability in the test for proximate cause. Dkt. #16 at 24 (citing *Seattle Audubon v. Sutherland*, 2007 WL 1300964, at *11 (W.D. Wash. May 1, 2007)). Everett argues that it has adequately pled that Purdue foresaw that the OxyContin it was supplying was being illegally diverted and that it would be trafficked and abused. *Id.* at 25. Everett cites to cases with similar theories of liability: *Ileto v. Glock Inc.*, 349

F.3d 1191 (9th Cir. 2003); *City of Seattle v. Monsanto Co.*, 2017 WL 698789 (W.D. Wash. Feb. 22, 2017); *City of Spokane*, *supra*. Everett argues that "the plausible allegations in the Complaint are even stronger and more substantial than the allegations sustained in the recent Monsanto cases and gun cases because, as discussed above, the Complaint is supported by (among other things) internal Purdue emails and witness statements." *Id.* at 17. Everett cites to *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) for the proposition that a "causal chain does not fail simply because it has several 'links.'" *Id.* at 24. Responding to Purdue's second theory, Everett argues that *Canyon County* and *Ass'n of Wash. Pub. Hosp. Dists.* "involved a wildly different set of legal theories, allegations, and claims — both cases concerned antitrust and racketeering theories, allegations grounded in fraud, and federal RICO claims." *Id.* at 25. Everett states:

> Purdue asserts that *Hospital Districts* "makes clear" that the federal standing requirements for RICO claims "also govern the Washington state law claims." Motion at 12. But a careful review of *Hospital Districts* reveals that the Ninth Circuit actually applied Washington's pattern jury instructions for proximate cause. *Compare* 241 F.3d at 707 ("in a direct sequence unbroken by any new independent cause") *with* WPI 15.01("in a direct sequence unbroken by any superseding cause"). As discussed above, here proximate cause is sufficiently alleged under Washington law for Everett's state law claims, including because the alleged injury was unquestionably foreseeable. *See City of Seattle*, 2017 WL 698789 at *7.

Id. at 26. Everett also argues that other courts have "recognized that the more stringent requirements for RICO claims are not applicable to common-law claims." *Id.* at 26 n.11 (citing *Sheperd v. Am. Honda Motor*, 822 F. Supp. 625, 633 (N.D. Cal. 1993) ("Parties who...are unable to satisfy RICO's stringent proximate cause and concrete loss requirements remain free to pursue common law or statutory state law claims."); *Blue Cross & Blue Shield of New Jersey, v. Philip Morris, Inc.*, 36 F. Supp. 2d 560, 579 (E.D.N.Y. 1999) ("defendants are simply

mistaken that the common law embraces a rule which bars all claims for 'indirect' injuries"); *City of St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008, 1012 (E.D. Mo. 1999) (holding that common-law claims were not "barred by the remoteness doctrine")). In response to Purdue's third theory, Everett argues that "the determination of 'issues about who knew what and when' are quintessential factual questions, which are not even appropriate for summary judgment." Dkt. #16 at 30. Everett presents several bases for disputing Purdue's version of the facts. *See id.* at 30-32.

On Reply, Purdue cites to *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) as a case where the Supreme Court "reaffirmed the established common law principle that 'proximate cause generally bars suits for alleged harm that is too remote from the defendant's unlawful conduct," and where the Court "reiterated that proximate cause 'requires some direct relation between the injury asserted and the injurious conduct alleged.'" Dkt. #20 at 7. Purdue argues that "the Supreme Court emphasized that the general approach should be 'not to go beyond the first step.'" *Id.* (citing *City of Miami*, 137 S.Ct. at 1306). The Supreme Court in *City of Miami* examined a similar fact pattern and held that proximate cause was not plausibly alleged based solely on foreseeability, overturning the Eleventh Circuit. Purdue argues that *Ass'n of Wash. Pub. Hosp. Dists., supra*, shows the Ninth Circuit follows the same logic. *Id.* at 10. Purdue stresses that there is no direct relation here.

The Court finds that what Purdue characterizes as nine links of causation could just as easily be characterized as four: (1) Purdue's affirmative action to continue to supply OxyContin through legal channels with knowledge that it was being diverted to a criminal drug ring, (2) the criminal conduct of the drug ring transferring and selling OxyContin, (3) the misuse and abuse of individual users located in Everett, (4) injuries to Everett bringing this action on behalf of the public. Although not as direct as a car accident or slip-and-fall case, this causal chain is still a

"direct sequence," and it is facially plausible that the involvement of third parties, even criminals, was reasonably foreseeable given the extensive facts of Purdue's knowledge in the pleadings. Purdue's citation to *Canyon County* and *Ass'n of Wash. Pub. Hosp. Dists.* are inapposite, as those cases applied a proximate cause standard from RICO law. Although *Ass'n of Wash. Pub. Hosp. Dists.* appears to have applied the same standard to a state law negligence claim, no Washington state court has subsequently applied this standard to tort or CPA claims. The Court agrees with Everett's interpretation of that case and its limited application. To the extent that Purdue presents its own facts of what Everett knew of the criminal activity, this may be irrelevant given that it was Purdue's tortious activity that forms the basis for this claim, and Everett alleges that full knowledge of Purdue's tortious activity was not revealed until the Los Angeles Times investigation of 2016. In any event, Everett is correct that these questions of fact cannot be resolved at this stage. Given all of the above, the Court finds that Everett has adequately pled proximate cause to survive this Motion to Dismiss.

D. Cognizable Injury

Purdue argues that "municipal costs" incurred in the rendering of public services are not a cognizable form of tort injury. Dkt. #8 at 24 (citing *City of Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983); *Canyon County*, 519 F.3d at 979). Purdue also argues that "'expense' claims of this type, derivative of addiction-treatment, addiction-related illnesses, or related injuries, do not constitute 'injuries to business or property' as required under the CPA." *Id.* at 25 (citing, *inter alia*, *Ass'n of Wash. Pub. Hosp. Dists.*, 241 F.3d at 705).

In Response, Everett argues that *City of Flagstaff* was interpreting Arizona law, and that Purdue fails to identify any authority adopting the "municipal cost recovery rule" in Washington. Dkt. #16 at 33 (citing *City of Los Angeles v. Citigroup Inc.*, 24 F. Supp. 3d 940,

948 (C.D. Cal. 2014)). Everett cites to *City of Seattle* and *City of Spokane*, *supra*, as cases where municipal injuries were present and the cases were allowed to proceed. *Id.* Everett presents several other bases for not applying the "municipal cost recovery rule" in this case. *Id.* at 33-34. With regard to its CPA claim, Everett argues that the Ninth Circuit has held that "the limitation that a defendant's conduct cause injury in 'business or property' has only been deployed to exclude suits for personal injury and emotional distress." *Id.* at 34 (citing *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1135 (9th Cir. 2016)).

On Reply, Purdue acknowledges that no Washington court has addressed the municipal cost recovery rule, but argue that public policy is consistent with its application. Dkt. #20 at 16. Purdue does not address Everett's arguments as to its CPA claim injuries.

The Court finds that Purdue has cited no basis under Washington law for dismissing Everett's claims for lack of cognizable injury, and that Everett has presented sufficient case law to create a facially plausible basis for all of its claims to proceed based on the pled injuries.

E. Purdue's Statute of Limitations Defense

Purdue argues that, given the claims in this case, the longest statute of limitations period is four years in connection with the CPA claim. Dkt. #8 at 26 (citing RCW § 19.86.120).[2] Accordingly, because the Complaint was filed January 19, 2017, claims based on conduct predating January 19, 2013, are time-barred. Purdue argues that the only factual allegations set forth in the Complaint predate 2013, *e.g.* the Lake Medical criminal conspiracy in Los Angeles that began in 2008 and was "shut down in 2010," and Purdue's negligent conduct based on internal Purdue correspondence from 2009. Dkt. #1-1 at ¶¶ 41–43, 48–53, 55. Even if the

[2] Gross negligence and negligence fall within the three-year catchall provision of RCW § 4.16.080(2). *See Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 29, 384 P.3d 232 (2016); *Woods View II, LLC v. Kitsap Cty.*, 188 Wn.App. 1, 19, 352 P.3d 807 (2015). Unjust enrichment also has a three-year statute of limitation. *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 738, 197 P.3d 686 (2008) (citing RCW § 4.16.080(3)). Public nuisance has a two-year statute of limitation. *Wallace v. Lewis Cty.*, 134 Wn. App. 1, 19, 137 P.3d 101 (2006).

Court measured the limitations period under the discovery rule,[3] Purdue argues that Everett "was positioned, through the exercise of appropriate due diligence, to determine whether the actions of Purdue, or others in the distribution chain, gave rise to a cause of action" no later than September 28, 2011. *Id.* at 26–27. Purdue argues that once a party "is placed on notice by some appreciable harm occasioned by another's wrongful conduct," the party must make further diligent inquiry to ascertain the scope of the actual harm and is "charged with what a reasonable inquiry would have discovered." *Id.* at 27 (citing *1000 Virg. Ltd. P'Ship. v. Vertecs Corp.*,158 Wn.2d 566, 581, 146 P.3d 423 (2006)). Purdue argues that the discovery rules apply in situations where there are "truly latent facts" not where, as here, the underlying facts were matters of public record. *Id.* at 27 n.11 (citing *Pruss v. Bank of Am. NA*, No. C13-1447-MJP, 2013 WL 5913431, at *3 (W.D. Wash. Nov. 1, 2013).

In Response, Everett argues first that it is immune from the statute of limitations under Washington law because it is a municipality acting in a sovereign capacity. Dkt. #16 at 35–36 (citing RCW 4.16.160; *Louisiana-Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1582 (9th Cir. 1994); *City of Seattle v. Monsanto*, 2017 WL 698789 at *4 ("When a municipality 'assists in the government of the state as an agent of the state to promote the public welfare generally,' that municipality acts in a sovereign capacity"); *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 165 Wn.2d 679, 694 (2009)). Everett argues that it is acting in its sovereign capacity "to promote the public welfare" and "for the common good." *Id.* Next, Everett argues that "Purdue fails to demonstrate how the face of the Complaint proves — as a matter of law — that Everett (as opposed to various federal law

[3] Washington first adopted the discovery rule in *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969). The limitation period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist, whether or not the party can then conclusively prove the tortious conduct has occurred. A smoking gun is not necessary to commence the limitation period. *Beard v. King County*, 76 Wn. App. 863, 868, 889 P.2d 501, 504 (1995).

enforcement agencies) had the requisite knowledge of Lake Medical or Lawson sufficient for the accrual of any cause of action" and that Purdue has not proven "that Everett had the requisite knowledge of ***Purdue's misconduct*** in connection with Lake Medical or Lawson." *Id.* at 36 (emphasis in original). Everett argues that a 12(b)(6) motion is premature if based on facts outside the Complaint. Importantly, Everett also argues that it had three years from July 2016 under the discovery rule because "the connection between, and significance of, ***Purdue's misconduct*** (e.g., Purdue's actual knowledge of diversion) in relation to Lake Medical and Lawson was not publicly exposed until (at the earliest) July 2016, when the Los Angeles Times published a multi-part series concerning its investigation of Purdue, Lake Medical, and Lawson." *Id.* at 37 (emphasis in original). Everett argues that the dismissal is only appropriate when "uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the [alleged] conduct." *Id.* at 38 (citing *Swartz v. Deutsche Bank*, 2008 WL 1968948, *7 (W.D. Wash. May 2, 2008)). Everett argues this test is not met because "none of the documents on which Purdue requests judicial notice address ***Purdue's misconduct*** in connection with Lake Medical or Lawson" and because "the statute does not begin to run until the plaintiff knows or with reasonable diligence should know that the defendant was the responsible party." *Id.* (citing *Allyn v. Boe*, 87 Wn. App. 722, 736 (1997)) (emphasis in original). Everett also cites out-of-circuit cases for the proposition that "courts have refused to find that matters in the so-called 'public record' are sufficient notice." *Id.* at 39. Everett argues that, at the very least, questions of fact preclude dismissal based on this defense.

Purdue first addresses the sovereign capacity argument in its Reply. Purdue argues that such benefit only applies when a municipality sues based on "the exercise of powers traceable to the sovereign powers of the states which have been delegated to the municipality," but not for "a municipality's proprietary functions" which are "not for the benefit of the State and thus are

not exempt from applicable limitations." Dkt. #20 at 17 (citing *City of Seattle*, 2017 WL 698789 at *4; *City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1177-78 (E.D. Wash. 2006)). Purdue also argues that the 2007 Consent Judgment between the State of Washington and Purdue preempts this suit and precludes Everett from acting in the state's capacity. *Id.* at 17–18. Purdue next addresses Everett's discovery rule arguments. Purdue argues that Everett did not act diligently to discover the source of its alleged harm as soon as the harm was apparent, and that this is dispositive. *Id.* at 18 (citing *Beard*, 76 Wn. App. at 868). Purdue argues that such diligence would have led Everett to discover the connection to Purdue via "information in court filings and public sources." *Id.* at 19.

The Complaint adequately pleads Everett discovered the acts giving rise to its causes of action within the last three years. It was not enough for Everett to know that criminal activity was occurring, or that that activity was leading to the alleged injuries; Everett's discovery did not occur as a legal matter until it became aware of *Purdue's* negligent and otherwise actionable conduct. Whether or not Everett acted diligently in discovering the source of its alleged harm is a factually intensive inquiry. Given this, it is entirely premature for the Court to dismiss Everett's claims based on Purdue's affirmative defenses. Because the discovery rule presents a dispositive basis for denying Everett's motion to dismiss based on the statute of limitations, the Court need not address Everett's sovereign capacity arguments.

F. Other, Additional Grounds for Dismissal of Certain Claims

Purdue also argues that Everett's public nuisance claim, undue enrichment claim, and claim for punitive damages are not supported by Washington law. Purdue argues that nuisance is statutorily defined under Washington law to require interference with the comfortable enjoyment of [] life and property." Dkt. #8 at 28 (citing RCW § 7.48.010; *Mustoe v. Ma*, 193 Wn. App. 161, 168, 371 P.3d 544 (2016) ("A nuisance is an unreasonable interference with

another's use and enjoyment of property.")). However, Everett does not allege that Purdue's actions have interfered with property or a property interest. Purdue also challenges whether Everett can bring a nuisance claim for acts that occurred in California. With regard to unjust enrichment, Purdue argues that it has not received a benefit from Everett as required under Washington law. *Id.* at 29 (citing *Hoffer v. State*, 110 Wn.2d 415, 434-35, 755 P.2d 781 (1988)). Finally, with regard to punitive damages, Purdue argues that Everett cannot bring a separate count for punitive damages under the laws of the States of Connecticut or California. *Id.* at 30 (citing, *inter alia*, *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 638 n.14, 278 P.3d 173 (2012). Purdue notes that, even if Everett could seek punitive damages under California or Connecticut law, it would not be a separate cause of action but a remedy. *Id.* at 30–31.

In Response, Everett argues that the nuisance statute does not require interference with real property and that it is not dispositive that the acts at issue occurred in California, but Everett does not cite to law explicitly supporting a nuisance claim for the type of acts at issue in this case. Dkt. #16 at 39–40. Everett appears to agree that Purdue has not directly received a benefit from Everett as required for unjust enrichment, but argues that "Purdue has profited immensely from its supply of OxyContin into the black market," and that case law supports a city bringing an unjust enrichment claim were it has had to pay the "so-called externalities" of a defendant's conduct. *Id.* at 41 (citing *City of Los Angeles v. JPMorgan Chase & Co.*, 2014 WL 6453808, at *10 (C.D. Cal. Nov. 14, 2014)). Everett argues that "if a state that recognizes punitive damages has an interest in deterring the defendant's misconduct, a claim for punitive damages under that state's law can be asserted in a Washington." *Id.* (citing *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 148 (2009)).

On Reply, Purdue points out that Everett "cannot cite a single Washington case applying a nuisance theory in the absence of interference with property." Dkt. #20 at 19. With regard to punitive damages, Purdue argues that Everett must show that California or Connecticut has a more "significant relationship" to the issue of punitive damages than Washington, and that Everett alleges no meaningful facts sufficient to show this relationship. *Id.* at 20 (citing *Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 635 P.2d 441, 443 (1981). Purdue does not address Everett's arguments as to unjust enrichment.

The Court first finds that Purdue has failed to show that Everett's unjust enrichment claim fails the facial plausibility test given the case law cited by Everett. As to the other claims, the Court agrees with Purdue and will dismiss Everett's public nuisance claim for failure to allege a connection to property and dismiss Everett's claim to punitive damages for failing to show some other state has a more significant relationship to these claims than Washington State, where the injuries clearly occurred. Where a complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). The Court finds that Everett could easily allege consistent facts that cure the above deficiencies and will grant leave to amend. However, the Court notes that Everett may not seek punitive damages as a stand-alone cause of action under California or Connecticut law, and must seek punitive damages as a remedy.

IV. CONCLUSION

Having reviewed the relevant pleadings and the remainder of the record, the Court hereby finds and ORDERS that Defendants' Motion to Dismiss (Dkt. #8) is GRANTED IN PART AND DENIED IN PART as set forth above. Plaintiff is granted leave to file an

Amended Complaint curing the above-mentioned deficiencies **no later than thirty (30) days** from the date of this Order. Failure to file an Amended Complaint within this time period will result in dismissal of Plaintiff's public nuisance and punitive damages claims. All other claims will remain undisturbed.

DATED this 25 day of September, 2017.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE