



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

Civil Action No. 19-C-9000

THIS DOCUMENT APPLIES TO:

MONONGALIA COUNTY
COMMISSION, et al.,

Plaintiffs,

v.

PURDUE PHARMA L.P., et al.,

Defendants.

Civil Action Nos. 18-C-222 MSH
 18-C-233 MSH
 18-C-234 MSH
 18-C-235 MSH
 18-C-236 MSH

ORDER DENYING PHARMACY DEFENDANTS'¹
MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Pending before the Court is the *Pharmacy Defendants' Motion to Dismiss Plaintiffs' Complaint* (Transaction ID 63617464), filed in *Monongalia County Commission, et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 18-C-222 MSH and 18-C-233 MSH through 18-C-236 MSH (the *Monongalia County* cases), which has been fully briefed by the parties. The Court has reviewed the parties' briefing of the instant motion, as well as the Circuit Court of Marshall County's *Order Denying Walmart Stores East, L.P., Rite Aid of Maryland, Inc., Kroger Limited Partnership II, and CVS Indiana, L.L.C.'s Motion to Dismiss* filed in *Brooke County Commission, et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 17-C-248 MSH through 17-C-255 MSH (the *Brooke County* cases). A copy of the Order is attached as Exhibit A.

In addition, the Court has reviewed *Plaintiffs' Motion for Entry of Orders Denying Defendants' Pending Motions to Dismiss* and proposed Orders (Transaction ID 64344046), the

¹ The Pharmacy Defendants refer to Walmart Stores East, L.P., Rite Aid of Maryland, Inc., Kroger Limited Partnership II, and CVS Indiana, L.L.C.

Pharmacy Defendants' *Notice Pursuant to the Court's Order of October 9, 2019 Respecting Pharmacy Defendants' Monongalia Motion to Dismiss* (Transaction ID 64346542) and *Response to Plaintiffs' Motion for Entry of Orders Denying Defendants' Pending Motions to Dismiss* (Transaction ID 64367308), and Defendants' *Objection to Interlocutory Decision, Notice of Intent to Seek Extraordinary Writ, and Request for Findings of Fact and Conclusions of Law* (Transaction ID 64346834). Having conferred with one another to ensure uniformity of their decision, as contemplated by Rule 26.07(a) of the *West Virginia Trial Court Rules*, the Presiding Judges unanimously **DENY** the *Pharmacy Defendants' Motion to Dismiss Plaintiffs' Complaint* (Transaction ID 63617464) for the following reasons.

The claims asserted by Plaintiffs in the *Monongalia County* cases are identical to those asserted by the Plaintiffs in the *Brooke County* cases, which are companion Opioid Litigation cases now pending before the Mass Litigation Panel. Prior to referral of the Opioid Litigation to the Panel, both the *Brooke County* cases and the *Monongalia County* cases were pending before the Honorable David W. Hummel, Jr. in the Circuit Court of Marshall County, West Virginia. The Pharmacy Defendants filed a motion to dismiss the complaint in the *Brooke County* cases, asserting the same arguments and issues raised in the instant motion to dismiss. The motion was fully briefed and argued before Judge Hummel, who denied the motion to dismiss in its entirety. See Exhibit A.

Thereafter, Defendants Amerisourcebergen Drug Corporation, Cardinal Health and McKesson Corporation filed a Petition for a Writ of Prohibition with the Supreme Court of Appeals of West Virginia concerning the Marshall County Circuit Court's denial of their motions to dismiss the Complaint in the *Brooke County* cases, and the Pharmacy Defendants filed a Motion to Join the Distributor Defendants' Petition for Writ of Prohibition. The Petition was unanimously refused.

As previously held, Judge Hummel has entered numerous Orders denying motions to dismiss in the *Brooke County* cases which the Court finds are well-founded. Those Orders are the law of the case. The Court will not revisit Judge Hummel's rulings, to the extent the same parties who filed motions to dismiss in the *Brooke County* cases have filed identical motions to dismiss in the *Monongalia County* cases. See *Order Regarding Rulings Issued During the September 20, 2019 Status Conference* (Transaction ID 64297517). Accordingly, the Court hereby adopts and incorporates by reference, as if fully set forth herein, the findings of fact and conclusions of law set forth in the Marshall County Circuit Court's *Order Denying Walmart Stores East, L.P., Rite Aid of Maryland, Inc., Kroger Limited Partnership II, and CVS Indiana, L.L.C.'s Motion to Dismiss* entered in the *Brooke County* cases. See Exhibit A.

The Pharmacy Defendants contend their motion and reply filed in the *Monongalia County* cases rely upon decisions rendered after Judge Hummel's Order denying the motion to dismiss filed in the *Brooke County* cases and, therefore, the Court should consider the pending motion and new authority. Pharmacy Defendants' *Notice Pursuant to the Court's Order of October 9, 2019 Respecting Pharmacy Defendants' Monongalia Motion to Dismiss* (Transaction ID 64346542) and *Response to Plaintiffs' Motion for Entry of Orders Denying Defendants' Pending Motions to Dismiss* (Transaction ID 64367308). The Court is not persuaded by this argument. The new authority cited by the Pharmacy Defendants is from trial courts in other jurisdictions that have no precedential value.

Based upon the foregoing, it is accordingly **ORDERED** that *Pharmacy Defendants' Motion to Dismiss Plaintiffs' Complaint* (Transaction ID 63617464) is **DENIED**.

It is further **ORDERED** that all exceptions and objections are noted and preserved.

A copy of this Order has been electronically served on all counsel of record this day via
File & Serve*Xpress*.

ENTERED: October 31, 2019.

/s/ Alan D. Moats
Lead Presiding Judge
Opioid Litigation

FILED
2011 DEC 28 AM 11:09
JULY 11, 2011

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

BROOKE COUNTY COMMISSION,
HANCOCK COUNTY COMMISSION,
HARRISON COUNTY COMMISSION, LEWIS
COUNTY COMMISSION, MARSHALL
COUNTY COMMISSION, OHIO COUNTY
COMMISSION, TYLER COUNTY
COMMISSION, and WETZEL COUNTY
COMMISSION,

Plaintiffs,

vs.

PURDUE PHARMA L.P.; PURDUE PHARMA
INC.; THE PURDUE FREDERICK COMPANY,
INC.; MARK RADCLIFFE; MARK ROSS;
PATTY CARNES; TEVA
PHARMACEUTICALS USA, INC.;
CEPHALON, INC.; JANSSEN
PHARMACEUTICALS, INC.; ORTHO-
MCNEIL-JANSSEN PHARMACEUTICALS,
INC. n/k/a Janssen Pharmaceuticals, Inc.; JANSSEN
PHARMACEUTICA, INC. n/k/a Janssen
Pharmaceuticals, Inc.; JOHNSON & JOHNSON;
ENDO HEALTH SOLUTIONS INC.; ENDO
PHARMACEUTICALS, INC.; ALLERGAN plc;
ACTAVIS plc; ACTAVIS, INC.; ACTAVIS
LLC; ACTAVIS PHARMA, INC.; WATSON
PHARMACEUTICALS, INC.; WATSON
PHARMA, INC.; WATSON LABORATORIES,
INC.; MCKESSON CORPORATION;
CARDINAL HEALTH, INC.;
AMERISOURCEBERGEN DRUG
CORPORATION; RITE AID OF MARYLAND,
INC.; KROGER LIMITED PARTNERSHIP II;
CVS INDIANA, L.L.C.; WAL-MART STORES
EAST, LP; GOODWIN DRUG COMPANY;
WEST VIRGINIA BOARD OF PHARMACY;
DAVID POTTERS; EDITA P. MILAN, M.D.;
TRESSIE MONTENE DUFFY, M.D.; EUGENIO
ALDEA MENEZ, M.D.; SCOTT JAMES
FEATHERS, D.P.M.; and AMY LYNN BEAVER,
P.A.-C,

Defendants.

Civil Action No. 17-C-248

The Honorable David W. Hummel, Jr.

ORDER DENYING WALMART STORES EAST, L.P.,
RITE AID OF MARYLAND, INC., KROGER LIMITED PARTNERSHIP II,
AND CVS INDIANA, L.L.C.'S MOTION TO DISMISS

JAN 04 2013

Exhibit A

On November 7, 2018, Plaintiffs and Defendants Walmart Stores East, L.P., Rite Aid of Maryland, Inc., Kroger Limited Partnership II, and CVS Indiana, L.L.C. appeared for a hearing on Defendants' Motion to Dismiss. Having considered the pleadings, the parties' arguments and authorities in support of as well in opposition to the instant motion, the applicable law, other materials filed by the parties, and the entire court record herein, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs filed their Complaint in the above Civil Action on December 13, 2017, asserting claims related to the manufacturing, marketing, sale, and/or distribution of opioids in the Plaintiff counties and in the areas surrounding the counties.

2. Plaintiffs' Complaint asserts the following causes of action against Defendants: Public Nuisance (Count I, Compl. ¶¶ 673-90); Unjust Enrichment (Count II, *id.* ¶¶ 691-99); Fraud by Concealment (Count III, *id.* ¶¶ 700-02); and Negligence (Count IX, *id.* ¶¶ 755-75).

3. On May 1, 2018, Defendants' filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

4. In their Motion, Defendants argue that Plaintiffs' claims should be dismissed for the following reasons: Plaintiffs fail to adequately allege causation, including because the acts of third parties break the causal chain and the proximate cause pleading burden is higher in the public nuisance context; Plaintiffs' negligence claim fails because they cannot establish that Defendants owe a duty of care under the West Virginia Controlled Substances Act ("WVCSA"), as that statute does not provide a private right of action, they cannot establish that Defendants owe a common-law duty of care, their claims are barred by the economic loss rule, and they did not sufficiently allege that Defendants breached any duty of care; Plaintiffs' public nuisance claim fails because

Defendants did not interfere with a public right; and Plaintiffs have not stated a claim for unjust enrichment because they have not conferred a benefit on Defendants, Plaintiffs did not rely to their detriment on a representation from Defendants, and it is not inequitable to allow Defendants to retain the money they made from distributing opioids in Plaintiff counties.

5. Plaintiffs oppose Defendants' arguments as follows: Plaintiffs sufficiently allege the requisite casual connection between Defendants' actions and Plaintiffs' harms, the acts of third parties (even criminals) did not break the causal chain because they were foreseeable and did not create a new effective cause or operate independently, and the pleading standard for causation in the public nuisance context is lower (not higher); Plaintiffs may rely on the WVCSA to help establish the standard of care owed by Defendants, Defendants owe a common-law duty of reasonable care, the economic loss rule does not bar Plaintiffs from recovering because their damages do not result from any "interruption in commerce," and Plaintiffs adequately allege that Defendants breached their duty of care in numerous ways; significant interference with public health and safety is sufficient to constitute an interference with a public right for purposes of public nuisance; and Plaintiffs are not required to establish a direct transactional relationship in order to recover for unjust enrichment, detrimental reliance is not an element of a cause of action for unjust enrichment under West Virginia law, and it would be inequitable to allow Defendants to retain the profits they made.

Legal Standard

6. A motion to dismiss for failure to state a claim "should be viewed with disfavor and rarely granted." *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159 (1978). "The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint." *Cantley v. Lincoln Cty. Comm'n*, 221 W.

Va. 468, 470, 655 S.E.2d 490, 492 (2007). To that end, a “trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice.” *Id.* See also W.Va. R. Civ. P. 8(f). The trial court’s consideration begins, therefore, with the proposition that “[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true.” *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978). The policy of Rule 8(f) is to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied. *Id.* at 158-59.

A. Causation

7. Under West Virginia law, proximate cause is defined as that “which, in natural and continuous sequence, produces foreseeable injury and without which the injury would not have occurred.” *Hudnall v. Mate Creek Trucking, Inc.*, 200 W.Va. 454, 459, 490 S.E.2d 56, 61 (1997).

8. A plaintiff is not required to show that the negligence of one sought to be charged with an injury was the sole proximate cause of an injury. Syl. Pt. 2, *Everly v. Columbia Gas of West Virginia, Inc.*, 171 W. Va. 534, 534–35, 301 S.E.2d 165, 165–66 (1982). Instead, a plaintiff need only show the defendants actions were a proximate cause of plaintiff’s injury. *Id.*

9. Proximate cause is an elastic principle that necessarily depends on the facts of each case. *Mays v. Chang*, 213 W. Va. 220, 224, 579 S.E.2d 561, 565 (2003). Therefore, questions of proximate cause are fact-based issues that should be left for jury determination. *Id.* See also *Aikens*, 208 W.Va. at 490, 541 S.E.2d at 580.

10. In the present case, the Court finds and concludes that Plaintiffs have sufficiently pled allegations to satisfy the requirements for causation under West Virginia law. Taking the allegations in the Complaint as true and construing them in the light most favorable to Plaintiffs,

as this Court must do on a motion to dismiss, Plaintiffs have alleged numerous facts from which a jury could conclude that Defendants' acts and omissions were a proximate cause of Plaintiffs' injuries. (See, e.g., Compl. ¶¶ 773 ("Plaintiffs are without fault and the injuries to the County and its residents would not have occurred in the ordinary course of events had the Distributor Defendants used due care commensurate to the dangers involved in the distribution of opioids."), 774 ("[T]he Distributor Defendants' breach of duty bears a causal connection with and/or proximately resulted in the harm and damages to Plaintiffs."), 775 ("As a direct and proximate result of the Distributor Defendants' actions, as set forth herein, Plaintiffs have suffered and continue to suffer injury and damages, including but not limited to, incurring excessive costs related to diagnosis, treatment, and cure of abuse and/or addiction or risk of addiction to opioids; bearing the massive costs of these illnesses and conditions by having to provide necessary resources for care, treatment facilities, and law enforcement associated with opioid addiction, abuse and diversion; and property damage.").)

11. The Court further finds and concludes that Defendants' conduct was not too remote from the opioid epidemic, even considering that third party conduct may have also have contributed to the opioid epidemic. Under West Virginia law, the acts of third parties do not break the chain of causation unless they "constitute[] a new effective cause and operate[] independently of any other act, making it and it only, the proximate cause of the injury." *Syl. Pt. 12, Marcus v. Staubs*, 230 W.Va. 127, 736 S.E.2d 360, 372 (2012) (quotation marks omitted). Even third-party criminal acts do not defeat causation if they are foreseeable. See, e.g., *id.*

12. Notably, other opioid cases addressing virtually identical allegations to those at issue here have held that proximate causation was sufficiently pled. See *Morrissey v. AmerisourceBergen Drug Corp.*, No. 12-cv-141, 2014 WL 12814021, at *12 (W. Va. Cir. Ct.,

Boone County Dec. 12, 2014); *In re Opioid Litigation*, No. 400000/2017, at 20 (Sup. Cr. Suffolk Co. July 17, 2018).

13. Finally, the Court finds and concludes that Plaintiffs have adequately pled causation for their public nuisance claims. In a public nuisance cause of action, “where the welfare and safety of an entire community is at stake, the cause need not be so proximate as in individual negligence cases.” *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435, 497 (E.D.N.Y. 2003) (emphasis added). And “[t]he tortious actions or omissions of a defendant or defendants need not be the immediate cause of injury to the public.” *City of New York*, 315 F. Supp. 2d at 282. “If a defendant’s conduct remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did, it may be held liable for setting in motion or being a force in the sequence of events resulting in injury to the public.” *Id.* (quotation marks omitted).

B. Negligence

14. A “[v]iolation of a statute is *prima facie* evidence of negligence.” *Marcus v. Staubs*, 736 S.E.2d 360, 368 (W.Va. 2012) (quoting *Anderson v. Moulder*, 183 W. Va. 77, 83, 394 S.E.2d 61, 66-67 (W. Va. 1990)) (quotation marks omitted). “The same is true for violations of regulations.” *Morrissey v. AmerisourceBergen Drug Corp.*, No. 12-cv-141, 2014 WL 12814021, at *7 n.6 (W. Va. Cir. Ct., Boone County Dec. 12, 2014) (citing *Hersh v. E T Enterprises, Ltd. P’ship*, 232 W.Va. 305, 752 S.E.2d 336 (2013)); *Miller v. Warren*, 182 W.Va. 560, 390 S.E.2d 207 (1990).

15. The Court finds and concludes that Plaintiffs are not attempting to assert a private right of action under the WVCSA. Instead, they rely on the WVCSA to help establish a standard of care for their common-law negligence claim, which is permissible under the law. *See, e.g., Morrissey*, 2014 WL 12814021, at *7 (“A violation of a statute or ordinance can constitute actionable negligence.”) (citing *State Rd. Comm’n v. Ball*, 138 W. Va. 349, 350 (W. Va. 1953));

In re Opioid Litigation, No. 400000/2017, at 20 (Sup. Ct. Suffolk Co. July 17, 2018) (“The distributor defendants also contend that the cause of action for negligence must be dismissed, because the plaintiffs may not enforce the New York State Controlled Substances Act. This argument is rejected, as the cause of action is not predicated solely on a violation of the statute[.]”)

16. The Court further finds and concludes that Defendants owe a common-law duty of reasonable care.

17. In West Virginia, foreseeability of risk is a primary consideration in determining the scope of a duty an actor owes to another. In addition, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection which include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant. *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983).

18. In the present case, Plaintiffs allege that the Distributor Defendants were aware of the potentially dangerous situation involving opioids, including but not limited to the addiction, abuse and diversion that was occurring, and had actual knowledge that opioid drugs were being misused, abused, and diverted within the Counties and surrounding areas. Plaintiffs further allege that Distributor Defendants knew that opioids were unreasonably dangerous and highly addictive and were highly susceptible to abuse and diversion. Plaintiffs allege the Distributor Defendants knew or should have known that the opioid drugs they distributed were highly susceptible to addiction, misuse, abuse and/or diversion; opioid drug addiction, misuse, abuse and/or diversion bore a direct relationship to the amount and volume of opioids being distributed within the Counties; and that the opioid drugs they distributed were being misused, abused and diverted across the country, including in the Counties. Plaintiffs also allege that the Distributor Defendants

knew or should have known that opioid addiction and its related consequences would injure and damage communities across the country, including the Counties. As discussed herein, applicable West Virginia laws, and the industry standards applicable to the distribution and sale of opioid drugs exist to control addiction, abuse and/or diversion associated with these dangerous drugs. Moreover, the Distributor Defendants were repeatedly warned and/or put on notice concerning their actions and the effects their actions were having in communities across the country, including the Counties. The escalating amounts of highly addictive drugs being distributed, and the sheer volume of these prescription opioids, further alerted the Distributor Defendants that addiction was fueling increased addiction, abuse and diversion, and that legitimate medical purposes were not being served.

19. Under the circumstances alleged in Plaintiffs' Complaint, and described hereinabove, it was foreseeable that the Distributor Defendants' actions and inactions would result in harm to Plaintiffs and, therefore, Defendants owed a duty of care to Plaintiffs as alleged in Plaintiffs' Complaint.

20. Furthermore, public policy considerations support the imposition of a duty of care here considering, without limitation, the likelihood and risk of injury caused by highly addictive opioids, the minimal burden imposed on the Distributor Defendants to guard against injury and damage, and the absence of adverse consequences of placing the burden on the Distributor Defendants to guard against the likely injury. *See Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983).

21. Moreover, under West Virginia law, "[t]he 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." *Syl. Pt. 1, Robertson v. LeMaster*,

171 W. Va. 607, 607, 301 S.E.2d 563, 563 (1983) (quotation marks omitted). *See also In re Opioid Litigation*, No. 400000/2017, at 19 (“Here, the plaintiffs have adequately pled the existence of a duty owed by the distributor defendants by alleging that societal expectations required different behaviors on their part, including, but not limited to, refusing to fill suspicious orders for opioids[.]”). In addition, “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.” *Stevens v. MTR Gaming Grp., Inc.*, 237 W. Va. 531, 534, 788 S.E.2d 59, 62 (2016). Here, Plaintiffs have alleged that Defendants were engaged in a dangerous activity that created an unreasonable risk of harm. (*See, e.g.,* Compl. ¶¶ 637, 639, 758-60.)

C. Economic Loss Rule

22. In contending that the economic loss rule bars Plaintiffs’ claims, Defendants rely on *Aikens v. Debow*, where a motel and restaurant operator sued a truck driver and his employer seeking damages for loss of income, which the operator claimed was the result of a bridge closure caused by repairs after it was struck by the defendants’ truck. *Id.*, 208 W. Va. 486, 490, 541 S.E.2d 576, 580 (2000). The court rejected the operator’s claims, holding that under the economic loss rule “[a]n individual who sustains economic loss from an *interruption in commerce* caused by another’s negligence may not recover damages in the absence of physical harm to that individual’s person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual.” *Id.* at Syl. Pt. 9 (emphasis added). “In *Aikens*, the Supreme Court of Appeals emphasized that the holding only applies strictly to plaintiffs alleging purely economic loss from an interruption in commerce caused by another’s

negligence.” *Morrissey v AmerisourceBergen Drug Corp.*, No. 12-cv-141, 2014 WL 12814021, at *20 (W. Va. Cir. Ct., Boone County Dec. 12, 2014) (quotation marks omitted).

23. Here, the Court finds and concludes that the economic loss rule does not bar Plaintiffs’ negligence claims because Plaintiffs’ damages do not result from any “interruption in commerce.” Moreover, the economic loss rule “does not bar recovery in tort where the defendant had a duty imposed by law rather than by contract and where the defendant’s intentional breach of that duty caused purely monetary harm to the plaintiff.” *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007).

24. Notably, a similar argument has been rejected by other courts in similar opioid litigations. *See In re Opioid Litigation*, No. 400000/2017, 2018 WL 3115102, at *27 (Sup Ct, Suffolk County June 18, 2018); *Morrissey*, 2014 WL 12814021, at *19.

25. Finally, the Court finds and concludes that Plaintiffs adequately allege that Defendants breached their duty of care. (See, e.g., Compl. ¶¶ 643 (“The Distributor Defendants owed the Counties a duty of care, yet failed in their duty to take any action to prevent or reduce the distribution of these drugs or the addiction, abuse, diversion misuse and other problems they were causing.”), 645 (“The Distributor Defendants, in the interest of their own massive profits, intentionally failed in these duties.”), 646 (“The Distributor Defendants have displayed a continuing pattern of failing to report suspicious orders, including those relating to the Counties.”), 763 (“Moreover, given the number of prescriptions and the total population of the Plaintiffs’ counties, the Distributor Defendants knew or should have known that they were supplying opioid medications far in excess of the legitimate needs of the Counties and surrounding areas and intentionally distributed an excessive amount of highly addictive pain killers to the Counties and surrounding areas.”), 769 (“The Distributor Defendants breached their duty to exercise the degree

of care, prudence, watchfulness, and vigilance commensurate to the dangers involved in the transaction of their business.”.)

D. Public Nuisance

26. The Court finds and concludes that public nuisance is not limited to property disputes and that West Virginia courts have applied the public nuisance doctrine in numerous contexts, including in opioids cases like this. *See, e.g., Morrissey*, 2014 WL 12814021, at *8 n.9 (“Our Supreme Court has stated that a nuisance has a ‘broad definition’ and that ‘nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations.’”) (quoting *Sharon Steel Corp. v. City of Fairmont*, 334 S.E.2d 616, 621 (1985)). *See also Lemongello v. Will Co., Inc.*, No 02-cv-2952, 2003 WL 21488208, at *2 (W. Va. Cir. Ct. June 19, 2003) (“This Court finds that West Virginia law does not limit claims of public nuisance to those dealing with real property.”); Restatement (Second) of Torts § 821B cmt. H (1979) (“a public nuisance does not necessarily involve interference with use and enjoyment of land”); Restatement (Second) of Torts § 821B(2)(a) (“a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience”).

27. The Court further finds and concludes that Plaintiffs have adequately alleged that Defendants interfered with a public right. (*See, e.g.,* Compl. ¶¶ 26, 34, 42, 44, 47, 51, 607, 610, 675, 678, 679, 686.) *See, e.g., Morrissey*, 2014 WL 12814021, at *9 (“An unreasonable interference includes acts that significantly interfere with public health, safety, peace, comfort, or convenience, conduct that is contrary to a statute, ordinance, or regulation, or conduct that is of a continuing nature or one which has produced a permanent or long-lasting effect upon the public right, an effect of which the actor is aware or should be aware.”) (citing Restatement (Second) of Torts § 821B(2)); *In re Opioid Litigation*, No. 400000/2017, at 13.

28. Finally, the Court finds and concludes that “although the Defendants argued the necessity of an unlawful act to sustain nuisance, . . . the same is not necessary to create a public nuisance.” *Lemongello*, 2003 WL 21488208, at *2.

E. Unjust Enrichment

29. The elements of an unjust enrichment are “(1) a benefit conferred upon the [defendant], (2) an appreciation or knowledge by the defendant of such benefit, and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.” *Employer Teamsters-Local Nos. 175/505 Health & Welfare Tr. Fund v. Bristol Myers Squibb Co.*, 969 F. Supp. 2d 463, 471 (S.D. W. Va. 2013).

30. In the present case, Plaintiffs need not establish that they wrote a check to Defendants. “A person may be unjustly enriched not only where he receives money or property, but also where he otherwise receives a benefit. He receives a benefit . . . where he is saved expense or loss.” *Prudential Ins.*, 180 W. Va. at 215, 376 S.E.2d at 109 (quotation marks and citation omitted).

31. A direct transactional relationship is also not a prerequisite for unjust enrichment. *See Absure, Inc. v. Huffman*, 213 W. Va. 651, 654-55, 584 S.E.2d 507, 510-11 (2003) (improper indirect payment could be basis for unjust enrichment, and “a third party connected with a transaction may seek restitution where there is unjust enrichment which resulted from the third party satisfying an obligation of the unjustly enriched party”) (citing *Prudential Ins. Co. v. Couch*, 180 W. Va. 210, 376 S.E.2d 104 (1988)); *Dunlap v. Hinkle*, 173 W. Va. 423, 426, 317 S.E.2d 508, 512 n. 2 (1984) (“unjust enrichment does not necessitate a finding of privity of contract between the parties.”) (citations omitted); *Realmark Developments, Inc. v. Ranson*, 214 W. Va. 161, 164,

588 S.E.2d 150, 153 (2003) (“[I]f benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value.”) (quotation marks and citation omitted).

32. The Court finds and concludes that Plaintiffs’ Complaint sufficiently alleges the elements of unjust enrichment in this case. The Complaint alleges that as a result of Defendants’ wrongful conduct in distributing opioids, Plaintiffs have incurred increased opioid-related costs. Defendants have benefitted from Plaintiffs having paid for these costs caused by Defendants’ negative externalities (*i.e.*, the cost of the harms caused by their wrongful practices). Defendants knowingly saved on expenses, thereby allowing them to distribute more opioids, and make more money, than if they had internalized the actual cost of their activities. Therefore, Defendants have received a benefit unjustly financed by Plaintiffs.

33. The Court further finds and concludes that detrimental reliance is not an element of a cause of action for unjust enrichment under West Virginia law. *See, e.g., Employer Teamsters-Local Nos. 175/505 Health & Welfare Tr. Fund*, 969 F. Supp. 2d 463, 471 (W.Va. S.D. 2013).

34. Finally, the Court finds and concludes that Plaintiffs have sufficiently alleged that it would be inequitable to allow Defendants to keep the profits they made from funneling opioids into Plaintiff counties. For this reason, other courts addressing similar allegations have denied motions to dismiss. *See In re Opioid Litigation*, No. 400000/2017, at 17 (“The distributor defendants have also failed to explain why, as a pleading matter, the retention of profits wrongfully obtained would not be unjust.”).

FILED

ORDER 2018 DEC 28 AM 11:10

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court, taking the allegations in the Complaint as true and construing the Complaint in the light most favorable to Plaintiffs, **FINDS** that Plaintiffs' Complaint sufficiently states claims for relief against the Defendants and the Defendants have not demonstrated beyond doubt that Plaintiffs can prove no set of facts in support of their claims (as it must do to succeed on a motion to dismiss). Accordingly, it is

ORDERED that Defendants' Motion to Dismiss is denied in its entirety.

It is further **ORDERED** that all exceptions and objections are noted and preserved.

It is further **ORDERED** that an attested copy of this Order shall be provided to all counsel of record.

ENTERED THIS 28th day of December, 2018.



Honorable David W. Hummel, Jr.
Judge of the Circuit Court
Marshall County, West Virginia

A Copy Teste:

Joseph M. Rucki, Clerk

By Dennis Croza Deputy