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CITY OF HOBOKEN,

Plaintiff,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL
CORP., ROYAL DUTCH SHELL PLC,
SHELL OIL COMPANY, BP P.L.C., BP
AMERICA INC., CHEVRON CORP.,
CHEVRON U.S.A. INC., CONOCOPHILLIPS,
CONOCOPHILLIPS COMPANY, PHILLIPS
66, PHILLIPS 66 COMPANY, and
AMERICAN PETROLEUM INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. HUD-L-3179-20

Civil Action
CBLP Action

ORAL ARGUMENT IS REQUESTED

**JOINT REPLY IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
ON THE GROUNDS OF THE STATE'S DUPLICATIVE SUIT**

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I. INTRODUCTION

The City of Hoboken (“Plaintiff” or the “City”) objects to Defendants’ commonsense call for judicial economy and avoiding duplicative litigation, but it fails to identify any material distinctions between the lawsuits filed by Plaintiff and the New Jersey Attorney General¹ (the “State”). Nor could it, because Plaintiff and the State seek virtually *the same relief*, for the *same alleged harms*, based on the *same set of facts*, from the *same Defendants*, relying on the *same theories of liability*.² Plaintiff also fails to address the significant burden that duplicative litigation would impose on New Jersey’s judicial system and Defendants, including duplicative discovery and motion practice, and it does not and cannot contest the substantial efficiencies to be gained from dismissing Plaintiff’s suit—or, at minimum, holding it in abeyance pending resolution of the State’s case.³ Finally, Plaintiff does not and cannot identify any prejudice that it would face if the Court dismissed its case and allowed the State, acting *parens patriae*, to proceed on behalf of the citizens of New Jersey, including the citizens of Hoboken. *See* N.J. Compl. ¶ 2.

Plaintiff’s attempts to challenge the propriety of this course of action are unavailing. Plaintiff incorrectly contends that the New Jersey Consumer Fraud Act (“CFA”) specifically allows for overlapping claims. *See* Opp. 5–6 (quoting N.J.S.A. § 56:8-2.13). Contrary to Plaintiff’s suggestion, although the CFA permits multiple types of actors—including both individuals and the

¹ The State’s Complaint can be found at Exhibit A to the Certification of Herbert J. Stern, Esq. (“Stern Cert.”), accompanying Defendants’ Motion to Dismiss.

² The only distinguishing factor that Plaintiff points to is its recently added (and meritless) claim for violations of New Jersey’s Racketeer Influenced Corrupt Organizations Act (“NJ RICO”), *see* Opp. 3, but the relief it seeks under that claim is entirely redundant of the relief sought under its other claims.

³ Consolidation would not eliminate such duplication in its entirety, and there is no reason to tolerate any waste of judicial and party resources given that the State’s case entirely encompasses Plaintiff’s claims for relief.

Attorney General—to file claims, it does not authorize *duplicative* lawsuits seeking the same relief to proceed *simultaneously*. And while the CFA does not “deny, abrogate, or impair” a plaintiff’s right to pursue statutory or common law rights in addition to a CFA claim, it does not—as Plaintiff contends—permit duplicative CFA claims. N.J.S.A. § 56:8-2.13.

Furthermore, Plaintiff’s contention that Defendants are attempting to “invent a new legal doctrine,” Opp. 1, is belied by New Jersey caselaw that favors the avoidance of duplicative litigation and the dismissal of claims where it is necessary to do so. *See, e.g., Lemelledo v. Beneficial Mgmt. Corp. of Am.*, 150 N.J. 255, 275 (1997) (noting that a court “may stay proceedings until the agency” “has exercised its jurisdiction” and, only then, “resume its proceedings after the agency has completed its own”); *Olive v. Graceland Sales Corp.*, 61 N.J. 182, 186 (1972) (stating that “there may be no need for a private” lawsuit if “the relief sought by the Attorney General will adequately deal with the grievance alleged by the private suitor”). And Plaintiff glosses over the critical holding of *Cosentino v. Philip Morris Inc.*, 1998 WL 34168879 (N.J. Super. Ct. Law. Div. Oct. 22, 1998), which disallowed private plaintiffs from pursuing the same relief sought by the Attorney General against tobacco industry defendants. *See* Opp. 7–9. Plaintiff does not and cannot dispute that it seeks materially identical relief as the State, and thus, under *Cosentino*, its claims should be dismissed.

Plaintiff’s reliance on out-of-state cases, *see* Opp. 11–15, is equally unavailing. At most, those cases stand for the proposition that certain local governments have *standing* to bring certain suits. But, importantly, none of the cases Plaintiff relies on supports the proposition that courts should permit duplicative lawsuits to proceed simultaneously.

At bottom, given the substantial burden that duplicative litigation would impose on Defendants and the New Jersey courts, and the lack of prejudice to Plaintiff in allowing the State

to proceed in its *parens patriae* capacity on behalf of Hoboken’s citizens, this Court should exercise its uncontested authority to manage its docket and dismiss Plaintiff’s claims in deference to the State’s pending lawsuit.

II. BACKGROUND

Plaintiff has brought a sprawling suit that seeks to use state law to hold Defendants responsible for the alleged effects of global climate change. Plaintiff initially asserted five causes of action: (1 & 2) public and private nuisance; (3) trespass; (4) negligence; and (5) violations of the CFA. Compl. ¶¶ 289–365.

After Plaintiff filed its suit, the State of New Jersey filed suit, seeking the same relief under its *parens patriae* authority. *See Platkin v. Exxon Mobil Corp. et al.*, No. MER-L-001797-22 (N.J. Super. Ct., Mercer Cnty.). When the State filed its case on October 18, 2022, it named the same thirteen defendants present here, and it asserted nearly identical claims and theories as this case does, with the State adding only a public trust claim. Importantly, the relief the State seeks—all damages from climate change suffered anywhere in the State, including by individual municipalities, such as Hoboken—entirely subsumes the relief the City seeks here. *See* N.J. Compl. at 193–94.

Plaintiff subsequently filed an Amended Complaint tacking on a claim under New Jersey’s RICO statute. *See* Am. Compl. ¶¶ 16, 385–415. Although pleaded as a distinct cause of action, this claim is predicated on the same underlying facts and seeks to recover for the same alleged injuries—*i.e.*, the “climate harms experienced by [the City].” *Id.* ¶ 15. Plaintiff’s requested relief includes compensatory damages, punitive damages, treble damages under the CFA and NJ RICO, abatement of the alleged nuisance, and an award of costs and fees. *Id.* at 160.

III. ARGUMENT

A. Plaintiff's Case Is Duplicative Of The State's Identical Suit.

Plaintiff's and the State's cases are virtually identical. Like the City, the State asserts causes of action for public and private nuisance, trespass, negligence, and violations of the CFA, among other claims. *See* N.J. Compl. ¶¶ 250–59; 268–81; 282–333. And the State alleges the same underlying facts as Plaintiff, *compare* Am. Compl. ¶¶ 1–16 *with* N.J. Compl. ¶¶ 1–18, including allegations related to flooding in Hoboken following Superstorm Sandy, N.J. Compl. at 147, which is also a focus of Plaintiff's Amended Complaint, *see, e.g.*, Am. Compl. ¶¶ 275–79. Moreover, the State brought suit in its *parens patriae* capacity, seeking to recover for all climate change-related “damages to the State of New Jersey [] and to its residents,” which includes Hoboken and its residents. N.J. Compl. ¶ 2. Finally, the State, like the City, seeks compensatory damages, punitive damages, abatement of the alleged nuisance, costs of abatement, and an award of costs and fees. *Id.* at 193–94. Given the virtually identical causes of action, alleged injuries, theories of liability, and requested relief, it is difficult to imagine a clearer example of duplicative litigation.

In its Opposition, Plaintiff does not dispute that there is near-complete overlap between the two cases. The *only* substantive difference Plaintiff identifies is the NJ RICO claim that it added through amendment in April 2023—more than six months after the State filed suit. *See* Opp. 1, 3, 10. But Plaintiff's NJ RICO claim, which fails as a matter of law for the numerous reasons identified in Defendants' Motion to Dismiss, *see* Defs.' Br. 58–66, is premised on the same theory of the case and the same allegations as Plaintiff's—and the State's—other causes of action. *See, e.g.*, Am. Compl. ¶ 392 (alleging “a common scheme . . . to deceive the public through fraudulent means about fossil fuels' central role in causing catastrophic climate change in order to ensure that oil and gas companies . . . could continue to accelerate their marketing and sale of fossil fuels”). Plaintiff makes an additional conclusory reference in a footnote to “separate money damages sought

by [the City] and the Attorney General” under the CFA, Opp. 8 n.3, but it fails to specify how, if at all, those damages are distinct from the damages sought by the State.⁴ Given that the State seeks compensatory damages, punitive damages, abatement, and related costs for the *exact same alleged injuries* as Plaintiff based on *precisely the same alleged facts* on behalf of the *same people*, Plaintiff unsurprisingly fails to identify any prejudice that would result from dismissing this action in deference to the State’s case.

B. Plaintiff’s Prosecution Of Duplicative Litigation Is Contrary To New Jersey Law.

New Jersey courts recognize that deference to the Attorney General’s *parens patriae* authority sometimes requires parallel suits to stand aside to avoid duplicative litigation. For example, in *Cosentino*, individual plaintiffs brought five actions seeking class certification against several tobacco companies and tobacco trade associations, but the Attorney General initiated a separate lawsuit “based on [the State’s] *parens patriae* power.” 1998 WL 34168879, at *3.⁵ The Superior Court noted that the State’s lawsuit contained many of the same allegations as the individual plaintiffs’ suits, including deceptive trade practice and product liability claims, and exercising its “discretionary power,” “disallow[ed]” any relief requested in the “private suits and/or class actions” that overlapped with the relief requested by the Attorney General. *Id.* Likewise, in *Olive*, the Supreme Court advised that “[w]hen the Attorney General sues for a class, there may be no need for a private class action if the class is the same and the relief sought by the Attorney

⁴ As set forth in Defendants’ Motion to Dismiss, *see* Defs. Br. 56–58, Plaintiff improperly seeks to bring a CFA claim on behalf of “consumers in New Jersey,” or the public more broadly, rather than in its capacity as a consumer, *see* Am. Compl. ¶¶ 375–76, 378.

⁵ Plaintiff argues that Defendants’ citation to *Cosentino* was somehow procedurally improper because *Cosentino* is unpublished. Opp. 7 n.2. This suggestion is baseless. Contrary to Plaintiff’s selective quotation, Rule 1:36-3 does not bar citation of an unpublished opinion; it merely requires the party to provide “a copy of the opinion and of all contrary unpublished opinions known to counsel”—which, of course, Defendants did. *See* Stern Cert., Ex. I.

General will adequately deal with the grievance alleged by the private suitor.” 61 N.J. at 186. The Supreme Court reaffirmed this guidance in *Lemelledo*, noting that a court entertaining a private cause of action under the CFA might, in its discretion, defer to an agency that “legitimately has exercised its jurisdiction” in connection with an identical proceeding. 150 N.J. at 275.

Plaintiff’s attempts to distinguish these cases are unavailing. Plaintiff claims that *Cosentino* involved only whether to certify individual plaintiffs’ motions for class certification, “not dismissal.” Opp. 7–8. But Plaintiff ignores the plain language of the decision. The court made clear that “[b]efore addressing the [class certification] issues in the present motion, the court must decide whether the suit which the Attorney General filed against the tobacco industry on behalf of the State of New Jersey preempts or precludes the plaintiffs in the instant case from seeking similar relief.” 1998 WL 34168879, at *2 (emphasis added). The Superior Court concluded that permitting duplicative litigation was inappropriate and accordingly “disallow[ed]” any “requests for relief in the private suits and/or class actions that deal with the reliefs enumerated in the Attorney General’s case.” *Id.* at *3. Only after making that threshold determination did the Court proceed to rule on the motion for class certification. *Id.* at *3–4. On this point, the Superior Court could not have been clearer—and Plaintiff’s failure to contend with this critical holding speaks volumes. Just as in *Cosentino*, Plaintiff’s duplicative claims seeking identical relief should be “disallow[ed].” *Id.* at *3.

Plaintiff’s heavy reliance on *Lemelledo* is misplaced. Plaintiff suggests that *Lemelledo* stands for the proposition that the CFA permits duplicative suits because the Court noted that “underenforcement may” result when “remedial power is concentrated in one agency.” Opp. 1. That is wrong. As explained in Defendants’ Motion to Dismiss, *see* Defs. Br. 56–58, the CFA authorizes claims by the Attorney General in his or her representative capacity and by private

persons in their capacity as consumers. *Lemelledo* did not permit simultaneous, duplicative litigation to proceed on behalf of the State and one of its political subdivisions. Rather, the language Plaintiff cites is related to the court’s analysis of whether a private CFA case was preempted by State regulation. *See* 150 N.J. at 266 (explaining that the court must resolve whether a lender’s being regulated “by several State agencies” exempted them from “CFA liability” out of concern for “potentially inconsistent administrative obligations”). That issue is not at play here, where the Attorney General of New Jersey has sought to enforce the CFA in his representative capacity on behalf of the State’s citizens, and the City attempts to do the same on behalf of a subset of those same citizens.

The portion of *Lemelledo* that is actually relevant to this case is the Supreme Court’s concluding observation that “a court entertaining *a private cause of action* under the CFA might, in its discretion, defer to an agency that legitimately has exercised its jurisdiction.” *Id.* (emphasis added). That is exactly the case here: this Court should, in its discretion, defer to the broader and more comprehensive action brought by the State, which entirely subsumes Plaintiff’s action. Notwithstanding Plaintiff’s strained attempt to distinguish *Lemelledo* based on the specific type of agency activity at issue, *see* Opp. 8–9, Plaintiff cannot escape the Supreme Court’s clear guidance that, to avoid duplicative litigation, courts may “defer to an agency that legitimately has exercised its jurisdiction.” *Lemelledo*, 150 N.J. at 275. Plaintiff also ignores the Supreme Court’s instruction that “courts and agencies charged with enforcement of the various laws designed to protect consumers from unscrupulous practices [should] be able and willing to coordinate their enforcement responsibilities in a constructive and flexible manner.” *Id.* Such coordination and deference to the Attorney General is exactly what Defendants advocate for here.

Plaintiff also cites irrelevant language from *Olive*, noting that the CFA does not “vest in

the Attorney General the exclusive power to act in the area of consumer fraud.” Opp. 4 (quoting *Olive*, 61 N.J. at 185). But, again, Defendants do not argue that the Attorney General is the only actor authorized to bring CFA suits. Rather, when the State *and* a local government have brought materially *identical* suits, seeking *duplicative* relief, the State’s suit subsumes the municipality’s. The Supreme Court’s opinion in *Olive* supports this result, advising that “there may be no need for a private class action if the class is the same and the relief sought by the Attorney General will adequately deal with the grievance alleged by the private suitor.” 61 N.J. at 186. Here, where the State’s suit “cover[s] the whole ground” and pursues the interests of the City and its citizens, among others, *id.*, the logic of *Olive* indicates that it is appropriate for Plaintiff’s suit to yield to the State’s.

Finally, Plaintiff repeatedly cites the CFA’s savings clause for the idea that ““addition[al]” and ““cumulative”” CFA claims are permitted. Opp. 6 (quoting N.J.S.A. § 56:8-2.13). Plaintiff plainly misinterprets that provision. Nowhere does N.J.S.A. § 56:8-2.13 contemplate duplicative CFA claims proceeding in parallel. Rather, N.J.S.A. § 56:8-2.13 provides that the CFA does not “deny, abrogate or impair” any “*other* right, remedy or prohibition accorded by the common law or [New Jersey] statutes” (emphasis added). Plaintiff’s proffered interpretation is irreconcilable with the statute’s plain language.

Ultimately, the question here is what to do with simultaneous, duplicative cases brought by subdivisions of the State and the Attorney General. The Supreme Court and Appellate Division have been unequivocal in their instruction to avoid such redundant proceedings, and Plaintiff cites no New Jersey caselaw or statutory law to the contrary. Indeed, even Plaintiff admits that a “court may elect to stay proceedings while an agency proceeding is ongoing.” Opp. 9.

C. The Court Has Inherent Authority To Dismiss Or Stay This Duplicative Litigation.

New Jersey trial courts are vested with broad inherent authority to manage their dockets to ensure fair, orderly, and efficient proceedings. Courts have recognized this inherent authority exists

in both civil and criminal cases, from the pleadings stage to trial. *See, e.g., State v. Shaw*, 455 N.J. Super. 471, 484 (App. Div. 2018), *aff'd*, 241 N.J. 223 (2020) (recognizing “the judiciary’s inherent authority to assure fundamental fairness”); *Zehl v. City of Elizabeth Bd. of Educ.*, 426 N.J. Super. 129, 139 (App. Div. 2012) (“[C]ourts have the inherent authority, if not the obligation, to control the filing of frivolous motions and to curtail harassing and vexatious litigation.” (quotation marks omitted)); *Dzubiek v. Schumann*, 275 N.J. Super. 428, 439 (App. Div. 1994) (“It is generally accepted that courts have inherent powers beyond those specifically delegated or confirmed by statute or court rule to do what is reasonably necessary for the orderly and efficient administration of justice within the scope of their jurisdiction.”). The Rules of Court themselves “shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.” Rule 1:1-2(a). Ultimately, this inherent authority boils down to discretion, on the part of trial courts, “to see that justice is done.” *State v. Speth*, 324 N.J. Super. 471, 474 (Law. Div. 1997), *aff'd*, 323 N.J. Super. 67 (App. Div. 1999).

One aspect of the courts’ inherent authority is the power to dismiss or stay redundant or duplicative proceedings that risk unnecessarily expending judicial resources or leading to conflicting rules. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”); *Young v. Martin*, 801 F.3d 172, 183 (3d Cir. 2015) (“[A] district court may stay proceedings ‘[i]n the exercise of its sound discretion’” (quoting *Bechtel Corp. v. Local 215, Laborers’ Int’l Union of N. Am.*, 544 F.2d 1207, 1215 (3d Cir. 1976))); *First City Nat’l Bank & Tr. Co. v. Simmons*, 878 F.2d 76, 80 (2d Cir. 1989) (holding that “considerations of judicial administration and conservation of resources” may require dismissal of a redundant lawsuit). Although courts normally defer to the “first-filed”

case in instances of significant overlap, they also recognize an exception where “balance of convenience” or “special circumstances” weigh strongly in favor of the later-filed lawsuit. *First City Nat’l Bank*, 878 F.2d at 79 (cleaned up).

Here, the Court should exercise its inherent authority to dismiss Plaintiff’s suit in deference to—and in recognition of the “special circumstances” presented by—the State’s materially identical suit. *Id.*; see *Cottle v. Bell*, 229 F.3d 1142 (4th Cir. 2000) (“[A] lawsuit is duplicative of another one if the parties, issues and available relief do not significantly differ between the two”). As explained in Defendants’ motion to dismiss, under New Jersey law, counties and cities are “subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental function.” *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 107–08 (1967). Counties and cities therefore have derivative status relative to the State itself and should defer to the State’s direct intervention in a litigation matter. Defs. Br. 9–10. Accordingly, courts seeking to ensure “that justice is done,” *Speth*, 324 N.J. Super. at 474, should avoid subjecting Defendants to duplicative litigation and expending unnecessary judicial resources when adjudication of a single suit—here, the State’s *parens patriae* action—can resolve all of the relevant claims.

Dismissing Plaintiff’s claims or holding them in abeyance now makes particular sense given that the parties are still in the very early stages of this litigation. Plaintiff will thus suffer no prejudice from having its case dismissed or stayed in deference to the Attorney General’s case, which is also in the pleadings stage. See Ex. A to reply Cert. of Herbert J. Stern, Esq. (Joint Stipulation & Consent Order, *Platkin v. Exxon Mobil Corp.*, No. MER-L-1797-22 (N.J. Super. Aug. 17, 2023)). This is particularly true given that the State, acting *parens patriae*, is pursuing claims on behalf of all citizens of New Jersey, including the citizens of Hoboken. See N.J. Compl. ¶ 2. The State’s case entirely encompasses—and extends beyond—Plaintiff’s claims for relief. These

“special circumstances” warrant deference to the State’s case and dismissal of Plaintiff’s narrower, entirely duplicative claims. *First City Nat’l Bank*, 878 F.2d at 79.

By contrast, there would be a tremendous waste of judicial and party resources if these nearly identical suits were to proceed simultaneously—invariably requiring duplicative fact discovery, expert discovery, and motion practice. Moreover, permitting the suits to proceed on parallel tracks would raise a substantial risk of contradictory or inconsistent rulings throughout the course of each suit, from motions to dismiss, to discovery, to summary judgment, to trial. As one example, the City’s and the State’s sprawling claims raise a number of complex questions of law, and it is theoretically possible that—based on essentially identical records—one court may dismiss some or all of a plaintiff’s claims, while the other allows a similar claim to proceed (although in reality all claims should be dismissed). In such an event, Defendants would almost certainly seek interlocutory review to clarify the correct legal rule “in the interest of justice,” *see* Rule 2:2-4, requiring yet a further waste of judicial resources that could otherwise be saved through the prosecution of only the State’s case. *Cf. Est. of Kainer v. UBS AG*, 175 A.D.3d 403, 405 (N.Y. App. Div. 2019), *aff’d*, 181 N.E.3d 537 (N.Y. 2021) (citing “the risk of conflicting rulings” as weighing in favor of dismissal based on *forum non conveniens*); *Datwani v. Datwani*, 121 A.D.3d 449, 449 (N.Y. App. Div. 2014) (same). This risk would continue throughout the litigation.

D. Courts Across The Country Have Recognized That State Litigation Should Take Precedence Over Local Litigation.

The commonsense principle articulated by Defendants has been recognized not only in New Jersey, but by courts around the country. In fact, although Plaintiff repeatedly cites opioid litigation in its Opposition, it ignores that a Florida state court recently issued an emphatic affirmation of Defendants’ position in the opioid context.

In Florida, the Attorney General brought nuisance, negligence, consumer fraud, and RICO

claims against defendants alleged to be responsible for the opioid crisis, before entering into a settlement that provided for the release of claims by the State’s political subdivisions. In a May 2023 decision, the trial court held that the Attorney General had authority to release the subdivisions’ claims—precisely because the State’s litigation took precedence over the suits brought by the subdivisions. Ex. B to reply Cert. of Herbert J. Stern, Esq. (*Attorney General v. Sarasota Cnty. Pub. Hosp. Dist.*, No. 2022 CA 000541 (Fla. Cir. Ct. May 26, 2023)). As the court recognized, the harms from the opioid crisis “do not flow in an insular fashion to individual subdivisions—the harms cross city and county lines.” *Id.* at 12. Moreover, while the Attorney General of Florida “retains all of the historic, sovereign common law powers and duties to represent and protect the people of Florida and their interests,” Florida’s local governments “are creatures of the State without any independent sovereignty.” *Id.* at 7, 12 (cleaned up).

Accordingly, “when there is conflict (or overlap) between sovereign state interests and insular subdivision interests, the sovereign’s interest necessarily must be deemed to be superior because the State’s interest subsumes, in its entirety, the subdivision’s interest.” *Id.* at 11–12. The alternative—“[a]llowing [municipal plaintiffs] to continue pursuing their subordinate opioid claims”—would “threaten[] Florida’s sovereign interest in vindicating its citizens’ rights—*all of its citizens’ rights.*” *Id.* at 12 (emphasis added). The same is true here.

In fact, the logic articulated in the Florida court’s decision applies squarely to this context. Just as in Florida, the City alleges widespread societal harms to the entire State of New Jersey—indeed, to the entire world. *See, e.g.*, Am. Compl. ¶¶ 2, 49, 53, 62. Just as Florida’s Attorney General retains broad, common-law powers to protect the public, the “powers and duties” of New Jersey’s Attorney General “stem from the traditions of the common law,” *Evans-Aristocrat Indus., Inc. v. City of Newark*, 75 N.J. 84, 94 (1977), and “the general public, in litigation concerning public

rights, should be represented by the Attorney-General,” *Woulfe v. Associated Realities Corp.*, 130 N.J. Eq. 519, 525 (Ch. Ct. 1942).

Other States have likewise recognized that litigation on behalf of the State must take precedence over litigation on behalf of its political subdivisions, since the State wields authority to settle those subdivisions’ claims. For instance, the Michigan Supreme Court has held that, because the Attorney General of Michigan “possesses the authority to represent the interests of the people of Michigan,” he has “the authority as part of this representation to represent the people of a county who are a part of these same people.” *In re Certified Question*, 638 N.W.2d 409, 414 (Mich. 2002). “The structure of the sovereign state and the constitutional and statutory powers granted to the Attorney General dictate that the county is ultimately subordinate to the state,” and thus the Attorney General’s statewide settlement with tobacco companies could bind a county’s claims as well. *Id.* at 415. *See also Town of Boothbay v. Getty Oil Co.*, 1999 WL 1319175, at *1–2 (1st Cir. Oct. 21, 1999) (per curiam) (town’s claims barred after identical cause of action brought by State of Maine was settled and dismissed with prejudice). Just as in Florida, Michigan, and Maine, New Jersey’s municipalities are “creatures of the State . . . subject to State control.” *Pet. of Hackensack Water Co.*, 196 N.J. Super. 162, 169 (App. Div. 1984). So, here too, if the New Jersey Attorney General were to pursue a global settlement with Defendants, that settlement would likely bar further prosecution of the City’s claims. It would make little sense to allow Plaintiff’s case to proceed when ultimately the State has the ability to settle the City’s claims at any time.

Similarly, in *New Hampshire v. City of Dover*, 891 A.2d 524 (N.H. 2006), the New Hampshire Supreme Court affirmed that two suits brought by New Hampshire cities regarding MTBEs should be dismissed in light of a similar suit brought by New Hampshire’s Attorney General, under the State’s *parens patriae* authority. The court held that “the state, when a party to

a suit involving a matter of sovereign interest, must be deemed to represent all its citizens,” and the cities had shown no “compelling interest” as to why they should be permitted to maintain separate actions. *Id.* at 530–31 (quoting *New Jersey v. New York*, 345 U.S. 369, 372 (1953)). Even though the State’s suit named fewer defendants and lacked various “theories of liability” and “remedies sought” by the cities, their “interests [were] represented by the State’s suit,” including their “direct economic interest in recovering” for the alleged harms. *Id.* at 531. Thus, “the doctrine of *parens patriae* controls and the cities’ suits must yield to the attorney general’s suit.” *Id.* at 532.

Here, New Jersey’s suit is an even closer fit to the City’s than New Hampshire’s suit in *Dover*, given that the defendants are the same, the remedies sought are nearly identical, and the theories of liability are the same, save for a single meritless RICO claim that seeks relief already sought through Plaintiff’s other claims. Moreover, the State’s suit is explicitly brought under its “*parens patriae* authority.” N.J. Compl. ¶ 22. Plaintiff provides no reason to believe the State will not adequately represent Plaintiff’s interests in that case, particularly given that the State’s requested relief includes all the relief sought by the City. And notwithstanding Plaintiff’s strained attempts to distinguish *Dover* from this case, *see* Opp. 10–11, its discussion ignores entirely the fundamental premise of *Dover*, which is that, under the *parens patriae* doctrine, “the cities’ suits must yield” to the State’s. *Dover*, 891 A.2d at 532.

Conversely, the out-of-state cases cited by Plaintiff provide little support for its position. *See* Opp. 11–13, 15. Several of Plaintiff’s cases concern the *standing* of local governments to bring suit, including under the municipal cost recovery doctrine, but the issue of standing is entirely distinct from the question of how to handle duplicative litigation. *See New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1175–88 (D.N.M. 2020) (City of Albuquerque had standing to challenge federal immigration policy change); *In re Nat’l Prescription Opiate Litig.*, 2018 WL 6628898, at

*6–10 (N.D. Ohio Dec. 19, 2018) (local governments had standing to bring RICO claim in opioid litigation); *City of New York v. Heckler*, 578 F. Supp. 1109, 1119–23 (E.D.N.Y. 1984) (New York City had standing to challenge procedures for evaluating Social Security disability claims). Likewise, *City of New York v. Beretta U.S.A. Corp.* did not concern simultaneous, duplicative litigation. 315 F. Supp. 2d 256, 263–74 (E.D.N.Y. 2004). Rather, *Beretta* concerned the irrelevant question of whether *res judicata* barred the City of New York’s claims when a prior suit by the State of New York had been dismissed for failure to state a cause of action. *Id.* at 263–64. Even Plaintiff admits the decision “relied . . . on specific characteristics of New York law” that are “different” from those here. Opp. 13. And the Sixth Circuit decision cited by Plaintiff was entirely premised on Ohio previously having failed to raise the argument at issue, and falling short of the “exceptional circumstances” required to obtain a writ of mandamus. *In re State of Ohio*, No. 19-3827, 2019 U.S. App. LEXIS 30500 at 1 (6th Cir. Oct. 10, 2019) (cleaned up).

In sum, decisions from other jurisdictions support what is already clear from New Jersey case law and the Court’s inherent authority to manage its own docket: that, in the interest of judicial economy and avoiding overlapping and potentially contradictory litigation and rulings, a duplicative action brought by a local government may properly yield to a suit brought by the State.⁶

IV. CONCLUSION

The Court should dismiss with prejudice Plaintiff’s Amended Complaint. In the alternative, Plaintiff’s case should be stayed pending disposition of the State’s identical suit.

⁶ Plaintiff’s citation to the Memorandum of Agreement Between the State of New Jersey and Local Governments on Opioid Litigation Recoveries is inapposite. Opp. 14. As the Opposition concedes, New Jersey local governments did not benefit from the Opioid settlement directly or by any legal right that Plaintiff asserts here. Rather, the local governments were only able to receive portions of the State’s settlement proceeds through a special agreement. Nothing would prevent Plaintiff and the State from entering into a similar special agreement here.

Dated: September 8, 2023
Florham Park, New Jersey

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Chevron Corporation and Chevron U.S.A. Inc.

CITY OF HOBOKEN

Plaintiff,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL
CORP., ROYAL DUTCH SHELL PLC,
SHELL OIL COMPANY, BP P.L.C., BP
AMERICA INC., CHEVRON CORP.,
CHEVRON U.S.A. INC., CONOCOPHILLIPS,
CONOCOPHILLIPS COMPANY, PHILLIPS
66, PHILLIPS 66 COMPANY, AMERICAN
PETROLEUM INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. HUD-L-3179-20

Civil Action
CBLP Action

**REPLY CERTIFICATION OF
HERBERT J. STERN, ESQ.**

HERBERT J. STERN, ESQ., of full age, does hereby certify as follows:

1. I am an attorney at law in the State of New Jersey, a member in good standing of this Court, and a member of the firm of Stern Kilcullen & Rufolo, LLC, counsel for Defendants Chevron Corporation and Chevron U.S.A. Inc. As such, the facts set forth herein are within my

personal knowledge, and if called and sworn as a witness, I could and would testify competently thereto.

2. I submit this Certification in support of the Joint Reply in Support of Defendants' Motion to Dismiss for Failure to State a Claim on the Grounds of the State's Duplicative Suit.

3. Attached hereto as **Exhibit A** is a true copy of the August 17, 2023 Joint Stipulation & Consent Order in *Platkin et al. v. Exxon Mobil Corp. et al.*, No. MER-L-001797-22 (N.J. Super. Ct., Mercer Cty.).

4. Attached hereto as **Exhibit B** is a true copy of *Attorney General v. Sarasota Cnty. Pub. Hosp. Dist.*, No. 2022 CA 000541 (Fla. Cir. Ct. May 26, 2023).

5. The following unpublished opinions are also referenced in Defendants' Joint Reply Brief and true copies thereof are attached in alphabetical order: *In re Nat'l Prescription Opiate Litig.*, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018) (**Exhibit C**); *Town of Boothbay v. Getty Oil Co.*, 1999 WL 1319175 (1st Cir. Oct. 21, 1999) (**Exhibit D**).

I certify that the foregoing statements made by me are true. I am aware that if any of these foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 8, 2023

s/ Herbert J. Stern
Herbert J. Stern, Esq.

EXHIBIT A

MATTHEW J. PLATKIN, ATTORNEY
GENERAL OF THE STATE OF NEW
JERSEY; NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION; and
CARI FAIS, ACTING DIRECTOR OF THE
NEW JERSEY DIVISION OF CONSUMER
AFFAIRS

Plaintiffs,

v.

EXXON MOBIL CORPORATION;
EXXONMOBIL OIL CORPORATION; BP
P.L.C.; BP AMERICA INC.; CHEVRON
CORPORATION; CHEVRON U.S.A. INC.;
CONOCOPHILLIPS; CONOCOPHILLIPS
COMPANY; PHILLIPS 66; PHILLIPS 66
COMPANY; SHELL PLC; SHELL OIL
COMPANY; and AMERICAN PETROLEUM
INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY
DOCKET NO. MER-L-1797-22

Civil Action
CBLP Action

JOINT STIPULATION AND CONSENT ORDER

THIS MATTER has been opened to the Court on the joint application of all parties to this action, each party represented by its undersigned counsel, and the parties having conferred and agreed that, in view of the prior proceedings in and current status of this matter recited below, the just and speedy determination of this matter can best be secured by this Court's entry of this Order on Consent imposing the scheduling and case management terms set forth herein.

WHEREAS, on October 18, 2022, Plaintiffs, the Attorney General of New Jersey, the New Jersey Department of Environmental Protection, and the Acting Director of the New Jersey Division of Consumer Affairs ("Plaintiffs"), filed a 197-page complaint commencing this action;

WHEREAS, on November 22, 2022, Defendants Chevron Corporation and Chevron U.S.A. Inc., with the consent of all Defendants, timely removed this action from Superior Court of New Jersey to the United States District Court for the District of New Jersey ("the District Court");

WHEREAS, on December 5, 2022, the District Court entered a Stipulation And Order For Extensions Of Time And To Set Briefing Schedule (Dkt. 36) providing, *inter alia*, that "No Defendant is required to file an Answer or Motion to Dismiss or otherwise respond to the Complaint before, and in accordance with, the entry by the Court, or the state court, of a schedule for briefing Defendants' Motions to Dismiss" (*id.* ¶ 6);

WHEREAS, R. 4:24-1(d) of the New Jersey Rules of Court provides in pertinent part that "[o]n matters remanded from a United States District Court . . . all injunctions, orders, and other proceedings in such action prior to its remand shall remain in full force and effect until dissolved or modified by the Superior Court";

WHEREAS, on December 21, 2022, Plaintiffs timely moved to remand this action to Superior Court of New Jersey, which Defendants opposed;

WHEREAS, on June 20, 2023, the District Court granted Plaintiffs' motion to remand;

WHEREAS, the District Court mailed the remand order to the Superior Court of New Jersey on June 20, 2023 and this action was reinstated in this Court on or around July 25, 2023;

WHEREAS, on July 26, 2023, this Court scheduled a case management conference for August 15, 2023;

WHEREAS, Defendants intend to file dispositive motions instead of answering the Complaint, including, but not necessarily limited to, Motions to Dismiss for failure to state a claim and, for certain Defendants, based on their objection to the exercise of personal jurisdiction, and Plaintiffs intend to oppose any such motions;

WHEREAS, Plaintiffs intend to seek merits discovery while Defendants' dispositive motions are pending, and believe such discovery is the default practice under New Jersey law and that many key witnesses are of advanced age;

WHEREAS, Defendants maintain that it would be premature and inefficient to take merits discovery until the dispositive motions are resolved and, moreover, that it is constitutionally impermissible to permit merits discovery to proceed until certain Defendants' personal jurisdiction defenses are resolved, *see, e.g., Marcello v. Roman Cath. Archdiocese of Philadelphia*, No. A-3219-21, 2023 WL 2249887, at *1 (N.J. Super. Ct. App. Div. Feb. 28, 2023); *International Fidelity Ins. Co. v. Goldberg*, 293 N.J. Super. 415 (App. Div. 1996); *Citibank, N.A. v. Est. of Simpson*, 290 N.J. Super. 519, 532 (App. Div. 1996). Defendants also maintain that discovery is not a "default practice" in CBLP cases, such as this, and that to the

extent Plaintiffs believe they need to take discovery for preservation purposes, those issues can be addressed separately from general merits discovery;

WHEREAS, the Parties agree that it would make sense to address the threshold issue of whether merits discovery can and should proceed before Defendants' Motions to Dismiss are resolved by having Defendants file and Plaintiffs oppose a Motion to Stay Discovery;

WHEREAS, Plaintiffs will not seek merits discovery while Defendants' Motion to Stay Discovery is pending;

WHEREAS, this stipulation does not operate as an admission of any factual allegation or legal conclusion and is submitted subject to and without waiver of any right, defense, affirmative defense, claim, or objection, not previously waived, including lack of subject matter jurisdiction and lack of personal jurisdiction; and

WHEREAS, the Parties through their undersigned counsel have conferred and consented to the entry of this Order; and good cause has been shown;

IT IS, on this 17th day of August, 2023, **ORDERED AND AGREED THAT:**

1. Defendants' Motion to Stay Discovery shall be due 45 days after this Joint Stipulation is ordered by the Court; Plaintiffs' opposition shall be due 30 days thereafter; and Defendants' reply shall be due 30 days thereafter. Defendants' opening brief shall not exceed 25 pages; Plaintiffs' opposition shall not exceed 25 pages; and Defendants' reply shall not exceed 15 pages.

2. Defendants' Motions to Dismiss for Lack of Personal Jurisdiction ("Personal Jurisdiction Motions to Dismiss"), and Motions to Dismiss For Failure to State a Claim ("Merits Motions to Dismiss"), and any Motion(s) to Strike and/or Dismiss under any relevant "anti-SLAPP" laws ("anti-SLAPP Motions") (collectively "the Motions to Dismiss") shall be due 60

days after this Joint Stipulation is ordered by the Court; Plaintiffs' oppositions shall be due 60 days thereafter; and Defendants' reply shall be due 45 days thereafter.

3. The page limitations for the Motions to Dismiss shall be as follows:

- a. Personal Jurisdiction Motions to Dismiss: Defendants shall use their best efforts to file a consolidated memorandum of law in support of their joint Personal Jurisdiction Motions to Dismiss, which shall not exceed 65 pages, exclusive of exhibits and other supporting materials. If any individual Defendant believes it is necessary to file an individual memorandum of law in support of the Personal Jurisdiction Motion to Dismiss based on individual issues, it may do so, and its individual memorandum of law shall not exceed 15 pages, exclusive of exhibits and other supporting materials. Plaintiffs' Opposition to the consolidated memorandum shall not exceed 65 pages, and any Opposition to an individual memorandum shall not exceed 15 pages. Defendants' consolidated Reply shall not exceed 30 pages, and any individual Reply shall not exceed 10 pages.
- b. Merits Motions to Dismiss: Defendants shall use their best efforts to file a consolidated memorandum of law in support of their joint Merits Motions to Dismiss which shall not exceed 70 pages, exclusive of exhibits and other supporting materials. If any individual Defendant believes it is necessary to file an individual memorandum of law in support of the Merits Motion to Dismiss based on individual issues, it may do so, and its individual memorandum of law shall not exceed 15 pages, exclusive of

exhibits and other supporting materials. Plaintiffs' Opposition to the consolidated memorandum shall not exceed 70 pages, and any Opposition to an individual memorandum shall not exceed 15 pages. Defendants' consolidated Reply shall not exceed 30 pages, and any individual Reply shall not exceed 10 pages.

- c. Anti-SLAPP Motions: The standard page limits pursuant to Rule 1:6-5 shall apply.

4. In the event the Court denies Defendants' Motions to Dismiss, in whole or in part, Defendants' answers shall be due within 45 days of the Court's denial of the last of the Motions to Dismiss.

/s/ Douglas H. Hurd

Hon. Douglas H. Hurd, P.J.Cv.

CONSENT AS TO FORM AND SUBSTANCE:

Dated: August 14, 2023

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EXHIBIT B

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,
STATE OF FLORIDA,

Plaintiff,

CASE NO.: 2022 CA 000541

v.

SARASOTA COUNTY PUBLIC HOSPITAL DISTRICT,
d/b/a Memorial Healthcare System, Inc.,
LEE MEMORIAL HEALTH SYSTEM,
d/b/a Lee Health,
NORTH BROWARD HOSPITAL DISTRICT,
d/b/a Broward Health,
HALIFAX HOSPITAL MEDICAL CENTER,
d/b/a Halifax Health,
WEST VOLUSIA HOSPITAL AUTHORITY,
SCHOOL BOARD OF MIAMI-DADE COUNTY, and
SCHOOL BOARD OF PUTNAM COUNTY.

Defendants.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,
DENYING HALIFAX HOSPITAL MEDICAL CENTER'S MOTION FOR SUMMARY
JUDGMENT, AND DENYING SARASOTA COUNTY PUBLIC HOSPITAL DISTRICT
AND LEE MEMORIAL HEALTH SYSTEM'S MOTION FOR CONTINUANCE OF
THE SUMMARY JUDGMENT HEARING AND SUMMARY FINAL JUDGMENT**

This case came for consideration after hearing on the Office of the Attorney General, Department of Legal Affairs, State of Florida's ("Florida" or "Plaintiff") Motion for Summary Judgment and Supporting Memorandum of Law (Dkt. #111), Halifax Hospital Medical Center's ("Halifax") Motion for Summary Judgment (Dkt. #105), and Sarasota County Public Hospital District's ("Memorial Healthcare") and Lee Memorial Health System's ("Lee Health") Motion for Continuance of the Summary Judgment Hearing (Dkt. ##128, 134). No party disputes the

damage wrought by the opioid epidemic in the State of Florida. The question in this case is whether Florida can release its subdivision claims as part of its settlement with those that purportedly caused this epidemic. After review of the motions, responses by each of the defendants, and argument of counsel, this Court concludes that Florida has the power to settle and release subdivisions' claims, based on the Florida Constitution, Florida Statutes, and the common law for the reasons stated below. There is no genuine issue of any material fact, and Florida is entitled to judgment as a matter of law. Accordingly, this Court will **GRANT** Florida's motion for summary judgment (Dkt. #111) on its claim and against the counterclaims filed by the defendants, **DENY** Halifax's motion for summary judgment (Dkt. #105), and **DENY** Memorial Healthcare's and Lee Health's motions for continuance (Dkt. ##128, 134).

PROCEDURAL POSTURE

On or about June 13, 2022, Florida filed its Amended Complaint (Dkt. #45) against Defendants Halifax, Memorial Healthcare, Lee Health, North Broward Hospital District ("North Broward"), the School Board of Miami-Dade County ("SBMD"), and the School Board of Putnam County ("SBPC"),¹ seeking a declaratory judgment that Florida had the power to release and did release each of the defendants' claims in a series of settlements that Florida entered into related to its opioid litigation. Just prior to the Amended Complaint being filed, on or about June 13, 2022, this Court granted (Dkt. #38) South Broward Hospital District's ("South Broward" and

¹ Almost all of these Defendants have separately sued distributors, manufacturers, or pharmacies in Florida or federal courts for alleged opioid-related harms. Sarasota County Public Hospital District, Lee Memorial Health System, Putnam County School Board, and School Board of Miami-Dade brought suits in federal court that are now part of a pending multidistrict litigation. *See Sarasota Mem. Healthcare Sys. v. Purdue Pharma L.P., et al.*, 1:18-op-46136-DAP; *Lee Health v. Actavis LLC, et al.*, 1:21-op-45092-DAP; *Putnam County School Board, et al. v. Cephalon, Inc., et al.*, 1:22-op-45025-DAP; *School Board of Miami-Dade County, Florida v. Endo Health Solutions Inc. et al.* 1:19-op-45913-DAP. Halifax Hospital Medical Center and North Broward Hospital District sued in Florida state court. *See Florida Health Sciences Center, Inc., et al. v. Richard Sackler, et al.*, CACE-19-018882.

collectively, Halifax, Memorial Healthcare, Lee Health, North Broward, South Broward, SBMD, and SBPC are referred to as “Defendants”) Motion to Intervene as a Defendant in this matter. All Defendants answered the Amended Complaint (Dkt. ##51, 57, 60, 61, 64, & 73). On or about July 5, 2022, North Broward filed a counterclaim against Florida (Dkt. #57), seeking a declaratory judgment that Florida did not have authority and did not release North Broward’s claims and seeking recovery from Florida for allegedly taking North Broward’s opioid claims. That same day, South Broward filed a counterclaim (Dkt. #60), seeking a declaratory judgment, seeking the imposition of a constructive trust against the State, and claiming that Florida had been unjustly enriched by the settlements. Also, that same day, SBMD and SBPC filed counterclaims (Dkt. ## 61, 64), alleging that each were entitled to declaratory relief that Florida had no authority to preempt their claims with the settlements. On or about July 15, 2022, Memorial Healthcare and Lee Health filed a counterclaim (Dkt.#73), seeking declaratory relief and asserting a takings claim against Florida.

On or about September 22, 2022, Halifax moved for summary judgment (Dkt. #105). On or about November 4, 2022, Florida moved for summary judgment (Dkt. #104) and filed a Declaration of John M. Guard attaching voluminous exhibits, including the settlement agreements at issue in this case (Dkt.## 116-21, 151). The Defendants filed responses (Dkt. ##134, 135, 137, 138, 139 141, 143) and affidavits opposing summary judgment (Dkt. ## 124-27, 129, 132-33, 140, 142, 144, 145). On or about November 23, 2022, Lee Memorial moved to continue the summary judgment hearing (Dkt.#128), which Florida opposed (Dkt. #148). On December 19, 2022, this Court held oral argument on the motions. On April 6, 2023, this Court held a status conference and heard additional argument.

BACKGROUND

The evidence in the record demonstrates that the opioid overuse has touched every part of the State of Florida. On May 3, 2017, then-Governor Rick Scott declared a public health emergency in the State. In 2020, the Florida Medical Examiners Commission (“Commission”) reported that there were 7,842 opioid-related deaths reported or almost twenty-one and a half opioid-related overdose deaths a day.² In its 2021 interim report, the Commission reported 4,140 opioid-related deaths reported in the first half of 2021 or roughly twenty-three Floridians dying everyday of an opioid-related drug overdose.³

On May 15, 2018, Florida filed its initial complaint (the “Opioid Litigation”) in the Sixth Judicial Circuit in and for Pasco County, Florida (the “State Court”). In its initial complaint of the Opioid Litigation, Florida brought claims against certain manufacturers and distributors who made and distributed opioids in the State of Florida. The Complaint alleged violations of Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”), Florida’s Racketeer Influenced and Corrupt Organization Act (“Florida RICO”), public nuisance, and negligence.

On November 16, 2018, the Office of Attorney General amended its complaint in the Opioid Litigation and added claims against two pharmacy chains who dispensed opioids in Florida (collectively, all the Opioid Litigation defendants are referred to as the “Opioid Defendants”), alleging similar causes of action as those in the initial complaint.

After Florida filed its initial complaint, around one hundred Florida cities, counties, and other political subdivisions, including the Defendants in the instant action, filed separate lawsuits

² <https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2020-Annual-Drug-Report-FINAL.aspx> (last viewed October 31, 2022); Declaration of John Guard, Ex. C.

³ <https://www.fdle.state.fl.us/MEC/Publications-and-Forms/Documents/Drugs-in-Deceased-Persons/2021-Interim-Drug-Report-FINAL.aspx> (last visited October 31, 2022); Declaration of John Guard, Ex. C.

against the Opioid Defendants and others, alleging similar claims as those raised by Florida.

After years of litigation and negotiation, the Attorney General finalized settlement agreements with (1) Johnson & Johnson (the “JJ Settlement”);⁴ (2) McKesson Corporation, Cardinal Health, Inc., and AmerisourceBergen Drug Corporation (the “Distributor Settlement”);⁵ (3) Endo (the “Endo Settlement”);⁶ (4) CVS (the “CVS Settlement”);⁷ (5) Teva (the “Teva Settlement”);⁸ (6) Allergan (the “Allergan Settlement”);⁹ and (7) after almost four weeks of a jury trial, Walgreens (the “Walgreens Settlement”)¹⁰ (collectively, the JJ Settlement, the Distributor Settlement, the Endo Settlement, the CVS Settlement, the Teva Settlement, the Allergan Settlement, and the Walgreens Settlement are referred to collectively as the “Opioid Settlements”). The State Court subsequently entered Consent Judgments.

Each of the Opioid Settlements provided for a release of the subdivision claims. For instance, The Distributor Settlement included in the definitions applicable to the release the following language:

III. “Releasors.” *With respect to Released Claims*, (1) each Settling State; (2) each Participating Subdivision; and (3) *without limitation and to the maximum extent of the power of each Settling State’s Attorney General* and/or Participating Subdivision to release Claims, (a) *the Settling State’s* and Participating Subdivision’s *departments, agencies, divisions, boards, commissions, Subdivisions, districts, instrumentalities of any kind* and attorneys, including its Attorney General, and any person in his or her official capacity whether elected or appointed to serve

⁴ See Declaration of John Guard, Ex. H.

⁵ *Id.*, Ex. G.

⁶ *Id.*, Ex. I.

⁷ *Id.*, Ex. L.

⁸ *Id.*, Ex. J.

⁹ *Id.*, Ex. K.

¹⁰ *Id.*, Ex. M.

any of the foregoing and any agency, person, or other entity claiming by or through any of the foregoing, (b) *any public entities, public instrumentalities, public educational institutions, unincorporated districts, fire districts, irrigation districts, and other Special Districts in a Settling State*, and (c) any person or entity acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or other capacity seeking relief on behalf of or generally applicable to the general public with respect to a Settling State or Subdivision in a Settling State, whether or not any of them participate in this Agreement. The inclusion of a specific reference to a type of entity in this definition shall not be construed as meaning that the entity is not a Subdivision. Each Settling State's Attorney General represents that he or she has or has obtained (or will obtain no later than the Initial Participation Date) the authority set forth in Section XI.G. In addition to being a Releasor as provided herein, a Participating Subdivision shall also provide the Subdivision Settlement Participation Form referenced in Section VII providing for a release to the fullest extent of the Participating Subdivision's authority.

Distributor Settlement at 8-9 (emphasis added).

LEGAL STANDARD

Florida Rule of Civil Procedure 1.510(a) provides that a court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fla. R. Civ. P. 1.510(a). This rule is “applied in accordance with the federal summary judgment standard.” *See id.*; *see also In re Amends. to Fla. Rule of Civ. Pro. 1.510*, 317 So.3d 72, 74 (Fla. 2021). Courts may grant summary judgment when, as here, “the only question a court must decide is a question of law.” *Glob. Travel Int’l, Inc. v. Mount Vernon Fire Ins. Co.*, 2021 WL 6070579, at *1 (M.D. Fla. Dec. 21, 2021) (citing *Saregama India Ltd. v. Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011)).

DISCUSSION

A. The Attorney General's Authority to Release Subdivisions' Claims

It is undisputed that the Defendants are political subdivisions of the State of Florida.

Attorney General executed the Opioid Settlements and those settlements release all of the opioid-related claims on behalf of Florida and all its political subdivisions. The only remaining issue is the legal question whether the Attorney General has the authority to release subdivision claims.

The Florida Constitution declares that the Attorney General is a member of the Cabinet, and she “shall be the chief state legal officer.” Fla. Const. Art IV, §§10(a), 10(b). The Attorney General’s duties extend to representing the interests of the State. Fla. Stat. §§ 16.01(4), (5) (stating that the Attorney General “[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which *the state* may be a party, *or in anywise interested*, in the Supreme Court and district courts of appeal of this state”; and “[s]hall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States.”)¹¹ (emphasis added). “When occasion arises ‘it is [her] duty to use means most effectual to the enforcement of the laws, and the protection of the people.’ The Attorney General is the principal law officer of the state.” *Thompson v. Wainwright*, 714 F.2d 1495, 1500 (11th Cir. 1983).

Critically, the Florida Statutes provide that the Attorney General “shall have and perform all powers and duties incident or usual to such office.” Fla. Stat. § 16.01(7). Florida courts have, repeatedly, interpreted this provision within its plain language and intent to mean that the Attorney General retains all of the historic, sovereign common law powers and duties to represent and protect the people of Florida and their interests. *See State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270 (5th Cir. 1976):

¹¹ See, e.g., *State ex rel. Boyles v. Fla. Parole & Prob. Comm’n*, 436 So.2d 207, 210 (Fla. 1st DCA 1983) (“In cases such as the one at bar, where the injury is to the public, the Attorney General has standing as a representative of the people. The Attorney General, as chief law officer of the State, may appear in and attend to all suits or actions in which the State may be ‘in anywise interested.’ He is the ‘people’s attorney’ and may properly intervene in a matter to represent the people in the courts.”) (internal citations omitted).

Finally, and most importantly, the Florida Supreme Court has consistently recognized the continuing existence of the Attorney General's common law powers. . . . This affirmation of the existence of the Attorney General's common law powers does not stand alone in Florida jurisprudence. It is echoed in case after case from *Gleason* to the 1972 decision in *State ex rel. Shevin v. Yarborough* . . . We conclude that there simply is no question that such powers exist.

“The Attorney General has the power and it is [her] duty among the many devolving upon [her] by the common law to prosecute all actions necessary for the protection and defense of the property and revenue of the state.” *State ex rel Landis v. S.H. Kress & Co.*, 155 So.823, 827 (Fla. 1934). “As the chief law officer of the state, it is [her] duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time.” *Id.*

With respect to public nuisance-like claims, like the claims brought by the Defendant subdivisions, the Florida Supreme Court has been clear that it is the Attorney General’s duty to abate and prevent nuisances. In *Kress*, the Florida Supreme Court stated that those common-law duties specifically include her duty “to prosecute all actions necessary for the protection and defense of the property and revenue of the state . . . to . . . prevent public nuisances” *Id.* Indeed, it is her duty “in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time.” 155 So. at 827.

In addition to these broad grants of power, the legislature has made repeated grants of specific authority.¹² As is most relevant to this case, the legislature specifically granted the Attorney General authority to enforce consumer protection laws, including the authority to bring

¹² In addition, the legislature has granted the Attorney General authority to pursue other actions, including: (1) false claims on the government (Fla. Stat. §68.082 (defining state for purposes of the false claims act as “the government of the state or any department, division, bureau, commission, regional planning agency, board, district, authority, agency, or other instrumentality of the state.”); (2) antitrust claims (Fla. Stat. §542.27 (“The Attorney General is authorized to institute or intervene in civil proceedings . . . on behalf of the state, its departments, agencies, and units of government”)); (3) public nuisance claims (Fla. Stat. §§60.05, 60.06, 823.05).

an action “on behalf of one or more consumers or *governmental entities* for the actual damages caused by an act or practice in violation of this part.” Fla. Stat. §501.207(1)(c) (emphasis added). Under Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”), the Attorney General is the enforcing authority in circumstances like this, because the violations alleged in the relevant opioid lawsuits in the state affect “more than one judicial circuit.” Fla. Stat. § 501.203.¹³

Although the Attorney General’s power may be limited by the Florida Legislature, absent an explicit statutory limitation, the Attorney General’s undertakings are presumed to be lawful sovereign actions.¹⁴ “As the chief law officer of the state, it is [her] duty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time.” *Kress*, 155 So. at 827. “Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the Attorney General of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.” *Shevin v. Exxon*, 526 F.2d. at 268. “And the attorney general has wide discretion in making the determination as to the public interest.” *Id.* at 269.

The court in *Shevin v. Exxon* was presented with a related question to the question before this Court: whether the Attorney General may institute actions under federal law to recover

¹³ Moreover, the enforcing authority for matters affecting only one judicial circuit is *not* the Defendant subdivisions in this case—it is the applicable state attorney’s office. *Id.*

¹⁴ Subdivisions’ statutory authority to sue does not supersede the Attorney General’s broad, sovereign common law powers, absent a clear legislative edict to the contrary. No such legislative edict exists in this case regarding any statutory claim; thus Defendants’ claims were validly released by the Attorney General. Separately, where a subdivision may have concurrent statutory authority to bring claims, the Attorney General’s claims are the superior claims, and as such she may release subdivisions’ claims pursuant to a statewide settlement.

damages sustained by departments, agencies, and political subdivisions that have not affirmatively authorized the Attorney General to bring suit for recovery on their behalf. 526 F.2d at 270. The court stated the Attorney General retained the power, and indeed had the duty, to “prosecute all actions necessary for the protection and defense of the property and the revenue of the state.” *Id.*¹⁵ Additionally, the court analyzed whether the Attorney General could initiate actions on behalf of state instrumentalities “without affirmative authorization” to recover damages on those instrumentalities’ behalf. *Shevin*, 526 F.2d at 272. The court concluded that because it could find no legislation barring the Attorney General from bringing an action on behalf of subdivisions without their consent, the Attorney General may act. *Id.* at 273-74.

The First District Court of Appeal in *Barati v. State* considered a similar issue to the issue presented in this case when it resolved whether the Attorney General had the power to dismiss an action in which she had not intervened. 198 So. 3d at 72. In *Barati*, the Attorney General filed a notice of voluntary dismissal in an action to which she was not a party, citing the Attorney General’s power to dismiss false claims suits under Florida Statutes §68.084(2)(a). *Id.* The First District did not rely solely on the plain language of Section 68.084(2)(a) in endorsing the Attorney General’s assertion but concluded that the Attorney General had authority to dismiss such an action in part based on “the constitutional authority of the executive branch vested in the Attorney General of the State of Florida to act as the State’s chief legal officer.” *Id.* at 84. The court reasoned that “[c]onducting and terminating legal actions brought in the name of and for the benefit of the State is the *sine qua non* of the State’s chief legal officer.” *Id.*

Similar to *Shevin* and *Barati*, it follows that, if the Attorney General has the power to

¹⁵ See also *id.* at n.10: “We must reject any argument by defendants that the right to ‘prosecute’ an action does not include the right to institute the action. That term typically is used to refer, as a unit, to the institution and maintenance to a conclusion of a legal proceeding.”

bring litigation on behalf of the people of Florida and its subdivisions, she must also be able to *settle litigation* on behalf of the people of Florida and its subdivisions—including the subordinate claims brought by Defendants. See *Abramson v. Fla. Psych. Ass’n*, 634 So.2d 610, 612 (Fla. 1994) (“[T]he power of a public body to settle litigation is incident to and implied from its power to sue and be sued.”); *In re Certified Question*, 638 N.W.2d 409, 414 (Mich. 2002) (“[I]nherent in the Attorney General’s authority to sue on behalf of a county in matters of state interest, is the Attorney General’s authority to settle such a suit. Given that the Attorney General has the authority to bring claims, it inevitably follows that the Attorney General has the authority to settle and release such claims.”).

The Defendants primarily rely on two Florida Supreme Court decisions: *Holland v. Watson*, 14 So. 2d 200 (Fla. 1943); *Watson v. Caldwell*, 27 So. 2d 524 (1946). In those cases, the Florida Supreme Court held that the statutorily created Board of Administration and Trustees of the Internal Improvement Fund were not required to allow the Attorney General to represent them in legal matters. Here, however, the question is not whether the Attorney General can force an agency to retain the Attorney General directly as its attorney. It is whether the Attorney General, in a case in which she is concededly authorized to represent the State, may exercise litigation authority to settle claims on behalf of the people of Florida and its subdivisions. Neither *Holland* nor *Watson* cast doubt on that well established authority.

Based on the foregoing authorities and given that the Defendants are subdivisions, this Court concludes that the Attorney General has the power to release claims, including the claims at issue in this case. This Court further states that when there is conflict (or overlap) between sovereign state interests and insular subdivision interests, the sovereign’s interest necessarily must be deemed to be superior because the State’s interest subsumes, in its entirety, the

subdivision's interest. "Local governments, including counties and municipalities, are creatures of the State without any independent sovereignty." *Fried v. State*, 355 So. 3d 899, 908 (Fla. 2023). Allowing Defendants to continue pursuing their subordinate opioid claims threatens Florida's sovereign interest in vindicating its citizens' rights—all of its citizens' rights—when confronted with societal harms such as the opioid crisis.¹⁶ These are collective harms. They do not flow in an insular fashion to individual subdivisions—the harms cross city and county lines. Indeed, the Opioid Settlements consider the pervasive harms caused by the opioid crisis and apply a mixture of statewide and local solutions—a framework to which nearly all affected parties (states and subdivisions alike) have agreed. Defendants' continued pursuit of their opioid claims in contravention of the Opioid Settlements jeopardizes the flow of tens of millions of dollars that will aid in the abatement of the opioid epidemic throughout the State of Florida. Accordingly, this Court concludes that Florida is entitled to judgment as a matter of law because the Attorney General had the authority to release the Defendants' claims and did, indeed, release the Defendants' claims.

B. The Defendants' Counterclaims

This Court concludes that Florida is entitled to summary judgment against the Defendants' counterclaims. There is no genuine issue of any material fact, and Florida is entitled to judgment as a matter of law on the Defendants' counterclaims. Florida is entitled to summary judgment on the Defendants' counterclaims seeking a declaratory judgment for the same reasons as Florida is entitled to judgment on its claim for a declaratory judgment. As to the takings

¹⁶ See, e.g., *United States v. City of Miami*, 614 F.2d 1322, 1332 (5th Cir. 1980) ("Unlike the situations in which we fear that a party may be attempting [to] profit at the expense of unrepresented individuals, e.g., class actions and shareholder derivative suits, we here have as plaintiff the government department charged with seeing that the laws are enforced. We therefore need not fear that the pecuniary interests of the plaintiff and defendant will tempt them to agree to a settlement unfair to unrepresented persons, but can safely assume that the interests of all affected have been considered.")

claims, Florida is entitled to judgment because subdivisions cannot assert takings claims against the state that created them. *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *also Bd. Of Levee Com'rs of the Orleans Levee Bd. v. Huls*, 852 F.2d 140, 142 (5th Cir. 1988) (“[A]s between the state and its agency, property is placed under the control of the agency for supervision and administration, the land to all practical intents and purposes being still the property of the state”); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976) (rejecting civil rights lawsuit brought by the City of Safety Harbor, Florida, regarding the annexation of a portion of Safety Harbor for the City of Clearwater).¹⁷ South Broward’s unjust enrichment and constructive trust claims also fail because they are barred by sovereign immunity¹⁸ and fail as a matter of law.¹⁹

C. Lee Health’s and Memorial Healthcare’s Motions for Continuance

The Florida Rules of Civil Procedure were revised in 2021 to adopt the federal standards of summary judgment. F.R.C.P. 1.510(a) (2022) (“The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard.”). Under Florida Rule of Civil Procedure 1.510(d), a nonmovant seeking to delay

¹⁷ Florida’s takings clause is coextensive with the Fifth Amendment’s and may properly be analyzed with cases interpreting the Federal Constitution. *See, e.g., Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 949 (11th Cir. 2018) (“Because Florida follows federal takings law, we can look to cases brought under the Fifth Amendment to inform our analysis.”); *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2012) (“This Court has previously interpreted the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively.”), *rev’d on other grounds*, 570 U.S. 595 (2013); *Highlands-In-The-Woods, L.L.C. v. Polk Cty.*, 217 So. 3d 1175, 1180 (Fla. 2d DCA 2017) (holding “because [developer] did not establish an unconstitutional taking under the U.S. Constitution, it has failed to establish an unconstitutional taking under the Florida Constitution”).

¹⁸ *See Lee Memorial Health System v. Hilderbrand*, 304 So. 3d 58, 62 (Fla. 2d DCA 2020) (concluding that sovereign immunity barred an unjust enrichment claim); *City of Fort Lauderdale v. Israel* 178 So. 3d 444, 447 (Fla. 4th DCA 2015) (holding that an unjust enrichment claim was barred “with no written contract” to defeat the [government entity’s] sovereign immunity claim....”).

¹⁹ *14th & Heinberg, LLC v. Terhaar and Cronley General Contractors, Inc.*, 43 So. 3d 877, 881 (Fla. 1st DCA 2010); *Williams v. Stanford*, 977 So. 2d 722, 730 (Fla. 1st DCA 2008) (citations omitted); *Est. of Kester v. Rocco*, 117 So. 3d 1196, 1201 (Fla. 1st DCA 2013).

consideration of a motion for summary judgment must “*show by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition...*” (emphasis added).²⁰ Here, Lee Health and Memorial Healthcare have failed to meet the requirements of the new standard adopted by the Supreme Court of Florida for the continuance of a summary judgment hearing. The facts that they seek in discovery will do nothing to help resolve a purely legal issue. And I would deny the motions for a continuance in my discretion anyway, as it is in the public interest for this matter to be resolved as quickly as possible. Accordingly, this Court will deny Lee Health and Memorial Healthcare’s Motions for Continuance.

It is therefore **ORDERED** and **ADJUDGED** that:

1. Florida’s motion for summary judgment (Dkt. #111) on its claim and against the counterclaims filed by the Defendants is **GRANTED**.
2. Halifax’s motion for summary judgment (Dkt. #105) is **DENIED**.
3. Memorial Healthcare’s and Lee Health’s motions for continuance (Dkt. ##128, 134) are **DENIED**.
4. A Summary Final Judgment is hereby entered in favor of Florida and against each of the Defendants on Florida’s claim for a declaratory judgment. The Attorney General had the power to release the Defendants’ claims against the Opioid Defendants and any other entity released by the Opioid Settlements. The Defendants’ claims against the Opioid Defendants and any other entity released by the Opioid Settlements were and are released.
5. A Summary Final Judgment is hereby entered in favor of Florida and against Defendants North Broward, South Broward, SBMD, SBPC, Memorial Healthcare, and Lee Health on each of these Defendants’ counterclaims for a declaratory judgment.

²⁰ The applicable Rule provides that “[a] party may move for summary judgment at any time after the expiration of 20 days from the commencement of the action.” Florida Rule of Civil Procedure 1.510(b).

6. A Summary Final Judgment is hereby entered in favor of Florida and against Defendants Memorial Healthcare, Lee Health, and North Broward on each of these Defendants' counterclaims asserting a takings claim.

7. A Summary Final Judgment is hereby entered in favor of Florida and against Defendant South Broward on its counterclaim for unjust enrichment.

8. The motions to dismiss the takings claims are denied as moot. The Clerk is directed to deny any other pending motion.

DONE and **ORDERED** in chambers in Tallahassee, Leon County, Florida this 26th day of

 April 2023.


JOHN C. COOPER
CIRCUIT COURT JUDGE

Copies:

To all parties of record

EXHIBIT C

2018 WL 6628898

United States District Court, N.D. Ohio, Eastern Division.

IN RE: NATIONAL PRESCRIPTION OPIATE

LITIGATION This Document Relates To:

The County of Summit, Ohio, et al. v. Purdue

Pharma L.P., et al., Case No. 18-op-45090

MDL 2804

|

Case No. 1:17-md-2804

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Signed 12/15/2018

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Filed 12/19/2018

OPINION AND ORDER**DAN AARON POLSTER**, UNITED STATES DISTRICT JUDGE

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

The District Court reviews proper objections pursuant to its duty under [Federal Rule of Civil Procedure 72\(b\)](#). [Fed. R. Civ. P. 72\(b\)](#) (“The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to.”) In a footnote, Manufacturer Defendants purport to object to “the entirety of the R&R.” **Doc #:** 1082 at n.1. This objection is not proper insofar as it does not include any bases in or support from legal authority. Therefore, as there are no proper objections to the facts or procedural history, the Court adopts the facts and procedural history as stated in the R&R. Further, there are no objections to the R&R with respect to the following sections:

- Section III.B. Preemption

- Section III.H. Count Eight: Fraud

- Section III.L. Statewide Concern Doctrine

- Section III.M. Article III Standing²

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

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

A. Tolling of the Statute of Limitations

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

1. Fraudulent Concealment

The R&R correctly states that “resolving a motion to dismiss based on statute-of-limitations grounds is appropriate when the undisputed facts ‘conclusively establish’ the defense as a matter of law.” R&R at 54 (citing *Estate of Barney v. PNC*

Bank, 714 F.3d 920, 926 (6th Cir. 2013); *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012), *cert. denied*, 568 U.S. 1157 (2013)). “In order for Plaintiff’s delay in filing to be excused due to Defendants’ fraudulent concealment, Plaintiff must affirmatively plead with particularity: ‘(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff’s due diligence until discovery of the facts.’ ” *Reid v. Baker*, 499 F. App’x 520, 527 (6th Cir. 2012) (quoting *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975)). However, as the R&R also points out, “courts should not dismiss complaints on statute-of-limitations grounds when there are disputed factual questions relating to the accrual date.” *Am. Premier Underwriters, Inc. v. Nat’l R.R. Passenger Corp.*, 839 F.3d 458, 464 (6th Cir. 2016) (citing as examples of disputed factual questions, “claims that the defendant fraudulently concealed facts, thereby preventing the plaintiff from learning of its injury...and complex issues about whether information in the plaintiff’s possession sufficed to alert it of the claim”).

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

Plaintiffs additionally point out that they could not have discovered “the nature, scope, and magnitude of Defendants’ misconduct, and its full impact on Plaintiffs, and could not have acquired such knowledge earlier through the exercise of reasonable diligence,” because until this Court ordered production of the ARCOS database in this litigation, Plaintiffs did not have access to that information. *Id.* at 233 (citing Doc. #: 233 at 6-7). Without access to the ARCOS data, Plaintiffs were forced to take Defendants at their word that they were complying with their obligations under consent

decrees, statutes, and regulations. Plaintiffs inarguably knew about Defendants’ marketing practices, but whether they had sufficient information, in the absence of the ARCOS data, to identify Defendants’ alleged concealment and thus the scope or magnitude of Defendants’ alleged misconduct is a disputed factual question.

2. Continuing Violations

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

Here, taking the factual allegations in the Complaint as true, Plaintiffs have alleged a longstanding and demonstrable policy of misrepresentations and omissions on the part of Defendants sufficient to demonstrate their engagement in continuing wrongful conduct. In addition, whether further injury could have been avoided had Defendants ceased this conduct is another disputed factual question. Therefore, the Court finds that Plaintiffs have alleged facts sufficient to raise a plausible inference that the applicable limitations periods are subject to tolling—under either a fraudulent concealment theory or a continuing violation theory—and that no claims should be dismissed on statute of limitations grounds at this early stage in the litigation.

B. RICO

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

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

Id.

The RICO analysis is complicated because, "RICO's civil-suit provision imposes two distinct but overlapping limitations on claimants—standing and proximate cause...[a]nd as a matter of RICO law, the two concepts overlap." *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 613 (6th Cir. 2004). Defendants object to the R&R's conclusions regarding both "overlapping" limitations. Regarding standing, Defendants argue that Plaintiffs' injuries are 1) not to Plaintiffs' "business or property" as required by the statute, and 2) derivative of a third-party's injuries (i.e. not direct). Regarding proximate cause, Defendants argue that Plaintiffs' injuries are too remote to hold Defendants liable under RICO (i.e. not direct). Manufacturing Defendants succinctly summarize the way "directness" applies to RICO analysis.

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

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

1. Proximate Cause

In *Holmes*, the Supreme Court described proximate cause as "the judicial tools used to limit a person's responsibility for the consequences of that person's own act," and further stated "the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" 503 U.S. at 268 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984)). In a RICO claim, "[t]he proximate-cause inquiry...requires careful consideration of the 'relation between the injury asserted and the injurious conduct alleged.'" *Anza*, 547 U.S. at 462 (quoting *Holmes*, 503 U.S. at 268). "Though foreseeability is an element of the proximate cause analysis, it is distinct from the requirement of a direct injury." *Perry v. Am. Tobacco Co.*, 324 F.3d 845, 850 (6th Cir. 2003) (citing *Holmes*, 503 U.S. at 268-69.). Additionally, the *Holmes* Court provided several reasons why "some direct relation between the injury asserted and the

injurious conduct alleged” is so important to the proximate cause analysis. *Holmes*, 503 U.S. at 268. The Court stated:

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

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

*5 Plaintiffs allege that “RICO Marketing Defendants...conducted an association-in-fact enterprise...to unlawfully increase profits and revenues from the continued prescription and use of opioids for long-term chronic pain” thereby creating the opioid epidemic.⁴ SAC at 270. Plaintiffs further allege that RICO Supply Chain Defendants...formed an association-in-fact enterprise...for the purpose of increasing the quota for and profiting from the increased volume of opioid sales in the United States” thereby creating the opioid epidemic.⁵ It is important to note that Plaintiffs never expressly define what they mean by the term “opioid epidemic.” The term may reasonably refer to the massive rate of addiction, overdose, and death associated with

taking opioids. *See, e.g., id.* at 214-15 (“Ohio is among the states hardest hit by the opioid epidemic....Overdose deaths have become the leading cause of death for Ohioans under the age of 55.”).

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

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

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

Doc. #: 1082 at 9-10 (emphasis in original). However, Plaintiffs have alleged sufficient facts to support a far more direct chain of causation: (i) RICO Marketing Defendants made deceptive claims in promoting their opioids in order to sell more opioids than the legitimate medical market could support (***the conduct***); (ii) the excess opioids marketed by the RICO Marketing Defendants and distributed by the RICO Supply Chain Defendants were then diverted into an illicit, black market; (iii) Plaintiffs were forced to expend resources beyond what they had budgeted to attempt to stop the flow

of the excess opioids into local communities and to bear the costs associated with cleaning them up. Under this potential chain of causation, the relationship between Plaintiffs' injury and Defendants' alleged conduct is less remote than prior Sixth Circuit precedent finding proximate cause, and is not too remote to support a finding of proximate cause here. *See, e.g., Trollinger*, 370 F.3d at 619 (finding proximate cause where Tyson "hired sufficient numbers of illegal aliens to impact the legal employees' wages," having an "impact on the bargained-for wage-scale," which "allowed Tyson not to compete with other businesses for unskilled labor," and finally where "Tyson's legal workers did not 'choose' to remain at Tyson for less money than other businesses offered").

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

2. Standing

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

"The 'by reason of' limitation...bundles together a variety of 'judicial tools,' some of which are traditionally employed to decide causation questions and some of which are employed to decide standing questions." *Trollinger*, 370 F.3d at 613 (citing *Holmes*, 503 U.S. at 268.). As it pertains to standing, the "by reason of" limitation is used to analyze whether a

plaintiff is asserting an injury that was borne directly by that plaintiff or whether the injury was "derivative or passed-on" to the plaintiff by some intermediate party. *See id.* at 614.

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

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

Defendants' characterization of *Perry* is correct, but *Perry* is factually distinct from this case. In *Perry*, tobacco users suffered smoking-related injuries which increased healthcare costs. That is where the similarities with the present case end. In *Perry*, the increased healthcare costs were borne by insurance companies who then passed-on those costs to individual insurance plan subscribers in the form of higher insurance premiums. The non-smoking individual subscribers then sued the tobacco companies for the costs passed-on to them by the insurance companies. *See Perry*, 324 F.3d at 847. Thus, *Perry* represents a classic case of "passed-on" economic injury. Here, as described above, Plaintiffs have alleged a plausible claim that their injuries are the direct result of Defendants' creation of an illicit opioid market within their communities.⁶ Plaintiffs' asserted economic injuries are borne by them and not passed-on by any intermediate party standing less removed from Defendants' actions.

*7 The tobacco cases, in general, are factually distinct from the present case for an additional reason. In the tobacco cases, no one asserted, nor could they have, that tobacco defendants created an "illicit cigarette market" the attendant consequences of which might have caused the government plaintiffs to expend their limited financial resources to mitigate. This "opioid epidemic as an illicit market" concept

is an important distinction underlying many of Plaintiffs' allegations. *See, e.g.*, SAC at 150-51. Therefore, assuming as it must that Plaintiffs can prove their allegations, the Court finds it plausible that Plaintiffs' asserted injuries were directly caused "by reason of" Defendants' injurious conduct.

b. The "business or property" Limitation

Even if Plaintiffs' asserted injuries were proximately and directly caused "by reason of" Defendants' alleged injurious conduct, Plaintiffs still may not bring a RICO claim if the injuries asserted were not to their "business or property." 18 U.S.C. § 1964(c). As a general principal, "money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). It is also true that, "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *County of Oakland v. City of Detroit*, 866 F.2d 839, 845 (6th Cir. 1989) (quoting *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906)). Plaintiffs assert thirteen categories of expenditures that they contend represent a substantial monetary loss, and are therefore an injury to their property. *See* SAC at 285. Defendants contend that none of the monetary costs asserted by Plaintiffs are the type of property injury anticipated (and thus permitted) by the RICO statute.

(i) Personal Injuries

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

The *Jackson* court's holding that RICO claims that allege damages "arising directly out of a personal injury" are not redressable adds another layer to the "directness" requirement summarized by Defendants above. As stated previously, Defendants explained two ways in which RICO allegations must be sufficiently direct to maintain a RICO claim. First, the relationship between the asserted injury and the alleged injurious conduct must have a *direct* causal connection. (the

proximate cause analysis). And second, the asserted injury must also be borne *directly* by Plaintiffs and not passed-on to them by intermediate parties (the standing "by reason of" analysis). Under *Jackson*, there is an additional element of *directness* to consider—whether Plaintiffs' alleged injury arises *directly* out of a personal injury. While the first two analyses require closeness of the relationship between injury and injurious conduct, the *Jackson* analysis requires separation between personal injury and pecuniary losses that arise therefrom.

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

*8 In other words, damages that result from a personal injury to a plaintiff (such as attorney fees, lost wages, lost workers' compensation benefits, or medical expenses), that are recoverable in a typical tort action are not recoverable in RICO, even if caused by a defendant's racketeering activity. These are costs that arise directly out of the plaintiff's personal injury, and are not injuries to plaintiff's "business or property" under the statute.

Defendants contend that Plaintiffs are attempting to recover the pecuniary losses resulting directly from their addicted residents' physical injuries, citing *Jackson*. Plaintiffs respond that their economic losses are not pecuniary losses resulting from their addicted residents' personal injuries; rather, they are concrete economic losses to the cities and counties

resulting directly from Defendants' relinquishment of their responsibility to maintain effective controls against diversion of Schedule II narcotics. *See, e.g.*, 21 U.S.C. § 823(a)-(b).

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

Plaintiffs assert the following injuries:

- a. Losses caused by the decrease in funding available for Plaintiffs' public services for which funding was lost because it was diverted to other public services designed to address the opioid epidemic;
- b. Costs for providing healthcare and medical care, additional therapeutic, and prescription drug purchases, and other treatments for patients suffering from opioid-related addiction or disease, including overdoses and deaths;
- c. Costs of training emergency and/or first responders in the proper treatment of drug overdoses;
- d. Costs associated with providing police officers, firefighters, and emergency and/or first responders with naloxone—an opioid antagonist used to block the deadly effects of opioids in the context of overdose;
- e. Costs associated with emergency responses by police officers, firefighters, and emergency and/or first responders to opioid overdoses;
- f. Costs for providing mental-health services, treatment, counseling, rehabilitation services, and social services to victims of the opioid epidemic and their families;
- g. Costs for providing treatment of infants born with opioid-related medical conditions, or born dependent on opioids due to drug use by mother during pregnancy;

h. Costs associated with law enforcement and public safety relating to the opioid epidemic, including but not limited to attempts to stop the flow of opioids into local communities, to arrest and prosecute street-level dealers, to prevent the current opioid epidemic from spreading and worsening, and to deal with the increased levels of crimes that have directly resulted from the increased homeless and drug-addicted population;

*9 i. Costs associated with increased burden on Plaintiffs' judicial systems, including increased security, increased staff, and the increased cost of adjudicating criminal matters due to the increase in crime directly resulting from opioid addiction;

j. Costs associated with providing care for children whose parents suffer from opioid-related disability or incapacitation;

k. Loss of tax revenue due to the decreased efficiency and size of the working population in Plaintiffs' communities;

l. Losses caused by diminished property values in neighborhoods where the opioid epidemic has taken root; and

m. Losses caused by diminished property values in the form of decreased business investment and tax revenue.

SAC at 285-286. Perhaps it can be said that items b and e above (the provision of medical treatment and emergency response services) arise directly out of the personal injury of the citizens because they are effectively claims to recoup the costs of medical expenses. However, there are other categories of costs, for example item h (the costs associated with "attempts to stop the flow of opioids into [Plaintiffs'] communities...[and] prevent the current opioid epidemic from spreading and worsening"), that cannot be said to arise directly out of Plaintiffs' residents' personal injuries. *Id.* Thus, under no reading of *Jackson* can it be maintained that *all* of Plaintiffs' asserted injuries arise directly out of a personal injury, and it is more likely, in this Court's opinion, that most do not.

(ii) Sovereign Capacity

Finally, Defendants argue that regardless of the above, Plaintiffs cannot recover injury to their property to the extent they seek to recover costs associated with services provided

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

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

***10** 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-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

*11 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

*12 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 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.

*13 *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:

***14** 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\(C\)](#).

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 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).

*15 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.

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

*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 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.

*17 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.

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.

*18 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.

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.

*19 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&R’s 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.”).

*20 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 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).

*21 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.

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.

All Citations

Not Reported in Fed. Supp., 2018 WL 6628898, RICO Bus.Disp.Guide 13,115

Footnotes

- 1 Defendant Noramco, Inc. states that it joined in Manufacturers' Motion to Dismiss "to the extent applicable," Doc. #: 499-1 at 1 n.2, and requests clarification that it is included among the moving Manufacturer Defendants and is entitled to all applicable relief. Doc. #: 1082 at 1 n.1. The Court clarifies that Noramco is included among the moving Manufacturer Defendants and is entitled to all applicable relief.
- 2 Pharmacy Defendants, in their objections, mention Article III standing only briefly in a section dedicated to the RICO claims. See Doc. #: 1078 at 2-3. They mischaracterize the R&R's analysis of the Article III standing directness requirement, rehash arguments already made in their motion to dismiss, and then move on to address their RICO analysis concerns. The Court finds this objection without merit, and therefore it is overruled.
- 3 See, e.g., Doc. #: 514 at 238 ("In May 2007, Purdue and three of its executives pled guilty to federal charges of misbranding OxyContin in what the company acknowledged was an attempt to mislead doctors about the risks of addiction."); see also *Id.* at 212 ("the increase in fatal overdoses from prescription opioids has been widely publicized for years.").
- 4 According to the Complaint, the RICO Marketing Defendants are "Purdue, Cephalon, Janssen, Endo, and Mallinckrodt." See Doc. #: 514 at 270.
- 5 According to the Complaint, the RICO Supply Chain Defendants are "Purdue, Cephalon, Endo, Mallinckrodt, Actavis, McKesson, Cardinal, and AmerisourceBergen" See Doc. #: 514 at 279.
- 6 Plaintiffs allege that "Congress specifically designed the closed chain of distribution to prevent the diversion of legally produced controlled substances into the illicit market....All registrants—which includes all manufacturers and distributors of controlled substances—must adhere to the specific security, recordkeeping, monitoring and reporting requirements that are designed to identify or prevent diversion." Doc. #: 514 at 150-51 (citing 21 U.S.C. § 823(a)-(b); 21 C.F.R. § 1301.74).

- 7 Footnote 4 of the *Jackson* opinion cites the following exemplary cases: *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir.2006) (false imprisonment causing loss of income not an injury to “business or property”); *Diaz v. Gates*, 420 F.3d 897 (9th Cir.2005) (*en banc*) (false imprisonment causing loss of employment and employment opportunity *is* an injury to “business or property”); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417 (5th Cir.2001) (assault claim against tobacco company causing wrongful death of smoker not an injury to “business or property”); *Hamm v. Rhone-Poulenc Rorer Pharm., Inc.*, 187 F.3d 941 (8th Cir.1999) (retaliatory firing causing damage to reputation not an injury to “business or property”); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir.1995) (surreptitiously recorded phone calls causing mental anguish not an injury to “business or property”); *Doe v. Roe*, 958 F.2d 763 (7th Cir.1992) (coercion into sexual relationship by attorney causing emotional harm not an injury to “business or property”); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir.1986) (exposure to toxic chemicals during employment with defendant causing personal injuries not an injury to “business or property”).
- 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.
- 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.
- 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\(A\)\(13\)](#).
- 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).
- 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.
- 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.
- 18 As opposed to only the county prosecuting attorney in which the nuisance exists as allowed by section 3767.03.
- 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.
- 20 Should the Ohio Supreme Court rule that a criminal conviction is required, this claim will of course be dismissed.

EXHIBIT D

201 F.3d 429

Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FICTA1 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, First Circuit.

TOWN OF BOOTHBAY, Plaintiff, Appellant,

v.

GETTY OIL COMPANY, Texaco Refining and Marketing, Inc., and Texaco, Inc., Defendants, Appellees.

No. 99-1046.

|

Oct. 21, 1999.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. David M. Cohen, U.S. Magistrate Judge].

Attorneys and Law Firms

David J. Van Dyke, with whom Berman & Simmons, P.A. were on brief for appellant.

John J. Aromando, with whom Byrne J. Decker and Pierce Atwood were on brief for appellees.

Before BOUDIN, Circuit Judge, BOWNES, Senior Circuit Judge, and STAHL, Circuit Judge.

Opinion

PER CURIAM.

*1 This appeal concerns the question whether, under Maine law, the doctrine of res judicata bars a town from suing a private party for environmental damage affecting the town's water supply insofar as the state has previously litigated and settled claims of environmental damage against the same private party for the same environmental harm. A detailed description of background facts and issues is set forth in the magistrate judge's thorough opinion below, *see Town of Boothbay v. Getty Oil Co.*, Civ. No. 98-125-P-DMC, Mem. Dec. at 2-8 (D.Me. Dec. 7, 1998), to which we add only a few brief comments addressed to the specific issues raised on this appeal.

In this case, the defendants are allegedly responsible for the discharge between 1939 and 1976 of gasoline from underground storage equipment at their service station in the Town of Boothbay, Maine ("the Town") into the surrounding groundwater. The Maine Department of Environmental Protection ("the State") subsequently discovered the contamination and began cleanup efforts. In 1990, the State discovered that the contamination had spread to surrounding wells, and brought suit against the defendants in Maine Superior Court pursuant to several state environmental statutes, *see* Me.Rev.Stat. Ann. tit. 38, §§ 347-A, 541-60, 561-70-G (West 1989 & Supp.1998), seeking reimbursement for the costs of cleanup and remediation of the affected area.

A central demand by the State was that the defendants finance an extension of the water line from the Town's water supply to the contaminated properties. Partway into the litigation, however, the State determined that other remediation schemes would obviate the need for a water line extension; it thus dropped its demand for a water line extension and settled with the defendants for a lump-sum payment calculated to cover the alternative remediation costs. The lawsuit was subsequently dismissed with prejudice. The Town evidently did not learn of the settlement until after it occurred, but it was aware of the State's lawsuit and opted not to intervene.

In 1998, subsequent to the dismissal of the state court action, the Town brought a diversity action against the defendants in the federal district court in Maine grounded not in the state environmental statutes but instead in state common law claims of trespass, negligence, nuisance, and strict liability. The most significant component of relief sought by the Town was for the same water line extension previously sought by the State. The magistrate judge granted summary judgment on this claim in favor of the defendants, reasoning that the same claim for environmental damage was previously brought and settled by the state, and that the Town was bound by this resolution because the issue was res judicata and the Town was in privity with the State.

The Town also claimed economic damages to itself due to an alleged reduction in the property tax base. As to that claim, the magistrate judge held that it was not barred by res judicata but that the amount was insufficient to meet the jurisdictional minimum so the claim should be dismissed without prejudice. Neither party has pursued this latter claim on appeal, but the Town has appealed from the dismissal of its claim for

environmental harm to its citizens because of the inadequate remediation, specifically, the failure to extend the water line.

*2 On this appeal, the Town mounts two attacks on the magistrate's finding that the claim for environmental damage was barred by res judicata. The Town's first argument is that there was a divergence of interests between the State and the Town such that the former did not adequately represent the latter's interest in restoring a clean water supply to the contaminated area because the State was only interested in recouping expenses that it had incurred. This, says the Town, precludes a finding of privity. *See Restatement (Second) Judgments* § 42(e) & cmt. f (1982). However, it appears from the record that the State vigorously pursued the demand that the defendants finance a water line extension until it determined that alternative measures would adequately solve the contamination problem. The Town fails to point to any facts in support of its contention that the State acted in bad faith or unreasonably, and its say-so is insufficient to make out a showing of misaligned interests or inadequate representation.

The Town's second argument is that because the state environmental statutes under which the State brought the earlier action reserve to municipalities and others a right against the state environmental funds as well as a right to

bring their own lawsuits, *see* Me.Rev.Stat. Ann. tit. 38, §§ 551(2), 569-A(2) (West 1989 & Supp.1998), the defense of res judicata is inapplicable in this context. It is true that the determination whether a party is deemed in privity with the state and thus barred from bringing *supplemental* claims against a defendant subsequent to a suit brought by the state is affected by the legislature's implicit or explicit reservation of their right to bring such claims. *See generally Restatement (Second) of Judgments* § 41, cmt. d. Yet in this case, the Town asserts a claim for relief which is not supplemental to but rather the same as that previously brought by the State. The legislature has empowered the Department of Environmental Protection to enforce its environmental laws, *see* Me.Rev.Stat. Ann. tit. 38, §§ 541, 561 (West 1989 & Supp.1998), and nothing suggests that the legislature wanted to give others the opportunity to bring the *same* environmental enforcement claim where the state has already done so. *See Department of Human Servs. v. Richardson*, 621 A.2d 855 (Me.1993).

Affirmed.

All Citations

201 F.3d 429 (Table), 1999 WL 1319175, 49 ERC 1671, 30 Env'tl. L. Rep. 20,164

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CITY OF HOBOKEN

Plaintiff,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL
CORP., ROYAL DUTCH SHELL PLC,
SHELL OIL COMPANY, BP P.L.C., BP
AMERICA INC., CHEVRON CORP.,
CHEVRON U.S.A. INC., CONOCOPHILLIPS,
CONOCOPHILLIPS COMPANY, PHILLIPS
66, PHILLIPS 66 COMPANY, AMERICAN
PETROLEUM INSTITUTE,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

Docket No. HUD-L-3179-20

Civil Action
CBLP Action

CERTIFICATION OF SERVICE

HERBERT J. STERN, ESQ., of full age, does hereby certify as follows:

On September 8, 2023, I caused copies of (1) the Joint Reply in Support of Defendants' Motion to Dismiss for Failure to State a Claim on the Grounds of the State's Duplicative Suit; (2) Reply Certification of Herbert J. Stern, Esq., and (3) this Certification of Service to be served upon Plaintiff's counsel of record via eCourts.

I certify that the foregoing statements made by me are true. I am aware that if any of these foregoing statements made by me are willfully false, I am subject to punishment.

Dated: September 8, 2023

s/ Herbert J. Stern

Herbert J. Stern, Esq.