

COMMONWEALTH OF KENTUCKY
HARDIN CIRCUIT COURT
DIVISION II

COMMONWEALTH OF KENTUCKY, ex rel.,
ANDY BESHEAR, ATTORNEY GENERAL

PLAINTIFF

v.

ORDER

INSYS THERAPEUTICS, INC., and
JOHN N. KAPOOR

DEFENDANTS

* * * * *

Defendant Insys Therapeutics, Inc. ("Insys") and Dr. John N. Kapoor ("Dr. Kapoor") filed Motions to Dismiss on January 31, 2019. Plaintiff Commonwealth of Kentucky ("Commonwealth") filed a Response on March 1, 2019, and Dr. Kapoor filed a Reply on March 18, 2019. The main basis for Dr. Kapoor's Motion to Dismiss is the claim that the court lacks personal jurisdiction over Dr. Kapoor. The Court offered an evidentiary hearing on this issue and both parties declined. The Motion is now submitted for a ruling.

When considering a motion to dismiss, Civil Rule 12.02 requires the Court to construe the pleadings liberally "in the light most favorable to the plaintiff" and to take all factual allegations in the complaint to be true. *Gall v. Scroggy*, 725 S.W.2d 867, 89 (Ky. Ct. App. 1987) citing *Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960).

This case was brought by the Attorney General of the Commonwealth against Dr. Kapoor and Insys alleging violations of Kentucky state law. Dr. Kapoor was the founder of Insys and also the chief executive officer for a period of time. As the parties have all declined an evidentiary hearing, the Court accepts the allegations in the Complaint as true for purposes of this Motion. The complaint alleges Defendants Insys and Dr. Kapoor used deceptive marketing schemes and kickback programs to push prescriptions of their drug Subsys in the Commonwealth and establish a system to defraud insurance companies and health benefit payors into paying for improper prescriptions.

Regarding Dr. Kapoor, the complaint alleges Dr. Kapoor "personally directed the[se] activities." Complaint ¶ 17; see also ¶¶ 20, 55, 65, 71-72. The Commonwealth claims Dr. Kapoor "at all times personally directed the activities of Insys, including, upon information and belief, the payment of fraudulent kickbacks to prescribers in Kentucky, and directed the misrepresentations made to third party payers to obtain off-label coverage of Subsys." *Id.* ¶17. It is also alleged "Dr. Kapoor ... targeted prescribers for speaker program bribes and arranged for the payment of bribes and kickbacks to these prescribers including, upon information and belief, prescribers in Kentucky." Moreover he "personally participated in meetings

to monitor the effectiveness of the bribes and kickbacks on prescribers. *Id.* ¶55

It is also alleged Dr. Kapoor personally "'planned and created' a prior authorization unit, called the Insys Reimbursement Center (IRC) to obtain approval for Subsys prescriptions" and "this unit employed a number of fraudulent and misleading tactics to secure reimbursements, including falsifying medical histories of patients, falsely claiming that patients had cancer, and providing misleading information to insurers and payors regarding patients' diagnosis and medical conditions ... in Kentucky." *Id.* ¶65

The Complaint also alleges Dr. Kapoor "tracked the ability of the IRC to obtain authorization from Subsys prescriptions and instructed IRC employees to make misrepresentations to third-party payors in order to obtain authorization for Subsys prescriptions," and as a result "defrauded the Commonwealth into paying for improper prescriptions of Subsys." ¶71-73

PARTICULARITY

Defendants move for dismissal of Plaintiff's complaint because it lacks the particularity CR 9.02 requires for fraud allegations. Specifically, the Defendants argue the pleadings offer conclusory assertions that are vague and do not satisfy CR 9.02's heightened pleading particularity standards. There are

two standards governing specificity of pleadings. Claims alleging fraud or mistake are governed by CR 9.02 and "shall be stated with particularity." All other claims are governed by a lower pleading standard set forth in CR 8.01. With regard to the Motion to Dismiss for Failure to State A Claim, the Court finds that all counts are sufficiently pled to put the Defendant on notice under both CR 8.01 and 9.02 pleading standards.

CAUSATION

Defendants argue the Commonwealth failed to allege facts in the complaint sufficient to plead causation for each claim. The Commonwealth alleged a theory of loss it has suffered because of Defendants marketing practices. The Court holds the Commonwealth has adequately pled that the results of Defendants' alleged misrepresentations served as a proximate cause for the harms the Commonwealth has endured.

PUBLIC NUISANCE

Defendants assert the Commonwealth failed to plead facts to support a claim of public nuisance. Specifically, the Defendants allege there are no facts to suggest the Defendants controlled the instrumentality that created the alleged nuisance.

Kentucky has adopted the definition of "public nuisance" found in Restatement (Second) of Torts, which identifies three circumstances that may "sustain a holding that an interference with a public right is unreasonable."

- a) If the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- b) If the conduct is proscribed by a statute, ordinance or administrative regulation, or
- c) If the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts §821B.

The Commonwealth has sufficiently alleged that Defendants actions and alleged deceptive marketing negatively interfered with public health and safety, were in violation of Kentucky's Consumer Protection Act and various fraud statutes, and have produced long-lasting and significant effects within Kentucky.

The Commonwealth alleges Defendants "controlled its deceptive and fraudulent marketing efforts to mislead the public, including its acts and omissions in detailing by its sales representatives, and other schemes described in this Complaint."

Complaint ¶192 The Courts finds the Commonwealth has sufficiently alleged the Defendants had control over the instrumentality that created the nuisance.

These allegations are sufficient to suggest a violation of public rights by the Defendants.

UNJUST ENRICHMENT

The Commonwealth has adequately pled unjust enrichment. The elements of unjust enrichment are 1) a benefit conferred upon the defendant at the plaintiff's expense, 2) a resulting appreciation of the benefit by the defendant, and 3) inequitable retention of the benefit without payment for its value. *Furlong Dev. Co. v. Georgetown-Scott Cty Planning and Zoning Comm'n*, 504 S.W.3d 34, 39-40 (Ky. 2016). The Complaint alleges the Commonwealth made payments for Subsys prescriptions and Insys benefited from these payments and that Insys received income, profits and other benefits which it would not have received if it had not engaged in the alleged deceptive and illegal conduct.

The Court rejects the Defendants' argument the Commonwealth has not pled an allegation the Commonwealth conferred a benefit on the Defendants. The Commonwealth has alleged Defendants benefited not only by revenue, but also by not having to bear the past, present and future costs of harm caused by the

Defendants' conduct and these costs have been incurred by the Commonwealth to its detriment. The Commonwealth is able to recover under a theory of unjust enrichment where it has claimed remedies at law elsewhere in its complaint.

NEGLIGENCE AND NEGLIGENCE PER SE

Defendants next assert the economic loss doctrine bars the Commonwealth's claims of negligence and negligence per se. The economic loss doctrine provides that economic losses with respect to a product or damages from an alleged defect in a product are not recoverable in a cause of action for negligence against a manufacturer. The rationale behind this doctrine is the remedy is under the law of contracts rather than tort. Here the Commonwealth has not alleged a breach of contract regarding commercial transactions or defective goods. Therefore the economic loss doctrine is inapplicable and does not bar the Commonwealth from suing for damages at this stage.

PERSONAL JURISDICTION UNDER KENTUCKY'S LONG ARM STATUTE

A non-resident can be subject to personal jurisdiction in Kentucky under Kentucky's long-arm statute, KRS 454.210. *Caesars Riverboat Casino, LLC v. Beach*, 336 S.W.3d 51, 54 (Ky. 2011). To determine whether Kentucky has long-arm jurisdiction

over a nonresident defendant, the Court goes through a two-step process. *Id.* It must first be determined whether the cause of action arises from defendant's conduct or activity under Kentucky's long-arm statute. This exercise of personal jurisdiction must then be shown not to offend federal due process protections. *Id.* at 57.

Claim arising from conduct or activity under the long-arm statute

To determine if Dr. Kapoor's alleged conduct or activity falls under the long-arm statute, the Court looks to the subsections of KRS 454.210. *Caesars Riverboat Casino* at 55. These subsections "should be liberally construed in favor of long-arm jurisdiction." *Id.* at 56.

KRS 454.210, in relevant part, provides ways a court may exercise personal jurisdiction over a person who acts directly or by agent. The claim can arise from the person's:

1. Transacting any business in this Commonwealth;
2. Contracting to supply services or goods in this Commonwealth;
3. Causing tortious injury by an act or omission in this Commonwealth;
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injuring occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct

or deviation of substantial revenue within the Commonwealth.

KRS 454.210(2)(a)

The Court finds the allegations in the Complaint fall within KRS 454.210(2)(a)(4). The allegations are Dr. Kapoor directed, managed and monitored tortious acts in Kentucky from outside of the Commonwealth. The conduct alleged would be considered a persistent course of conduct and it is alleged he derived substantial revenue from these acts in the Commonwealth. As the Supreme Court noted in *Caesars*, the conduct that subjects the nonresident to personal jurisdiction under the long arm statute must be the same conduct that forms the basis for the claims. It is clear in this case the claims also arise from this same alleged conduct.

Dr. Kapoor challenges jurisdiction arguing he is not subject to jurisdiction based on the acts of Defendant Insys. He is correct the court examines jurisdiction requirements of each defendant independently. However, the allegations in the complaint are that Dr. Kapoor acted directly in commission of tortious activities. Absent an evidentiary hearing, the Court accepts the facts alleged in the Complaint as true for purposes of this review.

Dr. Kapoor also alleges the Court lacks jurisdiction as none of the acts he is accused of committing happened in

Kentucky and he was never in Kentucky for his alleged actions. This is not required for him to be subject to personal jurisdiction. The Court of Appeals dealt with a similar fact pattern in *Clark v. Kolbell*, 2016 WL 304625 (Ky. App. 2016). In *Clark*, the defendant was a physician in Oregon contracted to review medical records and submit reports on those records to be used in determination of medical benefits. The defendant reviewed and submitted a report on the medical records of the Plaintiff who was a Kentucky resident which were used to deny his disability claim. The Plaintiff filed a complaint against the physician and the company that contracted the physician to review his records for negligence and defamation. The defendant physician filed an affidavit stating all work pertaining to his review of the file was done in Oregon and his only contacts related to his work were with the company that contracted him and their office is in Minnesota. The defendant also asserted he maintained no offices or agents in Kentucky.

The Court of Appeals noted KRS 451.210(2)(a)4 permits personal jurisdiction allowing "an act taken outside of the Commonwealth to subject a defendant to person jurisdiction if it is part of a larger course of conduct directed at the Commonwealth." The Court noted

If [plaintiff] is the only Kentucky resident whose records [defendant physician] has reviewed, Kentucky

law is clear that a single act would be insufficient for long-arm jurisdiction under KRS 454.210(2)(a)4. ... However, without discovery, it is impossible to determine whether [defendant physician]'s interaction with Kentucky is limited to the single act of reviewing [plaintiff]'s records and writing a report ... or whether he has conducted the same type of review regarding Kentucky residents on an ongoing basis that might be sufficient for personal jurisdiction as part of soliciting business, engaging in any other persistent course of conduct or deriving substantial revenue from services rendered in this Commonwealth. ... therefore, granting summary judgment and dismissing the case on this basis was premature without allowing Clark discovery on this issue.
Id at 5.

Specific Personal Jurisdiction does not violate due process

As the Court finds the claims against Dr. Kapoor arise from conduct subject to long-arm jurisdiction, a review must then be conducted to ensure the exercise of jurisdiction does not violate federal due process standards. "[D]ue process requires ... that in order to subject a defendant to a judgment *in personam*, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Hinnens v. Robey*, 336 S.W.3d 891, 897 (2011) citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) To satisfy this requirement, it must be shown "the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or

relate to' those activities." *Hinners* at 897 (internal citations omitted)

Based on the facts alleged in the complaint, Dr. Kapoor purposefully directed his activities at the state of Kentucky and the causes of action alleged are that his actions were to commit fraud in the state of Kentucky. These allegations clearly arise from his contacts within the state.

Finally, the Sixth Circuit has held that the acts of the defendant must have a substantial connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Childress Cattle*, 2017 WL 3446182, at 4 (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). In considering whether a substantial connection is present, the Court considers "(1) the burden on the defendant, (2) the interest of the forum state, (3) the plaintiff's interest in obtaining relief, and (4) other states' interest in securing the most efficient resolution." *Childress Cattle*, 2017 WL 3446182, at *6 (quoting *Air Products and Controls, Inc. v. Safetech Intern., Inc.*, 503 F.3d 544, 554-55). Dr. Kapoor does not appear to challenge these requirements are met. Dr. Kapoor is alleged to have personally directed the actions taken in the Commonwealth. Therefore the Commonwealth has a substantial

interest and is the most efficient place for resolution of this matter and does not create an undue burden on the defendant.

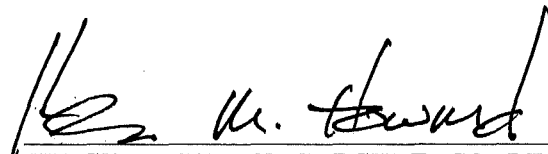
CONCLUSION

For the reasons set forth herein, the Court **DENIES** Defendants' Motions to Dismiss.

Ordered this 6th day of June 2019.

ENTERED: 6.18.19
ATTEST: LORETTA CRADY, CLERK
HARDIN CIR/DIST COURT
BY CT D.C.

m. Bonchue
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JUDGE, HARDIN CIRCUIT COURT,
DIVISION II