

NO. 18-CI-001013

JEFFERSON CIRCUIT COURT  
DIVISION TWELVE (12)  
JUDGE SUSAN SCHULTZ GIBSON

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

PLAINTIFF

V.

**MEMORANDUM AND ORDER**

CARDINAL HEALTH 5, LLC, ET AL

DEFENDANTS

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This matter is before the Court on the Motion of Defendants, Cardinal Health 5, LLC; Cardinal Health 100, Inc.; Cardinal Health 108, LLC; Cardinal Health 110, LLC; Cardinal Health 113, LLC; Cardinal Health 132, LLC; Cardinal Health 200, LLC; Cardinal Health 414, LLC; The Harvard Drug Company, LLC, d/b/a Major Pharmaceuticals, LLC, d/b/a Rugby Laboratories (collectively, "Cardinal"), to Dismiss the Complaint of Plaintiff, Commonwealth of Kentucky, *ex rel.*, Andy Beshear, Attorney General (the "Commonwealth"). The Court, after careful review of the record, memoranda and applicable law, and being otherwise sufficiently advised, does **deny** the motion.

**FACTS**

For the purpose of determining Cardinal's Motion to Dismiss, the Court will treat the claims asserted in the Commonwealth's Complaint as if they were true. The facts as asserted in the Complaint are stated pertinently below.

This case involves an alleged "public interest lawsuit" brought by the Kentucky Attorney General under Kentucky constitutional, statutory, regulatory and common-law authority to recover any and all damages, restitution, reimbursement and disgorgement, statutory civil penalties, injunctive relief, and other relief deemed appropriate by the Court from Cardinal as a consequence of its alleged role of fueling the opioid epidemic in the Commonwealth of Kentucky through fraudulent, unfair, false, misleading and/or deceptive

business practices. The actions of Cardinal allegedly include filling massive and/or "suspicious" orders, including orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency, from Kentucky pharmacies for prescription opioids;<sup>1</sup> shipping and/or distributing those massive quantities and/or suspicious orders of opioid drugs throughout the Commonwealth of Kentucky; shipping opioid drugs into the Commonwealth of Kentucky without adequate policies and procedures in place to detect suspicious orders; failing to report to appropriate authorities such suspicious orders; and failing to halt such excessive and suspicious shipments. These opioid drug orders allegedly include those of such large quantities of prescription narcotic pain medication that there could be no associated legitimate medical purpose.

The Food and Drug Administration ("FDA") originally approved opioid treatment for short term post-surgical or trauma-related pain and for palliative (end-of-life) care. Later, the approved use was extended to reach treatment of patients with "chronic pain" – pain lasting for more than three months. Following the extension of the approved use, the companies who manufactured and sold this class of drugs in the United States experienced a boom in their business. However, with this boom came a scourge that infected this country in the form of a public health epidemic caused by widespread addiction to opioids like OxyContin and Percocet, as well as their generic forms, oxycodone and hydrocodone. The scourge is now commonly known as the "opioid epidemic."

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<sup>1</sup> "Prescription opiates" are narcotic drugs derived from or possessing properties similar to opium and heroin and are generally categorized as "Schedule II" drugs due to their high potential for abuse and potential to cause severe psychological or physiological dependence. The terms "opioids" and "opioid analgesics" describe the entire class of natural and synthetic opiates.

While there are many purported causes related to the opioid epidemic, this case is focused solely on the actions of one of the alleged "dominant pharmaceutical wholesalers and market leaders," Cardinal, who allegedly "saturated and flooded" the Commonwealth of Kentucky with "excessive amounts of dangerous and addictive prescription opioids," while "disregarding its own real-time data, customer thresholds, internal reports and common sense." Cardinal allegedly failed to report "red flag, facially suspicious" orders in the Commonwealth of Kentucky and "opted instead to reap a windfall off the wave of addiction."

Cardinal, the third largest pharmaceutical distributor in North America, distributes pharmaceuticals to retail pharmacy operations, as well as institutional providers like hospitals and county health departments. Cardinal allegedly distributed oxycodone and hydrocodone, among other opioids, in the Commonwealth the Kentucky between January 1, 2007 and December 31, 2016. Cardinal allegedly maintained licensure through the Commonwealth of Kentucky for the wholesale distribution of controlled substances pursuant to multiple regulations, including the Kentucky Controlled Substances Act.<sup>2</sup>

During the creation and inflation of the opioid epidemic, Cardinal allegedly "knew or should have known" of the "dangerous, addictive qualities, and high rates of loss and misappropriation ('diversion rates')" of the drugs it shipped. Cardinal allegedly received millions of dollars per year for distributing excessive volumes of opioids into Kentucky. Cardinal allegedly situated itself to play a significant role in creating a "public nuisance" of historic proportions to maintain or increase its profits and market dominance.

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<sup>2</sup> Kentucky law mandates that all drug distributors, including Cardinal, apply for and receive a license from the Kentucky Board of Pharmacy under KRS 315.402. Additionally, wholesale distributors of controlled substances, including Cardinal, must apply for and receive a license from the Kentucky Cabinet for Health and Family Services under KRS 218A.150. Continuing licensure is dependent upon compliance with the laws and regulations relating to controlled substances, KRS 218A.160(1)(a), 201 KAR 2:105 § 3(2)(a), 902 KAR Chapter 55, KRS 218A.240 and 21 U.S.C. § 823.

Shipments of massive quantities of opioids into Kentucky by Cardinal, particularly to small sparsely populated rural counties in Eastern Kentucky were allegedly "unfair practices" that were "suspicious and excessive on their face."

Pharmaceutical wholesalers, like Cardinal, are requested to "know their customers" and set thresholds for each customer's anticipated order. When considering both the data available to Cardinal regarding the populations of the towns it shipped to and the customer thresholds it created based on said data, Cardinal allegedly violated several duties charged by law and by the nature of its industry.

Due to the alleged continued influx of dangerous and addictive prescription opioids by Cardinal, citizens of Kentucky suffered from prescription drug addiction and abuse. The reasonably foreseeable result of this widespread addiction was patients' transitioning their use and abuse of prescription opioids to illegal street drugs like heroin and carfentanil. The foreseeable results of Cardinal's alleged actions include loss of jobs and productivity, loss of health and enjoyment of life, increased financial burdens to the Commonwealth of Kentucky to respond to the devastation caused by the wave of addiction and, most tragically, the lost lives of thousands of Kentuckians.<sup>3</sup>

The Commonwealth of Kentucky's response to the health emergency allegedly created by Cardinal includes, but is not limited to, providing or reimbursing for medical treatment; shouldering the increased financial burden of public health insurance; dispatching emergency services; investigating and prosecuting drug-related crimes; incarcerating perpetrators; supervising and rehabilitating the addicted; preventing, investigating and treating overdoses; providing foster care for children whose parents are

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<sup>3</sup> In 2015, Kentucky had the third highest drug overdose death rate behind only West Virginia and New Hampshire. In 2016, the Kentucky Office of Drug Control Policy reported 1,404 overdose deaths.



in prison or dead from overdosing, or are simply unable to care for the children because of addiction; assembling necessary response teams; and tending to the infirm, dying and dead. The Kentucky Medicaid Program<sup>4</sup> alone has paid millions of dollars for medically unnecessary prescriber visits and improper prescriptions as well as addiction treatment and services, including emergency room admissions, inpatient hospitalizations, drug treatment, rehabilitation services, hepatitis treatments and a multitude of other adverse consequences of addiction afflicting Kentucky Medicaid recipients who became addicted to the controlled substance that Cardinal allegedly excessively distributed in the Commonwealth of Kentucky.

Rather than drug manufacturers selling opioids directly to physicians or pharmacies for ultimate dispensing, a sophisticated "closed distribution system" exists to distribute the drugs across the nation. This sophisticated system, born out of an acknowledgment by Congress that greater control was needed over abused and addictive prescription drugs, is intended to track and account for controlled substances from manufacturing to the ultimate consumer. For many important reasons, this system relies upon the honesty, integrity and accountability of prescription drug distributors to be effective. This "closed" chain of distribution was specifically designed by Congress to prevent the diversion and abuse that is complained of in this action.

States, including Kentucky, enacted similar state laws, rules and regulations to regulate the distribution of drugs and provide oversight over this unique industry. The Kentucky General Assembly determined and declared that "[t]he regulation of controlled

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<sup>4</sup> The Medicaid Program ("Medicaid") operates under Title XIX of the Social Security Act. Medicaid is a cooperative venture between the Federal and State governments to assist States in the provision of adequate medical care to its most deserving citizens, including the poor, the disabled, the elderly, the blind, pregnant women, infants and dependent children. The Department for Medicaid Services ("Kentucky Medicaid") is the single state agency charged with the administration of the Kentucky Medicaid Program pursuant to Title XIX of the Federal Social Security Act.

substances in this Commonwealth is important and necessary for the preservation of public safety and public health. ..." KRS 218A.005(1). This closed system of state and federal authority imposes specific duties upon wholesale distributors to monitor, identify, halt and, perhaps most importantly, report suspicious orders of controlled substances. 21 C.F.R. § 13.0 1.74; *Masters Pharm., Inc. v. Drug Enf't Admin.*, 861 F.3d 206 (D.C. Cir. 2017). All registrants of the closed distribution system must adhere to specific security, record keeping, monitoring and reporting requirements that are designed to identify or prevent diversion. The end purpose of these laws is to protect the consuming public.

Pharmaceutical distributors, such as Cardinal, are one of the key components of this closed distribution chain. The role of the pharmaceutical distributor is not simply one of shelf stocker, freight forwarder or simple shipper. If the closed system is to function properly, distributors must be vigilant in deciding whether a prospective customer can be trusted to deliver controlled substances only for lawful purposes.

To piggyback on the state and federal regulatory schemes, distributors created a system of "self-regulation and best practice sharing" through an industry trading group called the Healthcare Distribution Alliance ("HDA"),<sup>5</sup> formerly known as the Healthcare Distribution Management Association. According to the HDA, "[h]ealthcare distribution has never been just about delivery. It's about getting the right medicines to the right patients at the right time, safely and efficiently." The HDA created "Industry Compliance Guidelines" that stressed the critical role of each member of the supply chain in distributing controlled substances. These industry guidelines provided, pertinently, "[a]t

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<sup>5</sup> As the alleged dominant player within the healthcare distribution industry, Senior executives from Cardinal historically served on the board of the HDA. The CEO of Cardinal's Medical Segment, Jon Giocomin, is currently the Chairman of the HDA Board of Directors and a member of the executive committee of the HDA. Craig Cowman, Cardinal's Executive Vice President of Global Sourcing, also serves on the HDA's Board of Directors. Mike Kaufman, Cardinal's current CEO, is a former member of the executive committee of the HDA.

the center of a sophisticated supply chain, Distributors are uniquely situated to perform due diligence in order to help support the security of controlled substances they deliver to their customers." The HDA advises all distributors to "Know Your Customer."

Distributors, including Cardinal, are required to establish expected order thresholds for each customer. These thresholds are vital data points used to determine whether prospective orders are unusual in size, deviate from a prior pattern or are unusual in their frequency. To fulfill their obligations under federal and state laws as well as self-regulation, distributors, including Cardinal, use highly advanced data collection and analytical systems. The sophisticated software systems monitor the inventory and ordering needs of customer in real-time.

Cardinal, by virtue of its stated analytics and "know your customer" initiatives, was allegedly aware of the extent of numerous suspicious orders yet failed to report or halt their shipment. Cardinal was also allegedly aware that several of their pharmacy customers had "indicia of suspicion for diversion or misuse" such as "(1) individuals traveling long distances to fill prescriptions; (2) prescriptions for drug 'cocktails,' known for their abuse potential, such as oxycodone and Xanax; (3) individuals who arrived together with identical or nearly identical prescriptions; (4) purported pain patients with prescriptions for immediate-release rather than long-acting narcotics; (5) high percentage of cash purchases; and (6) doctors prescribing outside the scope of their usual practice."

The data collected by distributors and reported to government regulators is often reported in terms of drug dosage or doses.<sup>6</sup> In only 12 months, from February 1, 2016 to January 31, 2017, pharmacies in the Commonwealth of Kentucky filled prescriptions for 307,234,816 doses of Schedule II prescription drugs, which breaks down to 69 doses of

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<sup>6</sup> A dose is the amount of active ingredient in a particular pill or capsule.

Schedule II narcotics for every man, woman and child in the Commonwealth of Kentucky. Market share analysis indicates that of those, Cardinal distributed 63,597,606 doses. From January 1, 2010 through December 31, 2016, Jefferson County, Kentucky, had an average population of approximately 755,305. Pharmacies located in Jefferson County filled prescriptions for a total of 388,652,108 doses of opioid narcotic drugs in Jefferson County alone. With a 20.7% market share, Cardinal would have contributed 80,450,986<sup>7</sup> of those doses. From 2012 through 2016, Jefferson County experienced 1,066 prescription drug overdose deaths.

The number of pills allegedly shipped or delivered by Cardinal in Kentucky was and is allegedly “unreasonable, dangerous and facially suspicious.” With the system and technology used by Cardinal to collect and analyze robust data, Cardinal allegedly had access to information reflecting the full extent of their refill over-shipments in Kentucky. Rather than taking steps to protect the end customer from the massive volume of dangerous addictive drugs, Cardinal allegedly chose to pump addictive pills into the Commonwealth of Kentucky.

In its position as opioid distributor, Cardinal allegedly knew or should have known of Kentucky's exceedingly high rate of suspicious shipments, and the correlating risk of abuse, misuse and diversion of prescription opioids. Cardinal allegedly knew, or should have known, that many of the controlled substances that it was providing to customers in the Commonwealth were being obtained through fraudulent prescriptions from physicians who were prescribing controlled substances for illegitimate medical purposes. Cardinal allegedly knew, or should have known, it was supplying "pill-mill" pharmacies in the

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<sup>7</sup> The Complaint states “1,186,418” doses. This amount seems mathematically incorrect. Thus, the Court calculated the above stated figure by determining 20.7% of 388,652,108 doses.

Commonwealth of Kentucky. Cardinal was allegedly on notice of the "suspicious orders" it was receiving when it shipped massive quantities of controlled substances to pharmacies in areas that lacked the population dynamics to support the claimed need. Cardinal allegedly knew or should have known that the drugs were being diverted for illegal use.

Cardinal allegedly had a duty, which it knew of by way of the licensure practices in Kentucky, to report diversion of controlled substances through the license application and renewal process through the Cabinet for Health and Family Services Office of Inspector General, Drug Enforcement and Professional Practices Branch ("DEPPB"), which administers and enforces the Kentucky Controlled Substances Act and grants renewals of licenses of wholesalers of controlled substance in part by relying upon the information provided by the applicant.<sup>8</sup> Cardinal acknowledged and made sworn representations as required with each application for license renewal.

Despite the existence of suspicious orders and information available regarding the same through Cardinal's own sophisticated tracking system, Cardinal allegedly did not refuse to ship or supply the often-abused and highly addictive prescription opioids to Kentucky pharmacies between 2010 and the present. Cardinal also allegedly failed to report suspicious orders in Kentucky from 2010 to the present. Cardinal allegedly shipped

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<sup>8</sup> To maintain a Kentucky wholesaler's license, entities are required to comply with rules regarding controlled substance diversion controls under which, at the time of application or renewal, "the Cabinet for Health Services shall be notified in the event of any theft or other loss of controlled substances." Any problem, such as pilferage, which develops in a facility, must also be reported. To maintain a distributor's license in Kentucky, the Kentucky Board of Pharmacy requires licensed entities to comply with both state and federal law, including rules preventing the diversion of controlled substances. Pursuant to KRS 315.402, failure to report to the Board or willful submission of inaccurate information shall be grounds for disciplinary action, including fines, suspension or revocation of the wholesaler's license at issue. In addition, the Kentucky Board of Pharmacy requires initial and renewal applications for License to Operate as a Wholesale Distributor to acknowledge whether an applicant, owner, partner, officer, agent or employee (1) has been convicted of any felony, (2) had a wholesale distributor license or permit revoked or suspended, and (3) has been convicted under laws related to drug samples and wholesale or retail drug distribution of controlled substances.

millions of doses of highly addictive controlled pain killers into Kentucky, many of which should have been stopped and/or investigated as suspicious orders.

Cardinal allegedly failed to maintain effective controls against diversion in its distribution centers within Kentucky, including those in Jefferson County, as well as those that distributed opioids into Kentucky, including but not limited to its hub in Dublin, Ohio. Cardinal allegedly derived millions of dollars of income from the controlled substances it shipped into the Commonwealth. The rise in prescription opioid use and abuse triggered a resurgence in heroin abuse, imposing additional burdens on state and local governments in the Commonwealth of Kentucky to address heroin use and addiction.

Cardinal's inventory system allows for real-time inventory control and item look up. These products additionally permit for streamlined ordering, purchasing, reconciliations and account management. Cardinal utilized Six Sigma methodology, "an analytical approach that emphasizes setting high-quality objectives, collecting data and analyzing the results to a fine degree in order to improve processes, reduce costs and minimize errors." Cardinal allegedly possesses real-time data that fully and accurately depicts the exact number of pills, pill type, and anticipated consumer order threshold they have set. It is allegedly conceivable that such data monitoring systems could, and likely did, track and/or record facially suspicious orders from within the Commonwealth of Kentucky. Said data "likely reflects the exact, grossly inflated orders" that allegedly "caused or contributed" to the opioid crisis in Kentucky, including where Cardinal allegedly overrode its own internal controls and thresholds in order to consistently increase shipment volumes.

On or about February 19, 2018, the Commonwealth filed the Complaint in this action with the purported purpose of "(1) stop[ping] [Cardinal] from fulfilling suspicious



orders for opioids; (2) recover[ing] the damages suffered by Kentucky and its citizens; (3) recoup[ing] the expenses, penalties owed and disgorge the amounts Cardinal unjustly enriched itself with; and (4) to enjoin and abate the continuing public nuisance caused in whole or in part by the actions of Cardinal and force it to help solve the problems it both created and profited from." In the Complaint, the Commonwealth alleges that Cardinal committed "unfair, false, misleading or deceptive acts or practices in the conduct of the pharmaceutical wholesale trade or commerce by failing to investigate, report, and cease fulfilling suspicious orders of controlled substances to pharmacies in the Commonwealth[;]" that Cardinal has committed "negligent and/or intentional and reckless actions by failing to investigate, report, and cease fulfilling suspicious orders of controlled substances to pharmacies in the Commonwealth[;]" that Cardinal's actions have created a "public nuisance" by "failing to investigate, report, and cease fulfilling suspicious orders of controlled substances to pharmacies in the Commonwealth[;]" and that Cardinal's "actions have caused and will continue to cause the Commonwealth to expend substantial sums of funds from the State Treasury to deal with the effects of [the] epidemic of prescription drug addiction that was substantially fueled by [Cardinal's] illegal action in flooding the Commonwealth with highly addictive prescription medications without regard for the consequences to the Commonwealth and its citizens." The Commonwealth "seeks recuperation of the costs to its society caused by [Cardinal's] failure to act in accordance with the various laws cited herein, general disregard for the law, misrepresentations, actions, and inactions with regard to the distribution of opioids in the Commonwealth's communities." The Commonwealth further alleges that the "scope of conduct alleged herein has proximately caused damages to Kentuckians and their government in the form of a multigenerational healthcare epidemic of addiction, and resulting disease and

deaths[;]" and that, "[d]espite being acutely aware of the risks of oversupplying opioids, and despite being acutely aware of the increases in orders that were suspicious, Cardinal continued to oversupply opioids to Kentucky." The Commonwealth asserts the following claims: violations of the Consumer Protection Act, public nuisance, breach of statutory duties/negligence per se, negligence, unjust enrichment, fraud by omission, Medicaid fraud under KRS Chapters 205 and 194A, and seeks punitive damages from Cardinal's alleged fraudulent conduct and gross negligence.

In lieu of filing an Answer, Cardinal makes a Motion to Dismiss, contending that the Commonwealth fails to allege proximate causation for all its claims. Cardinal argues that the public nuisance claim should be dismissed as the Commonwealth fails to allege a public right with which Cardinal interfered; the Commonwealth fails to adequately allege that Cardinal had control of prescription opioids at the time of injury; and the Commonwealth's claim is an unprecedented expansion of public nuisance law. Cardinal asserts that the Commonwealth's negligence and negligence per se claims fail as a matter of law, since Cardinal does not owe the Commonwealth a statutory duty to halt or report suspicious orders under either Kentucky or federal law; that the claim that Cardinal had a duty to halt or report the steady upsurge in pharmacy orders for legal prescriptions as "suspicious" contends pertinently that it should have second-guessed both the doctors who prescribed the drugs and the DEA; that, to the extent that the Commonwealth's claims are about illegal prescription opioid use, Cardinal had no duty to prevent the downstream, inherently criminal "diversion" of opioids as a matter of law; that Cardinal cannot be held liable for failing to prevent the criminal misconduct of third parties with whom it has no relationship and over whom it has no control; that Cardinal's role in the distribution chain is limited to delivering pharmaceutical products from manufacturers to

licensed retail pharmacies and is responsible for securing those drugs while they are in its possession; and that the allowance of the Attorney General, through tort litigation, to use the blunt instrument of common-law decision-making to determine the circumstances under which a wholesale distributor's conduct was reasonable would impermissibly encroach on the federal and state enforcement prerogatives and insert the Court into a policy debate.

Cardinal argues that the Commonwealth's Kentucky Consumer Protection Act ("KCPA") claim fails for multiple overlapping reasons, as Cardinal had no duty under Kentucky law to halt or report to the Commonwealth suspicious pharmacy orders; that the claim is not pleaded with the requisite particularity under CR 9.02; that the Commonwealth fails to allege the sort of consumer-directed conduct that is actionable under the KCPA; that the Commonwealth fails to allege that Cardinal's purported failure to disclose suspicious orders which occurred "in the conduct of any trade or commerce," as the KCPA requires; and that the Commonwealth's claim for money damages under the KCPA fails as a matter of law, as the Complaint does not allege that Cardinal's purported regulatory reporting violations defrauded consumers. Cardinal contends that the Commonwealth's fraud by omission claim should be dismissed, as the Complaint alleges no cognizable "duty to the other to disclose" a material fact, since Cardinal does not have the same obligation that it has to report "suspicious" orders to the Commonwealth as it does to the Federal DEA; that the Complaint wholly fails to identify a misleading statement or omission by Cardinal and does not identify even a single pharmacy order that Cardinal fraudulently failed to report; that the Commonwealth does not explain how Cardinal's alleged omissions induced it to act and does not even attempt to explain what actions it allegedly took in reliance on Cardinal's purported omissions;

and that the Commonwealth has not shown that Cardinal's purported omission proximately caused it any actual damages.

Cardinal further argues that the claims for Medicaid fraud should be dismissed, as the Attorney General lacks authority to attempt to "enforce" KRS 205.8463 through a civil damages claim against a wholesale distributor for allegedly reporting and licensing violations; that the Complaint does not allege and could not allege that Cardinal provided opioids to recipients under the Kentucky Medicaid program, as it is a wholesale distributor whose role in the distribution of controlled substances is limited to delivering FDA-approved medicines to Commonwealth-licensed dispensaries; that nothing in the statutory language even remotely suggests that KRS 205.8463's criminal provisions were intended by the General Assembly to impose liability on wholesale distributors of pharmaceutical products for alleged regulatory reporting failures or licensing violations; that the Court should reject the Attorney General's strained reading of the statute and dismiss the KRS Chapter 205 Medicaid fraud claim; that the KRS Chapter 205 claim should be dismissed because the Complaint fails to properly allege that Cardinal violated KRS 205.8463 with adequate particularity; that the Complaint fails to allege that Cardinal submitted any false or fraudulent claims or documents; that the Complaint fails to plead that Cardinal's alleged wrongdoing was a "substantial factor" in causing the Commonwealth's harm in compliance with KRS 446.070; that the Complaint fails to identify any specific license renewal that was deceptive or the purportedly false or fraudulent statement contained therein which is fatal to its claim; and that the Complaint does not plead that Cardinal's purported benefit of payments for opioids was obtained by means of its allegedly fraudulent representations to the Commonwealth's licensing

authorities, as the only payments Cardinal received were from its retail pharmacy customers for contractually agreed upon prices.

Cardinal contends that the Commonwealth has asserted no facts to support any of the elements of its unjust enrichment claim, as the Commonwealth does not allege that it conferred a direct benefit on Cardinal; that the Commonwealth's allegation that Cardinal appreciated the benefit allegedly conferred upon it is wholly conclusory; and that there is no injustice under these circumstances, as the Commonwealth seeks funds that pharmacies or insurance programs paid Cardinal, which were owed Cardinal for opioid medications, and such funds cannot be simultaneously unjust enrichment conferred by the Commonwealth of Kentucky on Cardinal. Lastly, Cardinal contends that the free public services doctrine precludes the Commonwealth's claims for costs associated with responding to the opioid epidemic including law-enforcement costs and the cost of treating addiction.

The Commonwealth responds that it has adequately alleged causation; and that the derivative injury rule does not bar the Commonwealth's claims, as the action was brought in the Commonwealth's role as *parens patriae* under public nuisance law and statutorily under the Kentucky Consumer Protection Act for the protection and interest of its citizens. The Commonwealth argues that the purported intervening causes of the FDA approval process, prescribers, the dispensing pharmacist, and intervening criminal acts of third parties are not shields from any duty owed to the Commonwealth of Kentucky and do not act to bar the Commonwealth's action against Cardinal; that the result of Cardinal's wrongdoings is not extraordinary and the widespread devastation is a natural and predictable result of Cardinal's actions, considering Cardinal's superior position as a distributor, its access to information, its understanding of the regulatory schemes related

to controlled substances, and its admissions and prior statements, and it was reasonably foreseeable that the over-distribution of opioids would result in increasing diversion rates, addiction and overdose; that any actions by prescribers, pharmacists and third-party criminals could not have succeeded in fueling addiction without the availability of the addiction-causing product, something Cardinal controlled; and that Cardinal's causation arguments should likewise be rejected. The Commonwealth further argues that the public service doctrine fails to operate as Cardinal would like and should not be given credence in this case as it has not been adopted in Kentucky.

The Commonwealth asserts that it stated a valid public nuisance claim in the Complaint, facially pleading that Cardinal's conduct violated multiple statutes and regulations; that the conduct has been continuing in nature, creating long lasting effects, such as the influx of opioids and resulting increase in opioid abuse, addiction and overdoses and has had a significant and long-lasting effect upon the public right to health and safety; that Cardinal cannot escape liability by simply claiming that it did not control the instrumentality at the time of the injury; that the nuisance for which Cardinal is liable is the opioid epidemic which was caused by the over-supply of opioids into the Commonwealth of Kentucky, and led to diversion, misuse and abuse which has caused significant long-term interference with public health and safety; and that, contrary to Cardinal's logic and arguments on this issue, Kentucky has not limited public rights to those connected with "public property, public resources or public highways," as Kentucky has long recognized a wide scope of public nuisance, including where a defendant has contributed to narcotics trafficking.

The Commonwealth next argues that it has adequately pleaded negligence and negligence *per se*, as the failure of Cardinal to uphold its reporting duties under federal



law resulted in devastating harm to the Commonwealth of Kentucky and violations of the regulatory and license related statutes also give rise to negligence per se; that the Complaint clearly indicates the statutory and regulatory duties that apply to Cardinal, along with the conduct that resulted in the breach of said duties; that the claims are pleaded sufficiently with respect to the negligence *per se* claims; that the Commonwealth is within the class that the applicable statutes and regulations protect and the language of the statutes and regulations further establish the conduct expected of wholesale distributors like Cardinal, all with the purpose of protecting public safety and health; that the violations of these very statutes and regulations resulted in the public harm complained of by the Commonwealth and the Complaint sufficiently pleads that Cardinal's misconduct substantially contributed to this harm; that the Commonwealth is a member of the class intended to be protected by KRS Chapter 218A and related statutes; that the Commonwealth's claims for violation of 201 KAR 2:105 are sufficiently pleaded; that Cardinal's position that no duty existed under Kentucky law is unsupported, since Kentucky statutes and regulations create duties for Cardinal with the intent of protecting the public and the Commonwealth seeks to rectify the wrong that has resulted to the Kentucky Public as a result of Cardinal's statutory and regulatory violations.

The Commonwealth next argues that the Complaint sufficiently alleges that a common-law duty exists and was violated by Cardinal; that the harm to the Commonwealth was broader than focusing on the prescription rate within Kentucky as the harm that occurred, as Kentucky has suffered higher addiction and overdose rates, an increase in heroin usage, associated injuries like increased crime, increased need for foster care, increased health care expenses associated with medically unnecessary opioid prescriptions, and a decrease in quality of life which resulted from the influx of

unreasonable amounts of opioids which was a reasonably foreseeable consequence of excess supply; that Cardinal's attempt to hide behind purported interveners such as physicians and pharmacies cannot succeed; that the Commonwealth does not seek recovery for the acts of third parties but seeks damages from Cardinal negligently setting the wheel in motion, pushing opioids in Kentucky and creating an environment in which diversion, addiction, misuse and overdoses became an increasing reality and concern; and that the prescribers, pharmacists and even the criminals served only to connect consumers with the mass of opioids that Cardinal wrongfully pumped into the community and the actions of third parties, many who are revered customers of Cardinal, serve only as a natural and foreseeable extension of the wrongdoings by Cardinal.

The Commonwealth next argues that it has stated a valid claim under the KCPA; that claims brought by the Commonwealth under the KCPA are not subject to CR 9.02, as the elements of a cause of action under the KCPA differ from elements of fraud; that every prescription opioid distributed by Cardinal without the appropriate systems in place and without acceptable operational procedures was an unfair act under the KCPA; that the Commonwealth sues here as a sovereign and on behalf of the public and those consumers who ingested opioids that reached them as the result of that conduct in commerce as well as for the medically unnecessary prescriptions that the Commonwealth of Kentucky paid for as a result of that conduct in commerce; that the alleged unfair, false, misleading and deceptive conduct by Cardinal falls well within the conduct that may be prosecuted by the Attorney General under the KCPA; and that the Commonwealth properly seeks damages under its KCPA claim through KRS 367.200 and penalties under KRS 367.900.

The Commonwealth next asserts that it has stated a valid claim for fraud by omission, as Cardinal had a duty to the Commonwealth of Kentucky to disclose losses and thefts and protect against death and diversion yet it failed to disclose those facts, instead choosing to pump opioids into the Commonwealth of Kentucky without regard to those duties; that the Complaint alleges that Cardinal's reporting failures were in connection with opioid shipments occurring between January 1, 2007 and the present; that Cardinal omitted its failure to comply with state and federal regulations when applying for and using its Kentucky licensure to distribute drugs in the Commonwealth of Kentucky; that the Commonwealth of Kentucky relied on the information that Cardinal provided to the detriment of its population, while Cardinal refused to disclose the truth about its distribution practices; and that the requirements for pleading fraud are appropriately relaxed in its fraud by omission claim, given the extent and complexity of Cardinal's fraud and its control over relevant information.

The Commonwealth next argues that it has stated a valid cause of action under the Kentucky Medicaid Fraud and the Kentucky Assistant Program Fraud Statutes, as both of the fraud statutes reach beyond health care providers who submit fraudulent claims to those, like Cardinal, that cause or induce a submission of false claims for payment or participate in a scheme to defraud the Kentucky Medicaid program and actually benefit from the false submissions; that, although certain of the fraud statutes themselves may not incorporate a civil damages remedy, they give rise to a cause of action for damages under KRS 446.070; that Kentucky's Medicaid fraud statute does not require the Commonwealth to plead with specificity the six elements of fraud required under Kentucky common-law such that the Commonwealth has sufficiently pleaded these claims; that both of the medical assistance fraud statutory chapters impose liability for

misconduct beyond the mere submission of false claims of health care providers by also prohibiting the type of misconduct the Commonwealth alleges has been committed by Cardinal; and that the Commonwealth has sufficiently pleaded and properly alleged the violations by Cardinal under each of these statutes. The Commonwealth lastly argues that the Complaint clearly and properly sets forth each element of unjust enrichment, alleging that Cardinal profited and benefited from medically unnecessary and improperly shipped opioids purchased in the Commonwealth of Kentucky as an expected and intended result of its conscious wrongdoing; that due to and as intended by its deceptive acts, Cardinal has made millions of dollars at the expense of the Commonwealth of Kentucky; and that it would be inequitable for Cardinal to retain profits and benefits reaped from its deception, misrepresentation, and unlawful activity.

Cardinal filed a reply responding to the assertions of the Commonwealth and further setting forth arguments in support of its position. The parties presented oral argument before this Court on May 23, 2019. The matter now stands submitted for this Court's determination.

### **CONCLUSIONS**

A motion to dismiss for failure to state a claim should not be granted unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his or her claim. *Pari-Mutuel Clerks' Union, Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). It is well settled, when considering a motion to dismiss, that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true. *Mims v. Western-Southern Agency, Inc.*, 226 S.W.3d 833, 835 (Ky.App.2007), citing, *Gall v. Scroggy*, 725

S.W.2d 867 (Ky.App. 1987). Therefore, "the question is purely a matter of law." *James v. Wilson*, 95 S.W.3d 875, 884 (Ky.App. 2002).

CR 8.01(1) requires "(a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled." *Id.* "It is not necessary to state a claim with technical precision under this rule, as long as a complaint gives a defendant fair notice and identifies the claim." *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 844 (Ky. 2005), citing, *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky.1962). "But the simplification and liberality extend to the manner of stating a case and are not so great as to obviate the necessity of stating the elements of a cause of action or defense, as the case may be." *Johnson v. Coleman*, 288 S.W.2d 348, 349 (Ky. 1956). "There must be maintained some minimum standard in the art of pleading which must be met." *Morgan v. O'Neil*, 652 S.W.2d 83, 85 (Ky. 1983), citing, *Pike v. George*, 434 S.W.2d 626 (Ky. 1968); *Johnson v. Coleman*, 288 S.W.2d 348 (Ky. 1956). "The basic elements thereof must still be fairly shown, i.e., (a) a primary right of the plaintiff, and (b) a wrong of the defendant which breaches the right and results in damage." *Burkhart v. Community Medical Center*, 432 S.W.2d 433, 435 (Ky. 1968), quoting, *Clay's Kentucky Practice, Volume 6*, under Author's Comments, Rule 8.01. As noted by the Supreme Court of the United States in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), all that is required to defeat a motion to dismiss for failure to state a claim upon which relief can be granted is "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 547.

The Court will first address Cardinal's argument that the Complaint pleads, at most, a remote and indirect connection between Cardinal's alleged wrongdoing and the

Commonwealth's claimed harm. Cardinal argues that the Commonwealth's failure to adequately plead proximate causation requires dismissal of both its common-law and statutory causes of action. Causation is an element to the Commonwealth's claims for nuisance, negligence, consumer protection, fraud by omission and Medicaid fraud. Cardinal argues that the Complaint contains no allegations suggesting that its alleged wrongdoing (i.e., purported regulatory reporting failures) was a direct cause of the Commonwealth's injury. Cardinal asserts that the rule barring recovery for remote and derivative injuries applies with full force to claims by the Commonwealth to recover expenses incurred in the course of providing services to Kentucky's citizens. Cardinal argues that these alleged injuries – health care costs, law enforcement costs and social services costs – lack any direct causal link to its actions in Kentucky. Rather, according to Cardinal, it is the criminal intervening act of a third-party – a doctor who prescribes, a patient who sells a lawful prescription, or a thief of the drug – that causes injuries to Commonwealth of Kentucky. The Commonwealth argues that it has adequately pleaded causation in its Complaint; and that proximate cause is a matter for the jury because it is often, except in cases where no disputes about essential facts exist, a factual question.

“[L]egal causation[] presents a mixed question of law and fact.” *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003)(citations omitted).

The causal connection or proximate cause component traditionally was composed of two elements: cause-in-fact and legal or consequential causation. Cause-in-fact involves the factual chain of events leading to the injury; whereas, consequential causation concerns the concepts of foreseeability and the public policy consideration on limiting the scope of responsibility for damages. In Kentucky, the cause-in-fact component has been redefined as a “substantial factor” element as expressed in Restatement (Second) of Torts § 431.13 The scope of duty also includes a foreseeability component involving whether the risk of injury was reasonably foreseeable.



*Lewis v. B & R Corporation*, 56 S.W.3d 432, 436-37 (Ky.App. 2001) (citations omitted). "Consequent injury" consists of what hornbooks separate into two distinct elements: actual injury or harm to the plaintiff and legal causation between the defendant's breach and the plaintiff's injury." *Hammons*, 113 S.W.3d at 88-89 (citations omitted). Thus, the Commonwealth needs to show that Cardinal's conduct was a "substantial factor" to bring about the injury to the Commonwealth to establish a proximate cause. The Commonwealth avers that its allegations about the oversupply of pharmaceutical opioids by Cardinal in Kentucky is sufficient to establish causation.

The Commonwealth also asserts that the derivative injury rule does not bar its claims because it brought the action as *parens patriae* under the public nuisance law and the Kentucky Consumer Protection Act for the protection and interest of its citizens. Cardinal argues conversely that the holding in *Kentucky Laborers Dist. Council Health and Welfare Tr. Fund v. Hill & Knowlton, Inc.*, 24 F. Supp. 2d 755 (W.D. Ky. 1998), is "instructive." In that case, third-party payors<sup>9</sup> attempted to sue tobacco companies to recover medical costs that they expended for treatment of people with smoking related illnesses. The United States District Court for the Western District of Kentucky dismissed the action because the payors' claims were "remote" and entirely "derivative" of members' injuries. *Id.* at 762-63. The role of the Attorney General is distinct from that of the typical third-party payor seeking recovery from suit. The Attorney General has a special role as *parens patriae* to bring actions on behalf of its citizens. As noted by the United States Supreme Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592 (1982):

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<sup>9</sup> The plaintiff, third-party payors, in *Kentucky Laborers* were non-profit union multi-employer health and welfare trust funds that paid medical expenses incurred by those employed under various collective bargaining agreements and their dependents. *Id.* at 760.

In order to maintain [a *parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development – neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract – certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

*Id.* at 607. This case clearly falls within the first category. Thus, *Kentucky Laborers* is clearly distinguishable from the case at bar and does not support a dismissal under the derivative injury rule in this action. The Court finds that expenditures made related to opioid distribution in the Commonwealth of Kentucky are ripe for the remedies sought in the Commonwealth's Complaint. Likewise, the Commonwealth's allegations reflect that Cardinal's action of distributing opioids as alleged by the Commonwealth may be deemed to constitute proximate causation for opioid abuse, dependency and injuries as is alleged in the Complaint. The Court will note that the arguments of Cardinal with respect to proximate causation will be more appropriate after the parties are provided an ample opportunity to conduct discovery. At this point, there appear to be disputed facts that would be more appropriately reviewed by the fact finder. The allegations in the Complaint were sufficiently pleaded to provide Cardinal fair notice of the Commonwealth's claims with respect to proximate causation.

Cardinal next argues that the Commonwealth's claim for public nuisance should be dismissed because the Commonwealth fails to allege that Cardinal interfered with a public, as opposed to a private, right; that the Commonwealth fails to allege that Cardinal controlled prescription opioids at the time of the alleged injury; and that the

Commonwealth's claim is an unprecedented attempt to regulate prescription opioids through a "rarely-invoked common-law doctrine" typically used to remedy interferences with public rights involving land use. The Commonwealth argues that it stated a valid public nuisance claim in the Complaint, facially pleading that Cardinal's conduct violated multiple statutes and regulations; that the conduct has been continuing in nature, creating long lasting effects, such as the influx of opioids and resulting increase in opioid abuse, addiction and overdoses and has had a significant and long-lasting effect upon the public right to health and safety; that Cardinal cannot escape liability by simply claiming that it did not control the instrumentality at the time of the injury; that the nuisance for which Cardinal is liable is the opioid epidemic which was caused by the over-supply of opioids into the Commonwealth of Kentucky, and led to diversion, misuse and abuse that has caused significant long-term interference with public health and safety; and that, contrary to Cardinal's logic and arguments on this issue, Kentucky has not limited public rights to those connected with "public property, public resources or public highways," as Kentucky has long recognized a wide scope of public nuisance, including where a defendant has contributed to narcotics trafficking.

The Restatement provides that a public nuisance is "an unreasonable interference with a right common to the general public." Restatement (2nd) of Torts §821B (Am. Law Inst. 1979). Further, the Restatement provides guidance on circumstances that determine what constitutes an unreasonable interference with a public right. *Ibid.* According to the Restatement,

[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

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

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

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

*Ibid.* In the commentary following that section which discusses the meaning of the phrase “interference with a public right,” the drafters note, pertinently:

Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured. ... It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large. The obstruction of a public highway is a public nuisance, although no one is travelling upon the highway or wishes to travel on it at the time.

Restatement (Second) of Torts § 821B, cmt. g (1979). The Commonwealth argues that Cardinal has interfered with the public health and safety in Kentucky by oversupplying opioids in a fashion that contributed to increased risk of diversion, abuse, addiction and overdose in a long-lasting manner. A public nuisance “includes maintaining a condition of things which is prejudicial to the health, safety, comfort, property, sense of decency, or morals of the citizens at large. *Maum v. Commonwealth*, 490 S.W.2d 748, 749 (Ky. 1973), citing 66 C.J.S. Nuisances §§ 1-2 (1950). In *Maum*, the defendants were originally “charged with maintaining a public nuisance specifically because they permitted persons to traffic in narcotics on the property under their control.” *Id.* at 749-50. Though it reversed for other matters, the Supreme Court of Kentucky noted that the trafficking of narcotics was offensive to the public health, safety and quality of life, and could arise to a cause of

action for public nuisance. *Ibid.* Similar to the case at bar, the alleged influx of large quantities of opioids, at a disproportionate rate related to the population appears to meet the pleading requirements of violating the public right the *Maum* Court contemplated in its decision. Citizens share the right to be free from the adverse implications of drug abuse, diversion and overdose. Thus, the Court finds that the Commonwealth has adequately pleaded a public right that Cardinal has allegedly violated through its public nuisance claim. Likewise Cardinal has been provided fair notice of the claim.

Cardinal argues that the Commonwealth failed to allege that it had control of the prescriptions at the time of the alleged injuries sustained by Kentuckians. Cardinal asserts that the opioids only allegedly created the nuisance after the company sold prescriptions to licensed retailers and consumers then diverted the opioids for their illicit uses; and that the nuisance arose at the time of the drug's misuse, abuse or overdose. The Commonwealth argues that Cardinal simply misplaces the creation of the nuisance and, instead, created the nuisance at the time it over shipped a disproportionate number of opioids for the population into the Commonwealth, which would not have occurred but for Cardinal's actions. A party may only be liable for nuisance if the party controlled the instrumentality of the nuisance at the time of the injury. *Old Lewis Hunter Distillery Co. v. Commonwealth*, 273 Ky. 16, 116 S.W.2d 647, 649 (1938). In *Old Lewis*, the Court held that the distillery was not liable for the public nuisance associated with the smell of cattle where a third party fed cattle on property not owned by the distillery with slop from the distillery's byproducts. *Ibid.* The nuisance in that case was created at the time the cattle ate the slop, which was clearly controlled by the third party who fed the cattle the distillery's byproduct. In the case at bar, the nuisance to Kentucky, based on the Commonwealth's pleadings, arose at the time the Company distributed the opioids to

retailers. The volume of the opioids available to licensed retailers and prescribers allegedly caused the nuisance that has plagued the Commonwealth's right to be safe and healthy. The Commonwealth's pleadings consistently refer to the oversupply and overdistribution of opioids within this Commonwealth. Thus, the alleged nuisance occurred at the time when Cardinal maintained control of its products. Accordingly, the Commonwealth has sufficiently pleaded that Cardinal had control of opioids at the time of the alleged creation of the nuisance.

Cardinal's contention that the Commonwealth seeks to expand public nuisance law beyond the scope of Kentucky case law is unavailing. Kentucky has not limited public rights to those connected with "public property, public resources, or public highways." As shown above, Kentucky case law recognizes a wide scope of public nuisance, including where a defendant has contributed to narcotics trafficking.

The Court will next address Cardinal's argument with respect to the Commonwealth's claims of negligence and negligence *per se*. Cardinal argues that it does not owe the Commonwealth a statutory duty to "monitor, detect, investigate, refuse to fill and report suspicious orders of prescription opioids," as the Kentucky Attorney General is not authorized to enforce the federal Controlled Substances Act and violations of federal laws and regulations do not create a cause of action under KRS 446.070; and that none of the multiple state statutory and regulatory provisions cited by the Commonwealth in support of its claim for negligence *per se*, KRS 205.177,<sup>10</sup> KRS

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<sup>10</sup> KRS 205.177 deals with information that may be shared by state and local government agencies and the conditions upon which such information may be shared between those agencies.



205.5634,<sup>11</sup> KRS 128A.170,<sup>12</sup> 201 KAR 2:105 §2(4)(d),<sup>13</sup> and 201 KAR 2:105 §7,<sup>14</sup> gives rise to a cognizable claim under KRS 446.070.<sup>15</sup> Cardinal asserts that the doctrine of *ejusdem generis* applies in this case.<sup>16</sup> The Commonwealth responds that it adequately identified and pleaded violations of a statutory duty in its negligence *per se* claim; that the Commonwealth is a member of the class intended to be protected by KRS Chapter 218A and the other related statutes and regulatory provisions; and that the Commonwealth's claims for violation of 201 KAR 2:105 are sufficiently pleaded.

"A negligence *per se* claim 'is merely a negligence claim with a statutory standard of care substituted for the common law standard of care.'" *Lewis*, 56 S.W.3d at 438 (footnote omitted).

While it is unquestioned that violations of statutes constitute negligence *per se*, that statement is coextensive with the requirement that the violation "must be a substantial factor in causing the result." *Britton v. Wooten*, Ky., 817 S.W.2d 443, 447 (1991). However, the mere violation of a statute does not

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<sup>11</sup> KRS 205.5634 deals with the coordination of use of utilization data by the Drug Management Reviewed Advisory Board to identify appropriate use of pharmaceuticals and determine any need for educational interventions.

<sup>12</sup> KRS 218A.170 deals pertinently with the sale, distribution, administration or prescription of controlled substances by manufacturers, distributors, wholesalers, pharmacists or practitioners.

<sup>13</sup> 201 KAR 2:105 §2(4)(d) provides, pertinently, "[a] license shall not be issued or renewed unless the applicant demonstrates or continues to demonstrate acceptable operational procedures, including[] ... [p]roviding proof of registration with state controlled substance authority, and with the U.S. Drug Enforcement Administration and shall comply with all DEA regulations."

<sup>14</sup> 201 KAR 2:105 §7 provides:

(1) A wholesale distributor shall not distribute legend drugs directly to a consumer or a patient or operate in a manner that endangers the public health.

(2) Violation of any of these provisions shall be grounds for the suspension or revocation of the license.

<sup>15</sup> KRS 446.070 provides, " A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

<sup>16</sup> The doctrine of *ejusdem generis*, a rule of statutory construction, provides, "where, in a statute, general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose." *McCarty*, 476 S.W.3d at 235, quoting *Kentucky Retirement Systems v. Brown*, 336 S.W.3d 8, 16 (Ky.2011) (quoting *Steinfeld v. Jefferson County Fiscal Court*, 312 Ky. 614, 229 S.W.2d 319, 320 (1950)).

necessarily create liability unless the statute was specifically intended to prevent the type of occurrence which has taken place. Not all statutory violations result in liability for that violation. The violation must be a substantial factor in causing the injury and the violation must be one intended to prevent the specific type of occurrence before liability can attach.

*Ibid.* Under Kentucky law, three conditions must be satisfied to constitute a claim of negligence *per se* under KRS 446.070, (1) the plaintiff must fall within a class of persons the statute intends to protect; (2) the statute must be specifically intended to prevent the action that occurred; and (3) the violation of the statute must substantially contribute to the cause of the resulting harm. *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224, 227 (Ky. 2015).

The statutes contained in KRS Chapter 205, which relate to "Public Assistance and Medical Assistance," did not create a statutory duty for Cardinal, but rather fully explain the ability of the Attorney General's office to pursue civil remedy in this action. KRS 205.177(1) allows an agency to share patient information with "any other state or local governmental agency of similar function if the agency has a direct, tangible, legitimate interest in the individual concerned." KRS 205.5634 allows the Drug Management Review Advisory Board to coordinate data related to pharmaceutical drug use and determine the need for educational interventions. While these two statutes do not directly name the Attorney General's office in their text, the statutes implicitly confer the Attorney General with the authority to receive both specific patient information about opioid consumption and side effects from state agencies as well as larger, statistical information about the effect of opioids across the state. As previously noted, the Attorney General has a special role as *parens patriae* and may bring an action on behalf of the Commonwealth. Part of its ability to bring such an action requires it to collect information related to the Public Assistance and Medical Assistance as defined in KRS Chapter 205.

Therefore, the statutes provide the Commonwealth with the ability to collect information related to medical patients and overarching patterns across the Commonwealth of Kentucky.

KRS Chapter 218A implicitly includes the Commonwealth as a member of the class protected by its statutes. KRS 218A.005 includes a declaration and legislative finding that the regulation of controlled substances "it is important and necessary for the preservation of public safety and public health." KRS 218A.005(1). This declaration and legislative finding serves the entire chapter, which the Commonwealth's Complaint alleges Cardinal violated. The legislative finding establishes that the Kentucky public, represented here as the Commonwealth, is the protected class. The language of the statute further establishes conduct expected of wholesale distributors, including Cardinal, with the purpose of protecting public safety and health. KRS 218A.160(1)(a) requires pharmaceutical distributors to provide controlled substances to a list of approved recipients. The sale and distribution of drugs must be conducted in accordance with KRS 218A.200, which requires distributors to keep records that comply with state and federal laws. KRS 218A.140(4) prohibits any person from knowingly assisting "a person in obtaining or attempting to obtain a prescription in violation" of the statutes in KRS Chapter 218A. Additionally, KRS 218A.1402 provides for penalties for a criminal conspirator in violating sections of the chapter in the sale and transfer of illicit prescription drugs in the Commonwealth.

The scheme of KRS Chapter 218A and the regulations clearly indicates that the legislature intended to curtail improper handling of opioids and other controlled substances within the Commonwealth. Thus, the Commonwealth has correctly inferred from the concert of statutes within KRS Chapter 218A that distributors of controlled

substances have a duty to act within the best interest of public safety and health.

Likewise, the Commonwealth has sufficiently pleaded claims for violation of 201 KAR 2:105. Section 7 of the regulation prohibits a wholesale distributor from operating in a manner that endangers public health. The section is not limited to the direct distribution of drugs to a consumer or patient, but rather relates to the public health and safety considerations when it governs the licensure process from the Board of Pharmacy. See, 201 KAR 2:105 §3(1)(b). When read together as an entire scheme, it appears clear that the Legislature intended the regulations to safeguard against wholesale distributors acting in a manner that violates public health and safety concerns.

Viewing them as a whole or individually, the statutes and regulations were intended to prevent the type of harm alleged to have taken place in this case. The purpose of each is to protect the public by mandating requirements that would accomplish that goal. KRS 446.070 permits the Commonwealth to recover for injuries resulting from statutory or regulatory violations even though a penalty or forfeiture is imposed by the statute or regulation itself. Thus, the Commonwealth has sufficiently pleaded its claim for negligence *per se* as a matter of law.

Cardinal further argues that the Complaint fails to allege any harm to the Commonwealth under common law that should have been "foreseeable" to Cardinal; and that Cardinal had no duty to halt or report the steady upsurge in pharmacy orders for legal prescriptions as "suspicious" since it would be second-guessing both the doctors who prescribed the prescriptions and the DEA's increase of the manufacturing quotas for prescription opioids. Cardinal contends that it has no duty to prevent the downstream, inherently criminal "diversion" of opioids as a matter of law, as the duty does not extend to the downstream acts of third parties whose criminal acts Cardinal cannot foresee or

control. Cardinal asserts that its role in the distribution chain is limited to delivering pharmaceutical products from manufacturers to licensed retail pharmacies; and that allowing the Attorney General, through tort litigation, to utilize "the blunt instrument of common-law decision-making" to determine the circumstances under which a wholesale distributor's conduct was reasonable impermissibly encroaches upon the federal and state enforcement prerogatives and inserts the Court into a policy debate. The Commonwealth argues that it adequately identified and pleaded violations of a common-law duty in its negligence claim.

"Actionable negligence consists of a duty, a violation thereof, and a consequent injury. The absence of any one of the three elements is fatal to the claim." *Howard v. Fowler*, 207 S.W.2d 559, 561 (Ky. 1947). A plaintiff must present some evidence that the named defendant caused the injuries. *Holbrook v. Rose*, 458 S.W.2d 155, 157 (Ky. 1970). In order to prove causation, the Plaintiff must

... introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the results. A mere possibility of such causation is not enough; and when the matter remains one of speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

*Savill v. Hodges*, 460 S.W.2d 828, 830 (Ky. 1970).

Where it is sought to recover damages for negligence or wrongful acts, there must be some evidence to show that [plaintiff was injured] through the negligence of the defendant, and this evidence must be sufficient to charge the defendant with a breach of duty, and recovery cannot be had on mere surmises or speculation as to how the injury complained of happened, nor will it be presumed that the defendant was guilty of actionable negligence if the injury may as reasonably be attributed to a cause that will excuse the defendant as to a cause that will subject it to liability.

*Hearell v. Illinois Cent. R. Co.*, 185 Ky. 41, 213 S.W. 561, 562 (1919).

Kentucky recognizes a general, "universal" duty to exercise ordinary care to prevent foreseeable injury. *T & M Jewelry, Inc. v. Hicks ex rel. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006) (footnote omitted). "The examination must be focused so as to determine whether a duty is owed, and consideration must be given to public policy, statutory and common law theories in order to determine whether a duty existed in a particular situation." *Id* at 531, quoting *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 849 (Ky. 2005).

The focus of Cardinal on the prescription rate within Kentucky as the harm that occurred is extremely short sighted. As alleged by the Commonwealth, the harm was broader and foreseeable. According to the Complaint, Kentucky has suffered higher addiction and overdose rates, an increase in heroin usage, associated injuries like increased crime, increased need for foster care, increased health care expenses associated with medically unnecessary opioid prescriptions, and a decrease in the quality of life. This harm allegedly resulted from the influx of unreasonable amounts of opioids and was a reasonably foreseeable consequence of excess supply. The Commonwealth seeks damages from Cardinal for negligently setting the wheel in motion, pushing opioids in Kentucky and creating an environment in which diversion, addiction, misuse and overdose became an increasing reality and concern. The Commonwealth's Complaint does not allege that Cardinal is responsible for the acts of third parties, such as doctors, pharmacists or even criminals. Cardinal's continued pleas to find an intervening, superseding cause are no more persuasive here than they were in its argument with respect to causation. The prescribers, pharmacists and even criminals served only to connect the consumers with the mass of opioids that Cardinal allegedly wrongfully pumped into the community. The actions of the third parties, many of whom are revered



customers of Cardinal's, serve only as a natural extension of the alleged wrongdoings by Cardinal which were foreseeable to Cardinal. Accordingly, the Court finds that Cardinal has sufficiently pleaded its negligence claim in the Complaint as a matter of law. Likewise, the allegations in the Complaint provide Cardinal fair notice of the negligence claim.

The Court will next address Cardinal's argument that the Commonwealth's claim under the Kentucky Consumer Protection Act must be dismissed. Cardinal argues that it had no duty under Kentucky law to halt or report to the Commonwealth suspicious pharmacy orders; that the claim is not pleaded with the requisite particularity; and that the Commonwealth fails to allege the sort of consumer-directed conduct that is actionable under the KCPA. Cardinal further argues that the Commonwealth fails to allege that Cardinal's purported failure to disclose suspicious orders occurred "in the conduct of any trade or commerce," as is required by the KCPA, were not made to consumers or to businesses and did not "relate to the entrepreneurial, commercial or business aspect" of Cardinal's activities; and that the Commonwealth's claim for money damages under the KCPA fails as a matter of law, as the only KCPA provision that authorizes the Attorney General to bring a claim for money damages is KRS 367.200 and the Complaint does not allege that Cardinal's purported regulatory reporting violations defrauded consumers.

The Commonwealth argues that Cardinal's attempt to "graft" additional arguments to prove violations of the KCPA is misguided; and that each unit of opioids Cardinal shipped into Kentucky in the absence of the system to detect and halt delivery of suspicious orders constituted an unfair act under the KCPA. The Commonwealth contends that claims brought under the KCPA are not subject to CR 9.02, as the elements of a cause of action under the KCPA differ from those of fraud; that the KCPA was designed to enable the carrying out of law enforcement duties regardless of the persons

identified as being victimized by the wrongful practice of another "in the conduct of commerce" and the office of the Attorney General should not be "limited to prosecuting only selected types of illegal business acts or practices;" and that the Commonwealth has authority under the KCPA to ensure that all participants in the marketplace refrain from unfair, false, misleading or deceptive conduct.

The KCPA makes unlawful "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade[.]" KRS 367.170(1). Courts are to give the KCPA "the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts." *Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819, 821 (Ky. 1988). The KCPA permits a court to impose civil penalties after it finds a person has "willfully used a method, act, or practice declared unlawful by KRS 367.170[.]" KRS 367.990(2).

Claims brought by the Commonwealth under the KCPA are not subject to the specificity requirements under CR 9.02,<sup>17</sup> as the elements of a cause of action under the KCPA differ from the elements of fraud.<sup>18</sup> The KCPA does not require "proof of actual deception of some person in order to find a violation thereof." *Telcom Directories, Inc. v. Commonwealth ex rel. Cowan*, 833 S.W.2d 848, 850 (Ky.App. 1991). Thus, there would be no reason to require the heightened standard for pleading time, place and to whom the representation was made. Furthermore, imposing a heightened pleading requirement

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<sup>17</sup> CR 9.02 provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

<sup>18</sup> A claim of fraud requires proof of six elements under Kentucky common law: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury. *Farmers Bank and Tr. Co. of Georgetown, Kentucky v. Willmott Hardwoods, Inc.*, 171 S.W.3d 4, 11 (Ky. 2005); *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999), citing *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky.App. 1978).

on a KCPA claim would be inconsistent with the purposes of the KCPA, "which is designed to provide broad protection to consumers victimized by unlawful and deceptive trade practices." *Craig & Bishop, Inc. v. Piles*, 247 S.W.3d 897, 903 (Ky. 2008). Likewise, as noted by the Supreme Court of Kentucky in *Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819 (Ky. 1988), "Our examination and analysis of the various cases indicates clearly that the Kentucky legislature created a statute which has the broadest application in order to give Kentucky consumers the broadest possible protection for allegedly illegal acts." *Id.* at 821. Thus, the specificity requirements under CR 9.02 do not apply to KCPA actions as a matter of law.

"[T]he plain wording of the [KCPA] authorizes the Attorney General to proceed on behalf of the Commonwealth in his law enforcement authority when (1) he has reason to believe that any person is using, has used or is about to use any method, act or practice declared to be unlawful, and (2) that said proceeding would be in the public interest." *Commonwealth ex rel. Stephens v. North American Van Lines, Inc.*, 600 S.W.2d 459, 461 (Ky.App. 1979). "[T]he Kentucky Consumer Protection Act was broadly designed to curtail unfair, false, misleading or deceptive practices in the conduct of commerce[.]" *Id.* at 462. "[T]he Attorney General is therefore not limited to prosecuting only those selected types of illegal business acts or practices which are used in the merchandising of goods or services intended for personal, family or household use." *Ibid.* This is consistent with the legislative intent of enacting "a strong and effective consumer protection program to protect the public interest and the wellbeing of both the consumer public and the ethical sellers of goods and services." *Id.* at 460, quoting KRS 367.120. Thus, the Commonwealth may bring the claim in the public interest under the KCPA as a matter of law. Additionally, the Court will note that Cardinal has been provided adequate notice

through the pleadings that the Commonwealth of the KCPA claim in this action. The issue of damages would be best resolved at the final disposition of this case.

The Court will next address Cardinal's argument that the fraud by omission claim should be dismissed. Cardinal argues that the Commonwealth has not adequately pleaded the elements of fraud by omission and has not done so with particularity, as the Complaint alleges no cognizable "duty to the other to disclose" a material fact, since the Kentucky Controlled Substances Act imposes no duty on Cardinal "to disclose or report" suspicious pharmacy orders and only has an obligation to report "suspicious" orders to the federal DEA; that the Commonwealth's allegations of breach are wholly conclusory and fail to identify a misleading statement or omission by Cardinal; that the Commonwealth does not even attempt to explain what actions it allegedly took in reliance on Cardinal's purported omissions; and that the Commonwealth has not shown that Cardinal's purported omission proximately caused it any actual damages.

The Commonwealth responds that Cardinal had a duty to disclose facts with respect to the concerns of losses and debts, and protect against death and diversion, and wholly failed to report, provided inaccurate reporting, and/or provided partial reporting that omitted information that it had a duty to disclose; that Cardinal's alleged reporting failures were in connection with opioid shipments occurring between January 1, 2007 and the present; that Cardinal allegedly omitted its failure to comply with state and federal regulations when applying for and using its Kentucky licensure to distribute drugs in the Commonwealth; and that the Commonwealth relied on the information that Cardinal provided to the detriment of its population, as Cardinal refused to disclose the truth about its distribution practices. The Commonwealth argues that the requirements for pleading fraud are relaxed for circumstances which do not allow plaintiffs to access information

necessary to detail a claim and the relevant information is within the defendant's exclusive possession and control; and that, given the extent and complexity of Cardinal's alleged fraud and its control over the relevant information, the circumstances are fully met in this case.

"[A] fraud by omission claim is grounded in a duty to disclose. ... To prevail, a plaintiff must prove: (1) the defendant had a duty to disclose the material fact at issue; (2) the defendant failed to disclose the fact; (3) the defendant's failure to disclose the material fact induced the plaintiff to act; and (4) the plaintiff suffered actual damages as a consequence." *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011), citing *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky.App. 2003). "The existence of a duty to disclose is a matter of law for the court." *Ibid.*

In the Complaint, the Commonwealth alleges that Cardinal was under a duty required by law to disclose or report orders of unusual size, orders deviating substantially from a normal pattern, or orders of unusual frequency and failed to provide the reporting required by law, instead, providing minimal, inaccurate or partial reporting, if any reporting was provided that all; and that the Commonwealth of Kentucky acted in reliance on such failure to disclose and suffered grievous injury as a result of the failure to disclose through Cardinal's fraud by omission. (Compl. at ¶¶ 167-69). The Complaint also alleges that Cardinal admitted to prior violations of the federal controlled substances act in such a manner as to violate the Kentucky Controlled Substances Act and caused harm to the Commonwealth of Kentucky due to its clear fraud by omission for which the Commonwealth is entitled to recover all damages proximately caused by the fraudulent omissions. (*Id.* at ¶ 170).

"It is not necessary that the 'particularity' commanded by CR 9.02 attain such detail as to recite each minute detail; it is enough to plead the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud." *Scott v. Farmers State Bank*, 410 S.W.2d 717, 722 (Ky. 1966). "Rule requiring that averments of fraud be made with particularity does not require textbook pleading of all elements of fraud ...." *Ibid.* "Compliance with the particularity required by CR 9.02 merely commands that the claimant set forth with sufficient particularity to apprise [a party opponent] fairly of the charges against him or her." *Denzik v. Denzik*, 197, S.W.3d 108, 110 (Ky. 2006). "[T]he rule requiring pleading of fraud and mistake with particularity is to be considered in light of the entire spirit of modern pleading which lays emphasis upon short, concise and direct pleading." *Scott*, 410 S.W.2d at 722.

Viewing all the allegations in the Complaint in this action, it appears to this Court that the Commonwealth has sufficiently pleaded the fraud by omission claim with the particularity commanded by CR 9.02. While the time and place of the omissions is not specifically pleaded in the count itself, it is pleaded elsewhere in the allegations of the Complaint. The content of the alleged misrepresentations and the damages are sufficiently pleaded in the Count. Likewise, the Commonwealth has established that there is a duty to disclose which was allegedly breached by Cardinal. It will be best if the other arguments asserted by Cardinal are addressed through future dispositive motions after sufficient discovery is conducted by the parties. Accordingly, the Commonwealth has sufficiently pleaded the claim of fraud by omission as a matter of law. Likewise, Cardinal as been provided fair notice of the fraud by omission claim asserted in the Complaint.

The Court will next address Cardinal's position that the Commonwealth has failed to state a valid cause of action under the Kentucky Medicaid Fraud and Kentucky



Assistant Program Fraud statutes. Cardinal argues that KRS 205.8463 is a criminal statute outlawing medical fraud and has nothing to do with regulatory reporting or licensing violations by wholesale distributors and does not itself authorize civil damage actions. Within this argument, Cardinal notes that, as a wholesale distributor, it is not a health care provider under these programs and does not submit claims for payment to them; but, instead is paid for its drugs by pharmacies which, in turn, submit claims to the Commonwealth and private insurers when they dispense those drugs. Cardinal contends that there is no authority to support the Commonwealth's attempt to "enforce" this criminal statute in its civil damages claim against a wholesale distributor for alleged reporting and licensing violations; and that the Commonwealth cannot "salvage" its claim by invoking KRS 446.070. Cardinal further argues that the Commonwealth has not pleaded its claim with the required specificity under CR 9.02. The Commonwealth responds that both of the fraud statutes reach beyond healthcare providers who submit fraudulent claims to reach those, like Cardinal, that cause or induce a submission of false claims for payment or participation in a scheme to defraud the Kentucky Medicaid Program and actually benefits from the false submissions; that, although certain of the fraud statutes themselves may not encompass a civil damages remedy, they give rise to a cause of action for damages under KRS 446.070; and that Kentucky's Medicaid Fraud Statute does not require the Commonwealth to plead with specificity the six elements of fraud required under Kentucky common law, and, in terms of the statutory elements, the Commonwealth has sufficiently pleaded the claims.

KRS 205.8463 provides, pertinently:

(1) No person shall knowingly or wantonly devise a scheme or plan a scheme or artifice, or enter into an agreement, combination, or conspiracy to obtain or aid another in obtaining payments from any medical assistance program

under this chapter by means of any fictitious, false, or fraudulent application, claim, report, or document submitted to the Cabinet for Health and Family Services, or intentionally engage in conduct which advances the scheme or artifice.

(2) No person shall intentionally, knowingly, or wantonly make, present, or cause to be made or presented to an employee or officer of the Cabinet for Health and Family Services any false, fictitious, or fraudulent statement, representation, or entry in any application, claim, report, or document used in determining rights to any benefit or payment.

...

(4) No person shall, in any matter within the jurisdiction of the Cabinet for Health and Family Services under this chapter, knowingly falsify, conceal, or cover up by any trick, scheme, or device a material fact, or make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry.

KRS 194A.505(6) provides, "No person shall, with intent to defraud or deceive, devise a scheme or plan a scheme or artifice to obtain benefits from any assistance program by means of false or fraudulent representations or intentionally engage in conduct that advances the scheme or artifice." KRS 194A.505(8) provides, "The Attorney General on behalf of the Commonwealth of Kentucky may commence proceedings to enforce this section, and the Attorney General shall in undertaking these proceedings exercise all powers and perform all duties that a prosecuting attorney would otherwise perform or exercise."

In the Complaint, the Commonwealth alleges, pertinently, that Cardinal's "conduct, as described in the Complaint, violated KRS 205.8463(1), (2), & (4)[;]" that "Cardinal, through its annual deceptive license renewals through the Commonwealth's Cabinet for Health and Family Services ("CHFS") and Board of Pharmacy as well as its failure to identify, track, and reject suspicious orders of addictive prescription opioids: (a) schemed

to obtain payment from a medical assistance program through false application or document presented to the CHFS; (b) caused to be presented false or fraudulent claims to the CHFS; and (c) knowingly used or caused to be used a false statement, or statement which concealed or covered up a material fact, to get a false or fraudulent claim paid or approved by a program within the jurisdiction of the CHFS." (Compl. at ¶ 178). The Commonwealth also alleges in the Complaint that "Cardinal, by reason of the acts and/or omissions set forth herein, with the intent to defraud or deceive, devised a scheme or artifice to obtain benefits from the Kentucky Medicaid program and intentionally engaged in conduct that advanced said scheme, in violation of KRS 194A.505(6);]" and that "Cardinal, through its annual deceptive license renewals through the Commonwealth's CHFS and Board of Pharmacy as well as its failure to identify, track, and not distribute suspicious orders of addictive prescription opioids, schemed to obtain benefits from an assistance program through false representations and intentionally engaged in conduct that advanced the scheme." (*Id.* at ¶¶ 187-88).

Through the allegations in the Commonwealth's Complaint that Cardinal failed to identify, report and halt suspicious orders inform the Commonwealth of Kentucky of specific violations, the Commonwealth has sufficiently pleaded a claim for relief under KRS 205.8643 for Medicaid Fraud. The Commonwealth is properly seeking relief for Cardinal's alleged violations of KRS 205.8643 under KRS 446.070, which specifically provides for civil damages even though a penalty is imposed under the statute. The Commonwealth also sufficiently pleads a claim for relief under KRS 194A.505(6) of the Kentucky Assistance Program Fraud Statute. That claim is also properly before this Court under KRS 446.070. Cardinal has been provided adequate notice to the allegations in the Complaint of the Commonwealth's claims under the Kentucky Medicaid Fraud and

Kentucky Assistant Program Fraud statutes. It would be more proper for Cardinal to assert many of its arguments in opposition of the Commonwealth's claims that Cardinal violated the Kentucky Medicaid Fraud and Kentucky Assistant Program Fraud statutes after discovery is conducted by the parties in this action.

Lastly, the Court will address Cardinal's contention that the unjust enrichment claim should be dismissed. Cardinal argues that the Commonwealth has not alleged that it conferred a direct benefit on Cardinal; that the Commonwealth's allegation that Cardinal appreciated the benefit allegedly conferred on it is wholly conclusory; that there is no injustice under the circumstances, as the Commonwealth seeks funds that "pharmacies or insurance programs" paid Cardinal, which they owed Cardinal for opioid medications; and that the funds paid cannot be, simultaneously, unjust enrichment conferred by the Commonwealth. The Commonwealth responds that it has properly satisfied the pleading requirements for unjust enrichment, as it has alleged that Cardinal profited and benefited from medically unnecessary and improperly shipped opioids purchased in the Commonwealth as an expected and intended result of its conscious wrongdoing; that, due to and as intended by its deceptive acts, Cardinal has made millions of dollars at the expense of the Commonwealth; and that it would be inequitable for Cardinal to retain profits and benefits reaped from oversight failures and unlawful activity. The Commonwealth argues that the direct benefit to Cardinal was the continued payment for opioids distributed by Cardinal and allowing it to profit from its deception and the misconduct alleged, which not only caused the Commonwealth to pay for medically unnecessary opioid prescriptions but created a public health epidemic in the community, would plainly be unjust.

"For a party to prevail under the theory of unjust enrichment, [it] must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value." *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky.App. 2009). The doctrine of unjust enrichment "is applicable as a basis of restitution to prevent one person from keeping money or benefits belonging to another." *Haeberle v. St. Paul Fire and Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky. App. 1989), citing *Union Central Life Ins. Co. v. Glasscock*, 270 Ky. 750, 110 S.W.2d 681 (1937); 66 Am.Jur.2d *Restitution and Implied Contracts* § 1 *et seq.* (1973). The justification for restitution "is that one should not be unjustly enriched at the expense of another." *Alexander Hamilton Life Ins. Co. of America v. Lewis*, 550 S.W.2d 558, 559 (Ky. 1977) (citation omitted). "The obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation." *Marshall's Adm'r v. Webster*, 287 Ky. 692, 155 S.W.2d 13, 18 (1941).

In the Complaint, the Commonwealth alleges that "Cardinal created and maintained an artificial market for opioids within the Commonwealth that served only the purpose of spreading the addiction to create a reliable and growing stream of revenue[;]" that "Cardinal received financial benefit from the excessive distribution of opioids across Kentucky[, which] clear overuse and diversion was not reported to the appropriate authorities because ... Cardinal did not want to disrupt or diminish its highly profitable business practices[;]" that "[e]ach year, Defendant Cardinal renewed its license to operate as a pharmaceutical distributor in Kentucky, all the while misusing and abusing its privilege to do so by failing to report and halt suspicious orders and by failing to inform the Commonwealth of Kentucky of its continuing violations[;]" that "[t]he Commonwealth

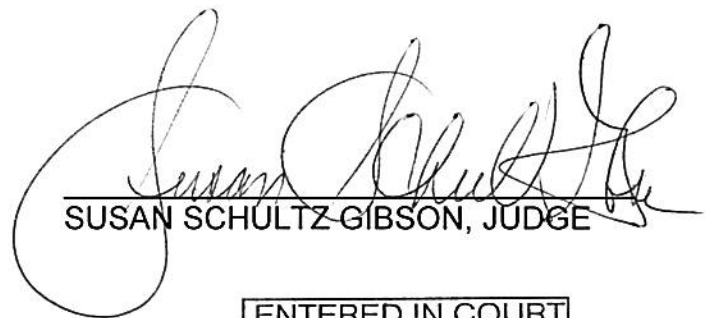
of Kentucky, through its insurers, including but not limited to the Department for Medicaid Services, paid direct reimbursement to the pharmacies or insurance programs which were pass through entities in order to allow financial benefits to be received by ... Cardinal[;] that "Cardinal was unjustly enriched and received an inequitable financial benefit as a result of their own unlawful action[;] ... and that "Cardinal should be required to disgorge all such unjust enrichment and to reimburse the Commonwealth for all sums to which Defendant Cardinal were not entitled." (Compl. at ¶¶ 159-64).

The Commonwealth has adequately pleaded facts to support its unjust enrichment claim. The Commonwealth has alleged that Cardinal profited from unnecessary and improperly shipped opioids purchased in the Commonwealth the Kentucky, profited from its endeavors, and equity would preclude Cardinal from keeping profits it unjustly earned off deception in the Commonwealth. Cardinal is provided fair notice through the Complaint that the Commonwealth is seeking a claim of unjust enrichment. Many of the arguments Cardinal has asserted against the unjust enrichment claim here would be more appropriately asserted after the parties are provided an opportunity to conduct sufficient discovery.

**ORDER**

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Motion of Cardinal to Dismiss is **DENIED**.

Date: 9/12/19

  
SUSAN SCHULTZ-GIBSON, JUDGE

cc: Brian C. Thomas, Esq.  
Linda Singer, Esq.  
James D. Young, Esq.  
W. Mark Lanier, Esq.

