No. 22-____

In the United States Court of Appeals for the Sixth Circuit

In re National Prescription Opiate Litigation

IN RE WALGREENS BOOTS ALLIANCE, INC., ET AL.,
Petitioners.

United States District Court for the
Northern District of Ohio, Eastern Division
(No. 1:17-md-2804) (The Hon. Dan Aaron Polster)

PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

This case is part of multidistrict litigation involving the abuse of prescription opioids, an issue of "enormous public interest and significance." *In re National Prescription Opiate Litig.*, 2019 WL 7482137, at *2 (6th Cir. Oct. 10, 2019). But these plaintiffs, Lake and Trumbull Counties, are not suing the pharmaceutical companies that manufactured and marketed opioids or the doctors who prescribed them. Rather, the Counties are suing *pharmacies*, claiming that they contributed to a public nuisance when their employees filled doctors' prescriptions. That claim never should have seen a courtroom because an Ohio statute abrogates all common-law public-nuisance claims based on the distribution or sale of products. To make matters worse, during trial the parties learned of juror misconduct so egregious that the Counties' own counsel conceded that a mistrial was necessary. For either reason or both, this Court should grant mandamus and forestall the upcoming bench trial on billions of dollars the Counties seek in purported "abatement."

At the threshold, Ohio has flatly foreclosed the Counties' claim. The Ohio Product Liability Act (OPLA) "abrogate[s] all common law product liability claims or causes of action." Ohio Rev. Code Ann. § 2307.71(B). And Ohio defines a "[p]roduct liability claim" to include "*any public nuisance claim*

or cause of action at common law" based on the "supply," "distribution," or "sale of a product." *Id.* § 2307.71(A)(13) (emphasis added). That definition plainly encompasses the Counties' claim. The district court, however, reasoned based on legislative history that OPLA was intended to abrogate only those public-nuisance claims that seek compensatory damages. "No resort to . . . an examination of the legislative history is warranted" when the statute is "unambiguous." *State ex rel. Brinda* v. *Lorain Cnty. Bd. of Elections*, 874 N.E.2d 1205, 1211 (Ohio 2007) (citation omitted).

Notwithstanding OPLA's plain text, this case proceeded to a jury trial on liability. During trial, the district court learned that a juror had conducted outside research into the testimony of one of the pharmacies' witnesses and printed fliers on the subject for every other juror. The court stated that it had never seen "anything like this" in 22 years. Tr. 3725:14-15. Even the Counties' lead counsel initially urged that a "mistrial is appropriate." Tr. 3770:2. Those reactions were warranted because a juror's provision of outside evidence to other jurors on a contested issue requires a mistrial, absent clear harmlessness. *See In re Beverly Hills Fire Litig.*, 695 F.2d 207, 215 (6th Cir. 1982). Here, the misconduct was far from harmless: the outside evidence showed that the pharmacies were charging money for a life-saving drug that

was available elsewhere for free—lawful behavior that nevertheless fed into the Counties' narrative that the pharmacies were improperly motivated by profit. Yet the court repeatedly pressed the Counties to rethink their position, and even suggested that it might not try the case again if they did not. Then, after dismissing the offending juror and questioning the rest, the court allowed the trial to proceed.

Not surprisingly, the tainted jury found the pharmacies liable for substantially contributing to an opioid public nuisance. The district court then declined to certify its rulings on OPLA and juror misconduct for interlocutory appeal under 28 U.S.C. § 1292(b). Absent this Court's immediate intervention, the case will now proceed to a costly and needless bench trial on the Counties' multibillion-dollar claim for relief, followed by potentially indefinite delay while the parties await the district court's award, let alone if the district court allows the Counties to pursue other outstanding claims in a second round of discovery and trial. All the while, the pharmacies will face unusual pressure to settle with the Counties—a result that the district court has openly advocated since the beginning of the MDL. This case cries out for immediate appellate oversight. The Court should issue a writ of mandamus requiring the

district court to enter judgment for the pharmacies, grant a mistrial, or at a minimum certify the relevant orders for interlocutory appeal.

STATEMENT OF FACTS

A. The Governing Ohio Statute

The Ohio Product Liability Act is a comprehensive statutory regime "intended to abrogate all common law product liability claims or causes of action." Ohio Rev. Code Ann. § 2307.71(B). The Act defines a "product liability claim" to include two types of actions. First, a product-liability claim "means a claim or cause of action that is asserted in a civil action . . . and that seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property." *Id.* § 2307.71(A)(13). Second, a product-liability claim "also includes any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public." *Id.* Taken together, OPLA abrogates all product-based claims that either seek a particular remedy (certain kinds of compensatory damages) or are based on a particular theory (the product contributed to a public nuisance).

When OPLA was first enacted in 1988, the statute did not expressly abrogate all product-liability claims, nor did it specifically discuss public-nuisance claims. *See* Ohio Rev. Code Ann. § 2307.71(M) (1988). And in the years following OPLA's enactment, the Ohio Supreme Court applied the statute narrowly. In *LaPuma* v. *Collinwood Concrete*, 661 N.E.2d 714, 716 (Ohio 1996), for example, the court held that OPLA abrogated only those product-liability claims that sought non-economic damages. In *Carrel* v. *Allied Products Corp.*, 677 N.E.2d 795, 800 (Ohio 1997), the court held that OPLA did not abrogate "the common-law action of negligent design." And in *City of Cincinnati* v. *Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143-1145 (Ohio 2002), the court allowed certain product-based public-nuisance claims to proceed, over a dissent's warning that the majority had taken "the ill-advised first step toward transforming nuisance into 'a monster that would devour in one gulp the entire law of tort,'" *id.* at 1157 (citation omitted).

Following those decisions, in 2005 the Ohio General Assembly amended OPLA to clarify the statute's intended broad scope, specifying that OPLA is "intended to abrogate *all* common law product liability claims or causes of action." Ohio Rev. Code Ann. § 2307.71(B) (emphasis added); *see* 2004 Ohio Laws File 144. Nevertheless, plaintiffs continued to bring public-nuisance

claims under Ohio common law based on allegedly harmful products. *See, e.g.*, *City of Toledo* v. *Sherwin-Williams Co.*, 2007 WL 4965044 (Ohio Ct. Com. Pl. Dec. 12, 2007). The General Assembly responded yet again in 2007, and this time it left no room to maneuver: it expressly defined product-liability claims to "include[] *any public nuisance claim*" under Ohio common law based on (among other things) the "supply," "distribution," or "sale of a product." 2006 Ohio Laws File 198 (codified at Ohio Rev. Code Ann. § 2307.71(A)(13)) (emphasis added).

B. OPLA Claims In The MDL

In this MDL, several Ohio plaintiffs have asserted common-law public-nuisance claims against companies that manufacture, distribute, and dispense opioids. Whether OPLA abrogates those claims first arose in earlier motion practice in the MDL. Summit County and the City of Akron brought a common-law public-nuisance claim and sought purported "abatement." The defendants in that case moved to dismiss the nuisance claim under OPLA, and Magistrate Judge Ruiz agreed that "the plain language of the statute" abrogated the claim. Doc. 1025 at 64.

The district court rejected the magistrate judge's recommendation. Doc. 1203 at 28. The court focused on a comment in the legislative history that,

in amending OPLA in 2005, the General Assembly had "intended to supersede the holding of the Ohio Supreme Court in *Carrel*." *Id.* at 24 (quoting 2004 Ohio Laws File 144). The court inferred from the explicit reference to *Carrel* that the General Assembly had intended *not* to supersede *LaPuma*'s holding that the 1988 version of OPLA abrogated only claims for compensatory damages. *Id.* The district court likewise dismissed the relevance of the 2007 amendment—which specifically forecloses *any* common-law public-nuisance suit—because another snippet of legislative history suggested that the amendment was "not intended to be substantive" but rather "to clarify the General Assembly's original intent" in enacting OPLA. *Id.* at 24-25 (quoting 2006 Ohio Laws File 198).

In this case, Lake and Trumbull Counties brought a similar public-nuisance claim under Ohio common law against pharmacies that dispense prescription opioids. The Counties sought billions of dollars for past and present harms, styled as "abatement" in their complaints. Doc. 3326 ¶ 655(p); Doc. 3327 ¶ 655(p). The pharmacies moved to dismiss the Counties' claim as abrogated by OPLA. Doc. 3340-1 at 30. The district court denied the motion, relying on its prior ruling. Doc. 3403 at 32-33. The case proceeded to a jury trial on liability.

C. Juror Misconduct At Trial

From the start of the liability trial, the Counties sought to develop a theme that the pharmacies' supposed corporate greed led them to profit from opioid addicts. The Counties contended in their opening arguments that "it wasn't profitable to follow the law" and that the pharmacies "could make money by selling." Tr. 92:24-93:3. The Counties returned to that theme when, in response to a juror's question about whether Walgreens provides free naloxone—a life-saving medication that can reverse an opioid overdose—the Counties' counsel cross-examined a Walgreens employee to show that Walgreens charges customers for naloxone. Tr. 3292:3-3293:15.

After hearing that testimony, Juror #4 went home and conducted independent internet research into the availability of naloxone. She printed copies of a flier stating that naloxone was available elsewhere for free, made one available to each of the other jurors, and discussed the availability of free naloxone with them. Tr. 3717:22-3721:6. Upon learning of the misconduct, the court dismissed Juror #4. *Id.* Other jurors then confirmed that they had received the flier, that some had reviewed the flier, and that the flier or Juror #4 had informed some of them that naloxone is available elsewhere for free. Tr. 3727:12-3764:3.

Counsel for both sides immediately recognized the need for a mistrial. The Counties' counsel admitted that the information could favor the Counties because it fed into the Counties' theory that the pharmacies were motivated by greed. Tr. 3723:7-12. Defense counsel agreed that "[i]t's clearly prejudicial to the companies here that you could get it for free, isn't it terrible that these companies are charging for it." Tr. 3765:7-9; *see* Tr. 3766:24-3767:8. The Counties' counsel also acknowledged the incurable problem that the outside evidence "affects everybody whether they recognize it or not." Tr. 3769:12-15. He explained that, under the circumstances, a "mistrial is appropriate. That's my candor to the tribunal which I owe under my ethical obligation." Tr. 3770:1-3.

The district court also recognized that the juror misconduct was egregious. The court remarked that "I've been a judge 22-some years" and "I've never had a juror, to my knowledge, do anything like this." Tr. 3725:14-15. But the court warned that "[i]f we have to stop the trial," it would "be a long time" before "we'll do it again." Tr. 3771:1-4. The court directed the parties to reconsider their positions over the weekend, Tr. 3770:4-7, and concluded by "emphasiz[ing]" that "[i]f we have to stop this trial, I'm

not making any commitment as to when or if I will retry the case." Tr. 3779:11-13.

The pharmacies promptly moved for a mistrial. But following the district court's admonitions, the Counties reversed course. The court denied the pharmacies' motion on the ground that, because the juror misconduct had been revealed before the jury reached a verdict, the court could assess any influence on the remaining jurors through individualized questioning. Tr. 3785:5-3789:24. The court then brought in each juror for one to two minutes and asked whether the juror could remain impartial after Juror #4's misconduct. Tr. 3796:23-3808:25. After each juror denied bias, the trial proceeded.

D. Post-Trial Motions

On November 23, 2021, the jury returned a verdict finding the pharmacies liable for contributing to a public nuisance. On December 21, 2021, the pharmacies filed motions for judgment as a matter of law under Rule 50(b) and for a new trial under Rule 59. Among the many reversible errors those motions identified was the district court's atextual ruling that the implementing regulations of the Controlled Substances Act impose duties on corporations that own pharmacies to maintain systems for aggregating and

analyzing prescription data and "red flags." The pharmacies also moved under Section 1292(b) to certify for interlocutory appeal the district court's orders denying their motion to dismiss and denying a mistrial.[1]

On January 31, 2022, the district court denied the motion for certification. Doc. 4251. The court concluded that the motion was redundant with a previous motion to certify the OPLA issue; was untimely; and did not satisfy the statutory criteria for certification because immediate appellate review would not "materially advance the ultimate termination of the litigation." *Id.* at 2-5.

A remedies trial is currently scheduled for May 2022.

ARGUMENT

"When there is extraordinary need for review of an order before final judgment and the District Court has refused to certify the issue pursuant to [28 U.S.C.] § 1292(b), this Court has authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651." *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005). Mandamus is appropriate when (1) the "right to issuance of the

[1] The pharmacies also raised the OPLA-abrogation issue in their Rule 50(a) motion. Doc. 4098 at 22-23. Because the district court declined to rule on that motion, however, the pharmacies sought certification of the court's earlier denial of their motion to dismiss. Doc. 4205 at 13.

writ is 'clear and indisputable'"; (2) "the party seeking the writ" has "no other adequate means to attain the relief he desires"; and (3) "the writ is appropriate under the circumstances." *Cheney* v. *U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-381 (2004) (citations omitted). In applying those criteria, this Court also has looked to whether the order under review "manifests a persistent disregard" of the law or "raises new and important problems, or issues of law of first impression." *John B.* v. *Goetz*, 531 F.3d 448, 457 (6th Cir. 2008). And because mandamus is an equitable "safety valve" to the final-judgment rule, this Court has emphasized that "[s]ome flexibility is required" in its application. *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997) (citation omitted); *see Chesher* v. *Allen*, 122 Fed. Appx. 184, 187 (6th Cir. 2005) (per curiam) (observing that this Court "has a more flexible approach to mandamus than other circuits").

The criteria for mandamus are readily satisfied here. The district court clearly and indisputably erred when it allowed this case to go to trial, because OPLA unambiguously abrogates the Counties' sole claim. And the court clearly and indisputably erred in allowing that trial to go forward after egregious juror misconduct. At the very least, the court clearly and indisputably erred in failing to certify for interlocutory appeal its orders deciding those important questions. Mandamus is the only adequate remedy

that can ensure a timely resolution of these issues and spare the defendants from the unusual pressures, high costs, and potentially indefinite delay of future proceedings, including a remedies trial premised on a reversible verdict.

I. THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS DIRECTING THE DISTRICT COURT TO DISMISS THE CASE OR CONDUCT A NEW TRIAL

A. The Pharmacies Have A Clear And Indisputable Right To Relief On The Merits

"Most importantly" to the mandamus inquiry, the district court's orders on OPLA and juror misconduct "are clearly erroneous as a matter of law." *John B.*, 531 F.3d at 458. Particularly when a district court's order "indicate[s] failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine," the "clearly erroneous nature of [that] order calls for" mandamus relief. *In re Impact Absorbent Techs., Inc.*, 106 F.3d 400 (6th Cir. 1996) (unpublished) (citation omitted).

1. The text of OPLA unambiguously forecloses the Counties' public-nuisance claim

The district court clearly and indisputably erred when it concluded that OPLA abrogates only those common-law public-nuisance claims that seek compensatory damages. OPLA's text and history make clear that the statute

abrogates *all* common-law public-nuisance claims involving products, regardless of the remedy sought.

a. OPLA is "intended to abrogate all common law product liability claims or causes of action." Ohio Rev. Code Ann. § 2307.71(B). To avoid any doubt, OPLA broadly defines two categories of "product liability claim[s]." First, "product liability claim" means a claim "that seeks to recover compensatory damages" caused by harmful products. Ohio Rev. Code Ann. § 2307.71(A)(13). Second, "product liability claim" "also includes *any* [common-law] public nuisance claim" that is based on, among other things, the "marketing," "distribution," "or sale of a product." *Id.* (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted).

On its face, OPLA's expansive language does not cover only public-nuisance claims seeking compensatory damages, as the district court held. The *first* definition of "product liability claim" is indeed tied to whether a claim, of any kind, seeks compensatory damages for the harm caused by a product. But the *second* definition is additive and directly on point: the set of abrogated claims "also includes any public nuisance claim" based on the distribution or

sale of a product. Ohio Rev. Code Ann. § 2307.71(A)(13); *see Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 25 (2018) ("'[A]lso' is a term of enhancement; it means 'in addition; besides' and 'likewise; too.'") (citation omitted).

The Counties have not offered any plausible explanation for how their claim escapes OPLA's plain text. To the contrary, the Counties' claim tracks the precise language of the statute. The Counties alleged in their complaints that the pharmacies "created and maintained a public nuisance" because their "marketing," "distributing," and "selling" of prescription opioids "unreasonably interfere with the public health, welfare, and safety." Doc. 3326 ¶ 619; Doc. 3327 ¶ 619; *see* Ohio Rev. Code Ann. § 2307.71(A)(13). And it is undisputed that prescription opioids fall within the statutory definition of a "product." *See* Ohio Rev. Code Ann. § 2307.71(A)(12). That should have been the end of the district court's analysis.

b. The district court's contrary analysis was wrong at every step. First, rather than starting with OPLA's plain language, the district court declared the text ambiguous and reasoned backward from excerpts of the legislative history. *See* Doc. 1203 at 23. That entire exercise was unnecessary because OPLA's abrogation of "any [common-law] public nuisance claim" is unambiguous. Ohio Rev. Code Ann. § 2307.71(A)(13). When "the meaning of

a statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Prade* v. *Ninth Dist. Ct. of Appeals*, 87 N.E.3d 1239, 1242 (Ohio 2017) (per curiam) (citation omitted); *see Olden* v. *LaFarge Corp.*, 383 F.3d 495, 502 (6th Cir. 2004) (warning against the "incentive to interpret what we believe to be unambiguous as ambiguous, in order to open the door to the legislative history").

Second, even when the district court finally discussed the statutory language, it erred. The court focused on the fact that OPLA defines "product liability claim" to "also *include*[] any public nuisance claim" (emphasis added). Doc. 1203 at 26-27. In the court's view, the use of "include" means that the second category of abrogated claims (public-nuisance claims) is only a subset of the first category of abrogated claims (those seeking compensatory damages). *Id.* But the General Assembly specifically amended OPLA in 2007 to provide that product liability claims would "*also* include[]" public-nuisance claims (emphasis added). Even if the word "includes" on its own often introduces an illustrative example, the full phrase "also includes," which appears in a new statutory paragraph, is plainly additive. *See Mount Lemmon*, 139 S. Ct. at 25. The district court thus made the classic error of focusing on a single word rather than the text as a whole. *See Gabbard* v.

Madison Loc. Sch. Dist. Bd. of Educ., 2021 WL 2557315, at *6 (Ohio June 23, 2021) ("Our precedent requires courts to read a statute as a whole and to not dissociate words and phrases from that context.").

Third, the district court was reluctant to read OPLA according to its plain terms because it believed that the statute otherwise "does not provide for any form of equitable remedy." Doc. 1203 at 26. The court assumed that plaintiffs like the Counties *must* be able to bring common-law public-nuisance claims for equitable relief like abatement. But States are the masters of their own common law. The Ohio General Assembly reasonably chose to foreclose any relief—including equitable relief—for product-based public-nuisance claims. That is hardly a novel choice. Many jurisdictions adhere to the "boundary between the well-developed body of product liability law and public nuisance law." *Camden Cnty. Bd. of Chosen Freeholders* v. *Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001). Moreover, the district court was wrong about OPLA. In fact, the Act allows equitable relief, including "in the form of the abatement of a nuisance," for "contamination or pollution of the environment." Ohio Rev. Code Ann. § 2307.72(D)(1). The Ohio General Assembly reasonably chose to abrogate certain novel claims for equitable

relief (product-based public-nuisance claims), while allowing more traditional claims (environmental public-nuisance claims).

c. OPLA's statutory history confirms its plain text. Before the 2005 and 2007 amendments, the Ohio Supreme Court had held that plaintiffs could bring product-based public-nuisance claims under Ohio common law. *See City of Cincinnati* v. *Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002). *Beretta*'s holding marked a significant expansion of public-nuisance law. *See id.* at 1158 (Cook, J., dissenting). Courts around the country had at the time, and have repeatedly since, rejected comparable product-based public-nuisance claims.[2] When the Ohio General Assembly amended OPLA in 2005 to emphasize the breadth of the intended abrogation of common-law claims, it

[2] *See Tioga Pub. Sch. Dist.* v. *U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) (warning that nuisance would become "a monster that would devour in one gulp the entire law of tort"); *Camden Cnty.*, 273 F.3d at 540 (reasoning that distributing "non-defective, lawful products . . . cannot be a nuisance without straining the law to absurdity"). In the specific context of opioid lawsuits like this one, see also, *e.g.*, *State ex rel. Hunter* v. *Johnson & Johnson*, 499 P.3d 719, 721 (Okla. 2021); *People* v. *Purdue Pharma L.P.*, No. 30-2014-00725287 (Cal. Super. Ct. Dec. 14, 2021); *State ex rel. Ravnsborg* v. *Purdue Pharma, L.P.*, No. 32CIV18-000065 (S.D. Cir. Ct. Mar. 29, 2021); *People* v. *Johnson & Johnson*, No. 19 CH 10481 (Ill. Cir. Ct. Jan. 8, 2021); *State ex rel. Stenehjem* v. *Purdue Pharma L.P.*, No. 08-2018-CV-01300, 2019 WL 2245743 (N.D. Dist. Ct. May 24, 2019); *State ex rel. Jennings* v. *Purdue Pharma L.P.*, No. N18C-01-223, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019); and *City of New Haven* v. *Purdue Pharma, L.P.*, No. X07HHDCV176086134S, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019).

sought to bring Ohio in line with those other jurisdictions. *See* 2004 Ohio Laws File 144.

Notwithstanding the 2005 amendment, the City of Toledo brought a high-profile lawsuit against lead-paint manufacturers for allegedly contributing to a public nuisance. *See City of Toledo* v. *Sherwin-Williams Co.*, 2007 WL 4965044 (Ohio Ct. Com. Pl. Dec. 12, 2007). While that lawsuit was pending, the Ohio General Assembly again amended OPLA to clarify that the term "'[p]roduct liability claim' also includes any [common-law] public nuisance claim" based on the manufacture or distribution of a product. 2006 Ohio Laws File 198. The Ohio Court of Common Pleas promptly dismissed Toledo's public-nuisance claim against the paint manufacturers, recognizing that the 2005 and 2007 amendments overruled *Beretta* and abrogated all common-law public-nuisance claims involving products. *Sherwin-Williams Co.*, 2007 WL 4965044, at n.2.[3]

[3] A different Ohio trial judge later suggested that *Beretta* still permits certain product-based public-nuisance claims. *See State ex rel. DeWine* v. *Purdue Pharma LP*, 2018 WL 4080052, at *4 (Ohio Ct. Com. Pl. Aug. 22, 2018). That decision discussed only the first category in the "product liability claim" definition; it failed to mention either the 2007 amendment or *Sherwin-Williams*.

The district court's conclusion that OPLA abrogates only public-nuisance claims for compensatory damages is impossible to square with the 2007 amendment. Before 2007, OPLA *already* barred any product-liability claim, including one sounding in nuisance, against manufacturers or suppliers for compensatory damages. The whole point of the 2007 amendment was to make clear that the prohibition "*also* includes *any* public nuisance claim" based on the distribution or sale of a product. Ohio Rev. Code Ann. § 2307.71(A)(13) (emphasis added). Yet on the district court's interpretation, the 2007 amendment accomplished nothing. *See Lynch* v. *Gallia Cnty. Bd. of Comm'rs*, 680 N.E.2d 1222, 1224 (Ohio 1997) ("When confronted with amendments to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law."). Even more perversely, under the court's reasoning, product-based public-nuisance claims that are disallowed in many common-law States, *see, e.g.*, *State ex rel. Hunter* v. *Johnson & Johnson*, 499 P.3d 719, 721 (Okla. 2021), are still permitted in Ohio—which has expressly abrogated them by statute.

The district court relied on snippets of legislative history indicating that the 2005 and 2007 amendments were not intended to "change[] much" from the 1988 version of OPLA. Doc. 1203 at 25. Read in full, however, the

legislative history reinforces what the statutory text and history already make clear: the General Assembly amended OPLA to overrule judicial decisions that had applied the statute too narrowly. In particular, the General Assembly explained that the 2007 amendment was "not intended to be substantive but [was] intended to clarify the General Assembly's original intent in enacting the Ohio Product Liability Act . . . , as initially expressed in [the 2005 amendment], *to abrogate all common law product liability causes of action including common law public nuisance causes of action*." 2006 Ohio Laws File 198 (emphasis added). In other words, the 2007 amendment confirmed the General Assembly's broad intent to correct judicial decisions that had wrongly narrowed the statute—a correction that a federal district court has now undone.

2. The egregious juror misconduct at trial requires a mistrial

Although the trial in this case never should have happened, at least it should have been fair. A jury's consideration of outside evidence on a contested issue requires a mistrial, absent clear harmlessness. As this Court explained in *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982), the "jury's receipt of such extraneous information 'requires that the verdict be set aside, unless *entirely devoid of any proven influence or the probability of*

such influence upon the jury's deliberations or verdict.'" *Id.* at 215 (emphasis added) (quoting *Stiles* v. *Lawrie*, 211 F.2d 188, 190 (6th Cir. 1954)). It is generally "not for the court to say" whether relevant "evidence improperly received" by the jury "could have had no influence on the verdict." *Stiles*, 211 F.2d at 190. Instead, a mistrial is appropriate when the outside evidence relates to a contested issue. *Id.* Accordingly, this Court has cautioned that "a juror introducing extraneous information into deliberations 'can rarely be viewed as harmless.'" *Nian* v. *Warden, N. Cent. Corr. Inst.*, 994 F.3d 746, 758 (6th Cir. 2021) (quoting *Beverly Hills*, 695 F.2d at 215).

Following that rule, this Court "has not hesitated to declare mistrials" when a jury reviews relevant outside evidence that pertains to a core disputed issue in the case. *Beverly Hills*, 695 F.2d at 213; *see, e.g.*, *Dassault Systèmes, SA* v. *Childress*, 828 Fed. Appx. 229, 246-248 (6th Cir. 2020) (juror acquired information about the defendant's income and settlement posture); *Aluminum Co. of Am.* v. *Loveday*, 273 F.2d 499, 499-500 (6th Cir. 1959) (juror traveled to the plaintiff's property to view allegedly injured cattle); *Stiles*, 211 F.2d at 190 (juror consulted Highway Department manual on skid marks made by cars driving at different speeds). By contrast, this Court has declined to require a new trial when extrinsic evidence is unrelated to the elements of

the offense or claim, or is indisputably cumulative. *See, e.g.*, *United States* v. *Wheaton*, 517 F.3d 350, 361-362 (6th Cir. 2008) (juror looked up distance between two towns and replayed CD that was already admitted into evidence).

The outside evidence in this case was relevant to a contested issue at trial: whether the pharmacies' dispensing practices were driven by improper motives. The flier that Juror #4 found and distributed to other jurors fed directly into the Counties' narrative that corporate greed drove the pharmacies to fill opioid prescriptions improperly. It showed that Walgreens charged customers for life-saving naloxone when other organizations made it available for free. Even the Counties' counsel acknowledged that, in his "candid[]" view, the outside evidence could favor the Counties "because Walgreens is charging for something that's commercially available for free." Tr. 3723:7-12.

Indeed, there is no need for guesswork about whether the jury considered the information relevant. A juror had asked whether Walgreens offered naloxone "for free" to customers, Tr. 3292:22, leading to the testimony that prompted Juror #4's outside research. For that reason, the Counties' counsel later acknowledged that the outside evidence bore on "*an issue in the case that has been questioned*." Tr. 3723:14-15 (emphasis added). The district

court, however, speculated that any relevance was limited because the parties might not even "mention" the issue "in final argument." Tr. 3786:12. But whether evidence is central enough to be raised in closing arguments is not the test. In any event, the Counties *did* address the pharmacies' profit motive in closing arguments, telling the jury that the pharmacies are "making money off every pill they sell" and that they "don't have to sell the drugs, they choose to sell the drugs." Tr. 7095:22-7096:1. In assessing whether that narrative was true, jurors naturally would have considered evidence that the pharmacies were charging for life-saving drugs that others dispensed for free.

The district court also was clearly and indisputably wrong to conclude that a mistrial is necessary only when a juror's misconduct "[comes] to light after the verdict." Tr. 3785:22-23. The court did not point to any authority limiting *Beverly Hills* that way. Nor would such a rule make sense. The need for a mistrial often does not turn on the timing of the revelation of misconduct. Regardless when misconduct comes to light, a jury's exposure to relevant extraneous evidence that "was not subject to scrutiny or cross-examination by any party" can yield "highly misleading results." *Beverly Hills*, 695 F.2d at 214-215. Although jurors may be able to set aside extraneous evidence that is irrelevant to a case, *see Wheaton*, 517 F.3d at 361, briefly asking jurors

whether they are biased cannot uncover the potential effect of outside evidence on deliberations on a core contested issue, because jurors might not yet be aware of its influence or might be instinctively inclined to reaffirm their impartiality. For the same reasons, merely directing the jury not to consider such evidence cannot necessarily cure unconscious bias that may have already formed. As even the Counties' counsel asserted, outside evidence on contested issues "affects everybody *whether they recognize it or not*." Tr. 3769:13-14 (emphasis added). This case's bellwether status does not change that analysis. *Compare* Tr. 3788:3-9 ("I have no idea when we could retry this, and this is a case of national importance because it's a Bellwether."), *with In re National Prescription Opiate Litig.*, 956 F.3d 838, 841 (6th Cir. 2020) ("The rule of law applies in multidistrict litigation . . . just as it does in any individual case.").

B. Mandamus Is The Only Adequate Remedy

Unless this Court intervenes now and grants mandamus, the district court's erroneous orders will harm the pharmacies "in a way not correctable on appeal." *John B.* v. *Goetz*, 531 F.3d 448, 457 (6th Cir. 2008). The pharmacies may be forced to wait *years* before an appealable final judgment is entered. Until then, they will be subject to extraordinary, unusual pressure to settle a claim that Ohio has plainly abrogated.

It is unclear just how long the pharmacies will have to wait before the district court enters an appealable final judgment. A bench trial on remedies is currently scheduled for May 2022, and the court has no deadline for entering an appealable remedies decision thereafter. Even after a remedies decision, another complication would arise because the district court previously severed, over the pharmacies' objection, the Counties' common-law public-nuisance claims from various other claims. Doc. 3315 at 3 n.2, 4. In its order denying certification, the court confirmed the possibility of a second trial on the Counties' remaining claims, observing that the Counties "will be able to pursue" their remaining claims once the remedies phase ends. Doc. 4251 at 5. The court also stated that "there will be a final judgment" after the remedies trial, *id.*, but it did not explain how that would be true in light of the severed claims, unless it was committing to enter a partial final judgment under Rule 54(b).

Either way, until the district court enters final judgment, the pharmacies will face extraordinary pressure to settle with the Counties. This case is remarkable in part because, as this Court has already recognized, the district court has publicly "pushed for settlement" throughout the MDL. *In re National Prescription Opiate Litig.*, 2019 WL 7482137, at *3 (6th Cir. Oct.

10, 2019). At the outset of the MDL, for example, the district court explained that it was not interested "in figuring out the answer to interesting legal questions," and that "we don't need trials." Doc. 71 at 4, 9. The court expressed its goal to "do something meaningful to abate this crisis" by ensuring "that we get some amount of money to [Plaintiffs] for treatment." *Id.* at 4-5. Although this Court concluded that the district court's comments did not warrant a writ of mandamus requiring recusal, the Court observed that "we do not encourage [the district court] to continue these actions." *National Prescription Opiate Litig.*, 2019 WL 7482137, at *2.

Together, the district court's documented preference for settlement and the enormous financial stakes place the pharmacies under unusually "intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Courts have held that the harm inflicted by unusually strong settlement pressure may warrant mandamus review because "the ruling that will have forced them to settle" cannot be corrected on appeal. *See id.* at 1298, 1304 (granting mandamus and directing the district court to decertify a class because certification imposed crushing pressure to settle a legally dubious claim); *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984) (granting mandamus and directing decertification of a settlement class

because petitioners would be prejudiced by having to wait to appeal a settlement order); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (E. Jones, J., specially concurring) (explaining that mandamus was appropriate to review the selection of bellwether cases because of settlement pressure).

This trial's "bellwether" status compounds the harms from indefinite delay and unusual settlement pressure. This trial was selected to be a bellwether for "1,400 other cases of similar Plaintiffs" that include the same public-nuisance claim against the pharmacies. Doc. 3315 at 3. Bellwether trials are designed to help the parties assess their legal strengths and potential liabilities. But here, the fatally flawed verdict lacks objective legal value: a tainted jury found liability on a statutorily foreclosed claim, and the parties now face a novel remedial exercise about a common-law claim that does not exist. The jury verdict and eventual remedies decision will exert settlement pressure divorced from the legal merits of the Counties' claim. By contrast, mandamus relief would resolve this plainly barred claim and would allow the district court to move forward with other claims and cases that could advance the resolution of the MDL in a legally justifiable way.

Moreover, even setting aside the unique pressures and high stakes of this litigation, the pharmacies must now prepare for and participate in an onerous and costly remedies trial premised on an infirm verdict. The burdens of a pointless remedies trial will be particularly high in light of competing opioid-related suits, which require the pharmacies to mobilize resources elsewhere—including two major opioid trials scheduled concurrently with the remedies trial here and three others within six months. Each of those trials will last at least two months and will require the resources of a full trial team, as well as the testimony of several expert witnesses scheduled to testify in the remedies trial here. For all of those reasons, absent this Court's immediate intervention, the pharmacies will "suffer at least some damage . . . that cannot be corrected on appeal." *John B.*, 531 F.3d at 458.

Finally, contrary to the district court's suggestion, Doc. 4251 at 2-4, the pharmacies have pursued their arguments diligently and have sought certification, and now mandamus, in the only practicable way. After the district court denied an earlier motion to certify the OPLA issue, Doc. 1283, it would have been futile for the pharmacies to seek certification of the same issue until the posture of the case changed significantly. So the pharmacies reluctantly went to trial. But trial before a tainted jury compounded rather

than mooted the district court's statutory-interpretation error. At that point, the pharmacies might have sought certification or mandamus after a ruling on the pharmacies' Rule 50(a) motion or their post-trial motions. But the district court deferred ruling on the Rule 50(a) motions, *see supra* p. 11 n.1, and has not yet ruled on the post-trial motions. So within 30 days of the jury verdict, the pharmacies sought certification of the underlying orders addressing OPLA and juror misconduct. Doc. 4205. With the remedies trial fast approaching, mandamus of those underlying orders (or, as discussed below, of the decision denying certification) is the pharmacies' only viable chance at relief.

C. Mandamus Is Appropriate Under The Circumstances

This Court has already recognized the "paramount importance of the litigation's subject matter." *In re National Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir. 2019). Mandamus is especially appropriate in this case for two additional reasons.

First, the district court's orders raise "new and important problems" and "issues of law of first impression." *John B.*, 531 F.3d at 457. The court's interpretation of OPLA is a significant issue of first impression. The Ohio Supreme Court has not addressed the scope of OPLA abrogation since the

2005 and 2007 amendments. And this is not a one-off case. Rather, the proper construction of the post-2007 statute will govern all Ohio claims in the MDL—including 93 filed suits and another bellwether suit awaiting trial, *Montgomery Cnty. Bd. of Cnty. Comm'rs* v. *Cardinal Health, Inc.*, No. 1:18-op-46326 (N.D. Ohio). The district court's ruling on juror misconduct likewise presents a "new and important problem[]," *John B.*, 531 F.3d at 457, implicating "the integrity of the [jury] system itself," *Beverly Hills*, 695 F.2d at 213.

Second, the federalism implications of the district court's OPLA ruling heighten the need for mandamus. *See In re University of Mich.*, 936 F.3d 460, 465-467 (6th Cir. 2019) (discussing federalism concerns that supported mandamus); *In re Gee*, 941 F.3d 153, 166 (5th Cir. 2019) ("[F]ederalism concerns justify review by mandamus."). A "state's sovereignty is unquestionably implicated when federal courts construe state law." *Scott* v. *Bank One Tr. Co., N.A.*, 577 N.E.2d 1077, 1080 (Ohio 1991). And when a federal court misinterprets a state statute, "the federal court both does an injustice to one or more parties, and frustrates the state's policy that would have allocated the rights and duties differently." *Id.* For that reason, federal courts must be "extremely cautious about adopting 'substantive innovation' in state law." *Combs* v. *International Ins. Co.*, 354 F.3d 568, 578 (6th Cir. 2004)

(citation omitted). Here, the district court negated Ohio's considered decision to remove public-nuisance claims from the common law. In so doing, the court massively expanded nuisance law beyond its traditional reach to cover the distribution and sale of lawful products—not just opioids—whose use can burden a community. That important change in Ohio law warrants this Court's immediate correction.

II. AT A MINIMUM, THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS DIRECTING THE DISTRICT COURT TO CERTIFY ITS ORDERS FOR INTERLOCUTORY APPEAL

At the very least, this Court should issue a writ of mandamus requiring the district court to certify its motion-to-dismiss and mistrial orders for interlocutory review under 28 U.S.C. § 1292(b). The pharmacies have a "clear and indisputable" right to certification, and immediate review of the underlying orders is both appropriate and necessary. *See Cheney*, 542 U.S. at 380-381.

A. This Court May Grant A Writ Of Mandamus To The Denial Of A Motion For Certification

When a district court clearly abuses its discretion in applying Section 1292(b), a writ of mandamus is available to remedy the error. Section 1292(b) provides that a district judge "shall" certify his order for interlocutory appeal whenever it "involves a controlling question of law as to which there is

substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." The district court's decision whether to certify is discretionary. *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995). But "discretion is not whim." *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 103 (2016) (citation omitted); *see, e.g.*, *Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 555 (2014) (reviewing discretionary denial of appellate review). Discretion can be abused, and a "clear abuse of discretion" can "justify the invocation" of the mandamus remedy. *Cheney*, 542 U.S. at 380 (citation omitted).

This Court has not yet had occasion to issue a writ of mandamus to correct the erroneous denial of certification under Section 1292(b)—rather than, as discussed in Part I, to correct the underlying orders that the district court erroneously refused to certify. *Cf. Lott*, 424 F.3d at 449. But a district court's denial of a motion to certify is a discretionary decision ripe for mandamus review. The mandatory directive "shall" in the statute underscores "the *duty* of the district court" to permit an interlocutory appeal "when the statutory criteria are met." *Ahrenholz* v. *Board of Trs. of Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (emphasis added); *see Mohawk Indus.*, 558 U.S. 100, 110-111 (2009). Moreover, a district court's decision to deny

certification carries great weight because it effectively strips appellate courts of their own discretion under Section 1292(b) to determine whether to accept jurisdiction over the case at an interlocutory stage. Mandamus relief is thus a critical "safety valve[]" to correct certification denials that constitute clear abuses of discretion. *Mohawk Indus.*, 558 U.S. at 111 (citation omitted).

Although clear abuses of discretion may be rare, other courts of appeals have recognized that they are not powerless when such abuses occur. *See, e.g.*, *Fernandez-Roque* v. *Smith*, 671 F.2d 426 (11th Cir. 1982) (granting mandamus and directing the district court to certify under Section 1292(b)); *In re Trump*, 928 F.3d 360, 371-372 (4th Cir. 2019) (same), *vacated*, 958 F.3d 274 (4th Cir. 2020) (en banc), *vacated*, 141 S. Ct. 1262 (2021); *cf. In re Trump*, 781 Fed. Appx. 1, 2 (D.C. Cir. 2019) (concluding that the criteria for certification were satisfied and remanding for the district court to reconsider); *In re McClelland Engrs., Inc.*, 742 F.2d 837, 837-838 (5th Cir. 1984) (concluding that the district court's refusal to certify constituted an abuse of discretion and "request[ing] that the district court certify"). This Court should do the same.

B. The District Court's Refusal To Certify An Immediate Appeal Warrants Mandamus Relief

This case "presents the truly 'rare' situation in which it is appropriate for this court to require certification." *Fernandez-Roque*, 671 F.2d at 431

(citation omitted). The three statutory criteria for interlocutory appeal under Section 1292(b) are clearly and indisputably satisfied, but the district court nevertheless denied the pharmacies' motion. That denial was an abuse of discretion, and mandamus relief is the only adequate means to correct the court's error.

First, the underlying orders clearly involve "controlling question[s] of law." 28 U.S.C. § 1292(b). A legal question "is controlling if it could materially affect the outcome of the case." *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002). Whether OPLA abrogates the Counties' public-nuisance claim is a pure question of statutory interpretation that would resolve the pharmacies' liability in the bellwether trial. Likewise, the juror-misconduct question turns on the legal rule adopted in *Beverly Hills* and that rule's application to undisputed facts, and a ruling for the pharmacies would allow the parties to present their case to a new, untainted jury.

Second, there is clearly "substantial ground for difference of opinion" over the district court's rulings on OPLA and juror misconduct. 28 U.S.C. § 1292(b). The district court plainly erred in departing from OPLA's unambiguous text and in determining that Juror #4's misconduct was

irrelevant. But at a bare minimum, reasonable jurists could disagree with the court's rulings (and Magistrate Judge Ruiz already has).

Third, it is clear and indisputable that immediate review of the orders "would materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If this Court concludes that OPLA abrogates the Counties' public-nuisance claim, the bellwether trial would be over—which, contrary to the district court's reasoning, Doc. 4251 at 5, materially advances the termination of this case even if some other claims might be tried later. Immediate review of the juror-misconduct issue would also advance the litigation by permitting the parties to proceed directly to a new trial before a new jury without first wasting time and resources on a pointless remedies trial premised on a tainted verdict.

Finally, mandamus relief is necessary and appropriate. If this Court declines to grant a writ of mandamus as to the district court's underlying orders, a writ of mandamus directing the district court to certify its orders for interlocutory appeal is the only available alternative to spare the pharmacies from the burdens and costs imposed by the upcoming remedies trial; the possibility of indefinite delay before an appealable final judgment or partial final judgment; and the unusual judicial pressure that the district court has

exerted and continues to exert on the pharmacies to settle while those delays stretch on.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of mandamus directing the district court to enter judgment for the pharmacies, order a mistrial, or at a minimum certify the relevant OPLA and juror-misconduct orders for interlocutory appeal.

Respectfully submitted,

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FEBRUARY 7, 2022

CERTIFICATE OF COMPLIANCE

This petition complies with Federal Rule of Appellate Procedure 21(d)(1) because it contains 7,794 words.

This petition also complies with Federal Rule of Appellate Procedure 32(a) because it was prepared in 14-point font using a proportionally spaced typeface.

/s/ Jeffrey B. Wall
JEFFREY B. WALL

FEBRUARY 7, 2022

CERTIFICATE OF SERVICE

I certify that on February 7, 2022, the foregoing was filed electronically with the Clerk of Court using the Court's CM/ECF system.

I further certify that on February 7, 2022, a copy of the foregoing was served upon the district court via email, and upon plaintiffs' counsel via email at the agreed-upon listserv. A copy of the foregoing will also be served upon the district court via U.S. First Class Mail.

/s/ Jeffrey B. Wall
JEFFREY B. WALL

FEBRUARY 7, 2022

ATTACHMENT A

(Doc. 1203, Opinion and Order Denying Defendants' Motion to Dismiss in *County of Summit* Case)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	**MDL 2804**
	)	
THIS DOCUMENT RELATES TO:	)	**Case No. 1:17-md-2804**
	)	
The County of Summit, Ohio, et al. v. Purdue Pharma L.P., et al., Case No. 18-op-45090	)	**Judge Dan Aaron Polster**
	)	
	)	**OPINION AND ORDER**

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

I.

The District Court reviews proper objections pursuant to its duty under Federal Rule of Civil Procedure 72(b). Fed. R. Civ. P. 72(b) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to.") In a footnote, Manufacturer Defendants purport to object to "the entirety of the R&R." Doc #: 1082 at n.1. This

[1] Defendant Noramco, Inc. states that it joined in Manufacturers' Motion to Dismiss "to the extent applicable," Doc. #: 499-1 at 1 n.2, and requests clarification that it is included among the moving Manufacturer Defendants and is entitled to all applicable relief. Doc. #: 1082 at 1 n.1. The Court clarifies that Noramco is included among the moving Manufacturer Defendants and is entitled to all applicable relief.

objection is not proper insofar as it does not include any bases in or support from legal authority. Therefore, as there are no proper objections to the facts or procedural history, the Court adopts the facts and procedural history as stated in the R&R. Further, there are no objections to the R&R with respect to the following sections:

- Section III.B. Preemption
- Section III.H. Count Eight: Fraud
- Section III.L. Statewide Concern Doctrine
- Section III.M. Article III Standing[2]

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

II.

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

[2] Pharmacy Defendants, in their objections, mention Article III standing only briefly in a section dedicated to the RICO claims. *See* Doc. #: 1078 at 2-3. They mischaracterize the R&R's analysis of the Article III standing directness requirement, rehash arguments already made in their motion to dismiss, and then move on to address their RICO analysis concerns. The Court finds this objection without merit, and therefore it is overruled.

A. Tolling of the Statute of Limitations

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

1. Fraudulent Concealment

The R&R correctly states that "resolving a motion to dismiss based on statute-of-limitations grounds is appropriate when the undisputed facts 'conclusively establish' the defense as a matter of law." R&R at 54 (citing *Estate of Barney v. PNC Bank*, 714 F.3d 920, 926 (6th Cir. 2013); *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012), *cert. denied*, 568 U.S. 1157 (2013)). "In order for Plaintiff's delay in filing to be excused due to Defendants' fraudulent concealment, Plaintiff must affirmatively plead with particularity: '(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.'" *Reid v. Baker*, 499 F. App'x 520, 527 (6th Cir. 2012) (quoting *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975)). However, as the R&R also points out, "courts should not dismiss complaints on statute-of-limitations grounds when there are disputed factual questions relating to the accrual date." *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 839 F.3d 458, 464 (6th Cir. 2016) (citing as examples of disputed factual questions, "claims that the defendant fraudulently concealed facts, thereby preventing the plaintiff

from learning of its injury . . . and complex issues about whether information in the plaintiff's possession sufficed to alert it of the claim").

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

Plaintiffs additionally point out that they could not have discovered "the nature, scope, and magnitude of Defendants' misconduct, and its full impact on Plaintiffs, and could not have acquired such knowledge earlier through the exercise of reasonable diligence," because until this Court ordered production of the ARCOS database in this litigation, Plaintiffs did not have access to that information. *Id.* at 233 (citing Doc. #: 233 at 6-7). Without access to the ARCOS data, Plaintiffs were forced to take Defendants at their word that they were complying with their obligations under consent decrees, statutes, and regulations. Plaintiffs inarguably knew about Defendants' marketing practices, but whether they had sufficient information, in the absence of

[3] *See, e.g.*, Doc. #: 514 at 238 ("In May 2007, Purdue and three of its executives pled guilty to federal charges of misbranding OxyContin in what the company acknowledged was an attempt to mislead doctors about the risks of addiction."); *see also Id.* at 212 ("the increase in fatal overdoses from prescription opioids has been widely publicized for years.").

the ARCOS data, to identify Defendants' alleged concealment and thus the scope or magnitude of Defendants' alleged misconduct is a disputed factual question.

2. Continuing Violations

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

Here, taking the factual allegations in the Complaint as true, Plaintiffs have alleged a longstanding and demonstrable policy of misrepresentations and omissions on the part of Defendants sufficient to demonstrate their engagement in continuing wrongful conduct. In addition, whether further injury could have been avoided had Defendants ceased this conduct is another disputed factual question. Therefore, the Court finds that Plaintiffs have alleged facts sufficient to raise a plausible inference that the applicable limitations periods are subject to

tolling—under either a fraudulent concealment theory or a continuing violation theory—and that no claims should be dismissed on statute of limitations grounds at this early stage in the litigation.

B. RICO

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

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

Id.

The RICO analysis is complicated because, "RICO's civil-suit provision imposes two distinct but overlapping limitations on claimants—standing and proximate cause . . . [a]nd as a matter of RICO law, the two concepts overlap." *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 613 (6th Cir. 2004). Defendants object to the R&R's conclusions regarding both "overlapping" limitations. Regarding standing, Defendants argue that Plaintiffs' injuries are 1) not to Plaintiffs'

"business or property" as required by the statute, and 2) derivative of a third-party's injuries (i.e. not direct). Regarding proximate cause, Defendants argue that Plaintiffs' injuries are too remote to hold Defendants liable under RICO (i.e. not direct). Manufacturing Defendants succinctly summarize the way "directness" applies to RICO analysis.

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

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

1. Proximate Cause

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

requirement of a direct injury." *Perry v. Am. Tobacco Co.*, 324 F.3d 845, 850 (6th Cir. 2003) (citing *Holmes*, 503 U.S. at 268-69.). Additionally, the *Holmes* Court provided several reasons why "some direct relation between the injury asserted and the injurious conduct alleged" is so important to the proximate cause analysis. *Holmes*, 503 U.S. at 268. The Court stated:

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

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

Plaintiffs allege that "RICO Marketing Defendants . . . conducted an association-in-fact enterprise . . . to unlawfully increase profits and revenues from the continued prescription and use of opioids for long-term chronic pain" thereby creating the opioid epidemic.[4] SAC at 270. Plaintiffs further allege that RICO Supply Chain Defendants . . . formed an association-in-fact enterprise . . . for the purpose of increasing the quota for and profiting from the increased volume of opioid sales in the United States" thereby creating the opioid epidemic.[5] It is important to note that Plaintiffs never expressly define what they mean by the term "opioid epidemic." The term

[4] According to the Complaint, the RICO Marketing Defendants are "Purdue, Cephalon, Janssen, Endo, and Mallinckrodt." *See* Doc. #: 514 at 270.
[5] According to the Complaint, the RICO Supply Chain Defendants are "Purdue, Cephalon, Endo, Mallinckrodt, Actavis, McKesson, Cardinal, and AmerisourceBergen" *See* Doc. #:514 at 279.

may reasonably refer to the massive rate of addiction, overdose, and death associated with taking opioids. *See, e.g., id.* at 214-15 ("Ohio is among the states hardest hit by the opioid epidemic. . . . Overdose deaths have become the leading cause of death for Ohioans under the age of 55.").

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

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

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

Doc. #: 1082 at 9-10 (emphasis in original). However, Plaintiffs have alleged sufficient facts to support a far more direct chain of causation: (i) RICO Marketing Defendants made deceptive claims in promoting their opioids in order to sell more opioids than the legitimate medical market could support (***the conduct***); (ii) the excess opioids marketed by the RICO Marketing Defendants

and distributed by the RICO Supply Chain Defendants were then diverted into an illicit, black market; (iii) Plaintiffs were forced to expend resources beyond what they had budgeted to attempt to stop the flow of the excess opioids into local communities and to bear the costs associated with cleaning them up. Under this potential chain of causation, the relationship between Plaintiffs' injury and Defendants' alleged conduct is less remote than prior Sixth Circuit precedent finding proximate cause, and is not too remote to support a finding of proximate cause here. *See, e.g.*, *Trollinger*, 370 F.3d at 619 (finding proximate cause where Tyson "hired sufficient numbers of illegal aliens to impact the legal employees' wages," having an "impact on the bargained-for wage-scale," which "allowed Tyson not to compete with other businesses for unskilled labor," and finally where "Tyson's legal workers did not 'choose' to remain at Tyson for less money than other businesses offered").

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

2. Standing

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

reasonable attorney's fee." 18 U.S.C. § 1964(c). The two operative portions of this section are the "business or property" limitation and the "by reason of" limitation.

"The 'by reason of' limitation . . . bundles together a variety of 'judicial tools,' some of which are traditionally employed to decide causation questions and some of which are employed to decide standing questions." *Trollinger*, 370 F.3d at 613 (citing *Holmes*, 503 U.S. at 268.). As it pertains to standing, the "by reason of" limitation is used to analyze whether a plaintiff is asserting an injury that was borne directly by that plaintiff or whether the injury was "derivative or passed-on" to the plaintiff by some intermediate party. *See id.* at 614.

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

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

Defendants' characterization of *Perry* is correct, but *Perry* is factually distinct from this case. In *Perry*, tobacco users suffered smoking-related injuries which increased healthcare costs. That is where the similarities with the present case end. In *Perry*, the increased healthcare costs were borne by insurance companies who then passed-on those costs to individual insurance plan subscribers in the form of higher insurance premiums. The non-smoking individual subscribers

then sued the tobacco companies for the costs passed-on to them by the insurance companies. *See Perry*, 324 F.3d at 847. Thus, *Perry* represents a classic case of "passed-on" economic injury. Here, as described above, Plaintiffs have alleged a plausible claim that their injuries are the direct result of Defendants' creation of an illicit opioid market within their communities.[6] Plaintiffs' asserted economic injuries are borne by them and not passed-on by any intermediate party standing less removed from Defendants' actions.

The tobacco cases, in general, are factually distinct from the present case for an additional reason. In the tobacco cases, no one asserted, nor could they have, that tobacco defendants created an "illicit cigarette market" the attendant consequences of which might have caused the government plaintiffs to expend their limited financial resources to mitigate. This "opioid epidemic as an illicit market" concept is an important distinction underlying many of Plaintiffs' allegations. *See*, *e.g.*, SAC at 150-51. Therefore, assuming as it must that Plaintiffs can prove their allegations, the Court finds it plausible that Plaintiffs' asserted injuries were directly caused "by reason of" Defendants' injurious conduct.

b. The "business or property" Limitation

Even if Plaintiffs' asserted injuries were proximately and directly caused "by reason of" Defendants' alleged injurious conduct, Plaintiffs still may not bring a RICO claim if the injuries asserted were not to their "business or property." 18 U.S.C. § 1964(c). As a general principal, "money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). It is also true that, "[a] person whose property is diminished by a payment of money wrongfully

[6] Plaintiffs allege that "Congress specifically designed the closed chain of distribution to prevent the diversion of legally produced controlled substances into the illicit market.. . . All registrants—which includes all manufacturers and distributors of controlled substances—must adhere to the specific security, recordkeeping, monitoring and reporting requirements that are designed to identify or prevent diversion." Doc. #: 514 at 150-51 (citing 21 U.S.C. § 823(a)-(b); 21 C.F.R. § 1301.74).

induced is injured in his property." *County of Oakland v. City of Detroit*, 866 F.2d 839, 845 (6th Cir. 1989) (quoting *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906)). Plaintiffs assert thirteen categories of expenditures that they contend represent a substantial monetary loss, and are therefore an injury to their property. *See* SAC at 285. Defendants contend that none of the monetary costs asserted by Plaintiffs are the type of property injury anticipated (and thus permitted) by the RICO statute.

(i) Personal Injuries

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

The *Jackson* court's holding that RICO claims that allege damages "arising directly out of a personal injury" are not redressable adds another layer to the "directness" requirement summarized by Defendants above. As stated previously, Defendants explained two ways in which RICO allegations must be sufficiently direct to maintain a RICO claim. First, the relationship between the asserted injury and the alleged injurious conduct must have a *direct* causal connection. (the proximate cause analysis). And second, the asserted injury must also be borne *directly* by Plaintiffs and not passed-on to them by intermediate parties (the standing "by reason of" analysis). Under *Jackson*, there is an additional element of *directness* to consider—whether Plaintiffs' alleged injury arises *directly* out of a personal injury. While the first two analyses require closeness

of the relationship between injury and injurious conduct, the *Jackson* analysis requires separation between personal injury and pecuniary losses that arise therefrom.

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

In other words, damages that result from a personal injury to a plaintiff (such as attorney fees, lost wages, lost workers' compensation benefits, or medical expenses), that are recoverable

[7] Footnote 4 of the *Jackson* opinion cites the following exemplary cases: *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir.2006) (false imprisonment causing loss of income not an injury to "business or property"); *Diaz v. Gates*, 420 F.3d 897 (9th Cir.2005) (*en banc*) (false imprisonment causing loss of employment and employment opportunity ***is*** an injury to "business or property"); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417 (5th Cir.2001) (assault claim against tobacco company causing wrongful death of smoker not an injury to "business or property"); *Hamm v. Rhone–Poulenc Rorer Pharm., Inc.*, 187 F.3d 941 (8th Cir.1999) (retaliatory firing causing damage to reputation not an injury to "business or property"); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir.1995) (surreptitiously recorded phone calls causing mental anguish not an injury to "business or property"); *Doe v. Roe*, 958 F.2d 763 (7th Cir.1992) (coercion into sexual relationship by attorney causing emotional harm not an injury to "business or property"); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir.1986) (exposure to toxic chemicals during employment with defendant causing personal injuries not an injury to "business or property").

in a typical tort action are not recoverable in RICO, even if caused by a defendant's racketeering activity. These are costs that arise directly out of the plaintiff's personal injury, and are not injuries to plaintiff's "business or property" under the statute.

Defendants contend that Plaintiffs are attempting to recover the pecuniary losses resulting directly from their addicted residents' physical injuries, citing *Jackson*. Plaintiffs respond that their economic losses are not pecuniary losses resulting from their addicted residents' personal injuries; rather, they are concrete economic losses to the cities and counties resulting directly from Defendants' relinquishment of their responsibility to maintain effective controls against diversion of Schedule II narcotics. *See, e.g.*, 21 U.S.C. § 823(a)-(b).

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

> Plaintiffs assert the following injuries:
>
> a. Losses caused by the decrease in funding available for Plaintiffs' public services for which funding was lost because it was diverted to other public services designed to address the opioid epidemic;
>
> b. Costs for providing healthcare and medical care, additional therapeutic, and prescription drug purchases, and other treatments for patients suffering from opioid-related addiction or disease, including overdoses and deaths;

> c. Costs of training emergency and/or first responders in the proper treatment of drug overdoses;
>
> d. Costs associated with providing police officers, firefighters, and emergency and/or first responders with naloxone—an opioid antagonist used to block the deadly effects of opioids in the context of overdose;
>
> e. Costs associated with emergency responses by police officers, firefighters, and emergency and/or first responders to opioid overdoses;
>
> f. Costs for providing mental-health services, treatment, counseling, rehabilitation services, and social services to victims of the opioid epidemic and their families;
>
> g. Costs for providing treatment of infants born with opioid-related medical conditions, or born dependent on opioids due to drug use by mother during pregnancy;
>
> h. Costs associated with law enforcement and public safety relating to the opioid epidemic, including but not limited to attempts to stop the flow of opioids into local communities, to arrest and prosecute street-level dealers, to prevent the current opioid epidemic from spreading and worsening, and to deal with the increased levels of crimes that have directly resulted from the increased homeless and drug-addicted population;
>
> i. Costs associated with increased burden on Plaintiffs' judicial systems, including increased security, increased staff, and the increased cost of adjudicating criminal matters due to the increase in crime directly resulting from opioid addiction;
>
> j. Costs associated with providing care for children whose parents suffer from opioid-related disability or incapacitation;
>
> k. Loss of tax revenue due to the decreased efficiency and size of the working population in Plaintiffs' communities;
>
> l. Losses caused by diminished property values in neighborhoods where the opioid epidemic has taken root; and
>
> m. Losses caused by diminished property values in the form of decreased business investment and tax revenue.

SAC at 285-286. Perhaps it can be said that items b and e above (the provision of medical treatment and emergency response services) arise directly out of the personal injury of the citizens because they are effectively claims to recoup the costs of medical expenses. However, there are other categories of costs, for example item h (the costs associated with "attempts to stop the flow of

opioids into [Plaintiffs'] communities . . . [and] prevent the current opioid epidemic from spreading and worsening"), that cannot be said to arise directly out of Plaintiffs' residents' personal injuries. *Id.* Thus, under no reading of *Jackson* can it be maintained that *all* of Plaintiffs' asserted injuries arise directly out of a personal injury, and it is more likely, in this Court's opinion, that most do not.

(ii) Sovereign Capacity

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

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

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

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

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

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

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

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

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

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

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

C. Civil Conspiracy

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

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

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

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

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

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

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

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

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

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

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

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

1. Abrogation of the Common Law Public Nuisance Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ohio Rev. Code § 2307.72(C).

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

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

Ohio Rev. Code § 2307.71(A)(13).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] "'Harm' means death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not 'harm.'" Ohio Rev. Code § 2307.71(A)(2).

[15] Page's Ohio Revised Code Annotated, Title 7: *Municipal Corporations*, Chapter 715: *General Powers*, §§715.37-715.44: Health and Sanitation, §715.44: Power to abate nuisance and prevent injury.

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

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

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

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

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

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

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

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

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

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

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

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

3. Abrogation of the Negligence Claim

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

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

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

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

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

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

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

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

E. Negligence

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

1. Duty of Care

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

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

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

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

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

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

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

2. Economic Loss Doctrine

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

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

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

F. The Injury Through Criminal Acts Objections

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

G. Unjust Enrichment

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

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

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

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

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

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

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

III.

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

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

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

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

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

IT IS SO ORDERED.

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

ATTACHMENT B

(Doc. 3403, Opinion and Order Denying Pharmacies' Motion to Dismiss in Present Case)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	**MDL 2804**
	)	**Case No. 1:17-MD-2804**
THIS DOCUMENT RELATES TO:	)	**Judge Dan Aaron Polster**
Track Three Cases:	)	**OPINION AND ORDER**
County of Lake, Ohio v. Purdue Pharma, L.P., et al., *Case No. 18-OP-45032*	)	
County of Trumbull, Ohio v. Purdue Pharma, L.P., et al., *Case No. 18-OP-45079*	)	

Before the Court is the Pharmacy Defendants'[1] Motion to Dismiss Second Amended Complaints. Doc. #: 3340.[2] Plaintiffs (Ohio's Lake and Trumbull Counties) filed an opposition brief. Doc. #: 3366. Pharmacy Defendants filed a reply brief. Doc. #: 3379. For the reasons stated below, the Motion to Dismiss is **DENIED**.

[1] The Motion was filed collectively by the following defendant families: (1) Walmart Inc., Wal-Mart Stores East, LP, WSE Management, LLC, WSE Investment LLC, and Wal-Mart Stores East, Inc. (collectively, "Walmart"); (2) CVS Health Corporation, CVS Pharmacy, Inc., CVS Indiana, L.L.C., CVS Rx Services, Inc., CVS TN Distribution, L.L.C., and Ohio CVS Stores L.L.C. (collectively, "CVS"); (3) Rite Aid Hdqtrs. Corp., Rite Aid of Ohio, Inc., Rite Aid of Maryland, Inc., and Eckerd Corp. d/b/a Rite Aid Liverpool Distribution Center (collectively, "Rite Aid"); (4) Walgreen Boots Alliance, Inc., Walgreen Co., and Walgreen Eastern Co. (collectively, "Walgreens"); and Giant Eagle, Inc., and HBC Service Company (collectively, "Giant Eagle"). The Court refers to all of these entities collectively as "Pharmacies" or "Pharmacy Defendants."

[2] Unless otherwise indicated, all document numbers refer to the MDL docket, Case No. 17-MD-2804. Page numbers refer to the documents' native format pagination. The amended complaints are filed at Doc. ##: 3326 & 3327.

I. Legal Standard.

The Court incorporates by reference the applicable legal standards set forth in its *Opinion and Order in Cleveland Bakers & Teamsters Health & Welfare Fund v. Purdue Pharma, L.P.*, Case No. 1:18-OP-45432 (Doc. #: 3177 at 4–6).[3]

II. Factual Allegations.

Plaintiffs each assert a claim of common law absolute public nuisance against the Pharmacy Defendants.[4] This Opinion addresses the viability of the public nuisance claims as they arise out of Pharmacy Defendants' activity of *dispensing* prescription opioids to customers. The Court previously concluded under Ohio law that nearly identical claims based on the Pharmacy Defendants' *distribution* activity survive a motion to dismiss. *See Opinion and Order in The County of Summit, Ohio v. Purdue Pharma L.P.*, Case No. 18-OP-45090 (Doc. #: 1203).[5]

With respect to dispensing practices, Plaintiffs contend the Pharmacy Defendants violated the Federal Controlled Substances Act and also Ohio controlled substance laws by, among other things, "dispensing and selling [opioids] without maintaining effective controls against the diversion of opioids." *Amended Complaint*, Doc. #: 3327 at ¶630(b).[6] In particular, Plaintiffs allege the Pharmacy Defendants failed to: "adequately train their pharmacists and pharmacy technicians on how to properly and adequately handle prescriptions for opioid painkillers," *id.* at ¶82; "put in place effective policies and procedures to prevent their stores from facilitating

[3] *In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d 773, 783-84 (N.D. Ohio 2020).

[4] The Motion and this Opinion and Order address only Plaintiffs' public nuisance claims against the Pharmacy Defendants (Count XI). Pursuant to this Court's Order, Doc. #: 3315, Plaintiffs' other claims against the Pharmacy Defendants and all claims against other defendants are stayed for later discovery and trial.

[5] *In re Nat'l Prescription Opiate Litig.*, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018).

[6] Because the Plaintiffs' Amended Complaints are nearly identical, the Court, like the parties, cites to Lake County's Amended Complaint for ease of reference.

diversion and selling into a black market," *id.* at ¶83; "conduct adequate internal or external reviews of their opioid sales to identify patterns regarding prescriptions that should not have been filled," *id.*; "effectively respond to concerns raised by their own employees regarding inadequate policies and procedures regarding the filling of opioid prescriptions," *id.* at ¶85; and "take meaningful action to investigate or to ensure that they were complying with their duties and obligations under the law with regard to controlled substances," *id.* at ¶86. Plaintiffs further allege the Pharmacies "had the ability, and the obligation, to look for [] red flags on a patient, prescriber, and store level, and to refuse to fill and to report prescriptions that suggested potential diversion," *id.* at ¶541, but the Pharmacy Defendants "systemically ignored red flags that they were fueling a black market." *Id.* at ¶81. Plaintiffs allege the result of all this conduct is that the Pharmacy Defendants distributed and dispensed opioids "in a manner which caused prescriptions and sales of opioids to skyrocket in Plaintiff's community, flooded Plaintiff's community with opioids, and facilitated and encouraged the flow and diversion of opioids into an illegal, secondary market." *Id.* at ¶621.

III. Analysis.

The Pharmacy Defendants argue there are four reasons why federal and Ohio law require dismissal of Plaintiffs' public nuisance claims based on dispensing activity. The Court considers each argument in turn.

A. Statutory Abrogation of Plaintiffs' Public Nuisance Claims.

The Pharmacy Defendants begin their motion with the contention that Ohio statutes (and associated regulations) that govern "distribution of a drug of abuse" displace the common law and thereby entirely preclude Plaintiffs' absolute public nuisance claims. Defendants explain that the

"Ohio legislature has comprehensively regulated the field of controlled substance dispensing and distribution, and has provided specific remedies that conflict with any common law cause of action." Doc. #: 3340-1 at 1. Defendants insist the Plaintiff Counties "can bring their claim under the appropriate statute, Ohio Rev. Code ("O.R.C.") § 4729.35, or not at all." *Id*. at 7. The Court finds this position unpersuasive.

The statute at issue falls under Title 47 of the Revised Code, "Occupations–Professions," which establishes professional standards applicable to 66 different occupations. Chapter 4729, titled "Pharmacists; Dangerous Drugs," governs numerous matters related to the practice of pharmacy, including: licensing; required and prohibited conduct; distribution and dispensing of prescription medication; and disciplinary actions against pharmacies and pharmacists.[7] The Chapter also establishes a State Board of Pharmacy ("OBOP") to administer and enforce the provisions of the Chapter, and to adopt rules to carry out its purposes. O.R.C. §§ 4729.01–4729.99; *see, e.g., Ohio State Bd. of Pharm. v. Dick's Pharmacy*, 780 N.E.2d 1075, 1077-82 (Ohio Ct. App. 2002) (affirming OBOP's imposition of a $25,000 civil fine against a pharmacy based on its determination that the pharmacy and its pharmacist-in-charge engaged in illegal dispensing of dangerous drugs).

Under the OBOP's rules, "[a]ll licensees and registrants shall provide effective and approved controls and procedures to deter and detect theft and diversion of dangerous drugs." Ohio

[7] *See, e.g.*, O.R.C. §§ 4729.07 (licensing application and examination); 4729.071 (criminal records check); 4729.08 (qualifications); 4729.28 (unlawful selling of drugs or practice of pharmacy); 4729.35 (unlawful distribution of drugs of abuse; prosecution); 4729.37 (record keeping); 4729.46 (limitations on dispensing opioid analgesics); 4729.01(Q) ("'terminal distributor' includes pharmacies … who procure dangerous drugs for sale or other distribution by or under the supervision of a pharmacist"); 4729.77 (terminal distributor pharmacies to submit prescription information); 4729.80 (submission of database information); 4729.281 (dispensing of drug without written or oral prescription); 4729.292 (annual on-site inspection of opioid treatment program).

Admin. Code §§ 4729-9-05(A), 4729-9-11, 4720-9-16(H).[8] Section 35 of Chapter 4729 declares violations of federal or state laws and regulations governing the distribution and dispensing of opioids to constitute a public nuisance *per se*.[9] It authorizes the attorney general, county prosecutors, and the OBOP to maintain a civil action "in the name of the state" to enjoin violative conduct. An injunction is the only remedy available under that section.[10]

Plaintiffs, however, do not assert a cause of action under O.R.C. § 4729.35. Rather, they bring *common law* absolute public nuisance claims, alleging that Defendants' violations of anti-diversion laws gave rise to a public nuisance. Doc. #: 3327 at ¶¶71-599, 616-654.

The Pharmacy Defendants insist Ohio law allows only the statutory public nuisance claim provided for in O.R.C. § 4729.35, so Plaintiffs' common law public nuisance claims must be dismissed. In support, Defendants rely on: (1) rules of statutory construction, (2) the doctrine of field preemption, and (3) assertions of irreconcilable conflict. Each topic is addressed below.

1. Rules of Construction Regarding Abrogation.

The Ohio Supreme Court has consistently recognized the following rule of statutory construction:

> Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment,

[8] Sections 4729-9-05(A) and 4729-9-16(H) of the Code were recently rescinded, revised, and reorganized. The provisions of the Code cited above presently appear at §§ 4729:5-3-14 and 4729:6-3-05.

[9] O.R.C. §§ 3719.01(C) & 3719.011(A) define "opiate" as "a drug of abuse."

[10] O.R.C. § 4729.35 provides:

> The violation by a pharmacist or other person of any laws of Ohio or of the United States of America or of any rule of the board of pharmacy controlling the distribution of a drug of abuse as defined in section 3719.011 of the Revised Code or the commission of any act set forth in division (A) of section 4729.16 of the Revised Code, is hereby declared to be inimical, harmful, and adverse to the public welfare of the citizens of Ohio and to constitute a public nuisance. The attorney general, the prosecuting attorney of any county in which the offense was committed or in which the person committing the offense resides, or the state board of pharmacy may maintain an action in the name of the state to enjoin such person from engaging in such violation.

> and in giving construction to a statute the Legislature will not be presumed or held to have intended a repeal of the settled rules of the common law, ***unless the language employed by it clearly expresses or imports such intention***.

State ex rel. Morris v. Sullivan, 90 N.E. 146, syllabus ¶ 3 (Ohio 1909) (emphasis added). Put more succinctly, an intent to abrogate the common law "must be expressly declared by the legislature or necessarily implied in the language of the statute." *LaCourse v. Fleitz*, 503 N.E.2d 159, 161-62 (Ohio 1986) (citation omitted); *see also Combs v. Ohio Dep't of Nat. Res., Div. of Parks & Recreation*, 55 N.E.3d 1073, 1078 (Ohio 2016) ("in the absence of language clearly showing the intention to supersede the common law, the existing common law is not affected by the statute, but continues in full force") (internal quotation marks and citations omitted).[11]

As Plaintiffs note, § 4729.35 does not expressly abrogate any common law or equitable cause of action or remedy (and neither does any other section of Chapter 4729). Despite this, Defendants contend there is an exception to the *Morris* statutory construction rule: it "applies only to the repeal of '***settled*** rules of the common law.'" Doc. #: 3379 at 2 (emphasis added). Defendants argue that "diversion of controlled substances" had no meaning at common law, so the General Assembly had no reason to declare the common law was abrogated. Put differently, Defendants assert that common law public nuisance claims asserting diversion of controlled substances "never existed in the first place," *id*. at 2-3, so there was no need for § 4729.35 to include "language clearly showing the intention to supersede th[is] common law." *Combs*, 55 N.E.3d at 1078.

Defendants' theory, however, constrains the *Morris* rule of construction to an unsupportable level of specificity. Defendants ignore that Ohio courts for many decades have recognized a common law claim for absolute public nuisance based on a defendant's unlawful

[11] *See also Frantz v. Maher*, 155 N.E.2d 471, 476 (Ohio Ct. App. 1957) ("An intention of the General Assembly to abrogate common-law rules must be manifested by express language. There is no repeal of the common law by mere implication."); *In re Nicole Gas Prod.*, 581 B.R. 843, 850 (B.A.P. 6th Cir. 2018) (citing *Morris* and applying the same rule).

conduct. *See, e.g., Taylor v. Cincinnati*, 55 N.E.2d 724, 727-32 (Ohio 1944). Undoubtedly, the General Assembly was aware of the *Morris* rule of construction when it enacted § 4729.35 and could easily have abrogated some or all of the existing species of common law public nuisance claims, whether premised upon diversion of controlled substances or any other intentional, unlawful, or hazardous conduct. Indeed, the General Assembly has abrogated very specific types of common law claims in other statutes, as well as entire categories of common law claims. *See, e.g.*, O.R.C. § 2307.98(E) ("This [shareholder liability] section is intended to codify the elements of the common law cause of action for piercing the corporate veil and to *abrogate the common law cause of action and remedies relating to piercing the corporate veil in asbestos claims.*"); O.R.C. § 2307.71(b) (stating that certain provisions in the Revised Code "are intended to *abrogate all common law product liability claims or causes of action*"). The fact that the Legislature did not do so in § 4729.35 negates any presumption that it intended to abrogate any aspect of the common law. *Morris*, 90 N.E. 146, syllabus ¶ 3.

Ohio case law further supports the conclusion that the Ohio Legislature did not intend to abrogate common law public nuisance claims or remedies when it enacted § 4729.35. Ohio courts have repeatedly held that § 3767.03, a general nuisance statute, does not supersede or preempt common law public nuisance claims. *See, e.g., Pizza v. Sunset Fireworks Co.*, 494 N.E.2d 1115, 1120 (Ohio 1986) ("[T]he appellate court concluded that the existence of R.C. 3767.03 in no way limited the right of a prosecutor to initiate an injunctive action in the case of a common law nuisance. We agree with the appellate court."); *Christensen v. Hilltop Sportsman Club, Inc.*, 573 N.E.2d 1183, 1184-85 (Ohio Ct. App. 1990) ("Although R.C. Chapter 3767 provides a statutory basis for nuisance actions, we do not accept appellant's argument that the statute supersedes all common-law nuisance. There is no language within the statute that provides that it was the

legislature's intent to supersede common-law nuisance and no court in Ohio has so held."); *Haas v. Sunset Ramblers Motorcycle Club, Inc.*, 726 N.E.2d 612, 614-15 (Ohio Ct. App. 1999) ("Although R.C. 3767.03 provides that a private citizen, as well as certain enumerated public officials, has the right to bring an action in equity to request a court to abate a presumably public nuisance and to enjoin the defendant from further maintenance of such nuisance, there is no language in the statute that provides that it was the legislature's intent to supersede common-law nuisance."); *Winkelmann v. Cekada*, 738 N.E.2d 397, 399-400 (Ohio Ct. App. 1999) ("In addition, the common-law tort of private nuisance survived the enactment of R.C. Chapter 3767."). These cases all stand for the proposition that common-law nuisance claims should not be deemed superseded by statute, absent clear language that says so.

2. Comprehensive Legislation.

Using an argument analogous to field preemption, Defendants also assert the specificity and comprehensive nature of Ohio's regulatory scheme governing distribution and dispensing of controlled substances implies an intent by the General Assembly to displace the common law and "limit[] public nuisance liability to the [injunctive] relief permitted under Section 4927.35." Doc. ##: 3340-1 at 8-13; 3379 at 3-4. Defendants cite *Thompson v. Ford* for the proposition that common law is superseded when the General Assembly enacts "general and comprehensive legislation, prescribing minutely a course of conduct to be pursued, the parties and things affected, and elaborately describing limitations and exceptions." 128 N.E.2d 111, 115-16 (Ohio 1955) (quoting 3 Sutherland Statutory Construction § 5305 (3d ed.)). *Thompson*, however, did not hold that the comprehensive nature of a statute necessarily implies legislative intent to displace all common law causes of action. Rather, as Plaintiffs correctly assert, *Thompson* merely concluded the statutory negligence *standard of care* displaced the common law negligence *standard of care*.

Doc. #: 3366 at 8. Nothing in the decision indicates an intent by the General Assembly that comprehensive statutory language should work to abolish common law *causes of action* or available remedies.

Defendants also assert Ohio's statutory scheme governing dangerous drugs is analogous to the federal scheme, set out in the Controlled Substances Act ("CSA"), "that balances the competing public health goals of making medications available to patients who need them and controlling against their abuse." Doc. #: 3340-1 at 12-13 (quoting *Gonzales v. Raich*, 545 U.S. 1, 24 (2005)). Nothing in *Gonzales*, however, supports Defendants' contention that, as a matter of law, Ohio's statutory scheme precludes a common law public nuisance claim based on conduct the statute proscribes.[12] To the contrary, this Court previously held that, even though the distribution of controlled substances is regulated under a comprehensive federal scheme, a claim under Ohio common law for absolute nuisance is not foreclosed. *See In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d at 808 (Doc. #: 3177 at 45) (rejecting the Distributor Defendants' contention that "they are not subject to nuisance liability because their business activities are authorized and extensively regulated by state and federal law").

3. Codification of the Common law and Irreconcilable Conflict.

Defendants next offer the related argument that the Plaintiffs' common law public nuisance claims are precluded because the Ohio legislature has "codified" the law governing distribution and dispensing of controlled substances, and has not demonstrated an intent for the statutory

[12] In *Gonzales*, the United States Supreme Court found that applying the CSA's criminal provisions regarding the manufacture, distribution, or possession of marijuana to California's in-state growers and medical marijuana users did not violate the Commerce Clause. *Gonzales,* 545 U.S. at 24-33. In reaching this conclusion, the *Gonzales* court noted the CSA creates a "comprehensive framework for regulating the production, distribution, and possession of 'controlled substances,'" most of which "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." *Id.* at 24.

provisions to be "cumulative" to common law. Doc. #: 3340-1 at 7-8. Under Ohio law, where the General Assembly has codified the law on a subject, "unless there is a clear legislative intention expressed or necessarily implied that the statutory provisions are merely cumulative," the statutory provisions govern to the exclusion of prior non-statutory law. *Metz v. Unizan Bank*, 2006 WL 8427066, at *10 (N.D. Ohio Feb. 28, 2006) (citing *Bolles v. Toledo Trust Co.*, 58 N.E.2d 381, syllabus ¶ 13 (Ohio 1944)).

Defendants attempt to support their position with cases involving claims arising under the Uniform Commercial Code ("UCC"). *See* Doc. #: 3340-1 at 7-8, 12-13 (citing *Alotech, Ltd. v. Huntington Nat'l Bank*, 2014 WL 281973, at *3-4 (N.D. Ohio Jan. 24, 2014); *Amzee Corp. v. Comerica Bank-Midwest*, 2002 WL 1012998, at *1 (Ohio Ct. App. May 21, 2002); *Peters Family Farm, Inc. v. Sav. Bank*, 2011 WL 497476, at *3 (Ohio Ct. App. Jan. 28, 2011); and *Baggott v. Piper Aircraft Corp.*, 101 F. Supp.2d 556, 561 (S.D. Ohio 1999)). These cases, however, are all readily distinguishable.

Unlike Chapter 4729 (which, as discussed above, governs the State's licensing, regulatory, and enforcement powers regarding pharmacies and does not address claims or remedies available to parties at common law), the UCC clearly codifies the law governing commercial transactions between private parties, including remedies. *See, e.g.*, *Metz*, 2006 WL 8427066, at *11 (UCC § 1-103 expresses the Ohio legislature's intent to: (1) "simplify, clarify, and modernize the law governing commercial transactions;" (2) "permit the continued expansion of commercial practices through custom, usage, and agreement of the parties;" and (3) "make uniform the law among various jurisdictions"); *Baggott*, 101 F. Supp.2d at 561 ("UCC § 2-607(5) is a codification of common law voucher in the context of the sale of goods"). Moreover, the UCC itself expressly provides that its provisions displace some—but not all—common law claims. *See Metz*, 2006

WL 8427066, at *10 (under UCC § 1-103, unless displaced by the UCC's particular provisions, the principals of law and equity shall supplement the UCC's provisions); *Alotech*, 2014 WL 281973, at *3 ("The UCC does not purport to codify the entire body of law affecting the rights and obligations of parties to commercial transactions.").

In the UCC cases cited by Defendants, the courts held that, where the UCC governs the particular conduct at issue, a plaintiff cannot assert a *conflicting* common law claim to circumvent the liabilities, responsibilities, and remedies provided under the UCC.[13] Defendants have not shown that allowing the Plaintiffs' public nuisance claims to proceed would in any way conflict or interfere with an authorized entity's ability to enjoin the same alleged unlawful conduct under § 4729.35. Nor have they demonstrated § 4729.35 is a codification of the common law.

Defendants also cite an Ohio rule of statutory construction, O.R.C. § 1.51,[14] which provides that "special or local" provisions control over irreconcilable general provisions – a rule this Court applied in its Track One Order addressing Plaintiffs' statutory nuisance claims. Doc. :# 3340-1 at 13 (citing *In re Nat'l Prescription Opiate Litig.*, 2018 WL 6628898, at *17 (Doc. #: 1203 at 30)). Defendants write: "Much as this Court concluded that the specific provision, Section 4729.35, must control over an irreconcilable general [public nuisance] statute, this same provision must prevail over an irreconcilable common law cause of action." *Id.* But the Track One Order addressed

[13] *See Peters Family Farm*, 2011 WL 497476, at *3-4; *Alotech,* 2014 WL 281973, at *4 (the UCC's statutory duty of care displaced the common law's duty of ordinary care; thus, plaintiff's exclusive remedy for its negligence claim was under the UCC); *Amzee*, 2002 WL 1012998, at *9-10 (the UCC provides different liabilities and responsibilities for negotiable instruments than those existing at common law and therefore supplants common law claims based on conduct governed by the UCC).

[14] *See* O.R.C. § 1.51 ("If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.").

a conflict between statutory causes of action and did not address an alleged conflict between statutory and common law claims.[15]

The fact that § 4729.35 provides authorized persons with a statutory public nuisance claim to enjoin unlawful conduct does not demonstrate an intent to preclude those or other persons from also obtaining relief at common law for harm caused by the same wrongful conduct. In fact, in Track One, the Court found the City of Akron lacked standing to bring a *statutory* public nuisance claim under § 4729.35, *see* Doc. #: 1203 at 30-31, yet also found the City stated a *common law* public nuisance claim under Ohio law, *see id.* at 23-28 (finding the Ohio Products Liability Act did not abrogate plaintiffs' common law absolute nuisance claims). Defendants point to no facts or authority demonstrating an irreconcilable conflict between a claim brought by a county under § 4729.35 and a common law public nuisance claim.

4. Conclusion.

Under the approach urged by Defendants, pharmacists, pharmacies, and "other person[s]"[16] who violate a state or federal law or regulation governing controlled substances would be subject only to an order enjoining the misconduct. This reading would immunize an entity from common law liability for the consequences of this conduct, even if it causes a dire nuisance by unreasonably interfering with the public's right to health and safety. To find the General Assembly intended this

[15] The Track One Plaintiffs asserted a statutory public nuisance claim under (i) O.R.C. § 4729.35 and also (ii) general sections O.R.C. §§ 715.44(A) (authorizing municipalities to "abate any nuisance") and 3767.03 (Ohio's general nuisance provision). Section 3767.03 confers standing on a broader range of persons than § 4729.35 and provides abatement ***and*** injunctive remedies. After finding the special Section was irreconcilable with the general Sections, the Court concluded the provisions of § 4729.35 prevailed to limit the categories of relief and parties with standing to sue. Doc. #: 1203 at 28-31 (citing *United Tel. Co., v. Limbach*, 643 N.E.2d 1129 (Ohio 1994)).

[16] Chapter 4729 defines "Person" as including "any individual, partnership, association, limited liability company, or corporation, the state, any political subdivision of the state, and any district, department, or agency of the state or its political subdivisions." O.R.C. § 4729.01(S).

outcome strains credulity and would contradict its fundamental instruction that, "[i]n enacting a statute, it is presumed that … [a] just and reasonable result is intended." O.R.C. § 1.47(C).

In sum, the Court perceives nothing in § 4729.35 expressly stating or necessarily implying abrogation of common law public nuisance claims. Accordingly, the Pharmacy Defendants' motion to dismiss on that basis is denied.

B. Pharmacy Duties Under the CSA.

The Pharmacy Defendants next argue they are entitled to dismissal of Plaintiffs' claims because ***only*** their pharmacist-employees—and not also they, themselves—have a duty under the Controlled Substances Act to prevent diversion of opioids via illegitimate prescriptions. This contention is deeply troubling and, for the reasons below, the Court firmly rejects it.

In its *Opinion and Order Regarding Plaintiffs' Summary Judgment Motions Addressing the Controlled Substances Act* (Doc. #: 2483),[17] this Court held that, "as a matter of law, Section 1301.74 [of Title 21 of the Code of Federal Regulations] imposes a legal duty on registrants to design and operate a system to disclose to the registrant suspicious orders." Doc. #: 2483 at 15. Section 1301.74 applies specifically to non-practitioners—that is, manufacturers and distributors, but *not* pharmacies. The Pharmacy Defendants acknowledge that corporate *distributors* of opioids have a duty to prevent diversion by monitoring suspicious orders, but assert "there is no equivalent corporate-level obligation with respect to *dispensing*." Doc. #: 3340-1 at 14 (emphasis added).[18] Defendants contend, instead, that "the responsibility to guard against invalid prescriptions rests

[17] *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3917575 (N.D. Ohio Aug. 19, 2019).

[18] The Court previously described the distinction between distribution and dispensing as follows: "'distribution' involves movement of opioid products from (for example) a warehouse to a specific pharmacy, while 'dispensing' refers to the 'final step' in the distribution process, from the pharmacy to an individual patient." *Discovery Ruling No. 8* at 1 (Doc. #: 1055). Although many of the Pharmacy Defendants are also registered as distributors, this order pertains specifically to their role in dispensing.

with individual pharmacists, and ***only*** with individual pharmacists." *Id.* (emphasis in original). In other words, the Pharmacy Defendants now ask the Court to conclude that the CSA, as a matter of law, does not impose any obligation on a pharmacy-registrant, itself, to identify or investigate dubious prescriptions prior to filling them. The Court declines to do so, as this strained interpretation of the CSA would turn the fundamental purpose of the Act on its head.

In a prior opinion, the Court described the statutory and regulatory framework of the CSA and its implementing regulations. *See In re Nat'l Prescription Opiate Litig.*, 2019 WL 3917575, at *3 (Doc. #: 2483 at 5). In short, all persons who dispense controlled substances (including pharmacies) must register with the Attorney General.[19] 21 U.S.C. § 822. Generally, in the case of pharmacies, the Attorney General must issue them a registration so long as they are authorized to dispense controlled substances by and in the State where they practice. 21 U.S.C. § 823(f). However, the Attorney General may deny a registration if he deems it inconsistent with the public interest. *Id.*; *see also* 21 U.S.C. § 824(a)(4).

To help the Attorney General determine the public interest, the CSA provides a nonexclusive list of five factors the Attorney General must consider, including "[t]he applicant's experience in dispensing … controlled substances" and its "[c]ompliance with applicable State, Federal, or local laws relating to controlled substances." 21 U.S.C. § 823(f)(2), (4). Chapter II of Title 21 of the Code of Federal Regulations further expands upon these general provisions. *See generally* 21 C.F.R. Ch. II.

The Regulations at Title 21, Chapter II have been properly promulgated pursuant to Congressional authorization and, thus, carry the full force and effect of law. *See In re Nat'l*

[19] The CSA expressly authorizes the Attorney General to regulate the distribution of controlled substances. In turn, the Attorney General delegated this authority to the DEA Administrator. *See John Doe, Inc. v. Gonzalez*, 2006 WL 1805685 at *1 (D.C. Cir. June 29, 2006); *United States v. Caudle*, 828 F.2d 1111, 1111 n.1 (5th Cir. 1987) (citing 38 FR 18380 (DEA Jul. 10, 1973)).

Prescription Opiate Litig., 2019 WL 3917575 at *3, *7 (Doc. #: 2483 at 6, 15) (citing *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984)). The CSA—as interpreted through these implementing regulations—is unequivocal:

> ***All*** applicants and registrants shall provide effective controls and procedures to guard against [i] theft ***and*** [ii] diversion of controlled substances.

21 C.F.R. § 1301.71(a) (emphasis added). The Court has previously explained that, "pursuant to this [Congressional] authorization, the DEA has promulgated regulations that set forth security requirements for registered manufacturers, distributors, and dispensers of controlled substances." *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3917575 at *3 (Doc. #: 2483 at 6) (citing 21 C.F.R. §§ 1301.71-77 (the "Security Requirements")).

The Pharmacy Defendants do not disagree that the CSA's Security Requirements apply to them. But they assert that, at least with respect to pharmacies, these regulations "only impose[] requirements for in-store physical security controls and ha[ve] never been understood to require a 'system' for monitoring prescriptions and disclosing 'suspicious orders of controlled substances.'" Doc. #: 3340-1 at 16 n.6. In other words, even though ***all*** other registrants (including their own pharmacist-employees) need to guard against theft ***and*** other species of diversion, the Pharmacy Defendants assert ***they*** need only guard against theft.

The Regulation's use of the word "and," however, unambiguously indicates that ***all*** registrants have an affirmative obligation to protect not only against diversion via theft but also other forms of diversion more broadly. To conclude otherwise, as the Pharmacy Defendants suggest, disregards the plain meaning of the text, undermines the purpose of the CSA, and would allow a frightening abdication of responsibility. Furthermore, as explained below, the CSA ***explicitly*** requires pharmacies to collect prescription data and use it to monitor for questionable prescriptions that might lead to diversion.

1. Statutory Obligations of Registrants.

The Pharmacy Defendants are certainly correct that the CSA includes provisions addressing physical theft of drugs from pharmacies. Specifically, the Regulation's Security Requirements lay out a non-exhaustive list of controls that a registrant must implement in order to store and dispense Schedule II controlled substances safely at their stores. *See* 21 C.F.R. § 1301.75-76.

But it is equally certain that the Pharmacy Defendants' statutory obligations do not end there. With respect to diversion more broadly, the CSA and its implementing regulations impose many other obligations on registrants—***all*** registrants—that serve to advance the CSA's overall stated purpose of preventing diversion. For example, the CSA imposes specific record-keeping requirements on registrants who handle controlled substances. Specifically, a pharmacy-registrant must, at a minimum and among other things, record and maintain:

> the number of units or volume of such finished form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the [controlled] substance on behalf of the dispenser.

21 C.F.R. § 1304.22(c). Whatever other information a pharmacy may choose to collect about its own dispensing practices, those of its stores, or those of its pharmacists, the CSA mandates the collection and retention of specific data-points that would inarguably be useful to the pharmacy (or the DEA) in identifying suspicious prescribing and dispensing activity. This record-keeping requirement is clearly intended as a guard against diversion. *See Medicine Shoppe-Jonesborough*, 73 FR 364-01, 365 (DEA Jan. 2, 2008) (because "Respondent [retail ***pharmacy***] violated federal law and DEA regulations by failing to maintain complete and accurate records," "revocation of its registration is necessary to protect the public interest"), *petition for review denied, Med. Shoppe-Jonesborough v. Drug Enf't Admin.*, 300 F. App'x 409, 411 (6th Cir. 2008) ("Medicine Shoppe

fell short of meeting its duty to maintain accurate records of the controlled substances it dispensed."). It would undermine the entire purpose of the CSA (and defy logic) for the Act to require a pharmacy to collect the dispensing data listed in § 1304.22(c), but then allow the pharmacy to ignore this data when fulfilling its fundamental obligation to guard against diversion.

In addition to the Security Requirements and record-keeping requirements, the CSA also mandates that a pharmacy-registrant must employ a properly licensed and trained pharmacist. The Pharmacy Defendants, as non-pharmacist corporate entities, attempt to interpose this requirement to insulate themselves from liability. But the result the Pharmacy Defendants espouse can only be reached through a strained reading of the CSA as a whole.

Under the CSA, a pharmacy is itself a "Practitioner." *See* 21 U.S.C. § 802(21) ("The term 'practitioner' means a physician, dentist, veterinarian, scientific investigator, ***pharmacy***, hospital, or other person licensed, registered, or otherwise permitted … to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice.") (emphasis added). Further, a pharmacy is also a "dispenser." *See* 21 C.F.R. § 1300.01 ("Dispenser means an individual practitioner, institutional practitioner, ***pharmacy*** or pharmacist who dispenses a controlled substance.") (emphasis added); *see also* 21 U.S.C. § 802(10) (a dispenser is "a practitioner who so delivers a controlled substance to an ultimate user").

The Pharmacy Defendants attempt to draw a distinction between the roles of a pharmacist and a pharmacy. The Pharmacy Defendants then insist that individual, licensed pharmacists, and only those pharmacists, bear responsibility for dispensing controlled substances improperly. *See* Doc. #: 3340-1 at 17 (citing 21 C.F.R. § 1306.04(a)). But the CSA does not make this distinction. ***Both*** pharmacists and pharmacies are "practitioners" under the Act. And ***both*** are "dispensers."

Accordingly, both pharmacists and pharmacies bear all the obligations imposed upon practitioners and dispensers. And, the statutory definitions of these two terms—especially the statutory definition of "practitioner"—expressly anticipate that a pharmacy has the ability to dispense controlled substances in the course of its own professional practice. Thus, under the CSA, any ***person*** (which, to be clear, includes corporate entities) who dispenses or delivers a controlled substance to an ultimate user must adhere to all of the obligations imposed by the Act.

This understanding is further confirmed by the language of Section 1306.04(a):

> The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with ***the pharmacist*** who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and ***the person*** knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

21 C.F.R. § 1306.04(a) (emphasis added). Put plainly, although this regulation recognizes it is "***the pharmacist***" who physically hands the controlled substance over to the patient, the regulation intentionally and explicitly subjects ***the person***—which is a much broader term, applying not just to the pharmacist but also to the pharmacy—to penalties for violation of the CSA. This interpretation has been adopted and ratified by the DEA and at least one other district court. *See Top RX Pharmacy*; *Decision and Order*, 78 FR 26069-01, 26082 (DEA May 3, 2013) ("The corresponding responsibility to ensure the dispensing of valid prescriptions extends to the pharmacy itself.") (citing multiple agency rulings);[20] *see also United States v. Appalachian Reg'l*

[20] The Pharmacy Defendants insist that, "[a]lthough DEA has sometimes referred to the ***pharmacist's*** responsibility as the ***pharmacy's*** responsibility, that occasional imprecision does not create an independent regulatory responsibility for a pharmacy." Doc. #: 3340-1 at 18 (citations omitted) (emphasis added). However, given the large number of agency actions that refer to a pharmacy-registrant's corresponding responsibility, the Court finds it highly unlikely that the Agency is so routinely "imprecise." This Court assumes, rather, that the Agency knows how to draw a distinction between a pharmacist and a pharmacy and, to the extent an ALJ or the Administrator wrote that a pharmacy has a responsibility to ensure prescriptions are legitimate, they did so intentionally. *See, e.g., Top RX Pharmacy;*

Healthcare, Inc., 246 F. Supp. 3d 1184, 1189-90 (E.D. Ky. 2017) (finding "nothing inconsistent about articulating the responsibilities of individual practitioners and pharmacists while simultaneously indicating that other entities may be subject to penalties for their role in issuing and filling invalid prescriptions.").

Seeking support outside of the CSA itself, the Pharmacy Defendants also turn to Ohio law, asserting it supports their contention that "[o]nly a licensed pharmacist—not the non-pharmacist corporate owner of a pharmacy—may engage in the practice of pharmacy." Motion at 15. Specifically, the Pharmacy Defendants rely on O.R.C. § 4729.27, which states: "A person not a pharmacist, who owns, manages, or conducts a pharmacy, shall employ a pharmacist to be in full and actual charge of such pharmacy." The Pharmacy Defendants submit this language indicates that only a pharmacist can be held liable for the dispensing practices of a pharmacy, because "[q]uestioning the validity of a prescription requires … specialized knowledge, judgment, and skill, and is a task that Pharmacy Defendants cannot lawfully usurp from their pharmacists." *Id*.

This logic fails. Ohio controlled substance law largely mirrors the federal scheme and sets out identical obligations. In Ohio, the Pharmacy Defendants are classified as "Terminal Distributors." The Ohio Revised Code defines "Terminal Distributor of Dangerous Drugs" as:

Decision and Order, 78 FR 26069-01, 26082 (DEA May 3, 2013) ("a pharmacist ***or pharmacy*** may not dispense a prescription in the face of a red flag") (emphasis added); *Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195, Decision and Order*, 77 FR 62316-01, 62343 (DEA Oct. 12, 2012) ("on various occasions, each of the Respondents [***pharmacies***] dispensed controlled substances in the face of red flags that were or should have been recognized"); *Role of Authorized Agents in Communicating Controlled Substance Prescriptions to Pharmacies*, 75 FR 61613, 61617 (DEA Oct. 6, 2010) ("Providing a copy [of the agency agreement] to ***pharmacies*** … may assist those ***pharmacies*** with their corresponding responsibility regarding the dispensing of controlled substances."); *Medicine Shoppe-Jonesborough*, 73 FR 364-01, 383 ("Here again, the evidence establishes that Mr. Street [a pharmacist] ***and Respondent [a pharmacy]*** failed to comply with their corresponding responsibility under federal law."); *United Prescription Services, Inc. Revocation of Registration*, 72 FR 50397-10, 50409 (DEA Aug. 31, 2007) ("***Respondent [pharmacy]*** thus violated 21 CFR 1306.04 by filling these [illegal] prescriptions."); *Issuance of Multiple Prescriptions for Schedule II Controlled Substances*, 72 FR 64921, 69424 (DEA Nov. 19, 2007) ("physicians ***and pharmacies*** have a duty as DEA registrants to ensure that their prescribing and dispensing of controlled substances occur in a manner consistent with effective controls against diversion and misuse.") (citing *Clarification of Existing Requirements Under the Controlled Substances Act for Prescribing Controlled Substances*, 70 FR 50408 (DEA Aug. 26, 2005)).

> a ***person*** who is engaged in the sale of dangerous drugs at retail, or any person, ***other than a … pharmacist***, who has possession, custody, or control of dangerous drugs for any purpose other than for that person's own use and consumption.
>
> "Terminal distributor" includes ***pharmacies*** … who procure dangerous drugs for sale or other distribution ***by or under the supervision of a pharmacist*** … authorized by the state board of pharmacy.

O.R.C. § 4729.01(Q) (emphasis added). Furthermore, the licensure requirements for Terminal Distributors of Dangerous Drugs, pursuant to O.R.C. § 4729.55, require that:

> No license shall be issued to an applicant for licensure as a terminal distributor of dangerous drugs unless the applicant has furnished satisfactory proof to the state board of pharmacy that:
>
> * * *
>
> (B) A pharmacist … authorized by the board … will maintain supervision and control over the possession and custody of dangerous drugs and controlled substances that may be acquired by or ***on behalf of the applicant***.
>
> * * *
>
> (D) Adequate safeguards are assured that the applicant will ***carry on the business of a terminal distributor*** of dangerous drugs in a manner that allows pharmacists and pharmacy interns employed by the terminal distributor to practice pharmacy in a safe and effective manner.

O.R.C. § 4729.55 (emphasis added).

Combined, these provisions mean that a pharmacy owner, who is not him- or herself a licensed pharmacist, must employ a licensed pharmacist as a control against diversion, and the pharmacy must conduct its business in a way that allows its pharmacist to properly dispense the pharmacy-licensee's controlled substances on its behalf. These provisions cannot be read to mean that pharmacy owners who ***are not themselves pharmacists*** are absolved of responsibility for their own dispensing practices simply because they must employ a pharmacist, whereas pharmacy

owners who ***are pharmacists***—and thus need not employ a separate pharmacist—are not.[21] Such a reading would undermine the purpose of Ohio's controlled substance law, and would disincentivize licensed pharmacists from owning and operating their own pharmacies.

Finally, the Ohio Revised Code specifically contemplates disciplinary action against ***pharmacies*** that "[c]eas[e] to satisfy the qualifications of a terminal distributor of dangerous drugs set forth in section 4729.55." O.R.C. § 4729.57(B)(7). That is, if a ***pharmacy*** fails to conduct its business in a way that allows its pharmacists to be effective, it is in violation of Ohio controlled substance laws.[22] The Pharmacy Defendants' invocation of Ohio law in support of their attempt to avoid their legal obligations under the CSA is unavailing.

In sum, the Court concludes the Pharmacy Defendants have not shown that sole responsibility for their dispensing practices rests with their pharmacist-employees. Rather, the CSA makes clear that any ***person***, which includes a pharmacy itself, who knowingly fills or allows to be filled an illegitimate prescription is in violation of the Act.

2. System Requirement.

Beyond the aforementioned statutory obligations, Plaintiffs assert the CSA also imposes duties on the Pharmacy Defendants to maintain systems, policies, or procedures to identify prescriptions that bear indicia ("red flags") that the prescription is invalid, or that the prescribed

[21] Such a reading would be tantamount to a statutory "safe harbor" by providing that a pharmacy owner could not be held liable for its role in dispensing controlled substances simply by employing a pharmacist. Employment of a properly licensed pharmacist must be read as a feature of the law, not a way to subvert it.

[22] The Court notes that, under Ohio law: (1) a Terminal Distributor is ***not a pharmacist***, *see* O.R.C. § 4729.01(Q); (2) a Terminal Distributor is engaged in the Retail Sale of dangerous drugs, *see id.*; (3) a Retail Seller is "***any person*** that sells any dangerous drug to consumers without assuming control over and responsibility for its administration, *see* § 4729.01(M); and (4) "sell" includes "***any transaction made by any person***" that effectively transfers the dangerous drug to another. *See* § 4729.01(J). Thus, the Ohio Revised Code expressly contemplates that a pharmacy's business includes dispensing of dangerous drugs to consumers.

drugs may be diverted for illegitimate use. The Pharmacy Defendants admit an equivalent duty exists for manufacturers and distributors with respect to suspicious ***orders***, but insist no such duty exists for pharmacies with respect to suspicious ***prescriptions***.[23] Defendants are wrong.

There is no question that dispensers of controlled substances are obligated to check for and conclusively resolve red flags of possible diversion prior to dispensing those substances.[24] The DEA, in Agency decisions interpreting its regulations, routinely conducts a "red flag analysis." In fact, the Agency has even articulated the specific elements of a *prima facie* violation of a pharmacy-registrant's responsibility under 21 C.F.R. § 1306.04(a) using the term "red flag." *See Holiday CVS*, 77 FR at 62341 ("to show a violation of a corresponding responsibility, the Government must establish that: (1) the Respondent [a pharmacy] dispensed a controlled substance; (2) a ***red flag*** was or should have been recognized at or before the time the controlled substance was dispensed; and (3) the question created by the ***red flag*** was not resolved conclusively prior to the dispensing of the controlled substance.") (emphasis added).[25] Agency

[23] The Court notes that many, if not all, of the Pharmacy Defendants maintain (or did maintain during the relevant time period) DEA registrations as distributors as well.

[24] The Pharmacy Defendants assert that any analogy between (i) a duty of dispensers to identify and resolve red flags before filling subscriptions and (ii) a duty of distributors to identify and conduct due diligence prior to shipping suspicious orders, is "unfounded and unworkable." Doc. #: 3379at 5 (referring to the Court's August 19, 2019 *Opinion and Order Regarding the CSA* (Doc. #: 2483)). But Agency decisions have made abundantly clear there exists a duty of dispensers to identify and resolve red flags before filling opioid prescriptions. Therefore, the Court need not rely upon "analogy" to conclude this duty exists.

[25] Regarding the second prong recited in *Holiday CVS*—whether "a red flag was or should have been recognized at or before the time the controlled substance was dispensed"—the DEA "has consistently interpreted [section 1306.04(a)] as prohibiting a pharmacist from filling a prescription for a controlled substance when he either ***knows or has reason to know*** that the prescription was not written for a legitimate medical purpose." *E. Main St. Pharmacy*, 75 FR 66149-01, 66163 (DEA Oct. 27, 2010) (citing agency and Sixth Circuit precedent) (internal quotations omitted). The Pharmacy Defendants assert that, absent identification by Plaintiffs of any *specific* prescription filled by Defendants that they knew or should have known was illegitimate, Plaintiffs do not state viable claims. Plaintiffs have alleged, however, that the Pharmacy Defendants had reason to know that at least some of the prescriptions they dispensed were illegitimate. At the motion to dismiss stage, with factual allegations in the complaint accepted as true and viewed in favor of the nonmoving party, the Court easily concludes that Plaintiffs allegations are plausible.

precedent, in analyzing whether a registrant properly identified and resolved red flags, uses a combination of factors (2) and (4) of 21 U.S.C. 823(f) as the statutory basis for the requirement.[26]

Many of the red flags that the Agency examines (which a registrant should have at least identified and, if possible, resolved) include indicia that would be very difficult, if not impossible, for a human pharmacist to identify consistently absent a system to aggregate, analyze, and provide feedback to the pharmacist about the prescription.[27] In other words, some prescriptions are not suspicious on their face but raise bright red flags when compared with other prescriptions in a database. One example of such a red flag is "'pattern prescribing,' defined as 'prescriptions for the same drugs, the same quantities[,] coming in from the same doctor." *Holiday CVS*, 77 FR at 62344. Identifying prescriptions presented over time for the same drugs or combinations of drugs, in the same quantities, issued by the same doctor (and possibly presented to different pharmacists in different stores owned by the same pharmacy), would test the limits of human memory; this red flag would be nearly impossible for any individual pharmacist to discern absent some global mechanism for reference to other prescriptions. However, given that a ***pharmacy-registrant*** is required to collect the specific data needed to identify exactly such a pattern, the pharmacy—not the pharmacist—is in the best position to identify such a red flag (or at least provide the pharmacist with data reports to do so). Indeed, the fact that the DEA has revoked registrations of ***pharmacies***

[26] Those factors are "[2] The applicant's experience in dispensing … controlled substances," and "[4] Compliance with applicable State, Federal, or local laws relating to controlled substances." 21 U.S.C. § 823(f)(2), (4). *Compare Holiday CVS*, 77 FR at 62341-42 (relying on factor (4)); *with E. Main St. Pharmacy*, 75 FR 66149-01, 66150 (DEA Oct. 27, 2010) (relying on factor (2)). Frequently, the two factors are analyzed together. *See, e.g.*, *Top RX Pharm.*, 78 FR at 26081.

[27] The DEA has unequivocally accepted certain "red flag" indications that some prescriptions are suspicious, and many of these red flags have nothing to do with the specialized knowledge or training of a pharmacist; rather, these red flags are patterns in prescription data that a human pharmacist normally would never see. Computer algorithms, when applied to sufficient data (which the pharmacies are required to collect), are particularly well-suited to identify these patterns.

for failure to identify such red flags necessarily means pharmacies are required to look for them, which can only be done by putting into place systems to identify them.

The Pharmacy Defendants assert they cannot be responsible for identifying red flags because they do not have the requisite "specialized knowledge, judgment, and skill" to engage in the practice of pharmacy. Doc. #: 3340-1 at 15 (citing O.R.C. § 4729.01(B)). But the Pharmacy Defendants do have an obligation under the CSA to employ someone who does have and can exercise appropriate professional knowledge, judgment, and skill on their behalf. The same is expressly true under Ohio law. *See* O.R.C. § 4729.55(D). Pharmacies also have an obligation under Ohio law to "allow[] pharmacists … to practice pharmacy in a safe and effective manner." *Id.* These objectives are accomplished fully only when a pharmacy actually uses the data it is required to collect under 21 C.F.R. § 1304.22(c) to provide a tool otherwise unavailable to its pharmacists.

The Pharmacy Defendants also assert the CSA cannot impose an obligation on them to identify red flags because, as corporate-entity non-pharmacists, they cannot override the professional decisions of their pharmacists to determine the propriety of a prescription. *See* Doc. #: 3340-1 at 16. But nothing about using data to identify a suspicious prescription would work to override a pharmacist's ability to determine if the prescription was proper. To the contrary, a data-driven analysis should assist and work in synergy with a pharmacist's expertise. Ultimately, pharmacists cannot best employ their "professional knowledge, judgment, and skill" to prevent diversion if their pharmacy-employer does not provide useful access to the "red-flag-revealing" data it has gathered.

Although the CSA is not perfectly clear about what a pharmacy-registrant must do with the prescription data it must collect, what is clear is that a pharmacy is required to: (1) collect and

maintain specific records and data regarding its dispensing activity; (2) employ a properly licensed pharmacist; and (3) properly dispense controlled substances and avoid diversion. Therefore, both the pharmacy and the pharmacist must cooperatively identify and resolve "red flags" prior to dispensing controlled substances. The Court concludes these requirements collectively mean that the Pharmacy Defendants cannot collect data as required by the statute, employ a licensed pharmacist as required by the statute, identify red flags as required by Agency decisions, but then do nothing with their collected data and leave their pharmacist-employees with the sole responsibility to ensure only proper prescriptions are filled. Possessing, yet doing nothing with, information about possible diversion would actually ***facilitate*** diversion, and thus violate the CSA's fundamental mandate that "***All applicants and registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances***." 21 C.F.R. § 1301.71(a) (emphasis added).

In sum, the Court concludes the Pharmacy Defendants have failed to meet their burden of demonstrating there is no corporate-level obligation to design and implement systems, policies, or procedures to identify red flag prescriptions. And the Pharmacy Defendants' ultimate argument—that they cannot be liable to Plaintiffs because only their pharmacist-employees are responsible for preventing diversion of opioids via illegitimate prescriptions—is premised upon a tortured reading of the CSA and its regulations. Because Defendants' reading of the CSA is antithetical to its very purpose, the Court rejects Defendants' positions.

C. Ohio Absolute Public Nuisance.

Plaintiffs allege common law claims for absolute public nuisance based on the Pharmacy Defendants' alleged intentional and unlawful misconduct involving both *distribution* and *dispensing* of prescription opioids. To the extent these claims are based on *dispensing* activities,

the Pharmacy Defendants argue the claims are simply not cognizable under Ohio law of public nuisance.[28] Doc. #: 3340-1 at 23-26. For the reasons stated below, the Court rejects this argument.

A "public nuisance" is an unreasonable interference with a right common to the general public, including the rights to public health and public safety.[29] *Cincinnati v. Deutsche Bank Nat'l Trust Co.*, 863 F.3d 474, 477 (6th Cir. 2017); C*incinnati v. Beretta USA Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002). Ohio law recognizes two categories of nuisance claims—"absolute" and "qualified"—and the distinction between the two depends on the conduct of the defendant. *Nottke v. Norfolk S. Ry. Co.*, 264 F. Supp.3d 859, 862 (N.D. Ohio 2017) (citation omitted). An "absolute" nuisance, also called a nuisance *per se*, is based on culpable and intentional or unlawful conduct by the defendant resulting in harm.[30] *Taylor*, 55 N.E. 2d at 727-732; *Barnett v. Carr*, 2001 WL 1078980, at *11 (Ohio Ct. App. Sept. 17, 2001). A "qualified" nuisance, on the other hand,

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[28] As to claims based on the Pharmacies' *distribution* activities, this Court has previously found similar allegations sufficiently support an absolute public nuisance claim under Ohio law. *See, e.g., In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d at 805-08 (Doc. #: 3177 at 41-47) (plaintiffs sufficiently pled Ohio absolute public nuisance claims based, in part, on defendants' alleged failure to maintain effective controls with respect to distribution activities); *Opinion and Order Regarding Manufacturers' Summary Judgment Motion in Track One, In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d 672, 672-76 (N.D. Ohio 2019) (Doc. #: 2578 at 1-7) (material fact issues regarding defendants' alleged failure to maintain anti-diversion controls precluded summary judgment on Ohio absolute public nuisance claims); *see also Opinion and Order Regarding Motions to Dismiss West Boca, In re Nat'l Prescription Opiate Litig.*, 2020 WL 1669655, at *17-18 (N.D. Ohio Apr. 3, 2020) (Doc. #: 3253 at 29-33) (same under Florida law); *Report and Recommendation Regarding Motions to Dismiss Blackfeet Tribe*, *In re Nat'l Prescription Opiate Litig.*, 2019 WL 2477416, at *9-18 (N.D. Ohio Apr. 1, 2019) (Doc. #: 1500 at 26-34) (same under Montana law), *adopted by* 2019 WL 3737023, at *9-11 (N.D. Ohio June 13, 2019) (Doc. #: 1680 at 16-20); *Report and Recommendation Regarding Motions to Dismiss Muscogee Nation*, *In re Nat'l Prescription Opiate Litig.*, 2019 WL 2468267, at *26-33 (N.D. Ohio Apr. 1, 2019) (Doc. #:1499 at 50-62) (same under Oklahoma law), *adopted by* 2019 WL 3737023, at *9-11 (N.D. Ohio June 13, 2019) (Doc. #: 1680 at 16-20).

[29] The Court has previously ruled claims similar to the Counties' sufficiently pled interference with a common public right to be free from the negative consequences allegedly suffered as a result of the opioid epidemic. *See* Doc. #: 1500 at 28-30 (Montana law), *adopted by* Doc. #: 1680 at 16-20; Doc. #: 1499 at 50-62 (Oklahoma law), *adopted by* Doc. #: 1680 at 16-20; *see also* Doc. #: 2578 at 3-4 ("A factfinder could reasonably conclude that [plaintiffs'] evidence demonstrates an interference with public health and public safety rights.") (Ohio law).

[30] An "absolute" nuisance can also be based on nonculpable conduct by the defendant that results in "accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability notwithstanding the absence of fault." *Taylor*, 55 N.E.2d at 727; *Nottke*, 264 F.Supp.3d at 862; *Angerman v. Burick*, No. 02CA0028, 2003 WL 1524505, at *2 (Ohio Ct. App. March 26, 2003). Plaintiffs here do not allege an absolute public nuisance based on inherently dangerous conduct.

involves harm caused by the defendant's negligence. *Taylor*, 55 N.E.2d at 727-732; *Angerman*, 2003 WL 1524505, at *2.

Here, the Plaintiffs assert absolute public nuisance claims based on alleged *intentional* and *unlawful* dispensing conduct. *See* Doc. #: 3327 at ¶620. The Pharmacy Defendants, however, contend the Plaintiffs' allegations "fundamentally sound in negligence" and do not sufficiently describe intentional or unlawful conduct necessary to support an absolute nuisance action. Doc. #: 3340-1 at 23-25. More specifically, the Defendants contend Plaintiffs merely allege that the Pharmacies engaged in lawful conduct and "should have innovated new ways to identify and prevent diversion." *Id.* at 24-25.

Contrary to the Pharmacy Defendants' contention, Plaintiffs clearly allege Defendants engaged in *intentional* conduct to dispense opioids in a manner that caused an oversupply of highly addictive drugs in Plaintiffs' communities. Plaintiffs allege the Pharmacy Defendants: (i) were "keenly aware of the oversupply of prescription opioids;" (ii) willfully and "systematically ignored red flags that they were fueling a black market;" (iii) required and rewarded speed and volume by opioid-dispensing employees, while minimizing standards of safety and care; (vi) purposefully implemented performance metrics and prescription quotas to increase dispensing of opioids; (v) "facilitated the supply of far more opioids than could have been justified to serve a legitimate market;" (vi) knowingly worked in concert with opioid manufacturers "to ensure that false messaging surrounding the treatment of pain and the true addictive nature of opioids was consistent and geared to increase profits for all stakeholders;" (vii) "worked together to ensure that the opioid quotas allowed by the DEA remained artificially high;" and (viii) falsely assured the public that Defendants were working to curb the opioid epidemic. Doc. #: 3327 at ¶¶74-77, 81, 413-425, 454-478, 480-494, 600-606, 609-611.

The Pharmacy Defendants contend these allegations are insufficient to show they intended to cause the harms allegedly suffered by the Plaintiffs. Doc. #: 3340-1 at 25. To meet the requisite intent for an absolute nuisance, however, a plaintiff need not allege the defendant intended to create the precise alleged nuisance; rather, plaintiff only need allege the defendant "intended to bring about the conditions which are in fact found to be a nuisance." *Nottke*, 264 F. Supp.3d at 863 (quoting *Angerman*, 2003 WL 1524505 at *2). Stated otherwise, "[w]here the harm and resulting damage are the necessary consequences of just what the defendant is doing, or is incident to the activity itself or the manner in which it is conducted, the law of negligence has no application and the rule of absolute liability applies." *Taylor*, 55 N.E.2d at 727; *see also In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d at 675-76 (Doc. #: 2578 at 5-7) (material fact issues regarding the opioid manufacturers' intent precluded summary judgment for defendants on absolute nuisance claims in the Track One cases).

Here, Plaintiffs allege the conditions created by the Pharmacies' intentional conduct – that is, oversupply of opioids in Plaintiffs' communities – necessarily resulted in the devastating consequences that Plaintiffs allegedly suffered because of the opioid epidemic. Doc. #: 3327 at ¶¶573-599, 621-626, 633-637. Accepting these allegations as true and construing them in the light most favorable to Plaintiffs, the Court finds Plaintiffs have fairly and sufficiently stated plausible claims for absolute public nuisance based on the Pharmacy Defendants' alleged intentional conduct involving their dispensing activities. *See Nottke*, 264 F. Supp.3d at 863-864 (plaintiffs stated a facially plausible claim for absolute nuisance where the harms allegedly suffered were the necessary consequence of defendant's intentional operation of braking systems that repeatedly produced "very loud, unbearable high-pitched squealing" sounds); *Angerman*, 2003 WL 1524505, at *1-3 (where defendants intentionally built and operated a motocross track that generated a great

deal of noise as an unavoidable byproduct of their intentional activity, the law of absolute public nuisance applied).

Additionally, as discussed in the previous section, Plaintiffs have sufficiently alleged the Pharmacy Defendants engaged in unlawful dispensing conduct by failing to comply with statutory and regulatory requirements to provide effective controls against diversion, including ensuring proper dispensing of controlled substances. These allegations provide an additional and alternative basis to support the absolute nuisance claims. *See In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d at 676 (Doc. #: 2578 at 7) (evidence of the opioid manufacturers' failure to comply with their anti-diversion obligations under the CSA precluded summary judgment in Track One on plaintiffs' absolute public nuisance claims based on unlawful conduct); *Kramer v. Angel's Path, LLC*, 882 N.E.2d 46, 53 (Ohio Ct. App. 2007) (strict liability is imposed under absolute nuisance "when there is 'the violation of law resulting in a civil wrong or harm,' especially when a safety statute is violated") (quoting *Taylor*, 55 N.E.2d at 728).[31]

The Pharmacy Defendants also argue that, as a matter of law, an absolute nuisance theory cannot apply because their dispensing conduct was licensed, authorized, and regulated under the CSA. Doc. #: 3340-1 at 24 n.24, 25; Doc. #: 3379 at 14. This Court has previously rejected identical arguments, finding that, under Ohio law, "'safe harbor' immunity from absolute nuisance liability is available only to those who perform in accordance with their applicable licensing

[31] In their reply brief, the Pharmacy Defendants argue that, even if their alleged dispensing conduct was *unlawful*, an absolute nuisance theory would not apply, because the CSA and its implementing regulations merely set forth a general duty to exercise ordinary care under the circumstances and do not set forth rules requiring or prohibiting the performance of specific acts. *See* Doc. #: 3379 at 13 (citing *Taylor*, 55 N.E.2d at 733; and *Natale v. Everflow E., Inc.*, 959 N.E.2d 602, 609-10 (Ohio Ct. App. 2011)). The Court declines to address arguments raised for the first time in a reply brief. *Ross v. Choice Hotels Int'l, Inc.*, 882 F.Supp.2d 951, 958 (S.D. Ohio 2012). Moreover, the Court disagrees with the Pharmacy Defendants' contention that the CSA and its regulations merely establish a general duty to exercise reasonable care. As discussed in the previous section, the CSA statutory and regulatory framework imposes specific obligations on pharmacies to protect against the diversion of controlled substances.

regulatory obligations." *In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d at 808 (Doc. #: 3177 at 45-47). The same analysis applies here. As discussed, Plaintiffs allege the Pharmacy Defendants did not comply with the regulatory scheme but, rather, violated it. Accordingly, the Court declines to dismiss the absolute nuisance claims on this ground. *Id.*[32]

Last, the Pharmacy Defendants assert Plaintiffs cannot pursue liability based on Defendants' First-Amendment-protected participation in trade groups that lobbied against additional regulation of the opioid supply chain. Completely aside from any alleged lobbying or trade group activities, however, Plaintiffs allege ample intentional and unlawful conduct by Defendants to support their absolute nuisance claims. Moreover, this Court has previously found that evidence of lobbying activities may be admissible for other purposes, such as to show motive or intent. *See Evidentiary Order,* Doc. #: 3058 at 51-53. On this record, the Court concludes Plaintiffs have sufficiently stated common law claims for absolute public nuisance based on the Pharmacy Defendants' alleged dispensing activities.

D. Proximate Causation – Learned Intermediary Doctrine.

Finally, the Pharmacy Defendants argue that, under the learned intermediary doctrine, the intervening conduct of prescribing medical professionals breaks the causal chain between the Pharmacy Defendants' conduct and the Plaintiffs' injuries. Doc. #: 3340-1 at 26.

The Court previously found allegations similar to Plaintiffs' here sufficient to overcome a motion to dismiss on proximate cause grounds.[33] Specifically, the Court declined to find, under

[32] *See also In re Nat'l Prescription Opiate Litig.*, 2020 WL 1669655, at *18 (Doc. #: 3253 at 32-33) (allegations of conduct incompatible with defendants' statutory authority stated an actionable public nuisance claim) (Florida law); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *10 (Doc. #: 1680 at 17-18) ("to allege an absolute public nuisance, the Tribe needed only to allege that Distributors exceeded their statutory authority") (Montana law).

[33] *See Opinion and Order in Broward*, *In re Nat'l Prescription Opiate Litig.*, 2020 WL 1986589, at *5 (N.D. Ohio Apr. 27, 2020) (Doc. #: 3274 at 8–9); *Opinion and Order in West Boca*, *In re Nat'l Prescription Opiate Litig.*, 2020

Florida and Oklahoma law, a doctor's prescribing decision breaks the causal chain between the Pharmacies' dispensing conduct and the plaintiffs' injuries as a matter of law. *See In re Nat'l Prescription Opiate Litig.*, 2020 WL 1669655, at *7 (Doc. #: 3253 at 12) (finding Florida law does not "relieve a pharmacist … from all responsibility stemming from the filling of prescriptions written by doctors"); *In re Nat'l Prescription Opiate Litig.*, 2020 WL 1986589, at *5 (Doc. #: 3274 at 8–9) (same); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *5 (Doc. #: 1680 at 9) ("[T]he Court is not convinced that the learned intermediary doctrine [under Oklahoma law] applies to the causal chain that has been alleged by the Muscogee Nation.").[34] In each instance, the Court noted that causation should be left to the trier of fact.[35]

Ohio law calls for the same result. Ohio courts apply the learned intermediary doctrine in strict products liability cases to shift a prescription drug manufacturer's duty to warn onto the prescribing physician, if the manufacturer has adequately warned the physician. *Tracy v. Merrell Dow Pharms., Inc.*, 569 N.E.2d 875, 878 (Ohio 1991). This shift recognizes manufacturers and physicians have distinct relationships with product users and are in different positions to issue warnings regarding a product. *See id.* at 878 ("The rationale behind [the doctrine] is that the physician stands between the manufacturer and the patient…."); *see also Seley v. G.D. Searle & Co.*, 423 N.E.2d 831, 840 (Ohio 1981) ("A direct relationship between the manufacturer and the patient does not arise as a result of the provision of [warning] brochures.").

WL 1669655, at *7 (Doc. #: 3253 at 10-11); *Opinion and Order in Tribal Track*, *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *4-6 (Doc. #: 1680 at 7-10); *Opinion and Order in Cleveland Bakers*, *In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d at 797, 812-813 (Doc. #: 3177 at 27-54).

[34] The Court has also concluded the Pharmacies cannot transfer to prescribers their liability (if any) to Plaintiffs, because Plaintiffs' liability theory relies on legal obligations and evidence independent of prescriber conduct. *Order Regarding Plaintiffs' Motion to Strike or Sever Third-Party Complaints*, *In re Nat'l Prescription Opiate Litig.*, 2020 WL 1526726, at *2-3 (N.D. Ohio Mar. 31, 2020) (Doc. #: 3246 at 4–5).

[35] *See In re Nat'l Prescription Opiate Litig.*, 2020 WL 1669655, at *5 (Doc. #: 3253 at 8); *In re Nat'l Prescription Opiate Litig.*, 2019 WL 3737023, at *5 (Doc. #: 1680 at 8).

These cases, on which the Pharmacy Defendants rely, confirm the learned intermediary doctrine is wholly inapplicable here. Plaintiffs are not seeking to hold the Defendants liable for personal injuries to opioid users for harms caused by products or related warnings. Plaintiffs' public nuisance claims instead pertain to broad harms to the public allegedly caused by the Pharmacies' dispensing conduct that implicates legal obligations independent of manufacturers, physicians, or any other participant in the opioid supply chain. The Pharmacy Defendants have not identified any legal authority that shifts their obligation to prevent diversion to any other person or entity, or otherwise establishes that prescribers are an intervening or superseding cause of Plaintiffs' alleged injuries.[36]

Finally, Ohio law instructs that proximate cause is ordinarily a question of fact for the jury. *Brondes Ford, Inc. v. Habitec Sec.*, 38 N.E.3d 1056, 1086 (Ohio Ct. App. 2015). Because Defendants have not demonstrated Plaintiffs' allegations of proximate cause fail as a matter of law, the Court declines to dismiss Plaintiffs' claims.

IV. Previously Adjudicated Issues.

In the final section of their Motion, the Pharmacy Defendants expressly incorporate by reference their and other defendants' briefing on various substantive motions previously ruled on by this Court in Track One. In response, the Track Three Plaintiffs incorporate by reference the responsive briefing on those motions as well. Although the Pharmacy Defendants assert the Court

[36] Indeed, the Court questions whether, as Defendants assert, prescribers' conduct is in fact situated *between* the Pharmacies' relevant conduct and Plaintiffs' alleged injuries, such that the prescribers' conduct could be an intervening or superseding cause of the injuries. Even if some of the Pharmacies' alleged culpable conduct occurs before a doctor writes an opioid prescription (for example, creating opioid dispensing policies), Plaintiffs' allegations also include conduct that necessarily occurs after doctors write prescriptions. *See* Doc. #: 3327 at ¶¶83–85 ("Pharmacies failed … to conduct adequate internal or external reviews of their opioid sales to identify patterns regarding prescriptions that should not have been filled, or … failed to take any meaningful action as a result").

erred in these rulings, they do not seek reconsideration and only assert they would like to have these prior arguments preserved for appellate review. Accordingly, the Court will not reconsider its prior rulings at this time, but the relevant briefs shall be part of the judicial record in these Track Three cases.[37]

V. Conclusion.

The Pharmacy Defendants have not shown Plaintiffs failed to state a claim for which relief can be granted. Accordingly, *Pharmacy Defendants' Motion to Dismiss*, Doc. #: 3340, is **DENIED**.

IT IS SO ORDERED.

/s/ Dan Aaron Polster Augst 6, 2020
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

[37] The specific documents the parties ask to incorporate are:

- Doc. #: 497 – Pharmacy Defendants' Motion to Dismiss;
- Doc. #: 491 – Distributor Defendants' Motion to Dismiss;
- Doc. #: 654 – Plaintiffs' Opp. to Defs.' Motion to Dismiss;
- Doc. #: 1874 – Pharmacy Defendants' Motion for Summary Judgment on Statute of Limitations;
- Doc. #: 1883 – Pharmacy and Distributor Defendants' Motion for Summary Judgment on Preemption;
- Doc. #: 1885 – Pharmacy Defendants' Motion for Summary Judgment on Causation;
- Doc. #: 2171 – Plaintiffs' Opp. to Defs.' Motion for Summary Judgment on Preemption;
- Doc. #: 2179 – Plaintiffs' Opp. to Defs.' Motion for Summary Judge on Statute of Limitations; and
- Doc. #: 2203 – Plaintiffs' Opp. to Defs.' Motion for Summary Judgment on Causation.

ATTACHMENT C

(Excerpt of Doc. 4065, Trial Transcript Vol. 14, Discussion of Juror Misconduct)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT CLEVELAND

IN RE:	Case No. 1:17-md-2804
NATIONAL PRESCRIPTION OPIATE LITIGATION	
	VOLUME 14
CASE TRACK THREE	JURY TRIAL
	(Pages 3596 - 3780)
	October 22, 2021

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

HELD BEFORE THE HONORABLE DAN AARON POLSTER

SENIOR UNITED STATES DISTRICT JUDGE

Official Court Reporter: Lance A. Boardman, RDR, CRR
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
216.357.7019

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

12:54:18 A F T E R N O O N S E S S I O N

12:57:55 - - - - -

12:57:55 (In open court at 12:57 p.m.)

12:58:02 THE COURT: All right. I had a more eventful lunch hour than anticipated. In addition to taking care of two criminal matters, my courtroom deputy advised me that earlier today one of the jurors informed him that another juror had brought in this morning copies of an article regarding Narcan, which he began showing to the jurors, others.

12:58:37 This juror was told immediately that this wasn't appropriate and it was to stop.

12:58:46 So what I'm proposing to do is to bring in the juror who reportedly had these articles, question her. It's Juror Number 4. And then take it from there. So that's what I'm proposing to do.

12:59:04 Does anyone have any objections?

12:59:06 MS. SULLIVAN: Your Honor, first of all, Your Honor, we'd have to talk to our client about a mistrial. But at a minimum --

12:59:12 THE COURT: This is what -- this is what I propose to do to find out the facts.

12:59:16 MS. SULLIVAN: Your Honor, at a minimum that juror should be disqualified.

12:59:21 THE COURT: Ms. Sullivan, I'm going one step

at a time to determine what the facts are, so the only way to determine what the facts are to question the juror. I don't want to question the juror who reported it because I don't -- for obvious reasons. I'm going to question the juror who reportedly brought this article in and find out what she did and hopefully make -- she probably has a copy of it and we can look at it. Absolutely if I find out that any juror has violated an instruction, she's summarily -- I'm going to propose to summarily excuse her.

MS. SULLIVAN: Agreed, Your Honor. Thank you.

THE COURT: But we should find out the facts.

MR. LANIER: Your Honor, our proposal would be that the Court does so *in camera* within chambers. I don't think it's appropriate for counsel necessarily to be present during this examination. We'll have it on record so we can read it, but I think that our presence in the presence of the juror with these examinations by the Court is not in best propriety.

MR. MAJORAS: I disagree with that, Your Honor. I think if you were to do it in chambers, a more limited group perhaps like we did in voir dire. But we have the opportunity to see the demeanor of the witness while responding to questions would be appropriate.

THE COURT: I think it's serious enough. I think everyone should be here. So I'm going to do it -- I'm

proposing to do it in the courtroom.

MS. SULLIVAN: Thank you, Your Honor.

THE COURT: Yes, Mr. Delinsky?

MR. DELINSKY: It sounds like it's already on your radar screen, but one important thing would be to get a copy or a citation of --

THE COURT: Well, I'm hoping that the juror has a copy of what she brought in, all right?

I'm assuming since it was today that she did, unless she, you know, was told it was bad and destroyed them all and maybe she did, but I'll at least find out, hopefully she's got what she has.

MR. MAJORAS: And if this is the only instance, of course, Your Honor.

MS. SULLIVAN: And thank you, Mr. Pitts, and Your Honor for taking it to our attention.

THE COURT: You're welcome. That's what you do, okay?

So all right. So we want to bring in, Mr. Pitts, Juror Number 4.

(Juror present.)

THE COURT: Okay. Good afternoon, ma'am. You can take off your mask. We'd like to be able to see because I'm going to ask you some questions.

All right.

Ma'am, it's been reported to me that earlier this morning you brought in an article, copies of an article which you showed to the other jurors.

THE JUROR: Oh, about the Narcan.

THE COURT: Well, just so you did bring in something, an article you showed to jurors?

THE JUROR: Not an article. It was just about Project DAWN and how it's --

THE COURT: I'm sorry, what?

THE JUROR: About Project DAWN.

THE COURT: What did you bring? Was it an article, was it electronic? Was it a piece of paper? What was it, ma'am?

THE JUROR: It was a piece of paper.

THE COURT: Do you have what you brought in?

THE JUROR: It's in the other room. Do you want me to go get it?

THE COURT: Well, I'd like to see what you brought in, ma'am.

THE JUROR: So when we left the other day and there was a conversation about Walgreens and the price of Narcan and that how you have to pay for Narcan unless it's covered by insurance. And so as a mental health professional I felt very strongly that I didn't want anyone to think that they had to pay for Narcan. So I printed out

01:04:18 the information about Project DAWN, which is the free
01:04:21 service that offers Narcan kits, and told the jury I want
01:04:27 everyone to be very clear about this, that you can get
01:04:29 Narcan for free. And that's it.
01:04:32 THE COURT: All right. Ma'am, I want you
01:04:34 to -- can you get the material you showed to people?
01:04:41 THE JUROR: Sure.
01:05:14 (Pause in proceedings.)
01:05:31 THE COURT: All right. The juror has handed
01:05:32 me one piece of paper, has text at the top "Northeast Ohio
01:05:40 free naloxone (Narcan) is available. Project DAWN." It
01:05:46 gives an address, times.
01:05:53 All right. Did you bring in multiple copies of this
01:05:57 or just this one piece of paper, ma'am?
01:06:00 THE JUROR: I handed it out to each juror.
01:06:03 THE COURT: All right. Ma'am, you were
01:06:07 present when I instructed you, were you not, that you were
01:06:13 not to be doing any independent research whatsoever about
01:06:20 anything you heard about in this trial? You were present
01:06:25 when you heard that?
01:06:26 THE JUROR: Yes.
01:06:29 THE COURT: And you had the ability to ask
01:06:34 questions. You've seen that a number of jurors have asked
01:06:37 questions, and I think in almost all cases one lawyer or the
01:06:39 other asked the question, right?

01:06:43 THE JUROR: Okay.

01:06:46 THE COURT: So and yet you took it on yourself to just decide -- you were to educate the jurors about the fact that naloxone is available for free?

01:07:02 THE JUROR: To me, this feels bigger than this case. We're talking about people's lives. And I didn't want people to think they had to pay for a Narcan kit. I mean, that seems like basic knowledge we should all have.

01:07:18 THE COURT: Well --

01:07:20 THE JUROR: And for all of you too.

01:07:21 THE COURT: Well, I appreciate that -- why you would want people to know that Narcan is available and that it's available for free to people who need it, but that really isn't the point.

01:07:35 The problem is this is something that came up in the trial. There was testimony about Narcan and naloxone. And I have instructed you I don't know how many times that you're not to do any independent research on your own, you're not to bring in things from outside the courtroom about anything whatsoever connected to this trial while the trial is going on. After the trial, you can do whatever you want.

01:08:07 And you violated that instruction, and it's a huge problem, and it should be apparent that it's a huge problem because the fact that I'm questioning you now.

All right. So you gave a copy of this to everyone?

THE JUROR: Yes.

THE COURT: What did you say in addition to handing them this piece of paper?

THE JUROR: Know that Narcan is free and available in Northeast Ohio through Project DAWN.

THE COURT: All right. I'm curious, did any of the other jurors say that, hey, this is exactly what we're not supposed to be doing?

THE JUROR: It wasn't really discussed further than that. It was like, okay, and everybody moved on.

THE COURT: All right. And this was this morning that this happened?

THE JUROR: Yesterday morning.

THE COURT: It was yesterday morning. Okay.

All right. Any other counsel, any counsel wish to question this juror any further?

MR. LANIER: Not the plaintiff, Your Honor.

MR. STOFFELMAYR: No, thank you, Your Honor.

MR. MAJORAS: No, Your Honor.

MR. DELINSKY: Nothing, Your Honor.

MS. SULLIVAN: Nothing, Your Honor.

THE COURT: Mr. Pitts, I'd like you to have this juror go into -- is one of the witness rooms empty?

MR. STOFFELMAYR: I think both of the ones

here are being used.

THE COURT: All right. Well, take her back into my chambers. You can sit in my office.

(Juror out.)

THE COURT: All right. It's my strong recommendation that this juror be summarily excused.

Does anyone have an objection to that?

MS. SULLIVAN: I agree, Your Honor.

And, Your Honor, I didn't want to ask her in front of everyone in case she wasn't going to be dismissed to prejudice my client, but if the Court would be good enough to ask her if she's discussed anything else about the case with other jurors.

Thank you, Your Honor.

THE COURT: That's a good point, Ms. Sullivan.

MR. DELINSKY: We had the same concern, Your Honor.

MR. SWANSON: Same with us, Your Honor.

MR. LANIER: Your Honor, may I be seated while I talk so I'm at the microphone?

THE COURT: Sure.

MR. LANIER: I mean no disrespect. I'm troubled and perplexed and I care deeply about this record that we're going to be taking up on appeal. We had a juror question on the issue of whether or not Walgreens charged

for Narcan because there was the reference on the target drug good faith dispensing checklist to ask if they wanted Narcan.

Project DAWN is a project that does supply Narcan, but it's not supplying it through Walgreens. Walgreens charges when they dispense Narcan.

I don't know how to read this with this juror. I don't know if this is something in my favor because Walgreens is charging for something that's commercially available for free. I don't know if it's something against me because maybe the witness -- I don't see how it could be against me, candidly.

But I don't -- I am concerned about continuing a case where we know that the jury has been discussing something that is an issue in the case that has been questioned.

THE COURT: Well, let's take this one step at a time.

Do you have any objection to dismissing this juror?

MR. LANIER: Zero.

THE COURT: Okay. All right. Well, the juror will be dismissed, but I'd like her brought back. I'm going to ask her if she has brought anything else I guess outside of the record into the courtroom, either in writing or orally.

So, all right, Mr. Pitts, if you can bring her back,

please.

And then I think once I do this, I'm going to have to bring the rest of the jurors in and find out, you know -- you know, talk to them collectively, I guess.

(Juror present.)

THE COURT: Ma'am, I need to ask you a few more questions.

Obviously this trial has been going for now three or four weeks. Have you bought anything else into the jury room, either in writing or orally --

THE JUROR: No.

THE COURT: -- about this case, about this trial, about the subject matter, about witnesses, anything like this on any other occasion?

THE JUROR: No.

THE COURT: Are you absolutely confident of that?

THE JUROR: Yes, I'm confident in that.

THE COURT: All right. Has any other juror brought anything into the jury deliberation room of the nature that you did, something in writing or providing information orally about what a witness said or what -- anything related to the trial?

THE JUROR: No.

THE COURT: Okay. Anyone want to ask anything

01:14:53 further on that?

01:15:00 MR. SWANSON: No, thank you, Judge.

01:15:02 MR. MAJORAS: No, thank you.

01:15:03 THE COURT: Ma'am, I've discussed this with
01:15:05 counsel, and we need to excuse you from this jury. This was
01:15:10 a very serious violation of my instructions. I think I
01:15:15 understand your motivation, but candidly, it doesn't matter.
01:15:20 This is -- so you can no longer sit on this jury.

01:15:26 I do not want you discussing this case at all with
01:15:29 anyone until you find out that the case is over.

01:15:33 Is that clear?

01:15:35 THE JUROR: Is there any way that I can stay?

01:15:37 THE COURT: No, there's not. No, there's not.

01:15:42 I've never -- I've been a judge 22-some years. I've
01:15:47 never had a juror, to my knowledge, do anything like this,
01:15:49 so there is absolutely no way. And that's all I can say.

01:15:57 So you are to immediately collect whatever you have in
01:16:01 the jury room.

01:16:03 Mr. Pitts, does she need to report to the jury
01:16:06 department?

01:16:10 THE COURTROOM DEPUTY: No.

01:16:10 THE COURT: Then you can go back home, go back
01:16:12 to work, you're free. But I'm ordering you not to discuss
01:16:15 this case with anyone until the -- you learn that the trial
01:16:22 is over.

Is that clear?

THE JUROR: May I speak to you privately?

THE COURT: Not now, ma'am. At some subsequent time maybe, but not now. My decision's final. There's nothing you can say that's going to change it.

THE JUROR: Okay. Thank you.

THE COURT: All right.

(Juror out.)

MS. SULLIVAN: Your Honor, we're trying to reach our client about the motion for a mistrial in light of the egregious breach of jury protocol here in violation of the Court's instructions.

THE COURT: What I now propose to do is bring in the remaining 13 jurors. First I'm obviously going to -- if anyone has a copy of this, I'm going to collect it.

I'm going to again advise all of them of the importance of following the instructions. I'll try and determine what, if any, conversation there was about this document, and then if any other lawyer wants to ask any questions of the group, that's what I'm going to try to find out, in there was a -- any -- what, if any, discussion there was about this, and I'm going to find -- and I'm going to ask the other 13 the same question I asked the juror at the end, is this the first and only time in the last three weeks that anything like this occurred.

01:18:58 MR. WEINBERGER: Your Honor, having
01:18:59 experienced something like this I think once in my career,
01:19:04 it might be preferential to do this one by one rather than
01:19:11 as a group.
01:19:13 MR. SWANSON: We concur, Your Honor.
01:19:15 THE COURT: All right. Okay. That's probably
01:19:16 a good suggestion.
01:19:17 All right, Mr. Pitts, I guess bring them in one by
01:19:21 one.
01:19:30 That's a good idea.
01:20:05 (Juror present.)
01:20:12 THE COURT: Ma'am, you can take a seat please.
01:20:14 And you can take your mask off.
01:20:32 It's my understanding that yesterday one of the other
01:20:35 jurors shared some information about Project DAWN and
01:20:40 Narcan.
01:20:40 Is that right?
01:20:45 THE JUROR: Yes. I saw a paper about it in
01:20:47 the --
01:20:47 THE COURT: Okay. Were you given a piece of
01:20:51 paper? Did she give you a copy of the piece of paper?
01:20:55 THE JUROR: Yes, it was laying on my notebook
01:20:58 when I walked in yesterday.
01:20:59 THE COURT: Do you still have it?
01:21:01 THE JUROR: I believe I left it behind. I

didn't really pay much attention to it.

THE COURT: Did you read it at all?

THE JUROR: I skimmed it.

THE COURT: What do you remember that you read?

THE JUROR: Something about free Narcan, I believe.

THE COURT: Did the juror say anything more about the subject?

THE JUROR: No, I wasn't really sure where the paper came from. I just kind of skimmed it and left it there..

THE COURT: I'm curious, did you or any other jurors say to this one juror, hey, we're not supposed to be doing this?

THE JUROR: I honestly didn't hear anything about that. I walked in kind of late yesterday, so it was just sitting there. I didn't hear any of the conversation about it.

THE COURT: Okay. All right. You understand the importance of the instruction I gave you that no one is to do any independent research about anything having to do with this trial, right?

THE JUROR: Yes. I have personally not done any.

THE COURT: All right. You've been been seated for three weeks. Have there been any other instances where a juror brought in something, in writing or relayed orally, his or her knowledge about something they learned outside of the courtroom or some knowledge outside of the courtroom of any of the subject matter of this trial?

THE JUROR: Not that I've heard, just the paper yesterday.

THE COURT: Okay. All right. Well, you should know we have dismissed that juror. She's no longer on the jury. And it's extremely important that everyone follow this instruction, okay?

THE JUROR: Okay.

THE COURT: Anyone want to -- any questions?

MR. LANIER: Not for plaintiff, Your Honor.

MR. STOFFELMAYR: No, thank you, Judge.

MS. SWIFT: No, thank you.

MS. SULLIVAN: No, thank you.

MR. DELINSKY: No, thank you.

THE COURT: All right. Thank you, ma'am.

THE JUROR: Thank you.

(Juror out.)

MR. DELINSKY: Your Honor, before we seat another one, I think your admonitions to the jury included no discussion of the case until --

01:23:27 THE COURT: Right.

01:23:28 MR. DELINSKY: If we could add that question, it would be helpful from my perspective.

01:23:30 And the reason I suggest that, Your Honor --

01:23:37 THE COURT: All right. I'll follow that.

01:23:42 (Juror present.)

01:23:52 THE COURT: All right. All right, ma'am. Good afternoon. You can take your mask off while I'm doing this.

01:23:53 All right. It's been brought to our attention that yesterday morning one of your other jurors brought something in in writing, a piece of paper, and shared it with some of you about Narcan, naloxone.

01:23:57 Do you remember anything like that?

01:24:09 THE JUROR: Yes.

01:24:14 THE COURT: All right. Were you given a piece of paper?

01:24:18 THE JUROR: Yes.

01:24:19 THE COURT: Do you still have it?

01:24:20 THE JUROR: I just folded it up and threw it in my book. I didn't even look at it.

01:24:22 THE COURT: All right. Did the juror say anything?

01:24:22 THE JUROR: Just that she knew there were free programs. I really didn't pay that much attention to it. I

01:24:24

01:24:26

01:24:28

01:24:32

01:24:34

01:24:38

mean --

THE COURT: Was there any other discussion by you or any of the other jurors, to your knowledge, about that with her?

THE JUROR: No.

THE COURT: Okay. All right.

You've been seated for exactly three weeks. Is this the first and only time that anyone -- or anyone on the jury has brought in something in writing or relayed something orally about some checking on research they'd done about anything relayed during the trial?

THE JUROR: Nobody else has done anything.

THE COURT: Okay. You understand that there's a very important instruction -- we've dismissed that juror, she's no longer on the jury, for violating my instructions. And it's extremely important that everyone comply with that.

THE JUROR: Absolutely.

THE COURT: Everything you need to learn about this case is in the courtroom, and of course jurors have the ability to ask questions and you've all asked some very good ones and the witnesses have answered them.

I mean, if someone had a question about Narcan, naloxone, with a witness, they could have asked it and the witness would have answered to the best of his or her knowledge.

01:25:51 THE JUROR: Me personally, I'm learning a lot.

01:25:55 THE COURT: Well, that's fine. But as I've said, what you need to learn to decide at the end of the case you're going to get right here. I'll make sure of that.

01:26:04 THE JUROR: Yeah.

01:26:05 THE COURT: And again, if you have a question, you have the ability to ask one. But you're not supposed to go out and whatever and bring things in. And that's --

01:26:13 THE JUROR: Yesterday, I wrote down a couple other questions and then I decided that they weren't relevant and didn't need to be asked and I tore up the piece of paper and threw it away.

01:26:20 THE COURT: Okay. Well, that's fine. But I want you to tear this up and just throw it in the trash, don't even read it.

01:26:30 THE JUROR: Okay.

01:26:30 THE COURT: I've also instructed the jury that you're not to, you know, discuss this case, discuss the witnesses, discuss the testimony until the case is over, which it's obviously not.

01:26:41 Have people been discussing the case in violation of that instruction?

01:26:45 THE JUROR: No.

01:26:45 THE COURT: All right. Okay.

Anything anyone else wants to ask?

MR. LANIER: Not for plaintiffs, Your Honor.

MR. MAJORAS: No, Your Honor.

MS. SULLIVAN: No, Your Honor. Thank you.

THE COURT: Okay. Thank you, ma'am.

THE JUROR: Thank you.

(Juror out.)

(Juror present.)

THE COURT: Good afternoon, ma'am.

THE JUROR: Good afternoon.

THE COURT: You can take your mask off while I talk to you briefly.

Ma'am, it's come to our attention that yesterday morning one of your fellow jurors brought in some piece of paper concerning Narcan, naloxone, Project DAWN, something like that.

Do you recall that?

THE JUROR: I do.

THE COURT: Were you given a piece of paper?

THE JUROR: The papers were set on the table for us to look at it if we wanted to, but I didn't feel like it was the right thing to do since we're not supposed to be researching anything in the case.

THE COURT: Well, you're absolutely right.

I'm curious, did you say something to that juror that,

hey, this is exactly what the judge has been telling us every day not to do?

THE JUROR: I did not say anything to her, but someone in the room did.

THE COURT: Oh, okay. All right.

Did she say anything other than leaving -- you know, but did she talk to anyone about this?

THE JUROR: I can't remember who all was in the room at that time, but there were a few of us in the room. One of the other jurors did tell her like, you know, you really shouldn't have -- I don't think you should have printed that out or even researched it or anything. And she's like, well, something along the lines of this wasn't verbatim but it was like, I didn't feel -- I just felt like we all needed to know that you can get it for free, and I just wanted to give us all that information or something like that. But the papers were placed on the table and maybe one or two people picked it up, but no one really looked at it.

THE COURT: Okay. All right. Whichever juror said that that was a wrong thing to do was absolutely right. I have dismissed that juror, the juror who brought in the papers, because it was a hundred percent wrong.

And, you know, everything you need to know to make a decision at the end of the case, you're going to get in this

courtroom from the witnesses and the documents and the instructions. And it's absolutely wrong and improper to be bringing anything in.

So I want to make sure that everyone really understands that instruction.

Is this the only time in the last three weeks that anyone has done anything like that?

THE JUROR: Correct, that is.

THE COURT: Okay. And I've also instructed everyone, you know, not to discuss this case, not to be discussing who said what or what witnesses you credit or whatever or making conclusions, anything like that, until the case is over.

Has anyone been violating that instruction?

THE JUROR: Not that I'm aware of.

THE COURT: Okay. All right.

And thank you very much, ma'am.

THE JUROR: You're welcome.

THE COURT: And again, if you happen to find that you kept that piece of paper or have it in your notebook, just make sure to throw it out.

THE JUROR: I didn't even pick it up or look at it.

THE COURT: Okay. Thank you.

THE JUROR: You're welcome.

(Juror out.)

THE COURT: I'm just asking Special Master Cohen to show the lawyers the document that the juror said she brought in, this flier on free naloxone just so you can see it.

(Juror present.)

THE COURT: Good afternoon, ma'am.

It's come to our attention, ma'am, that yesterday morning one of your fellow jurors brought in a piece of paper, copies of a piece of paper, having something to do with free Narcan, free naloxone, something like that.

You can be seated.

Do you recall that, something like that happened?

THE JUROR: Yes.

THE COURT: All right. What happened, to your recollection?

THE JUROR: A piece of paper was brought in and just told that just in case so everybody knows that if you want -- if somebody needed the -- whatever it was.

THE COURT: Narcan, naloxone?

THE JUROR: Yeah, Narcan, that it was available for free.

THE COURT: Okay. Did you take one of the pieces of paper?

THE JUROR: No, I did not.

01:32:21 THE COURT: Okay. I'm curious, did anyone say
01:32:27 to that juror, hey, you know, the judge told us not to be
01:32:31 doing this?
01:32:34 THE JUROR: Not that I recall.
01:32:34 THE COURT: Okay. Did the juror say
01:32:38 anything -- do you recall anything else -- anything that the
01:32:41 juror said to the group?
01:32:42 THE JUROR: No, just that, that, you know, it
01:32:45 was available at no cost if needed, and we just started
01:32:48 conversating about other things.
01:32:50 THE COURT: Okay. All right. Look, I've said
01:32:53 I don't know how many times that no one is to be doing any
01:32:58 independent research and bringing things in that they
01:33:01 learned or heard or read or were told outside the courtroom
01:33:05 about anything that we've talked about here.
01:33:08 THE JUROR: Correct.
01:33:09 THE COURT: I mean, everything you need to
01:33:10 know you're going to get here. And obviously jurors have
01:33:13 the ability to ask questions of witnesses. If they think,
01:33:19 you know, something's been left out or they can say, hey,
01:33:22 you know, I think the witness was wrong, you can put that in
01:33:26 question. And we've had good questions.
01:33:28 So this is the only time over the last three weeks
01:33:34 that anything like this has happened?
01:33:36 THE JUROR: That is correct.

01:33:37 THE COURT: All right. Well, it's very
01:33:38 important. You should know we have dismissed that juror.
01:33:42 She's no longer one of the jurors because of a serious
01:33:49 violation of the rule.
01:33:50 And I've also instructed you not to discuss this case,
01:33:55 the details of the case, you know, which witnesses you like,
01:33:58 which -- anything about that until the case is over and
01:34:01 you've had all the evidence and my instructions.
01:34:04 Has anyone been violating that?
01:34:06 THE JUROR: No.
01:34:07 THE COURT: All right. Okay. All right.
01:34:12 Thank you, ma'am.
01:34:17 (Juror out.)
01:34:51 (Juror present.)
01:34:55 THE COURT: Good afternoon, ma'am. You can
01:34:56 take your mask off while we're conversing.
01:34:59 It's been brought to our attention that yesterday
01:35:04 morning one of the jurors brought in some piece of paper or
01:35:07 some fliers, whatever, regarding Narcan or naloxone.
01:35:10 THE JUROR: Mm-hmm.
01:35:11 THE COURT: So that something like that
01:35:14 happened.
01:35:14 What do you recall happened?
01:35:16 THE JUROR: I just remember there being a
01:35:17 paper about, like, the availability of Narcan from different

projects, but that was it.

THE COURT: That one of the jurors brought in and just left it on the table?

THE JUROR: As far as I know, yes.

THE COURT: All right. Did you take one of the copies?

THE JUROR: I think it was in my notebook.

THE COURT: All right. Do you still have it?

THE JUROR: I honestly don't know. I would have to check my purse.

THE COURT: All right. Well, if you do, I want you to throw it out.

THE JUROR: Okay.

THE COURT: I'm curious, did you or anyone say to that juror, hey, this is exactly what the judge told us not to be doing?

THE JUROR: I think we all wondered, but I don't know if anyone said, like, specifically we're not supposed to. I think we all wondered about that though.

THE COURT: Well, if you were wondering, you were wondering correctly, because that's exactly what you're not allowed to do, and we have dismissed that juror.

THE JUROR: Okay.

THE COURT: She's no longer on this jury for a serious violation of my instruction.

And everything you need to know to decide this case you're going to get right here in this courtroom from all these witnesses and all these documents and then my instructions. And you're absolutely not to be trying to supplement in any way. And as you've all seen, you know, if you have a question of a witness you think he or she has left something out or if something's confusing, you have the ability to ask a question of that witness and he or she will answer it, and you'll have it not only everyone will have it, you'll have the same thing.

So to your knowledge, this is the only time any of the jurors have done anything like this?

THE JUROR: Yes, that's the only thing.

THE COURT: All right. It's extremely important. No one does anything remotely like this again. And if you have that piece paper, just throw it out.

THE JUROR: Okay.

THE COURT: An also, I've instructed all of you not to discuss the case, you know, which witness you think you agree with, which you don't, anything like that, forming conclusions.

Has anything like that been going on?

THE JUROR: No.

THE COURT: All right. Well, it's important, again, you wait till the end of the case because we're,

like, in the middle. It's not fair to be, you know, even making preliminary conclusions before you've heard everything.

Okay, thank you.

(Juror out.)

(Juror present.)

THE COURT: Good afternoon, sir. You can take your mask off while I'm speaking to you.

THE JUROR: Sure.

THE COURT: It's come to our attention that yesterday morning one of the jurors brought in some fliers, pieces of paper, whatever, regarding Narcan/naloxone.

THE JUROR: Yes.

THE COURT: So you recall that happened?

THE JUROR: Yes, sir.

THE COURT: What happened, to your recollection?

THE JUROR: She came in out of the -- I'm sorry, the juror came in, handed the papers out. I took the paper, folded it up, never looked at it, and put it in my bag. There was no real conversation about it after that.

THE COURT: Did she say anything about it or what she was trying to do?

THE JUROR: Just to let everybody know that Narcan was available, that you didn't have to get it at the

pharmacies, that it was available if you needed it for any reason.

THE COURT: Okay. Did any -- I'm curious, did you or anyone say to that juror, hey, I think this is just what the judge told us not to do, to be bringing things in doing research, bringing things in about the subject matter or what comes up in the testimony, doing this on our own?

THE JUROR: Yes, there was one juror that said, hey, we don't think this is the right thing to do, and that's when everybody folded it up and put it in the bag.

THE COURT: All right. Well, if you still have it, I want you to just throw it out, don't look at it.

THE JUROR: It's home destroyed already.

THE COURT: All right. That's fine. That juror who said that was absolutely right. And the juror who did this you should know is no longer on this jury because I was crystal clear, and she violated a direct order.

THE JUROR: Okay.

THE COURT: So it's extremely important that everyone follows that.

Now, is this the only instance of anything like this that's occurred in the last three weeks or has there been anything else like this?

THE JUROR: No, this is the only one and it happened yesterday.

01:39:57 THE COURT: Well, I want you to make sure to the best extent you can that it doesn't happen again.

01:40:06 THE JUROR: I will.

01:40:07 THE COURT: I can't impress on you more that you just can't do this. Everything you need to know about this case you're going to get right here. And if you -- someone has a question, obviously we've had a lot of good questions asked. Someone could have asked a question about Narcan, whatever.

01:40:22 So it's also extremely important that people not be discussing this case, even reaching tentative conclusions that you're sharing, because you're right in the middle of the case.

01:40:33 Has anyone been doing that?

01:40:37 THE JUROR: No, sir.

01:40:37 THE COURT: Well, that's important too because it's not fair to either side to be really deliberating -- first, you only do it when all 12 of you are there, and, second, it's in the middle of the case. You haven't heard all the evidence.

01:40:49 Okay. Thank you, sir.

01:40:51 THE JUROR: All right. Thank you.

01:40:52 (Juror out.)

01:41:26 (Juror present.)

01:41:34 THE COURT: Good afternoon, ma'am. You can

have seat, and you can take your mask off while I'm talking to you.

It's come to our attention that yesterday morning I believe one of the other jurors brought in some pieces of paper, placed them on the table and said, hey, something about Narcan/naloxone.

Do you recall anything like that?

THE JUROR: Yes.

THE COURT: All right. What occurred?

THE JUROR: Okay. So the juror came in with a stack of papers, was like, hey, I researched this about Narcan, and we're like, we're pretty sure you can't do that. And she's like, all right, well, I did. And we're like, okay. And pretty much the stack of papers she was attempting to hand them out, but then we're like, ah, we don't want that, and she kind of -- she sat down.

THE COURT: Okay. Did you take one of the pieces of paper?

THE JUROR: I did not.

THE COURT: Okay. Well, whoever said that, if you were one of them, you were a hundred percent right, because that's -- I have given that instruction I don't know how many times. And that juror is no longer a juror. I summarily excused her for violating an order.

And everything you need to learn and know to decide

this case you're going to get right here in this courtroom from all these witnesses and all these documents and then the instructions I give you. And no one's to do any supplementing on your own. And obviously if people have a question of a witness, you can ask the questions and they're generally being asked and so that's how you get your questions answered, not by going off freelancing and then certainly bringing it in and sharing it.

Has there been anything like this at all other than this one episode the last three weeks?

THE JUROR: No.

THE COURT: All right. Well, I want you to do whatever you can to make sure that it doesn't happen again.

THE JUROR: Roger that.

THE COURT: All right. Also, I've instructed everyone not to discuss, deliberate the case before it's done, so I don't want anyone discussing the case, discussing witnesses, documents, whatever, until you're all together and all the evidence is in.

Have people been doing that?

THE JUROR: No, not in detail or anything of what happened.

THE COURT: Well, they shouldn't be doing it at all, okay?

THE JUROR: Gotcha.

01:44:03 THE COURT: If people start, you say, hey, this is what the judge said not to do, the case isn't over and we're not all here. Okay? We're in the middle.

01:44:11 So, I mean, you know, someone may say some isolated thing, but there should be no substantive discussions about the case, who you think -- you know, which witness you liked, which you didn't, any of that stuff, all right?

01:44:27 You mentioned there's been some isolated -- I mean, what kind of isolated discussions have there been?

01:44:34 THE JUROR: Pretty much just the -- I would say the -- not to be crass or anything, but maybe comments on what people wear, that's it. The --

01:44:47 THE COURT: Well, I mean --

01:44:48 THE JUROR: We've got to keep it light.

01:44:50 THE COURT: That's okay. I mean, seriously, I'm not --

01:44:52 MS. SULLIVAN: Your Honor, I object to that.

01:44:54 MR. LANIER: That's funny.

01:44:55 THE COURT: Well, so --

01:44:57 MR. STOFFELMAYR: Can we get any feedback?

01:45:03 THE COURT: Look, not that that's great, and it obviously has zero to do with the merits or the substance and I think everyone knows that, but the key is you don't talk about the substance of the case because you're right in the middle, and it's not fair to either side.

You can talk about what I wear, what I look like. That's fine, okay? Seriously, talk about me because you're stuck with me and I'm not taking any sides, so you can say whatever you want about me.

All right. Well, thank you, ma'am.

THE JUROR: Thank you.

(Juror out.)

(Juror present.)

THE COURT: Good afternoon, ma'am.

THE JUROR: Good afternoon.

THE COURT: It's come to our attention that yesterday morning one of the jurors brought in some pieces of papers, fliers, whatever, having something to do with Narcan/naloxone.

Do you remember something like that? That's a "yes"?

THE JUROR: Yes.

THE COURT: Okay. What happened? What do you recall?

THE JUROR: She just said she thought it was important and for general information, if I recall. I didn't talk about it with her.

THE COURT: All right. Did you pick up one of the fliers or the piece of paper?

THE JUROR: I looked at it and put it down.

THE COURT: Okay. What do you recall seeing

on the piece of paper?

THE JUROR: That there was a program for an area, somewhere in this area, Northeast Ohio, to get free Narcan.

THE COURT: Okay. Well, I'm curious, did anyone say to that juror, hey, I think this is just what the judge told us we're not supposed to be doing?

THE JUROR: I didn't hear that.

THE COURT: Okay. Well, you should know that that juror is no longer on the jury. I summarily dismissed her for violating a very important order.

Everything you need to know to decide this case you're going to get in this courtroom. That's my job, to make sure you hear all the witnesses, see the documents, get accurate instructions. No one's to be supplementing or adding or doing independent research or whatever and bringing it in. That's a hundred percent wrong and improper.

THE JUROR: I understand.

THE COURT: Have there been any other instances of this in the last three weeks where someone's brought anything else in?

THE JUROR: Not that I'm aware of.

THE COURT: All right. I want you to make sure you do whatever you can to make sure it doesn't happen. Obviously I'm talking to each juror independently, one by

one, so everyone is hearing exactly the same thing. But this is, you know, exactly what no one was to do, and I can't really fathom why this juror did what she did, but it's a serious problem.

So also, I have instructed you not to be discussing the details of this case, the testimony of the witnesses, the documents, until the case is over.

THE JUROR: Correct.

THE COURT: Have people been following that instruction?

THE JUROR: Yes.

THE COURT: All right. That's also very important because, first, you're not to discuss this case unless all 12 of you or 13 or 14, however many there are, until you're all present. And second, you're not to start that until you have all the evidence. It's not fair to either side to do it in the middle, start making decisions when you've only heard part of the case.

Okay.

THE JUROR: I understand.

THE COURT: Okay. Thank you, ma'am.

THE JUROR: Thank you.

(Juror out.)

(Juror present.)

THE COURT: Good afternoon, sir. You can take

your mask off while I'm talking to you for a few minutes.

It's come to my attention that yesterday morning one of your fellow jurors brought in some pieces of paper and having to do with Narcan, naloxone, whatever, and left them for everyone.

THE JUROR: Yes.

THE COURT: All right. What do you recall about that?

THE JUROR: She handed me one and just said it was about Narcan, and that was about it.

THE COURT: All right. Do you still have the piece of paper?

THE JUROR: I don't believe so.

THE COURT: All right. Well, if you have it, I want you to throw it out, okay?

THE JUROR: Okay.

THE COURT: I mean, did you read it? I'm curious, did you read it, look at it?

THE JUROR: I didn't read it. I looked at it, and then I just put it in my bag.

THE COURT: Do you recall what it said?

THE JUROR: I don't.

THE COURT: I'm curious, did you or anyone else say anything to that juror about, hey, this is exactly what this be mean, bad judge told us not to do?

THE JUROR: I believe somebody did. I think they asked if that was allowed. I don't remember who it was though.

THE COURT: Well, whoever asked the question was right, it's not allowed.

THE JUROR: Okay.

THE COURT: You should know that that juror is no longer a juror.

THE JUROR: All right.

THE COURT: I threw her off. I mean, a few minutes ago.

THE JUROR: Okay.

THE COURT: And I certainly thought I was -- had been crystal clear about the fact that no one is to be supplementing their knowledge by doing independent research or bringing stuff in. Everything you need to know to decide this case you're going to get right here, from the lawyers, the documents, the witnesses, my instructions.

And if you have a question, obviously you have the ability to ask any witness any question. I think the lawyers have been asking almost all of them. So if someone had had a question about Narcan/naloxone, how it's provided, who pays for it, whatever, they could have asked that question. If they thought the witness was incorrect, they could have asked a follow-up. But that's the way to do it,

not anything like this.

THE JUROR: Okay.

THE COURT: Has anything like this happened any other time in the last three weeks?

THE JUROR: No.

THE COURT: All right. Well, I want you to do whatever you can do to make sure it doesn't happen again, okay?

THE JUROR: Okay.

THE COURT: Because it's a big problem.

THE JUROR: All right.

THE COURT: And also, it's extremely important that you not discuss this case, discuss the witnesses, the testimony, the documents, start making even tentative conclusions before the case is over.

To your knowledge, has anyone been doing that?

THE JUROR: No.

THE COURT: All right. Because it would be wrong and unfair, first because not all 12 of you are there and second we're in the middle of the case. Someone had to go first, so the plaintiffs have gone first. You haven't heard the defense side. You don't make important decisions without hearing everything, right?

THE JUROR: Right.

THE COURT: Okay. Thank you.

01:52:44 THE JUROR: All right. Thank you.

01:52:45 (Juror out.)

01:53:25 (Juror present.)

01:53:26 THE COURT: Good afternoon, ma'am. You can take your mask off while I'm talking to you.

01:53:30 THE JUROR: Okay.

01:53:30 THE COURT: It's come to our attention that yesterday morning one of your fellow jurors brought in some pieces of paper and put them on the table and started talking about them, something to do with Narcan/naloxone.

Do you remember anything like that?

01:53:46 THE JUROR: So I got here a little later yesterday, so by the time I had come in the room, there was a paper in my juror book where I take notes. And I say, oh, is this from the Court? And she replied, no, I put that in there. And so I said, well, you can't do that, and she said, well, I was uncomfortable. And then that was it. I just left it on the table.

01:54:10 THE COURT: Okay. So you didn't even look at it?

01:54:12 THE JUROR: I saw the -- it didn't have Narcan but it had the --

01:54:15 THE COURT: Naloxone?

01:54:16 THE JUROR: Yeah. And that's all I saw.

01:54:19 THE COURT: Okay. All right. Well, you were

absolutely right to do that because that juror is no longer a juror. I mean, I was very clear about none of you in any way trying to supplement your knowledge by doing research or bringing things in or educating the jurors on your own. Everything you need to know you're going to get right here from the documents and the witnesses and my instructions.

THE JUROR: I understand.

THE COURT: All right. Has anyone done anything like this in the other three weeks we've been here?

THE JUROR: Not outside that one juror, no.

THE COURT: Okay. Well, I want you to do whatever you can to make sure it doesn't happen again, because it's -- you know, it's probably the most important instruction I give, because it's completely improper. And I mean no one -- if someone brings something in, there's no way to test it, it may be accurate, half of you hear it, half of you don't. It's a hundred percent improper.

THE JUROR: Right. I think I was really uncomfortable with it, and I think -- I'm sure other jurors were too, so --

THE COURT: All right. Well, the juror did it. She's no longer a juror.

So it's also very important, I know I've instructed you not to discuss the substance of this case at all, the witnesses, the documents, until you've heard all the

evidence.

So I want to make sure that hasn't been happening. Is that right?

THE JUROR: Yeah, yeah.

THE COURT: That's extremely important. Someone had to go first. Both sides couldn't proceed simultaneously, so the plaintiffs have gone first, but you've got to hear all the evidence that the defendants bring in.

THE JUROR: I understand.

THE COURT: All right. Thank you, ma'am.

THE JUROR: Thank you.

(Juror out.)

MR. WEINBERGER: Your Honor, one of the questions that -- the question you asked, "Has anyone done anything like this in the other three weeks we've been here?" And her answer was, "Not outside that one juror, no." Which begs the question --

(Juror present.)

THE COURT: All right, sir, you can take your mask off.

It's come to our attention that yesterday morning one of your fellow jurors brought in some pieces of paper about Narcan/naloxone, whatever, and started talking about them.

Were you present when that occurred?

THE JUROR: Yes, I was.

THE COURT: Okay. What do you recall happening?

THE JUROR: She just had a piece of paper and laid it down and says there's a place where you can get free Narcan. That was it.

THE COURT: Okay. Did you take one of the pieces of paper?

THE JUROR: No.

THE COURT: Okay. Did you read it at all?

THE JUROR: No.

THE COURT: All right. I'm curious --

THE JUROR: I know where to get it if I needed it. I worked at a hospital.

THE COURT: Got it. Got it.

I'm curious, sir, did anyone tell that juror, hey, we're not supposed to be doing this, we're not supposed to be bringing things in from outside into the Court?

THE JUROR: No, nobody said a word.

THE COURT: All right. Well, they should have, all right, because it's a hundred percent wrong, and that juror's no longer a juror. I dismissed her.

Has anything like this occurred the other three weeks, any other time?

THE JUROR: No.

THE COURT: All right. Is the only time that someone's tried to bring in something outside the courtroom -- from outside the courtroom?

THE JUROR: Not that I know of.

THE COURT: Is this the only time that this juror did anything like this?

THE JUROR: Yes.

THE COURT: All right. I can't emphasize any more than I have how important it is that everyone follow this instruction. It's a big problem that it was violated. And so everything you need to know you're going to get here. And if you have a question, you have the ability to ask questions, you know, and you can ask it of a witness. You don't bring this something from outside, and then everyone can hear the answer, okay? That's how it works.

All right. It's also extremely important that you not discuss this case, do not even make preliminary or tentative conclusions or decisions until you've heard all the evidence.

Is that clear?

THE JUROR: Clear.

THE COURT: Has anyone been doing that, to your knowledge?

THE JUROR: No. Mostly the conversations that go on are about movies and stuff like that.

01:59:12 THE COURT: That's fine. That's fine. That's
01:59:13 what -- I mean, you get to know each other. But that's
01:59:17 exactly what you should be doing, and wait until you've
01:59:20 heard all the evidence and the instructions and then you're
01:59:24 all together and that's when you start talking about the
01:59:26 case but not until then.
01:59:28 All right. Thank you very much, sir.
01:59:31 THE JUROR: Thank you.
01:59:32 (Juror out.)
02:00:23 (Juror present.)
02:00:25 THE COURT: Good afternoon, sir. You can take
02:00:26 your mask off while I'm talking to you.
02:00:29 It's come to our attention that yesterday morning one
02:00:32 of your fellow jurors brought in some pieces of paper having
02:00:37 to do with Narcan/naloxone and left them for people.
02:00:42 Do you recall that?
02:00:45 THE JUROR: Yes.
02:00:46 THE COURT: Okay. What do you recall about
02:00:47 it?
02:00:48 THE JUROR: It was just a -- I don't know, it
02:00:50 looked like the top one was a link to a website. I don't
02:00:54 know what the bottom two were because -- I don't know -- all
02:01:00 I know is when I came out of the bathroom, it was in front
02:01:02 of my notepad.
02:01:04 THE COURT: Okay. Did you keep one of the

fliers?

THE JUROR: No, I threw it out.

THE COURT: Okay. Do you recall if the juror -- what the juror said, if anything, about it?

THE JUROR: She said, I thought this might be helpful or something along those lines. I don't exactly recall because in my mind I was already going to throw it out.

THE COURT: All right. I'm curious, did anyone say to that juror, hey, this is -- we're not supposed to be doing this, that's what the judge has told us?

THE JUROR: Yes.

THE COURT: All right. Well, whoever said it was right, because it was a hundred percent wrong, and the juror who did this is no longer a juror. I threw her out a few minutes ago.

And has there been any other episode like this in the last three weeks?

THE JUROR: No.

THE COURT: All right. Well, it's extremely important that there not be, and I want you to do everything in your power to ensure it doesn't happen again, because it's not fair to either side. And everything you need to know to decide this case you're going to get right here, from the lawyers, the documents, the witnesses, the

instructions.

And obviously if someone has a question, you have the ability to ask a question, and then everyone will hear the answer, okay? And they'll know what it is and the witness can be asked for follow-up, whatever.

It's also imperative, essential, that no one be discussing the details of this case, you know, two or three of you or even ten of you, whatever, and starting to form even tentative conclusions until the case is completely over.

You understand that?

THE JUROR: Yes.

THE COURT: Has anyone been doing that?

THE JUROR: No.

THE COURT: All right. Because again, it's not fair. Someone has to go first. Both sides can't go at the same time. The plaintiffs went first, but it's going to be soon the defendants' turn. And you can't be making decisions or even discussing the details until you've heard everyone's witnesses.

You got it?

THE JUROR: Yes, sir.

THE COURT: Okay. Thanks very much.

(Juror out.)

(Juror present.)

02:03:38 THE COURT: Good afternoon, sir.

02:03:39 THE JUROR: Good afternoon.

02:03:40 THE COURT: It's come to our attention that yesterday morning one of your fellow jurors brought in fliers, piece of paper, whatever, having to do with Narcan/naloxone.

02:03:52 Do you recall something like that?

02:03:53 THE JUROR: Yes, I do.

02:03:54 THE COURT: What do you remember happening?

02:03:55 THE JUROR: I didn't look at it.

02:03:58 THE COURT: Okay. Well, that's good. That's good. But what -- do you recall what she said or did?

02:04:03 THE JUROR: She said, I did some research and something about this is supplied somewhere, somewhere, somewhere.

02:04:14 I ignored it because we're here.

02:04:18 THE COURT: Well, good, I'm glad. You did the right thing.

02:04:21 I'm curious, sir, did you or anyone say to that juror, hey, this is exactly what the judge told us not to be doing?

02:04:30 THE JUROR: As I was getting up to leave, I said this is what we're not supposed to do, and I walked out to the little --

02:04:36 THE COURT: Right, okay.

02:04:37 Did she say anything?

02:04:40 THE JUROR: She didn't -- she says, I just
02:04:44 want us to know what was going on.
02:04:46 THE COURT: You did exactly the right thing.
02:04:47 And you should know that juror is no longer a juror. I
02:04:49 threw her out because she violated a very, very important
02:04:53 order, probably the most important instruction I give in the
02:04:56 case.
02:04:56 THE JUROR: I was -- I was taken aback to see
02:05:00 it, and a couple other people --
02:05:02 THE COURT: I can tell you I was too, and I
02:05:05 reacted quickly.
02:05:06 You've been here for three weeks. Anything like this
02:05:09 happen any other time in the last three weeks?
02:05:12 THE JUROR: No. Not that I can --
02:05:14 THE COURT: Is this the only time this juror
02:05:15 brought anything in?
02:05:20 THE JUROR: I don't recall.
02:05:20 THE COURT: Do you recall her bringing in
02:05:22 something else?
02:05:23 THE JUROR: I don't recall it.
02:05:24 THE COURT: Okay. All right. Do you recall
02:05:27 any other juror bringing in anything like this?
02:05:31 THE JUROR: No, I don't -- no. Mostly they're
02:05:39 making fun of people out here.
02:05:42 THE COURT: All right. Tell them they should

make fun of people.

THE JUROR: No, they respect you a little bit more than they respect them.

THE COURT: All right. We'll leave it at that. That's okay. That's fine. People can -- the point is it's fine to do -- to talk like that. You're not talking about the substance of this case. And I was going to get to that.

It's extremely important that you not discuss the substance of the case until all the evidence is in. I mean, both sides couldn't proceed at the same time, so the plaintiffs had to go first. Well, it's going to be the defendants' turn soon. You've got to listen to all their witnesses and their documents.

All right. Well, I want you to, you know, do whatever you can to make sure -- obviously you won't violate this, but that no one else does. And I'm obviously talking to each juror individually to impress upon each and every one of you this.

THE JUROR: I think you've shown to them that this is a serious matter.

THE COURT: All right. Well, that -- I mean, I'm sorry it took this, and I would -- you know, I'll take it on myself. I certainly thought I had been pretty darn clear, but things happen. So I want to make sure they don't

happen anywhere -- anything remotely like this again, okay?

All right. Thank you, sir.

(Juror out.)

THE COURT: Okay. Well, I am satisfied that this was the only episode like this over the last three weeks. Fortunately, it appears to be on something that is really not relevant to anything the jurors have to decide. I mean, whether or not -- whether you have to pay for Narcan or whatever is very tangential. But I think I've impressed upon each of them that this is an absolute, absolute no-no.

So I plan to go forward.

MS. SULLIVAN: Your Honor, I appreciate the Court undertaking that inquiry and Mr. Pitts and you bringing it to our attention.

THE COURT: All right. Before I forget, Ms. Sullivan, I'm going to mark this --

Mr. Pitts, if you'd mark this as Court's Exhibit 1 with today's date, just so we have it. This is the flier, the piece of paper, whatever, that Juror Number 4 brought in. So just so the record -- we've got it in the record.

MS. SULLIVAN: Thank you, Your Honor.

And Your Honor, despite the Court's hard work in this matter and the hard work of all the lawyers here, I think we have an incurable real problem now in terms of jury taint. We've got a juror who purposely researched, made 14 -- at

least 14 copies of a Narcan informational document, handed it out to each juror. Some of the jurors clearly stated they read it, all of them got it, it was an issue in the case, it was part of the examination of the Walgreens witness. The Walgreens witness said that somebody had to pay for it, and this juror showed that, you know, basically they're making a profit. It's clearly prejudicial to the companies here that you could get it for free, isn't it terrible that these companies are charging for it. Even plaintiffs' lawyer acknowledged he can't figure out how it could be bad for him.

It's clear we had a juror who violated the Court's order, who communicated information damaging to the defense, to all of her co-jurors, and you can't unring that bell, Your Honor.

There was questions about Narcan, it featured in the testimony, and so at this time Giant Eagle moves for a mistrial, notwithstanding Your Honor's hard work and efforts to inquire of the jurors.

Thank you, Your Honor.

THE COURT: Let me just see if any of the other defendants are moving for a mistrial.

MR. MAJORAS: Your Honor, John Majoras. I would actually request if we could have a few minutes. I would like to confer.

And also, we really need to talk -- we'd like to talk to our client. They're aware of what's happening. I can do that quickly. But there's been a lot invested in this case, and I think that they should be allowed to be involved in that decision, sir.

THE COURT: You can move --

MR. MAJORAS: I just want to spend some time.

THE COURT: You can move for mistrial at any point. I mean, I'm not -- I'm denying it at this point, but you can all -- you can renew it, and you don't have to make a snap decision. If you want to make a thoughtful one and whatever, I mean -- I'm proceeding with this trial because I don't -- and I'm going to suggest that counsel work together, among the other things you're working together. I do want to give something more on Narcan, all right, just so I don't -- I mean, again, I don't think it is ultimately relevant at all to what the jurors have to decide, how you get Narcan or who pays for it. But I will give some instruction about it.

MS. SULLIVAN: It makes it worse, Your Honor.

MR. SWANSON: Your Honor, Brian Swanson for Walgreens.

The issue that we have is that during the cross-examination of Ms. Polster, a big deal was made of the fact that we charge money and make a profit from selling

Narcan. And it apparently angered that juror enough that she not only went back to do research but came into the jury room and said, hey, you can get it for free, right after they'd had a witness who was berated -- well, who was -- I'm sorry, who was cross-examined for the fact that we charge for Narcan and make a profit.

And so it may be irrelevant to the case, but for Walgreens, it's clearly not irrelevant.

THE COURT: Well --

MR. STOFFELMAYR: It's become relevant.

THE COURT: Well, I can cure that by saying that it's -- that it's not -- well, whether or not Walgreens or any of the other defendants sell it or -- they're entitled to sell it, all right? It's certainly permissible to sell it. If you sell anything, you can make a profit. So -- it has no bearing on whether or not the plaintiffs can prove a public nuisance.

MR. SWANSON: But what the jury is thinking is that we're selling something -- that we're essentially tricking people they can get something for free and we're make a profit from it. There was five minutes of cross-examination on that very point.

THE COURT: But they might have known that anyway.

MR. SWANSON: Well, they might have, but now

they certainly do.

THE COURT: Well, fine. I can tell them that's irrelevant.

MR. SWANSON: It's all because of what this juror did.

THE COURT: Well, I can tell them -- well, first of all, I can't recall if it was -- the testimony was objected to. I mean, I don't know why it even came in whether someone was selling it. But I can instruct the jury that --

MR. SWANSON: I think it was probably a question from that juror. As I recall, it was a juror question.

MR. LANIER: It was a juror question, Your Honor.

THE COURT: Well, in retrospect, we probably shouldn't have gotten into it at all. But --

MR. LANIER: It's on the good faith dispensing target checklist, there's a specific question, did we offer them Narcan.

THE COURT: Oh, right, right, because if the --

MR. LANIER: The dosage.

THE COURT: The concern that -- right, to make sure that if they're getting a dosage that creates any

concern about overdose, that the person has the Narcan there.

MR. LANIER: And then the question became from the juror, well, yeah, but are you selling it, is this a sales opportunity, or are you giving it away. And so that was the question that was displayed and asked of the witness, and then the witness gave the answer where she hedged on it, and then I pressed the witness not to hedge, and the witness said, well, yes, we sell it.

MR. SWANSON: She didn't hedge.

MR. LANIER: In my vocabulary.

And I'll be candid, Your Honor, I think that it affects this jury, I think it affects everybody whether they recognize it or not, and I think that the mistrial is appropriate.

And it's in your discretion, but that's my concern.

THE COURT: Well, I want everyone to know, if there's a mistrial, I have no idea when I'm going to try this again. It's not going to be for a while.

MR. LANIER: It is not my preference, Your Honor. I don't -- but it is my concern, and I just -- obviously we've invested -- I've been here for seven solid weeks. We've invested a lot of time and energy and money in this. It's not anything I say lightly.

But before I spend another four weeks here with a case

that's going up, I just want to tell the Court I think that the mistrial is appropriate. That's my candor to the tribunal which I owe under my ethical obligation.

THE COURT: Well, then I -- I guess what I'm going to suggest is that defendants take the rest of the day and the weekend to confer with their clients and decide if they want to join in the motion.

MR. SWANSON: Thank you, Judge.

MS. SULLIVAN: Your Honor, obviously Giant Eagle --

THE COURT: And you don't have to make --

And, Ms. Sullivan, I suggest maybe you talk to your client, you know, maybe there will be four -- well, there can't be four different decisions, it's either yes or no. Each client can decide independently.

MS. SULLIVAN: And, Your Honor, Ms. Fiebig did talk to our client, and I agree with Mr. Lanier, we don't want to waste time Your Honor's respectfully here for another month when this record is incurably tainted in our view.

THE COURT: Well, we'll see what the other defendants think. But, you know, as I said, I have no idea when I'm going to try it again. I'm not making any commitment to either side to -- when that will be or that I'll push everything else I have aside to do it.

So everyone understands that, if this -- if we have to stop the trial, we have to stop the trial, but I don't know when it will be -- we'll do it again. It will be a long time, I can tell you that.

MR. STOFFELMAYR: I think everyone understands that --

THE COURT: And maybe I won't do it. We've got five others, five other Bellwethers. I may just say all right, let those judges have at it. I may very well -- that may make more sense at this point and just -- we've got what we've got, and people can use this maybe as a vehicle to have some serious discussions. And if you want to have them, you want to have them. If not, you try the other five. That may be what we do.

So I suggest, Mr. Lanier, Mr. Weinberger, you -- I mean, you shouldn't make a snap decision.

MR. LANIER: Agreed, Your Honor.

THE COURT: And you ought to talk to your clients too.

MR. LANIER: Agreed, Your Honor.

THE COURT: You do have -- no, I'm being not being facetious, the plaintiffs have clients too. They're public officials.

MR. WEINBERGER: Your Honor, as you know, we have a unique obligation not just to these clients --

THE COURT: Got it. Of course.

MR. WEINBERGER: -- but to the entire PEC.

THE COURT: Right.

MR. WEINBERGER: So we will certainly confer, Your Honor.

MR. LANIER: And I don't want you to think, Your Honor, that I just made this decision in a vacuum freewheeling. We have been on burning up the text messages and we have been in dialogue, Mr. Weinberger and myself, in this regard. We'll certainly talk to the clients.

And if all the defendants will agree to go forward, then there may be a good path forward. That's just where we land.

THE COURT: Well, I think you should, you know, obviously talk first to your clients, talk to each other.

Candidly, I don't think -- I mean, I think I can cure whatever -- you know, this thing with Narcan, of all the very important things that have occurred in this trial for three weeks and will occur the next three weeks, I can't imagine that any juror is going to make his or her mind up over whether anyone charges for Narcan. All right? And I think I can make that clear.

But, again, if everyone thinks there should be a mistrial, I've never seen a case where a judge says, well,

everyone's wrong and we can go ahead. There may be one, but I --

But again, everyone should understand that I have a lot of other cases, I have a lot of other responsibilities. This took a huge amount of time even to get this jury, and I really have no idea as to if we have to stop this trial, when or if I'll do it again, and I may just decide, I'll let the other five judges do it. And quite frankly, people have probably seen enough that if the parties want to use this as an opportunity to work on a resolution, fine. If not, you can try the other five cases over the next three or four years. That's fine. I mean, that may make more sense. It's not my preference. My preference is to see this through, and I think we have a very good jury. Actually, this is an extremely attentive jury. I can't imagine we'd ever find a better one. And, you know, I don't think this juror was -- intended to cause a mistrial, but she sure as heck should have known better.

But anyway, I think the problem can be cured, and I don't think these other individuals are going to make up their mind based on, I mean, who's paying for Narcan.

So I really think you ought to discuss this with your clients.

MR. LANIER: We will, Your Honor.

THE COURT: I'm sure everyone has a sense of

who's doing well and who's not. I can tell you from my side, I have no clue what this jury's going to do at the end, and they're going to have to be unanimous. And I think plaintiffs are going to make good arguments, the defendants have going to make good arguments. I think this is as good a case as any to see it through.

But you ought to, you know, really think it through. I mean, obviously, if you really think that this jury will not be able to decide this case fairly based on the evidence, then you ought to move for a mistrial. But if you're doing it for tactical reasons, I don't think either side should do it for tactical reasons.

MR. MAJORAS: Your Honor, John Majoras.

If the parties were to reach a consensus just in our views on the motion before the end of the weekend, do you want us to inform the Court perhaps through Special Master Cohen just so you'll know what to expect on Monday morning?

THE COURT: That's probably a good idea. I mean, you know, the jury's going to come in anyway because I would -- if we have to end the trial, I certainly would talk to them and let them know. If they've got any questions, whatever, I always do that at the end of the trial. I wouldn't just say bye, don't come in.

MR. LANIER: Your Honor, in that regard, of course my brain's wheeling on what might happen if we

don't -- if everybody will agree to continue and we can continue this trial, right now we're set to take by video Nelson at 9:00 a.m. on Monday. He'll be in Dallas. If I can call his counsel and bump that to right after lunch as a start time so that if we go Monday, we'll begin with videos.

I can't bring Dr. Keyes back Monday, but I can bring her back Tuesday. So we could play a video Monday morning --

THE COURT: That probably makes sense. I mean, I don't have a problem with that.

MR. MAJORAS: Your Honor, we don't -- we'll be in touch with Mr. Lanier in terms of making contact with Mr. Nelson's counsel, and that's obviously going to be their call. That's fine with us. I'd just ask as we've been doing that maybe before we leave today we have some clear understanding, just order of witnesses as we go into next week.

MR. LANIER: All right. We'll do that.

THE COURT: And either way, I mean, I want everyone here Monday morning. If we're not going forward, obviously I have to put some things on the record. If we are, we'll see however we are.

Well, I think what I'll do, then, is -- well, let me ask you this: Why don't we finish up with Ms. Keyes? She's here, all right? I mean, she's here. I mean, I assume we

can finish up with her and then be done. I don't -- you know, does anyone have a problem with that?

MR. MAJORAS: No objection, Your Honor.

MR. LANIER: I'm rather concerned about the distraction level of the jury right now in light of everything we've been through, Your Honor.

It's our expense to bring her back. I'd much rather bring her back on Tuesday morning. I commit that obviously none of us will talk to her about her testimony or anything like that. But we've got an extremely distracted jury that's been in here one at a time, and frankly, I think that this is not on a Friday afternoon, mid afternoon, a time to put them back into the wringer on this. That's my opinion. Two more hours of testimony after this, I think they'd be quite distracted.

I'll do as the Court's pleasure.

MR. STOFFELMAYR: Your Honor, as the questioner, I'm happy either way. If the Court wants to continue, we're happy to continue. If the Court thinks it makes more sense to wait till Tuesday morning, that's fine as well, from our perspective.

THE COURT: Well, my thought is, you know, the jury knows this was serious, okay? I mean, but, you know, I think it's -- if I just dismiss them out, I don't know what they're going to be thinking. I think it's better candidly

that they just -- you know, they know why we had this break and what we did and that we're proceeding. If it turns out that this is their last day in the trial, so be it.

MS. SULLIVAN: Your Honor, obviously you're the judge, anything you decide, but it seems a shame to waste these -- I mean, these people have taken so much time out of their lives, if we're all going to agree on a mistrial to have them sit through another afternoon for no reason.

THE COURT: I don't know if we're going to agree on a mistrial. If your clients really all think that, knowing that you may never try this case or it may be a year or something -- I don't think anyone should make that decision lightly.

So, look, if everyone thinks we should just break for the day, it's all right with me. I think actually it's going to be -- the jury's going to leave with a lot more questions than answers, but --

MR. LANIER: Your Honor, we'll do whatever the Court thinks is best. We'll do whatever the Court thinks is best.

MR. MAJORAS: Your Honor, Mr. Lanier has actually convinced Walmart that the distraction may be significantly strong this afternoon, that coming back on Tuesday would make more sense.

02:26:29 THE COURT: All right. Well, then I'll just
02:26:33 excuse them, and I won't say much other than my usual
02:26:36 admonitions. I'll just say we've determined that the best
02:26:39 thing to do is to conclude today and to come back 9:00 a.m.
02:26:47 Monday morning.
02:26:49 MR. LANIER: I think that might even
02:26:51 underscore the gravitas of what happened, Your Honor. And
02:26:54 if we can continue the trial, I think it better ensures
02:26:58 juror behavior.
02:27:01 THE COURT: Okay. All right. We'll bring the
02:27:03 jury back then.
02:29:37 (Jury present in open court at 2:29 p.m.)
02:29:42 THE COURT: All right. Please be seated,
02:29:43 ladies and gentlemen.
02:29:43 Because of the matter that has taken up all of our
02:29:55 time the last hour and a half, we have decided the best
02:29:58 thing to do is to recess for the week. So I'm going to send
02:30:03 you home a little early today.
02:30:08 I'm going to reemphasize everything I've said, and I'm
02:30:11 going to -- I thought everyone was paying close attention,
02:30:14 but clearly at least one person wasn't.
02:30:21 You are absolutely not to do any independent research,
02:30:24 checking whatsoever about any of these witnesses, the
02:30:27 subject matter, anything remotely connected to this trial.
02:30:31 Everything you'll need you're going to learn in this

courtroom.

You're not to discuss this case among anyone. Just tell them that the judge has ordered me not to discuss it.

Have good weekend, and we'll see you at 9:00 a.m. on Monday.

(Jury excused for the day at 2:30 p.m.)

THE COURT: All right. Just close the door in the back, please.

Everyone just be seated for one minute.

All right. Well, obviously each party needs to figure out what you want to do, but I really want to emphasize what I said. If we have to stop this trial, I'm not making any commitment as to when or if I will retry the case. I just want everyone to understand that.

I've obviously put aside -- pushed aside all of my other obligations, but I cannot in good faith continue to do that. I've got a whole lot of criminal defendants who have been sitting in jail for over a year. I've got to deal with them. I have a number of other commitments. So it will be a long time, if at all.

But, and again, I may decide just not to do it. And again, the whole purpose of this was to, in my opinion, give a test case so everyone could see and to use it as a vehicle for some resolution, because clearly no one can try these cases for 10 years or 50 years or 100 years.

So I may just decide I'll let the other five go forward and, you know, we've got what we got on this. I don't know. So I haven't -- I just want everyone to understand that. No one should assume this was -- this trial will go forward again in any -- in the near future it won't, and when or if, I'm not making any commitment to anyone. I think I've fulfilled my obligations.

Okay.

MR. DELINSKY: Your Honor, I just -- on behalf of my client and our team, I'd just like to thank you for the care that you've taken on this issue regardless of how it turns out.

THE COURT: You're welcome, Mr. Delinsky.

I think I've conducted a fair trial. That's my commitment to everyone. I mean, I've made rulings that, you know, no one liked, certainly half didn't, but that's how it goes.

But I think I've had the same strike zone for both sides, and that's what I'll continue to do if we resume this or whenever.

Okay. Well, have a good weekend.

(Proceedings adjourned at 2:33 p.m.)

* * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter prepared from my stenotype notes.

/s/ Lance A. Boardman *10-22-2021*

Lance A. Boardman, RDR, CRR DATE

ATTACHMENT D

**(Excerpt of Doc. 4078, Trial Transcript Vol. 15,
Denial of Mistrial Motions)**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT CLEVELAND

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	Case No. 1:17-md-2804
CASE TRACK THREE	**VOLUME 15** JURY TRIAL *(Pages 3781 - 4028)*
	October 25, 2021

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

HELD BEFORE THE HONORABLE DAN AARON POLSTER

SENIOR UNITED STATES DISTRICT JUDGE

Official Court Reporter: Heather K. Newman, RMR, CRR
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
216.357.7035.

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

(In open court at 8:43 a.m.)

COURTROOM DEPUTY: All rise.

THE COURT: Okay. Everyone can be seated.

(Brief pause in proceedings).

THE COURT: All right. I've read everyone's briefs and the cases that both sides cited. I have concluded that the appropriate thing to do is bring each of the jurors in individually as I did last Friday, instruct each juror that they are completely -- to completely disregard anything that former Juror No. 4 showed them or said to them and make sure they can follow that instruction, and then ask them if anything that that juror said or did leads them to believe they can no longer be a fair and impartial juror. Anyone who says yes is out. I'm not going to make any attempt to rehabilitate them.

I think as an added precaution I'll ask them that if anything else that has occurred in the roughly one month since they've been sworn causes them to doubt whether they can be fair and impartial. And then assuming we have an adequate number of jurors, to proceed.

The cases that the defendants cited all deal with situations after the fact when the extraneous information or independent tests that a juror did improperly came to light after the verdict. And also in those situations the extraneous information and/or test went to the heart of the case, and it was clearly prejudicial. It went -- you know, it went to the

heart of the case. The speed of the automobile, the cause of the fire, et cetera. It was the -- what the offending juror had did went to the essence of the issues in dispute.

This case is not going to be decided on Narcan or naloxone. I don't recall either side -- either side, the plaintiffs or any of the four defendants mentioning this in opening statement, and I don't think anyone's going to mention it ---

Robert, I don't think this mic's on. Can you take care of it, please.

I don't think any of the defendants are even going to mention it in final argument. It's extraneous and it's irrelevant as to whether or not the plaintiffs can prove their public nuisance claims against any or all of the defendants. And I'm confident from the answers of the jurors that most of them ignored it, what this juror -- ex-Juror No. 4 said.

So it's clear from the case law a mistrial in the middle of a trial is the very last resort, and if there are any measures short of mistrial that the judge feels can address the issue, that's what the judge should do. And so that's what I'm going to do.

MS. SULLIVAN: And, Your Honor --

THE COURT: I also want to point out what should be obvious. One of my responsibilities is the preservation of judicial resources and the most effective and efficient use of

judicial resources. It took us more than two months to pick this jury. I've been, you know, in the courtroom on one side or the other for 45-plus years. I've never seen a more diligent or attentive jury in all my 45-plus years.

I have no idea what they're going do at the end, but I know it's going to be based on attention and detail and doing the right thing. Because they're paying attention all the time. Every time I look at them, they are focused. All right? They're not daydreaming. They're not wandering. They're not dozing. Trust me, I've had that. All right? So -- and this trial was postponed twice because of COVID.

I mean, none of the cases anyone cited, of course, dealt with trials that were conducted during COVID because fortunately that never happened before. You know, a lot of people said we couldn't pull this off and it was a foolish thing to start this trial and try to do it when we did. I felt we could do it safely. So far we haven't had any issues. No one has any idea what the course of this pandemic is going to be. Just about everyone's thoughts, predictions, prophecies where been wrong. Certainly mine were. So, since no one can predict the future and we've done pretty well so far, we're halfway through, that's another reason to go forward and not try to redo it. Because given my professional commitments -- I mean, I have a whole lot of criminal defendants who have been waiting for over a year for a trial and they've been locked up

and I've got a constitutional obligation to give them their trials. Everyone else has professional obligations, personal obligations. I have no idea when we could retry this, and this is a case of national importance because it's a Bellwether for the pharmacies to really whether or not the plaintiffs' theory of liability will resonate with a jury. The plaintiffs think it will; the defendants think it won't. Well, we'll find out. And it's important to find out, and so we're going to make every effort to do that.

So that's what I plan to do and then assuming -- I mean, we've got 13 jurors now. We have way more than we need. If we loss one or two, we loss one or two, I really don't think we'll' loss any, but if any juror who says I doubt -- you know, I have any concern I can be fair and impartial is going to be out. I'm not going to endeavor to rehabilitate anyone if an answer is given like that. So that's what I plan to do.

And then -- then we'll proceed with the plaintiffs' next witness. But I appreciate everyone's very thorough briefing.

MS. SULLIVAN: Your Honor, I understand you've ruled, so just briefly, this is an issue that we do not believe can be cured as acknowledged by the plaintiffs' counsel. Everybody was affected. Clearly Juror No. 4 believes --

THE COURT: Ms. Sullivan, you -- you don't need to say anything further. I understand -- I mean, you've made your

argument. All right?

MS. SULLIVAN: Thank you, Judge. Thank you.

THE COURT: I just, you know, I disagree, but, you preserved your issue.

MR. LANIER: And, Your Honor, for the record I put this into writing in front of the Court, but in the midst of trial to figure this all out and the immediate reaction, having now a chance to research Sixth Circuit law, I speak on behalf of the plaintiffs saying that this is not an incurable situation, and we believe if you polled the jury, as you're saying, as long as the jury commits that they can be fair and independent, then we are absolutely fine proceeding. And I don't want anything I said on Friday to misdirect the Court or any appellate court in that regard.

THE COURT: That's okay. I mean, Mr. Lanier, you said what you said. I encouraged everyone to think about it, reflect, talk to their clients. Everyone did that. So let's -- I mean, as I have. I mean, I said some things. I thought about them some more. I've looked at some cases. Read what everyone said, and then that's the way to make a decision of this -- of consequence to take some time to reflect on it. And that's what everyone's done and I appreciate that.

So I think what I will do, I'll ask Mr. Pitts to bring in the jurors one by one as we did on Friday.

It's actually a couple minutes before 9:00 so I'll

08:52:43 wait till 9:00. Good point.

08:52:44 Since we have a couple minutes, I don't know if anyone
08:52:49 did any further work on the exhibits. I think -- what have I
08:52:55 got here? There was a list from the plaintiffs for
08:53:08 Tasha Polster. Two pages, one and a half pages.

08:53:11 Do the defendants have any objection to any of those?

08:53:17 MS. SWIFT: Your Honor, Kate Swift for Walgreens. We
08:53:20 do have a couple of objections of that. I'm happy to walk
08:53:21 through those right now.

08:53:21 THE COURT: All right. If we can do it quickly, I'll
08:53:22 take them up. If not, we'll put them off.

08:53:23 Which ones?

08:53:24 MS. SWIFT: Sure. The first one is P19927, which is
08:53:28 Ms. Polster's personnel file, which was marked highly
08:53:32 confidential for perhaps obvious reasons. We don't believe --

08:53:34 THE COURT: Wait a minute. Hold it. One -- all
08:53:36 right. Ms. Swift, I'm sorry, I've got on the list the
08:53:41 plaintiffs gave me, 19927 says an investigation report of
08:53:45 Douglas Winland.

08:53:47 MS. SWIFT: I'm looking at the list that plaintiffs
08:53:49 gave me.

08:53:49 THE COURT: All right. Well, look, this isn't working
08:53:52 well already, so, see if you can get this straightened out and
08:53:55 then --

08:53:56 MS. SWIFT: Sure. Happy to.

08:53:57 THE COURT: -- I'll do it another time. I mean,
08:53:59 I'm -- I've got a list that was given to me last week by the
08:54:02 plaintiffs, and the first one is 19927. It says investigation
08:54:07 report of Douglas Winland.
08:54:09 MS. SWIFT: We object to that one too, but I don't
08:54:11 have that on the list right in front of me.
08:54:13 THE COURT: All right, look --
08:54:15 MS. SWIFT: We'll work with the plaintiffs on it.
08:54:17 THE COURT: I'll give this back to the plaintiffs.
08:54:19 Figure it all out and we'll deal with it another time.
08:54:23 MR. WEINBERGER: Your Honor, while we have some
08:54:25 time --
08:54:25 THE COURT: Well, let me --
08:54:27 MR. WEINBERGER: I'm sorry --
08:54:28 THE COURT: So that needs work.
08:54:30 What about with Dr. Alexander? Maybe we can take care
08:54:34 of that. Any exhibits with Dr. Alexander.
08:54:39 MS. SWIFT: Your Honor, before we move off
08:54:41 Ms. Polster, I just want to make clear. Defendants have some
08:54:43 exhibits that we'd like to offer with her as well.
08:54:45 THE COURT: Well, sure you do. But have you gone over
08:54:46 those with the plaintiffs?
08:54:47 MS. SWIFT: I have sent them to the plaintiffs, yes,
08:54:51 Your Honor.
08:54:51 THE COURT: See if you can work this out, get me a

list of the exhibits that the plaintiffs are going to offer, a list the defendants are going to offer and just some sort of a mark where anyone objects and then I'll go through those.

MS. SWIFT: We will, Your Honor. Thank you.

THE COURT: All right. What about Dr. Alexander?

MR. WEINBERGER: We have no exhibits to move --

THE COURT: Okay.

MR. WEINBERGER: -- into evidence.

THE COURT: That's easy.

What the defendants?

MS. FIEBIG: Giant Eagle has two exhibits that we were hoping to admit through Dr. Alexander. We've shared them with plaintiffs.

THE COURT: Let me see them, Ms. Fiebig.

With two, we may be able to get those done quickly.

Any of the other defendants have anything with Dr. Alexander?

MR. SWANSON: No, Your Honor.

THE COURT: All right. Well, we should be able to take a quick look at these two.

All right. We've got Exhibits 1328 and 1329. They're -- looks like government hearings. I don't know, are you proposing to admit the whole thing, or just the portion of Dr. Alexander's testimony?

MS. FIEBIG: Yes, we have the page numbers that we can

offer for admission.

MR. WEINBERGER: Your Honor, these are impeachment materials and shouldn't be admit into evidence. This is prior testimony of his that they impeached him on or attempted to impeach him on. His testimony in court is the testimony to -- for the jury to consider, not --

THE COURT: Well, I tend to agree. I mean, you cross-examined him on these and he didn't -- he didn't disavow them.

MS. FIEBIG: He didn't disavow them, but we think that his --

THE COURT: Do you think they're fundamentally different than what he said? Anything in here is fundamentally different? I think there is a rule of evidence that a prior statement that's directly contradictory may be admissible under certain circumstances, but I don't -- didn't recall that.

MS. FIEBIG: That's right, Your Honor. And that's 801(d)(1)(A). We do think that this is an inconsistent statement that he provided in a sworn hearing.

THE COURT: Well, what specifically -- what page of -- you know, let's start with 1328. Give me a page and where you think something was directly inconsistent.

MS. FIEBIG: Sure. In 1328, on Page 41, which is Bates stamped 132800045 --

THE COURT: Hold it, please. Well, Page 41 of the --

MS. FIEBIG: The page number at the top.

THE COURT: All right. I've got it. Now, what statement?

MS. FIEBIG: So you'll see starting in the middle of the page he testified, "In my testimony I'd like to mention three important steps to address this problem." He started with prescribing practices.

THE COURT: Right.

MS. FIEBIG: Talked about addiction. And then how people should properly dispose of opioids.

THE COURT: Yeah. Yes. Well, I don't see anything directly contradictory to what he said in court.

MS. FIEBIG: It's not that it's directly contradictory to what he said in court, it's that the statements that he made --

THE COURT: Well, that's the only basis that you could possibly admit it. So, without that, it's not coming in.

All right. The next document is 1329? What's directly contradictory there?

MS. FIEBIG: But there's actually a couple of other pages in 1328.

THE COURT: All right.

MS. FIEBIG: And I'm happy to provide them to plaintiffs and the Court --

THE COURT: All right. If you can -- if you can show

something in here that is directly contradictory to what he said, I'll consider that, and that alone. So show it to the plaintiffs and if -- you know, the plaintiffs agree, fine, if they disagree, then I'll deal with it.

MS. FIEBIG: Understood, Your Honor.

THE COURT: But unless it's directly contradictory it doesn't come in.

All right. And, Mr. Weinberger, you had something you wanted to raise.

MR. WEINBERGER: Your Honor, this motion we filed a motion to admit.

THE COURT: I saw that -- I'll wait -- this was something I was hoping the parties could work out with Special Master Cohen. I don't know, I'd still like him to work this out. If he can't, I'll just have to deal with it, so, I don't know if the defendants are objecting to it or not or on what basis, but I had directed -- I think there's several issues that I wanted you to --

MR. WEINBERGER: Right.

THE COURT: -- work on with Special Master Cohen. This was one of them. There were at least two others.

MS. FIEBIG: Understood, Your Honor.

MR. WEINBERGER: The other was the IMS contracts, and I have --

THE COURT: IMS CSA.

MR. WEINBERGER: Right. I have had discussions with them about that.

THE COURT: A stipulation or instruction on settlement agreements.

MR. WEINBERGER: Right. We submitted a response. We haven't had a chance to discuss our response with the other side, and as to the CSA, the general additional instructions on the CSA, we are going to file this morning our own version. Again, we will discuss --

THE COURT: All right. Well, I want you to keep working on it.

MR. WEINBERGER: -- with counsel.

THE COURT: Use Special Master Cohen to assist you. If parties can't agree, obviously I'll decide it.

MR. DELINSKY: And, Your Honor, we'll be putting in something shortly on the IMS today.

THE COURT: All right. Well, you can file it, but again, I want you to try and -- you ought to be able to come together on all three of these.

Okay. Now we'll start bringing in the jurors, please. One by one.

(Brief pause in proceedings).

(Juror returned to courtroom).

THE COURT: Good morning, ma'am.

You can take your mask off. This will be very quick.

I hope you had a good weekend.

First, I am instructing you that you are to completely disregard anything that former Juror 4 showed to you or said to you.

One, it was obviously improper that she did it, and two, it has no relevance to the case. So can you follow that instruction?

A JUROR: Yes.

THE COURT: Okay. Second, is there anything about what former Juror No. 4 showed you or said to you that casts any doubt in your mind as to whether you can continue to be a fair and impartial juror in this case?

A JUROR: No. It didn't really change anything about what I'm thinking about the case.

THE COURT: Okay. And just to be safe, is there anything else that has occurred in the roughly one month since I gave you the oath and swore you in with your fellow jurors that casts any doubt in your mind as to whether you can continue to be fair and impartial in this case?

A JUROR: No.

THE COURT: Okay. Thank you.

A JUROR: Thank you.

(Juror excused from courtroom).

(Juror returned to courtroom).

THE COURT: Good morning, ma'am. You can take your

mask off for a minute. This won't take long.

A JUROR: Good morning.

THE COURT: Hope you had a good weekend.

A JUROR: I did. Thank you.

THE COURT: I am instructing you that you must completely ignore, disregard not consider anything that former Juror No. 4 showed you or said to you.

Can you follow that instruction?

A JUROR: Yes, I can.

THE COURT: Obviously it was completely improper what she did and said, and it's also not relevant to the issues in this case.

Second, is there anything about what happened with former Juror No. 4 that causes you to doubt whether you can continue to be a fair and impartial juror in this case?

A JUROR: No.

THE COURT: All right. And just to be sure, is there anything else that has occurred in the roughly one month since I gave you the oath that causes you to doubt whether you can continue to be fair and impartial in this case to both sides?

Is that a no?

A JUROR: I'm fine. I can continue do this role.

THE COURT: Okay. You have no doubt of your ability to be fair and impartial?

A JUROR: I can be fair and impartial.

09:05:21 THE COURT: Fair and impartial or -- I just want to
09:05:24 make sure --
09:05:25 A JUROR: Fair and impartial.
09:05:26 THE COURT: Okay. All right. Just wanted to be sure.
09:05:29 Thank you, ma'am.
09:05:29 A JUROR: You're welcome.
09:05:29 (Juror excused from courtroom).
09:05:29 (Juror returned to courtroom).
09:06:12 THE COURT: Good morning, ma'am.
09:06:13 A JUROR: Good morning.
09:06:14 THE COURT: Hope you had a good weekend.
09:06:16 I am instructing you that you must completely
09:06:20 disregard anything that former Juror No. 4 said or did.
09:06:25 A JUROR: Yes, sir.
09:06:26 THE COURT: Can you follow that instruction?
09:06:28 A JUROR: Absolutely, sir.
09:06:29 THE COURT: Okay. It was improper what she did, and
09:06:31 it's not relevant to the issues you have to decide in this
09:06:35 case.
09:06:36 A JUROR: Okay.
09:06:37 THE COURT: Second, is there anything about what
09:06:40 former Juror No. 4 said or did that causes you to doubt whether
09:06:46 you could continue to be a fair and impartial jury -- juror in
09:06:50 this case?
09:06:50 A JUROR: No. I just -- I let it in one ear and out

09:06:54 the other.
09:06:55 THE COURT: All right. That's fine.
09:06:56 And just to be sure, is there anything else that might
09:07:00 have occurred in the roughly one month since you took the oath
09:07:02 that causes you to doubt your ability to be fair and impartial
09:07:06 in this case?
09:07:07 A JUROR: No. Nothing. Listening with open ears.
09:07:11 THE COURT: Okay. Good. Thank you very much.
09:07:13 A JUROR: You're welcome.
09:07:13 (Juror excused from courtroom).
09:07:48 (Juror returned to courtroom).
09:07:48 THE COURT: Good morning, sir.
09:07:50 A JUROR: Good morning.
09:07:51 THE COURT: You can take off your mask, please.
09:07:53 I am instructing you that you must completely
09:07:58 disregard anything that former Juror No. 4 said or did.
09:08:00 Can you do that?
09:08:01 A JUROR: Yes.
09:08:02 THE COURT: All right. Second, has anything that
09:08:08 former Juror No. 4 said or did cause you to doubt in any way
09:08:13 your ability to continue to be a fair and impartial juror in
09:08:16 this case?
09:08:17 A JUROR: No.
09:08:19 THE COURT: All right. And just to be sure, is there
09:08:21 anything else that might have occurred over the last month or

so since you took the oath that causes you to be doubt your ability to be a fair and impartial juror in this case?

A JUROR: No, sir.

THE COURT: All right. Thank you.

(Juror excused from courtroom).

(Juror returned to courtroom).

THE COURT: Good morning, ma'am. You can take your mask off for a minute while I -- this should just take a minute or two.

First, I am instructing you that you must completely disregard anything that former Juror No. 4 said or did.

Can you follow that instruction?

A JUROR: Absolutely.

THE COURT: And, second, is there anything that former Juror No. 4 said or did that casts any doubt in your mind about your ability to continue to be a fair and impartial juror in this case?

A JUROR: Absolutely not.

THE COURT: And just to be sure, is there anything else that might have occurred in the roughly one month since you took the oath that causes you to doubt your ability to continue to be a fair and impartial juror in this case?

A JUROR: No, sir.

THE COURT: All right. Thank you very much, ma'am.

(Juror excused from courtroom).

09:10:38 (Juror returned to courtroom).

THE COURT: Good morning, ma'am. I hope you had a good weekend, and you can take off your mask for a minute.

A JUROR: Thank you.

THE COURT: First, I am instructing you that you must completely disregard anything that former Juror No. 4 said or did.

Can you follow that instruction, ma'am?

A JUROR: Yes.

THE COURT: Second, is there anything that former Juror No. 4 said or did that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this case?

A JUROR: No.

THE COURT: And just to be sure, is there anything else that might have occurred in the roughly one month since I gave you the oath that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this case?

A JUROR: No.

THE COURT: Thank you.

09:11:22 (Juror excused from courtroom).

09:11:55 (Juror returned to courtroom).

THE COURT: Good morning, sir.

A JUROR: Good morning.

09:11:58 THE COURT: I am instructing you that you must
09:12:00 completely disregard anything that former Juror No. 4 said or
09:12:04 did.
09:12:05 Can you follow that instruction?
09:12:07 A JUROR: Understood. Yeah. Absolutely.
09:12:09 THE COURT: And, second, is there anything that former
09:12:11 Juror No. 4 said or did which causes you to doubt in any way
09:12:15 your ability to continue to be a fair and impartial juror in
09:12:19 this case?
09:12:20 A JUROR: Absolutely not.
09:12:21 THE COURT: All right. And just to be sure, is there
09:12:23 anything else that might have occurred over the last month that
09:12:27 causes you to doubt in any way your ability to be -- to
09:12:31 continue to be a fair and impartial juror in this case?
09:12:34 A JUROR: No, sir.
09:12:34 THE COURT: All right. Thank you.
09:12:36 A JUROR: All right. Thank you.
09:12:36 (Juror excused from courtroom).
09:13:12 (Juror returned to courtroom).
09:13:12 THE COURT: Good morning, ma'am. I hope you had a
09:13:14 good weekend.
09:13:15 A JUROR: Good morning.
09:13:16 THE COURT: First, I am instructing you that you must
09:13:18 completely disregard anything that former Juror No. 4 said or
09:13:22 did.

09:13:22 Can you follow that instruction, ma'am?

09:13:24 A JUROR: Yes.

09:13:25 THE COURT: And, second, is there anything about what former Juror 4 -- No. 4 said or did that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this case?

09:13:38 A JUROR: No.

09:13:39 THE COURT: And just to be sure, is there anything else that might have occurred over the roughly one month since I gave you the oath that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this case?

09:13:56 A JUROR: No.

09:13:57 THE COURT: Thank you very much.

09:13:58 (Juror excused from courtroom).

09:14:33 (Juror returned to courtroom).

09:14:33 THE COURT: Good morning, ma'am.

09:14:35 A JUROR: Good morning.

09:14:36 THE COURT: I hope you had a good weekend, and you can take off your mask for a minute, please.

09:14:40 I am instructing you that you must completely disregard anything that former Juror No. 4 said or did.

09:14:46 Can you follow that instruction, ma'am?

09:14:49 A JUROR: I understand, and I agree.

09:14:51 THE COURT: Okay. And, second, is there anything

about what former Juror No. 4 said or did that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this case?

A JUROR: None whatsoever.

THE COURT: All right. And just to be sure, is there anything else that might have occurred over the roughly one month since I gave you the oath that causes you to doubt your ability to continue to be a fair and impartial juror in this case?

A JUROR: No.

THE COURT: Thank you very much, ma'am.

A JUROR: Thank you.

(Juror excused from courtroom).

(Juror returned to courtroom).

THE COURT: Good morning, sir.

A JUROR: Good morning.

THE COURT: You can take your mask off for a minute, please.

First, I am instructing you that you must completely disregard anything that former Juror No. 4 said or did.

Can you follow that instruction, sir?

A JUROR: Yes.

THE COURT: Second, is there anything about what former Juror No. 4 said or did that causes you to doubt in any way your ability to be -- to continue to be fair and impartial

in this case?

A JUROR: No.

THE COURT: And just to be sure, is there anything else that might have occurred over the roughly one month since I gave you the oath that causes you any concern about continuing to be a fair and impartial juror in this case?

A JUROR: No.

THE COURT: Thank you very much.

A JUROR: All right. Thank you.

(Juror excused from courtroom).

(Juror returned to courtroom).

THE COURT: Good morning, ma'am.

A JUROR: Good morning.

THE COURT: First, I am instructing you that you must completely disregard anything that former Juror No. 4 said or did.

Can you do that?

A JUROR: Yes.

THE COURT: Second, is there anything about what former Juror No. 4 said or did that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this case?

A JUROR: No.

THE COURT: And just to be sure, is there anything else that might have occurred in the roughly one month since I

gave you the oath that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this case?

A JUROR: No.

THE COURT: Thank you very much.

A JUROR: Thank you.

(Juror excused from courtroom).

(Juror returned to courtroom).

THE COURT: Good morning, sir. If you could take your mask off for a minute, please.

A JUROR: Sure.

THE COURT: First, I am instructing you that you must completely disregard anything that former Juror No. 4 said or did.

Can you do that, sir?

A JUROR: Yes, I can.

THE COURT: Second, is there anything about what former Juror No. 4 said or did that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this case?

A JUROR: No.

THE COURT: And just to be sure, is there anything else that might have occurred over the roughly one month since I gave you the oath that causes you to doubt in any way your ability to continue to be a fair and impartial juror in this

09:19:15 case?
09:19:16 A JUROR: No.
09:19:17 THE COURT: Thank you very much.
09:19:17 (Juror excused from courtroom).
09:20:00 (Juror returned to courtroom).
09:20:00 A JUROR: Good morning.
09:20:00 THE COURT: Good morning, sir.
09:20:06 I am instructing you that you must completely
09:20:08 disregard anything that former Juror No. 4 said or did.
09:20:14 Can you follow that instruction, sir?
09:20:16 A JUROR: Yes.
09:20:17 THE COURT: Okay. Second, is there anything about
09:20:19 what former Juror No. 4 said or did that causes you to doubt in
09:20:25 any way your ability to continue to be a fair and impartial
09:20:28 juror in this case?
09:20:29 A JUROR: No, Your Honor.
09:20:30 THE COURT: And just to make sure, is there anything
09:20:33 else, sir, that might have occurred over the last month since I
09:20:36 gave you the oath that causes you to doubt in any way your
09:20:39 ability to continue to be a fair and impartial juror in this
09:20:43 case?
09:20:44 A JUROR: No.
09:20:45 THE COURT: Thank you.
09:20:45 (Juror excused from courtroom).
09:21:14 (Juror returned to courtroom).

09:21:14 COURTROOM DEPUTY: That's all.

09:21:17 THE COURT: Okay. All right. Well, based on each juror's answer, I am confident that each juror can follow my instruction to completely disregard what former Juror No. 4 said and did and that each juror doesn't feel that whatever they remember or recall will affect their ability to be fair and impartial or anything else that's occurred in the last month would do so. So I'm going to go forward.

09:21:49 Okay. We can bring -- I assume the plaintiffs are ready with its witness. We're going to have a deposition, I think.

09:21:58 MR. LANIER: Yes, Your Honor, we have a deposition and then after that we'll do the video hookup of Nelson.

09:22:04 THE COURT: Okay. All right.

09:22:07 MR. SWANSON: Your Honor, before you do, Brian Swanson for Walgreens. Appreciate the process that you just undertook. We believe that the prejudice to our client cannot be cured, and so we believe that a mistrial is appropriate, but just wanted to have that on the record.

09:22:20 Thank you.

09:22:21 THE COURT: That's fine.

09:22:22 MR. MAJORAS: Walmart joins, Your Honor.

09:22:26 MR. DELINSKY: CVS as well, Your Honor.

09:22:32 MS. SULLIVAN: Giant Eagle as well.

09:22:44 THE COURT: I had asked clients to be on for this

portion. They can stay on if they want but they're not required to be on, those who were on the phone.

(Brief pause in proceedings).

(Jury returned to courtroom at 9:24 a.m.)

THE COURT: Good morning. Please be seated.

All right. Mr. Lanier, you may call your next witness, please.

MR. LANIER: Thank you, Your Honor.

May it please the Court, ladies and gentlemen. Good morning.

Your Honor, our -- my voice is a little rough.

Your Honor, our next witness is Mark Vernazza. It will be a videotape deposition. He spells his name V-e-r-n-a-z-z-a. He is CVS's corporate counsel who testified in the deposition in what's called a 30(b)(6) capacity. That means, in essence, he's speaking for the corporation because companies need someone to speak for them. So he was designated by the company to speak for the company.

The whole deposition play, Your Honor, is an hour and 8 minutes. 37 of that is what we've designated as plaintiffs. 31 minutes is what CVS has designated as defendants, and with the Court's permission, we're ready to play it.

MR. DELINSKY: Your Honor, may I just add one line to Mr. Lanier's --

THE COURT: Yes, Mr. Delinsky.

ATTACHMENT E

(Doc. 4251, Opinion and Order Denying Pharmacies' Motion for Certification of Orders for Interlocutory Appeal)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	**MDL 2804**
	)	
	)	**Case No. 1:17-md-2804**
THIS DOCUMENT RELATES TO:	)	
	)	**Judge Dan Aaron Polster**
The County of Lake, Ohio v. Purdue Pharma L.P., et al., Case No. 18-op-45032	)	**OPINION AND ORDER**
	)	
The County of Trumbull, Ohio v. Purdue Pharma L.P., et al., Case No. 18-op-45079	)	

Before the Court is Defendants' Joint Motion for Certification of Orders for Interlocutory Appeal (the "Motion"). Doc. 4205. Plaintiffs have filed an opposition brief (Doc. 4240), and the Pharmacy Defendants submitted a reply brief (Doc. 4246). For the following reasons, the Motion is **DENIED**.

I. Background

On December 21, 2022, the Pharmacy Defendants[1] jointly moved for certification of interlocutory appeals on three issues in the Court's prior orders. The first issue is whether the Ohio Product Liability Act ("OPLA") abrogated Plaintiffs' (Ohio's Lake and Trumbull Counties) public nuisance claim. Doc. 4205 at 4-7. The Pharmacy Defendants earlier raised this issue by incorporation in their Track Three Joint Motion to Dismiss, which the Court denied on August 6, 2020. Doc. 3340-1 at 30 (citing Doc. 497-1 at 8 and Doc. 491-1 at 22-26); Doc. 3403 at 32-33. The second issue is whether the Court properly handled a juror's misconduct during the trial. Doc.

[1] The Pharmacy Defendants are Walmart Inc.; Walgreens Boots Alliance, Inc.; Walgreen Co.; Walgreen Eastern Co., Inc.; CVS Pharmacy, Inc.; Ohio CVS Stores, L.L.C.; CVS TN Distribution, L.L.C.; CVS Rx Services, Inc.; CVS Indiana, L.L.C.

4205 at 8-10. The Pharmacy Defendants earlier raised this issue in their mistrial motion, which the Court orally denied on October 25, 2021. Doc. 4068 at 3-6; Doc. 4078 at 3785-89. The final issue is whether the Controlled Substances Act ("CSA") imposes anti-diversion duties on corporate pharmacies. Doc. 4205 at 10-13. The Court not only rejected the Pharmacy Defendants' position in the August 6, 2020 dismissal order, but it also refused to certify the issue for interlocutory appeal on September 22, 2020. Doc. 3403 at 13-25; Doc. 3439-1 at 21-23; Doc. 3499 at 8-9.

II. Analysis

A. Redundancy

As an initial matter, the Motion is partially redundant because the Court has already declined to certify the OPLA abrogation and CSA duties issues for interlocutory appeal. Doc. 1283 at 2; Doc. 3499 at 8-9.[2] Despite these prior orders, the Pharmacy Defendants neither ask the Court to reconsider the previous rulings, nor apply the law of reconsideration in their recent Motion. Rather, the Pharmacy Defendants present their certification arguments anew without any reference to the Court's previous decisions. The Court declines to entertain these certification arguments again, particularly because the Pharmacy Defendants have provided no reason to do so. *Cf. Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (commenting that "routine resort" to interlocutory appeal confounds the federal courts final judgment rule).

B. Timing

A motion for an interlocutory appeal certification must be filed with the district court within a reasonable amount of time after the court issues the order sought to be appealed. *See Williams Powell Co. v. National Indem. Co.*, 1:14-cv-807, 2019 WL 6840167, at *1 (S.D. Ohio

[2] During Track One, the Court rejected the OPLA abrogation argument. Doc. 1203. The Distributor Defendants then moved for certification of an interlocutory appeal on the abrogation issue (Doc. 1280-1 at 19-22), but the Court denied the motion (Doc. 1283).

Dec. 16, 2019) (citing *Arenholz v. Board of Trs. of Univ. of Ill.*, 219 F.3d 674, 675-76 (7th Cir. 2000)).[3] While the relevant statute does not fix a specific time by which a certification motion must be filed with the district court, various courts within this Circuit have commented that a lapse of more than "two months" between the court order and the certification request is unreasonable and untimely. *Eagan v. CSX Transp., Inc.*, 294 F. Supp. 2d 911, 914 (E.D. Mich. 2003).

In this case, the Pharmacy Defendants' request to certify portions of the Court's dismissal order is plainly untimely because their delay is measured not in months, but in years.[4] The Court first rejected the OPLA abrogation issue during Track One on December 19, 2018, meaning the Pharmacy Defendants waited three years and one day before asking the Court to certify an interlocutory appeal of this issue.[5] Likewise, the Court issued its dismissal order on August 6, 2020, which is a delay of one year and four months.

The Pharmacy Defendants' only explanation for their delay is the "changed posture" of the case, but this does not excuse their delays. The Pharmacy Defendants offer no legal support for the proposition that a "changed posture" can excuse years-long delays. Doc. 4246 at 2, 4. And, even assuming *arguendo* the Pharmacy Defendants are correct, their identified changes in posture do not help them. The Pharmacy Defendants first contend their request to certify the OPLA abrogation issue is timely because the Court was previously reluctant to allow an interlocutory

[3] Curiously, the Pharmacy Defendants cite the *Arenholz* case in their reply brief for the proposition that there is no statutory time limit to seek certification but somehow omit the very next sentence, which states there is a "non-statutory requirement" that the certification must be sought within a "reasonable time" after the order to be appealed is issued. Doc. 4246 at 4. It is extremely bad form for the Pharmacy Defendants to cherry-pick portions of a decision supporting their argument and simply ignore the rest.

[4] Even the Pharmacy Defendants' certification request for the juror misconduct issue is pushing the limits of reasonableness because they waited 56 days before requesting an interlocutory appeal of the mistrial order. This delay approaches the two-month limit articulated in *Eagan*.

[5] During Track One, the Pharmacy Defendants' dismissal motion adopted the Distributor Defendants' OPLA abrogation argument. Doc. 497-1 at 8 (citing Doc. 491-1 at 22-26). However, the Pharmacy Defendants did not subsequently join the Distributor Defendants' motion to certify the issue for interlocutory appeal. *See* Doc. 1280.

appeal without proper discovery. Doc. 4246 at 4-5. Yet, the case has long since advanced past discovery, and the Pharmacy Defendants still waited years to seek certification. Further, the Pharmacy Defendants defend their delay in seeking certification of the CSA duties issue for a second time by pointing to Plaintiffs' decision to drop their distribution-based claims during trial. *Id.* at 5. But the Court previously denied certification of this issue, in part, because Plaintiffs could establish public nuisance in dispensing without proving CSA violations, and that logic remains true without the distribution claims. Thus, the Pharmacy Defendants have failed to provide an adequate explanation for their delay, and that alone warrants denial of this branch of the Motion.

C. Merits

Even without the redundancy and timing issues, the Court further concludes the Pharmacy Defendants' certification arguments fail on the merits because none of their identified issues meet the statutory criteria for certification. Under 28 U.S.C. § 1292(b), a district court may, at its discretion, certify an order for interlocutory appeal when: (1) the order at issue involves a controlling question of law; (2) there is substantial ground for difference of opinion of the legal issue; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation." When analyzing these elements, a district court must be mindful that certification under Section 1292(b) should be "granted sparingly and only in exceptional cases." *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002). Indeed, "doubts regarding appealability should be resolved in favor of finding that the interlocutory order is not appealable." *Jackson v. City of Cleveland*, 219 F. Supp. 3d 639, 643 (N.D. Ohio 2016) (internal alterations omitted) (citing *United States v. Stone*, 53 F.3d 141, 143-44 (6th Cir. 1995)).

Here, each of the Pharmacy Defendants' identified issues clearly do not meet the third element because resolution of the issues will not materially advance termination of the litigation.

First, the OPLA abrogation issue fails because Plaintiffs have other causes of action against the Pharmacy Defendants that were bifurcated and stayed during the public nuisance trial, and they will be able to pursue those claims even if the OPLA abrogated the public nuisance claim. Doc. 3315. Next, as even the Pharmacy Defendants recognize, the juror misconduct issue would result in a new public nuisance trial, which would extend the litigation rather than advance its termination. *See* Doc. 4205 at 10. Third, as the Court previously explained, the CSA duties issue would not terminate the litigation because Plaintiffs can establish public nuisance with proof of either intentional *or* unlawful conduct—meaning Plaintiffs could succeed with evidence of intentional conduct even if the Pharmacy Defendants did not violate the CSA. Doc. 3499 at 8-9.

Quite simply, each of the proposed interlocutory appeals will unnecessarily extend the litigation because a final judgment is near. The abatement hearing is set for two weeks in May 2022, and the parties have invested significant time and resources to prepare. Authorizing an appeal at this juncture will result in longer delays than if the Court simply proceeds to the abatement hearing. At that point, there will be a final judgment, and the parties can appeal as a matter of right. The Court is certain that the Sixth Circuit Court of Appeals will be better off addressing all appellate issues at once on a complete record.

III. Conclusion

Defendants' Joint Motion for Certification of Orders for Interlocutory Appeal, Doc. 4205, is DENIED.

IT IS SO ORDERED.

/s/ Dan Aaron Polster *1/31/22*
Dan Aaron Polster
United States District Judge