Matter of Opioid Litig.
2018 NY Slip Op 31229(U)
June 18, 2018
Supreme Court, Suffolk County
Docket Number: 400000/2017
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 400000/2017

SUPREME COURT - STATE OF NEW YORK
NEW YORK STATE OPIOID LITIGATION PART 48 - SUFFOLK COUNTY

PRESENT:

E-FILE

Hon. JERRY GARGUILO
Justice of the Supreme Court

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IN RE OPIOID LITIGATION

---X

MOTION DATE 2/7/18
ADJ. DATE 3/21/18
Mot. Seq. #009 - MD

Upon the reading and filing of the following papers in this matter (1) Notice of Motion by defendan Insys Therapeutics, Inc. (Mot. Seq. #009), dated November 10, 2017, and supporting papers (including Memorandum of Law); (2) Memorandum of Law in Opposition (Mot. Seq. #009), dated January 19, 2018; (3) Reply Memorandum of Law (Mot. Seq. #001), dated February 23, 2018;

ORDERED that the motion by defendant Insys Therapeutics, Inc. for an order pursuant to CPLR 3211, dismissing the master long form complaint against it is denied.

The plaintiffs are counties within the State of New York that have commenced separate actions against certain pharmaceutical manufacturers for harm allegedly caused by false and misleading marketing campaigns promoting semi-synthetic, opium-like pharmaceutical pain relievers, including oxycodone, hydrocodone, oxymorphone, and tapentadol, as well as the synthetic opioid prescription pain medication fentanyl, as safe and effective for long-term treatment of chronic pain. Also named as defendants in those actions are certain pharmaceutical distributors that allegedly distributed those opium-like medications (hereinafter referred to as prescription opioids or opioids) to retail pharmacies and institutional health care providers for customers in such counties, and individual physicians allegedly "instrumental in promoting opioids for sale and distribution nationally" and in such counties. Briefly stated, the plaintiffs allege that tortious and illegal actions by the defendants fueled an opioid crisis within such counties, causing them to spend millions of dollars in payments for opioid prescriptions for employees and Medicaid beneficiaries that would have not been approved as necessary for treatment of chronic pain if the true risks and benefits associated with such medications had been known. They also allege that the defendants' actions have forced them to pay the costs of implementing opioid treatment programs for residents, purchasing prescriptions of naloxone to treat prescription opioid overdoses, combating opioid-related criminal activities, and other such expenses arising from the crisis.

One such lawsuit was commenced in August 2016 by Suffolk County and assigned to the Commercial Division of the Supreme Court. By order dated July 17, 2017, the Litigation Coordinating Panel of the Unified Court System of New York State directed the transfer of eight opioid-related actions brought by other counties, and any prospective opioid actions against the manufacturer, distributor, and individual defendants, be transferred to this court for pre-trial coordination. That same day, the

undersigned issued a case management order reiterating that the individual actions are joined for coordination, not consolidated, and directing that a master file, known as "In re Opioid Litigation," assigned index number 400000/2017, be established for the electronic filing of all documents related to the proceeding. The undersigned further directed the plaintiffs to file and serve a master long form complaint subsuming the causes of action alleged in the various complaints, and directed the manufacturer defendants, the distributor defendants, and the individual defendants to file joint motions pursuant to CPLR 3211, seeking dismissal of the master complaint, all by certain dates.

The plaintiffs have adopted the master long form complaint (hereinafter the complaint) in accordance with the court's directive. In response, the defendant manufacturers and distributors have submitted numerous motions, individually and jointly, for dismissal of the complaint. Among the motions submitted to the court is a joint motion by the defendant manufacturers seeking dismissal of the long form complaint. Defendant Insys Therapeutics, Inc. (herein referred to as "Insys"), the lone defendant manufacturer not listed as a party to the joint motion, now moves, individually, for an "[order, pursuant to CPLR 3211, dismissing the Complaint . . . in its entirety." In seeking judgment in its favor, Insys purports to adopt and incorporate by reference the arguments and authorities set forth in the abovementioned joint motion by the remaining defendant manufacturers. Additionally, Insys asserts that the plaintiffs failed to state viable causes of action against it, because the sales of its drug "Subsist accounted] for approximately .01% of opioids prescribed in New York in the last 10 years, and less than approximately .03% of opioids prescribed in New York since the beginning of 2012." Insys argues, in connection with this assertion, that the allegations against it in the complaint are general in nature and lack any specific facts to suggest that Subsist was prescribed in the plaintiff counties, that the plaintiff counties ever paid for Subsist prescriptions, or that Subsist either caused harm to a single person in any of the counties or caused such persons to become addicted to opioids.

In addition, Insys argues that the allegations contained in the complaint relating to the harm sustained by to the residents of Nassau, Niagara, Rensselaer, and Schoharie counties are general in nature and implausible on their face when applied to Insys, and that they are impermissibly based upon national rather than county specific data. To this end, Insys asserts that the complaint is devoid of a single fact about any false advertising or misrepresentation it allegedly conducted within the confines of the plaintiff counties. Insys further asserts that the plaintiffs erroneously allege that it was responsible for fraudulent marketing that allegedly took place in the year 2000, when, in fact, its drug was not introduced to the New York market until 2012. Insys then makes a final generalized argument that the complaint contains "myriad other defects, such as impermissible group pleading, a wholesale failure to plead damage causation, and others, which are addressed in detail by the primary motion."

The plaintiffs oppose Insys' motion on three grounds. The plaintiffs reject Insys' argument that they cannot adequately allege causation or harm because the sales of Insys' drug accounted for only a "minuscule" percentage of all the opioids sold in New York, arguing that even if there was a minuscule number of Subsist sales within the counties, the court may determine Insys' liability for such sales in proportion to its market share of all the opioids sold in the New York market generally. Alternatively, the plaintiffs contend that dismissal based on this argument would be inappropriate where, as in this case, there has been no discovery and additional facts may be later discovered showing that the volume

of Subsist sales within the state is much larger than indicated in Insys' moving papers. As to Insys' argument that plaintiffs will be unable to establish a cause of action against it for alleged fraudulent marketing that took place prior to 2012 when Subsist allegedly entered the New York market, plaintiffs assert that Insys may nonetheless be held liable for the prior conduct of other drug manufacturers or suppliers with whom Insys acted with as a co-conspirator when it later adopted their common scheme. To substantiate their claim of a conspiracy between Insys and some of the other drug manufacturers, plaintiffs point to the specific allegations made in the complaint that detail how ex-employees of Cephalon, Inc., another defendant drug manufacturer named in the complaint, became employed by Insys and participated in the rollout of a scheme substantially similar to the one utilized by their prior employer to deceptively market Subsist to county residents for off-label use.

As to Insys' general assertion that the complaint lacks specific allegations concerning its alleged deceptive practices within the plaintiff counties, the plaintiffs assert that the complaint provides detailed allegations describing deceptive and fraudulent marketing tactics deployed by Insys to avoid prior authorization from insurance companies, their creation of a fraudulent speakers program used to bribe doctors to write numerous off-label prescriptions for Subsist , and Insys' wilful failure to impose sufficient compliance procedures to prevent prescription fraud and to audit interactions between their employees and outside entities. Finally, plaintiffs request, should the court deem the complaint deficient in any way, that they be granted leave to amend the pleading pursuant to CPLR 3025 (b).

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (***Antoine v Kalandrishvili***, 150 AD3d 941, 941, 56 NYS3d 142 [2d Dept 2017]; *see* ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; *see* ***Kaplan v New York City Dept. of Health and Mental Hygiene***, 142 AD3d 1050, 38 NYS3d 563 [2d Dept 2016]), and a plaintiff is not obligated to demonstrate the existence of evidentiary facts to support the allegations contained in the complaint (*see* ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314 [1976]; ***Stuart Realty Co. v Rye Country Store***, 296 AD2d 455, 745 NYS2d 72 [2d Dept 2002]). Indeed, when determining a motion to dismiss pursuant to CPLR 3211(a) (7) an assessment of the "relative merits of the complaint's allegations against the defendant's contrary assertions" is not authorized (***Salles v Chase Manhattan Bank***, 300 AD2d 226, 228, 754 NYS2d 236 [1st Dept 2002]), and the burden never shifts to the nonmoving party to rebut a defense asserted by the movant (*see* ***E & D Group, LLC v Vialet***, 134 AD3d 981, 21 NYS3d 691 [2d Dept 2015]; ***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). The sufficiency of a complaint need only be measured against what the law requires of the pleadings in a particular case, and will be met so long as they give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action (*see* CPLR 3013; ***East Hampton Union Free Sch. Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]). Moreover, it is well established that a motion to dismiss made pursuant to CPLR 3211 (a) (7) "'will be denied in its entirety where the complaint asserts several causes of action, at least one of

which is legally sufficient, and . . . the motion [wa]s aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed'" (***Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assoc.***, 215 AD2d 450, 452, 626 NYS2d 828, 829 [2d Dept 1995], quoting ***Martirano Constr. Corp. v Briar Contr. Corp.***, 104 AD2d 1028, 481 NYS2d 105 [2d Dept 1984]; *see* ***Advance Music Corp. v American Tobacco Co.***, 296 NY 79 [1946]; ***Chase v Town of Camillus***, 247 AD2d 851, 668 NYS2d 830 [4th Dept 1998]; ***Great N. Assoc. v Continental Cas. Co.***, 192 AD2d 976, 596 NYS2d 938 [3d Dept 1993]).

Initially, the court notes that Insys' motion, which is aimed at the pleadings as a whole, fails to particularize which of the seven causes of action contained in the complaint it wishes to be dismissed, or which one of the many arguments contained in the joint motion it wishes to adopt and deploy against the unique set of allegations made against it in the complaint. Indeed, Insys failed to identify what section of CPLR 3211 it intends to rely upon in support of its application to dismiss the complaint. The court, therefore, is left in the untenable position of having to speculate which arguments relate to the unique set of allegations made against Insys, and how such arguments should be applied to the particular causes of action. As a result, the court concludes that Insys has not only failed to meet its initial burden of demonstrating entitlement to judgment in its favor pursuant to CPLR 3211, but the motion, which was addressed to the long form master complaint as a whole, must be denied in its entirety, since the court finds, as discussed below, that the plaintiff counties have sufficiently pleaded a cognizable claim pursuant to section 349 of the General Business Law (*see* ***Advance Music Corp. v American Tobacco Co.***, 296 NY 79; ***Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assoc.***, 215 AD2d 450, 626 NYS2d 828; ***Great N. Assoc. v Continental Cas. Co.***, 192 AD2d 976, 596 NYS2d 938; ***Elias v Handler***, 155 AD2d 583, 548 NYS2d 33 [2d Dept 1989]; ***Gedan v Home Ins. Co.***, 144 AD2d 338, 533 NYS2d 945 [2d Dept 1988]; ***Wright v County of Nassau***, 81 AD2d 864, 438 NYS2d 875 [2d Dept 1981]).

General Business Law § 349 (a) provides that it is unlawful to perform "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The statute is "meant to curtail deceptive acts and practices – willful or otherwise – directed at the consuming public" (***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 704 NYS2d 177 [1999]). Although the statute as originally enacted was only enforceable by the Attorney General, it was amended in 1980 to allow actions by private plaintiffs, including corporate entities, injured by such illegal conduct (*see* General Business Law § 349 [h]; ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 205, 785 NYS2d 399 [2004]; ***Karlin v IVF Am., Inc.***, 93 NY2d 282, 290, 690 NYS2d 495 [1999]; ***Blue Cross & Blue Shield of N.J., Inc. v Phillips Morris USA Inc.***, 344 F3d 211 [2003] [a party has standing under General Business Law § 349 when its complaint alleges a consumer injury or harm to the public interest, regardless of whether the plaintiff is a consumer]). To state a cause of action under General Business Law § 349, a plaintiff must allege that a defendant engaged in consumer-oriented conduct, that the conduct was materially deceptive or misleading, and that the plaintiff suffered injury as a result of such conduct (*see* ***Stutman v Chemical Bank***, 95 NY2d 24, 29, 709 NYS2d 892 [2000]; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529 [1995]). The court notes that, for the reasons set forth in the related order

issued today, the court has determined that the General Business Law § 349 cause of action alleged by the plaintiff counties is not preempted by the Food Drug and Cosmetic Act (21 USC § 301 et seq.).

For pleading purposes, the claim of consumer-oriented conduct must be premised on allegations of facts sufficient to show that the challenged acts or practices were "directed at the consuming public" (***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 343, 704 NYS2d 177), had a broad impact on consumers at large (***Karlin v IVF Am.***, 93 NY2d 282, 290, 690 NYS2d 495), or was harmful to the general public interest (*see* ***Securitron Magnalock Corp. v Schnabolk***, 65 F3d 256 [SD NY 1995]; ***Azby Brokerage, Inc. v Allstate Ins. Co.***, 681 F Supp 1084, 1089 [SD NY 1988]). The element of pleading consumer-oriented conduct may also be satisfied where the plaintiff alleges facts demonstrating that the deceptive acts were standardized such that "they potentially affect[ed] similarly situated consumers" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 27, 623 NYS2d 529; *see* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***,102 AD3d 5, 14, 953 NYS2d 96 [2d Dept 2012]). Sufficient consumer-oriented conduct has been found where a defendant employed "multimedia dissemination of information to the public" (***Karlin v IVF Am.***, 93 NY2d 282, 293, 690 NYS2d 495), or employed an "extensive marketing scheme" that had a broad impact on consumers (***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 343, 704 NYS2d 177).

With respect to the second element of misleading or deceptive conduct, a plaintiff must allege that the challenged act or practice was "misleading in a material way" (***Stutman v Chemical Bank***, 95 NY2d at 30, 709 NYS2d at 895). "In determining whether a representation or omission is a deceptive act, the test is whether such act is 'likely to mislead a reasonable consumer acting reasonably under the circumstances'"(***Andre Strishak & Assoc. v Hewlett Packard Co.***, 300 AD2d 608, 609, 752 NYS2d 400, 402 [2d Dept 2015], quoting ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d at 26, 623 NYS2d at 533). The statute is aimed at addressing those omissions or misrepresentations "which undermine a consumer's ability to evaluate his or her market options and to make a free and intelligent choice" (***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d at 26, 953 NYS2d at 102). Furthermore, the deceptive representation or omission in question need not arise to the level of common-law fraud to be actionable (*see* ***Gaidon v Guardian Life Ins. Co. of Am.***, 94 NY2d 330, 704 NYS2d 177), and no proof of intent to defraud by the defendant or justifiable reliance by the consumer is required (*see* ***Small v Lorillard Tobacco Co.***, 94 NY2d 43, 698 NYS2d 615 [1999]; ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529). As a result, courts have determined that the strict pleading requirements imposed by CPLR 3016 are inapplicable to a cause of action predicated on General Business Law § 349 (*see* ***Joannou v Blue Ridge Ins. Co.***, 289 AD2d 531, 735 NYS2d 786 [2d Dept 2001]; ***McGill v General Motors Corp.***, 231 AD2d 449, 647 NYS2d 209 [1st Dept 1996]).

As to the third element relating to injury, a plaintiff is required to allege "actual injury," though not necessarily pecuniary harm, that results from a defendant's deceptive act or practice (***City of New York v Smokers-Spirits.Com, Inc.***, 12 NY3d 616, 623, 883 NYS2d 772 [2009]; ***Stutman v Chemical Bank***, 95 NY2d 24, 709 NYS2d 892; ***Small v Lorillard Tobacco Co.***, 94 NY2d 43, 698 NYS2d 615). A plaintiff need not quantify the amount of harm to the public at large or specify consumers who suffered

pecuniary loss due to the defendant's alleged deceptive conduct (*see* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96). While courts have rejected General Business Law § 349 actions predicated on derivative claims that "arise[ ] solely as a result of injuries sustained by another party" (***Blue Cross & Blue Shield of N.J., Inc. v Phillip Morris USA Inc.***, 3 NY3d 200, 206, 785 NYS2d 399; *see* ***City of New York v Smokers-Spirits.Com, Inc.***, 12 NY3d 616, 883 NYS2d 772), they have repeatedly held that a cause of action under the statute has been adequately stated where the plaintiff has alleged that it suffered direct loss of its own as a result of a defendant's deceptive or misleading conduct (*see* ***M.V.B. Collision, Inc. v Allstate Ins. Co.***, 728 F Supp 2d 205, 217-218 [ED NY 2010]; ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96; ***In re Pharm. Indus. Average Wholesale Price Lithog.***, 2007 WL 1051642 [D Mass 2007]). General Business Law § 349 claim by New York City and a number of New York State counties alleging that drug manufacturers deceptively raised their prices on consumers was found to not be derivative in nature where the court found that the plaintiffs, which had an independent duty to pay for medicaid reimbursement costs, were directly harmed in having to overpay for such prescriptions]).

Here, a review of the complaint reveals that plaintiffs pleaded specific conduct by Insys sufficient to meet all of the elements required to state a cognizable claim under section 349 of the General Business Law (*see* ***Karlin v IVF Am.***, 93 NY2d 282, 293, 690 NYS2d 495; ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 953 NYS2d 96; ***Wilner v Allstate Ins. Co.***, 71 AD3d 155, 893 NYS2d 208 [2d Dept 2010]; ***In re Pharm. Indus. Average Wholesale Price Lithog.***, 2007 WL 1051642; *compare* ***Small v Lorillard Tobacco Co.***, *supra*; ***Baron v Pfizer, Inc.***, 94 NY2d 43, 698 NYS2d 615). Significantly, the plaintiffs allege that despite the limited approval by the Food and Drug Administration ("FDA") for the sale of Subsist, a fentanyl sublingual spray, only to treat opioid tolerant cancer patients experiencing breakthrough pain, Insys conducted an extensive and sophisticated public marketing scheme meant to exploit a loophole in the FDA guidelines which permitted physicians to make numerous "off-label" prescription of the drug to treat chronic pain in patients who had neither developed a tolerance to opioid pain killers or who had experienced the same grade of pain as end-stage cancer patients. According to the complaint, Insys' marketing scheme aimed to change the institutional and public perception of the risk-benefit assessment of the utilization of its drug for the treatment of non-cancer related chronic pain and, by doing so, enabling it to market an addictive drug to residents of the counties for uses, and in volumes, that precipitated the opioid epidemic. The complaint describes in detail how Insys engaged in acts and practices which were either directed at the consuming public or had a broad impact on consumers at large, and how such practices were harmful to the overall public interest. In particular, the plaintiffs allege that Insys formed an entity known as the Insys Reimbursement Center ("IRC"), which served as a liaison between the members of the public, their doctors, their insurers, and prescriptions managers, for the purpose of maximizing the volume of Subsist dispensations. According to the complaint, employees of the IRC would do whatever it took, including misrepresenting medical conditions and impersonating patients and doctors, to obviate the practice of prior authorization, whereby insurers or their pharmacy benefit managers assessed the appropriateness of the prescription before authorizing the dispensation of powerful drugs like Subsist.

In addition, the plaintiffs allege that Insys published "education articles" to the public which falsely praised Subsist as non-addictive, and funded public patient advocacy groups which unwittingly promoted the manufacturer's agenda of raising the overall profile of pain to justify the use of powerful opioids like Subsist to treat chronic pain. The plaintiffs allege that Insys simultaneously created a scam "legal speakers program" meant to disseminate information convincing a broad range of physicians – other than oncologists – about the benefits of making off-label Subsist prescriptions to non-cancer patients, and lauding the drug's nonaddictive nature. It is alleged that the speakers program not only sought to leverage the scientific reputation of Insys to the physicians in order to persuade them to make off-label prescriptions, but that the manufacturer, who paid doctors attendance fees, routinely forged attendance sheets and paid bribes to top prescribers. In this way, Insys allegedly deceived consumers, and the doctors to whom they looked for confirmation, into accepting as a new norm the practice of using Subsist as a legitimate option for treating comparatively low-grade chronic pain. Further explaining the deliberate and serious nature of Insys' deceptive marketing scheme, the plaintiffs allege that the manufacturer complimented its external acts and practices with internal strategic maneuvers, such as building an infrastructure to train and assist employees in obtaining prior authorization on behalf of the public and establishing an internal 1-800 reimbursement assistance hotline for those who failed to procure prior authorization.

Moreover, a review of the allegations contained in the complaint reveals the plaintiffs' description of the very type of materially misleading conduct aimed at the public General Business Law § 349 was meant to proscribe; the plaintiffs allege a scheme of practices and conduct meant to undermine the ability of members of the public "to evaluate [their] market options and to make a free and intelligent choice" regarding the use of a powerful and addictive drug (***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 13, 953 NYS2d 96). Insys allegedly accomplished this erosion of free and intelligent choice through a series of misrepresentations and omissions meant not only to change ordinary consumer "perception of the risk-benefit assessment" of using Subsist to treat chronic pain, but by facilitating the dispensation of a drug – known to be up to 50 times stronger and more addictive than heroine – that would likely alter the decision-making apparatus of members of the public who became addicted to opioids. And by discussing an internal compliance review conducted by Insys, the allegations in the complaint reveals the manufacturer's knowledge of the potential legal problems with the content of IRC employees' communications with the public and health care professionals regarding prior authorizations for Subsist. Despite such knowledge, the plaintiffs allege that the IRC staff continued to flout Insys' own internal compliance guidelines so much so that within a year of the compliance review, an IRC employee allegedly misled a pharmacy benefit manager about his or her affiliation to Insys and the diagnosis of a patient requesting dispensation of Subsist.

The allegations contained in the complaint also include numerous examples of direct pecuniary harm sustained by the plaintiff counties. The plaintiffs allege that, as mandated payors of a portion of the state's medicaid expenses, the counties suffered direct financial loss as a result of the explosion of long term and emergency care costs which accompanied the burgeoning opioid epidemic. The complaint also identifies other forms of direct pecuniary harm incurred by the counties that correlate with the growth of the opioid epidemic. The complaint lists, among others, direct financial losses the counties allegedly

incurred in having to increase their expenditures on social services, drug addiction treatment and diversion programs, additional policing and criminal justice costs, as well as expenditures associated with the purchase of Narcan and the implementation of programs to train the public and public personnel in its use. In addition, the allegations in the complaint delineates how the plaintiff counties, which provide both full and partial medical insurance and workers' compensation insurance coverage to their employees, suffered direct harm when they were made to pay the cost of excessive claims for Subsist or other opioid prescriptions made by their employees, who were either deceived or addicted, to the powerful drugs. Affording the plaintiffs the benefit of every possible inference, as the court is required to do when determining a motion to dismiss, the court finds neither of the aforementioned alleged categories of pecuniary harm to be derivative in nature, as such harm was directly incurred by the counties because they bore independent duties, whether as municipalities constitutionally and statutorily mandated to protect the welfare, safety, and public health of their citizens or as self-funded health and workers' compensation insurance providers, to make the expenditures necessary to meet such obligations (*see* ***M.V.B. Collision, Inc. v Allstate Ins. Co.***, 728 F Supp 2d 205; ***In re Pharm. Indus. Average Wholesale Price Lithog.***, 2007 WL 1051642; *compare* ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 785 NYS2d 399; ***Small v Lorillard Tobacco Co.***, 94 NY2d 43, 698 NYS2d 615). Furthermore, unlike insurers or third-party payors who may seek to recover indirect losses via the equitable remedy of subrogation, the plaintiff counties have no other means of seeking compensation for the pecuniary harms they allegedly suffered as a result of Insys' conduct (*compare* ***Blue Cross & Blue Shield of N.J., Inc. v Phillip Morris USA Inc.***, 3 NY3d 200, 785 NYS2d 399).

Finally, the court rejects Insys' arguments that the plaintiff counties will be unable to show causation in connection with their General Business Law § 349 claim because Subsist accounted for approximately .01% of opioids prescribed in New York in the last 10 years, and less than approximately .03% of opioids prescribed in the State since the beginning of 2012. Insys' assertion is erroneous. Causation, in the context of a General Business Law §349 action, merely refers to the link between an alleged deceptive practice and the actual injury sustained by a plaintiff (*see* ***Stutman v Chemical Bank***, 95 NY2d 24, 30, 709 NYS2d 892). Thus, the plaintiffs will be deemed to have adequately pleaded causation where, as here, they have alleged a causal connection between a defendant's deceptive conduct and the actual harm they suffered as a result of such conduct (*see* ***Stutman v Chemical Bank***, 95 NY2d 24,709 NYS2d 892). Indeed, a defendant's harmful conduct need not be repetitive or recurring to come within the purview of the statute (*see* ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD3d 5, 14, 953 NYS2d 96). With regards to Insys' assertion that the complaint lacks specificity as to the number of prescriptions made in the counties or whether Subsist caused harm to any individual or the counties themselves, as noted above, the strict pleading requirements imposed by CPLR 3016 are inapplicable to a cause of action predicated on the violation of General Business Law § 349 (*see* ***Joannou v Blue Ridge Ins. Co.***, 289 AD2d 531, 735 NYS2d 786; ***McGill v General Motors Corp.***, 231 AD2d 449, 647 NYS2d 209). Rather, the pleading requirements will be met where, as in this case, they have set forth the material elements of the cause of action and given the court and the parties involved notice of the series of transactions or occurrences intended to be proved (*see* CPLR 3013; ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94). Furthermore, the court need not address the parties' relative arguments concerning conspiracy or the proposed use of the

"market share theory" to determine the quantum of Insys' liability, as such a discussion is inapposite as to whether the plaintiff counties have met their pleading requirements (*see* ***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 799 NYS2d 170; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314) and is not authorised in the context of a CPLR 3211 (a) (7) motion to dismiss the complaint (*see* ***Salles v Chase Manhattan Bank***, 300 AD2d 226, 754 NYS2d 236; ***E & D Group, LLC v Vialet***, 134 AD3d 981, 21 NYS3d 691).

Accordingly, the motion by defendant Insys Therapeutics, Inc. for an order pursuant to CPLR 3211, dismissing the complaint against it is denied.

Dated: June 18, 2018

Jerry Garguilo
J.S.C.
HON. JERRY GARGUILO