E-FILE

SHORT FORM ORDER INDEX No. 400000/2017

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

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants Beverly Sackler, David A. Sackler, Ilene Sackler Lefcourt, Jonathan D. Sackler, Kathe Sackler, Mortimer D.A. Sackler, Richard S. Sackler and Theresa Sackler (Mot. Seq. #047), dated February 19, 2019, and supporting papers (including Memorandum of Law); (2) Memorandum of Law in Opposition by the plaintiffs (Mot. Seq. #047), dated April 5, 2019, and supporting papers; (3) Reply Affirmation by defendants Beverly Sackler, David A. Sackler, Ilene Sackler Lefcourt, Jonathan D. Sackler, Kathe Sackler, Mortimer D.A. Sackler, Richard S. Sackler and Theresa Sackler (Mot. Seq. #047), dated April 17, 2019, and supporting papers (including Memorandum of Law); (4) Notice of Motion by defendants Beverly Sackler, David A. Sackler, Ilene Sackler Lefcourt, Jonathan D. Sackler, Kathe Sackler, Mortimer D.A. Sackler, Richard S. Sackler and Theresa Sackler (Mot. Seq. #058), dated April 15, 2019, and supporting papers (including Memorandum of Law); (5) Memorandum of Law in Opposition by the plaintiffs (Mot. Seq. #058), dated April 18, 2019, and supporting papers; and (6) Reply Affirmation by defendants Beverly Sackler, David A. Sackler, Ilene Sackler Lefcourt, Jonathan D. Sackler, Kathe Sackler, Mortimer D.A. Sackler, Richard S. Sackler and Theresa Sackler (Mot. Seq. #058), dated April 22, 2019, and supporting papers (including Memorandum of Law); it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Beverly Sackler, David A. Sackler, Ilene Sackler-Lefcourt, Jonathan D. Sackler, Kathe Sackler, Mortimer D.A. Sackler, Richard S. Sackler, and Theresa Sackler for an order pursuant to CPLR 3211 (a) (5), (7), and (8), dismissing as against them the master long form complaint and amended short form complaints filed by each of the above-named plaintiffs except for County of Herkimer, City of New York, County of Lewis, County of Montgomery, County of St. Lawrence, and County of Washington, is denied, with leave to renew that branch of the motion which is pursuant to CPLR 3211 (a) (8) upon completion of jurisdictional discovery; and it is further

ORDERED that the motion by defendants Beverly Sackler, David A. Sackler, Ilene Sackler-Lefcourt, Jonathan D. Sackler, Kathe Sackler, Mortimer D.A. Sackler, Richard S. Sackler, and Theresa Sackler for an order pursuant to CPLR 3211 (a) (5), (7), and (8), dismissing the master long form complaint and amended short form complaints filed by County of Herkimer, City of New York, County of Lewis, County of Montgomery, County of St. Lawrence, and County of Washington, is denied, with leave to renew that branch of the motion which is pursuant to CPLR 3211 (a) (8) upon completion of jurisdictional discovery.

The plaintiffs are counties and cities within the State of New York. The defendants are pharmaceutical manufacturers and distributors, as well as individuals and entities associated with Purdue Pharma L.P., Purdue Pharma, Inc., and The Purdue Frederick Company, Inc. (collectively, Purdue).

By way of this action, the plaintiffs seek to recover damages for harm allegedly caused by false and misleading marketing campaigns promoting opioid medications as safe and effective for long-term treatment of chronic pain, and by the sale and distribution of those medications in such counties and cities. Briefly stated, the plaintiffs allege that tortious and illegal actions by the defendants fueled an opioid crisis within their municipalities, causing them to spend millions of dollars in payments for prescription opioids 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.

In October 2017, the plaintiffs filed their master long form complaint, alleging seven causes of action. The first cause of action alleges deceptive business practices in violation of General Business Law § 349, and the second cause of action alleges false advertising in violation of General Business Law § 350. The third cause of action asserts a common-law public nuisance claim, the fourth cause of action asserts a claim for violation of Social Services Law § 145-b, and the fifth cause of action asserts a claim for fraud. The sixth cause of action is for unjust enrichment, and the seventh cause of action is for negligence.

The plaintiffs have since filed amended short form complaints asserting claims against additional defendants not named in the master long form complaint, together with addenda setting forth factual allegations supporting the claims against those defendants. Among the new defendants named are Beverly Sackler, David A. Sackler, Ilene Sackler Lefcourt, Jonathan D. Sackler, Kathe A. Sackler, Mortimer D.A. Sackler, Richard S. Sackler, and Theresa Sackler (collectively, "the Sacklers"). The plaintiffs allege, at all relevant times, that the Sacklers and those individuals retained by them to represent their interests comprised all the members of the board of directors of Purdue Pharma, Inc., the managing general partner of Purdue Pharma L.P., thereby insuring their control of all Purdue-related entities; that through their beneficial ownership and control of those companies, they implemented the deceptive marketing strategies and misinformation campaigns used to perpetuate the alleged fraud at the heart of this action, with the overriding purpose of enriching themselves through the sale of narcotics; and that they profited to the extent of all the distributions they received from those entities. According to the plaintiffs, Beverly Sackler and Theresa Sackler are each the direct or indirect beneficiary of some portion of 50% of the profits earned by Purdue and its related entities from the sale of opioids, Richard S. Sackler, Jonathan D. Sackler, and David A. Sackler are each the direct or indirect beneficiary of some portion of 25% of the profits, and Mortimer D.A. Sackler, Kathe A. Sackler, and Ilene Sackler Lefcourt are each the direct or indirect beneficiary of 7.14% of the profits. In their amended short form complaints, the plaintiffs expressly adopt as against the Sacklers each of the allegations and causes of action alleged against Purdue and all of the other manufacturer defendants in the master long form complaint.

The Sacklers now move, pre-answer, for an order dismissing the master long form complaint and amended short form complaints (collectively, the complaint). In support of their motions, the Sacklers

claim, principally, that the plaintiffs have failed to allege any personal participation by any of them in the alleged wrongdoing or any conduct that the plaintiffs could not have known about in May 2012 or earlier.

Initially, the court will address the Sacklers' claim that dismissal is warranted for lack of personal jurisdiction (*see* CPLR 3211 [a] [8]). The court notes that the Sacklers' jurisdictional claim does not relate to Mortimer, Ilene, David, who are New York residents, but only to those defendants who are alleged to reside outside of New York (Beverly, Jonathan, Kathe, and Richard) as well as to Theresa, who is alleged to be a New York resident but who the defendants contend is actually a United Kingdom resident of British nationality. Notwithstanding that, and for purposes of the jurisdictional analysis to follow, the court will continue, in the interest of convenience rather than clarity, to refer to the limited group on whose behalf the claim is made as "the Sacklers." The court also notes, parenthetically, that jurisdiction over the Sacklers, all of whom are alleged to have controlled Purdue and its associated companies, does not automatically follow from the fact that those companies have submitted to jurisdiction (*see e.g.* ***SNS Bank v Citibank***, 7 AD3d 352, 777 NYS2d 62 [1st Dept 2004]).

When a motion is made to dismiss an action for lack of personal jurisdiction, it is the plaintiff who bears the burden of proving a basis for such jurisdiction (*e.g.* ***Carrs v Avco Corp.***, 124 AD3d 710, 2 NYS3d 533 [2d Dept 2015]). To withstand such a motion, the plaintiff must make a prima facie showing that the defendant is subject to the personal jurisdiction of the court (*e.g.* ***Jacobs v 201 Stephenson Corp.***, 138 AD3d 693, 30 NYS3d 134 [2d Dept 2016]). The facts alleged in the complaint and affidavits in opposition to the motion are deemed true and considered in the light most favorable to the plaintiff, and all doubts are to be resolved in the plaintiff's favor (***Weitz v Weitz***, 85 AD3d 1153, 926 NYS2d 305 [2011]). The plaintiff may also oppose the motion on the ground that discovery on the issue of personal jurisdiction is necessary (*see* CPLR 3211 [d]), in which case the plaintiff "must come forward with some tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous" (***Mandel v Busch Entertainment Corp.***, 215 AD2d 455, 455, 626 NYS2d 270, 271 [2d Dept 1995]; *see* ***Peterson v Spartan Indus.***, 33 NY2d 463, 354 NYS2d 905 [1974]). Upon such a showing, a court may, in the exercise of its discretion, grant jurisdictional discovery and postpone resolution of the issue (***Goel v Ramachandran***, 111 AD3d 783, 975 NYS2d 428 [2d Dept 2013]).

There are two types of personal jurisdiction which a New York court may exercise: general (CPLR 301) and specific (CPLR 302). The court may exercise general jurisdiction over a defendant only if the defendant is domiciled in New York or, in an exceptional case, where the defendant's contacts with the forum are so extensive as to render the defendant "essentially at home" in the state (***Goodyear Dunlop Tires Operations v Brown***, 564 US 915, 919, 131 S Ct 2846, 2851 [2011]; *accord* ***IMAX Corp. v Essel Group***, 154 AD3d 464, 62 NYS3d 107 [1st Dept 2017]). In situations where a defendant is not sufficiently present in New York such that the court's exercise of general jurisdiction would be appropriate, the court may be able to exercise specific jurisdiction. Under CPLR 302 (a), the court may exercise specific, or long-arm jurisdiction, over a defendant only if the plaintiff's claim arises from one of the listed forms of activity, namely transacting business within the state or contracting anywhere to supply goods or services in the state (para 1), committing a tortious act within the state

(para 2), committing a tortious act outside the state that causes injury within the state (para 3), and owning, using, or possessing real property in the state (para 4). Even if the plaintiff can establish the requisite elements for the exercise of personal jurisdiction under CPLR 302, it must also appear that a finding of personal jurisdiction comports with federal due process.

> First, a defendant must have "minimum contacts" with the forum state such that the defendant "should reasonably anticipate being haled into court there" (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291, 297 [1980]) and, second, the maintenance of the suit against the defendant in New York must comport with "traditional notions of fair play and substantial justice" (*International Shoe Co. v Washington*, 326 US 310, 316 [1945] [internal quotation marks omitted]).

(***Williams v Beemiller, Inc.***, 159 AD3d 148, 156, 72 NYS3d 276, 283 [4th Dept 2018]).

Here, the plaintiffs seek to establish that the Sacklers are subject to the jurisdiction of this court under CPLR 302 (a) (2), alleging that they committed torts in New York on two separate theories: (i) through their agents, the Purdue-related entities over which they exercised ownership and control, and (ii) in furtherance of a conspiracy with those entities. The plaintiffs also rely on CPLR 302 (a) (3), claiming that the Sacklers committed torts outside New York that caused injury. Alternatively, the plaintiffs request that this court hold the motion in abeyance pending the completion of jurisdictional discovery.

CPLR 302 (a) (2) permits a court to exercise long-arm jurisdiction where the plaintiff's cause of action arises from "a tortious act [committed by the defendant or the defendant's agent] within the state." It applies only when the wrongful conduct is performed in New York and traditionally requires the physical presence of the defendant or the defendant's agent in the state at the time the act is performed (*e.g.* ***Longines-Wittnauer Watch Co. v Barnes & Reinecke***, 15 NY2d 443, 261 NYS2d 8, *cert denied sub nom.* ***Estwing Mfg. Co. v Singer***, 382 US 905, 86 S Ct 241 [1965]). It is also generally recognized that the acts of a New York "co-conspirator" may be imputed to a nondomiciliary tortfeasor for jurisdictional purposes under an agency rationale (***Small v Lorillard Tobacco Co.***, 252 AD2d 1, 679 NYS2d 593 [1st Dept 1998], *affd* 94 NY2d 43, 698 NYS2d 615 [1999]; ***Reeves v Phillips***, 54 AD2d 854, 388 NYS2d 294 [1st Dept 1976]). To establish jurisdiction over a nondomiciliary conspirator based on the tortious acts of a New York co-conspirator, a plaintiff must allege, in addition to a prima facie case of civil conspiracy, that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant" (***Lawati v Montague Morgan Slade Ltd.***, 102 AD3d 427, 428, 961 NYS2d 5, 7 [1st Dept 2013]; *accord* ***Chrysler Capital Corp. v Century Power Corp.***, 778 F Supp 1260 [SD NY 1991]). A New York co-conspirator may be regarded as acting under the control or at the behest of a nondomiciliary conspirator if the nondomiciliary "has knowledge of the tortious acts being perpetrated in New York" (***Lawati v Montague Morgan Slade Ltd.***, 102 AD3d at 429, 961 NYS2d at 8). Significantly, however, the conspiracy theory of personal jurisdiction has been called into doubt following the Supreme Court's recent ruling in ***Walden v Fiore*** (571 US 277, 134 S Ct

1115 [2014]) as incompatible with the requirements of due process (*see e.g.* ***In re Dental Supplies Antitrust Litig.***, 2017 WL 4217115, 2017 US Dist LEXIS 153265 [ED NY, Sept. 20, 2017]; ***In re N. Sea Brent Crude Oil Futures Litig.***, 2017 WL 2535731, 2017 US Dist LEXIS 88316 [SD NY 2017, June 8, 2017]).

Pursuant to CPLR 302 (a) (3), a court may exercise jurisdiction over a nondomiciliary who "commits a tortious act without the state causing injury to person or property within the state," and (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." As with paragraph 2, even if the elements of paragraph 3 have been met, it must be shown that the exercise of personal jurisdiction comports with due process; that is, minimum contacts must exist between the nondomiciliary defendant and the forum, and the assertion of jurisdiction must not offend traditional notions of fair play and substantial justice (***LaMarca v Pak-Mor Mfg. Co.***, 95 NY2d 210, 713 NYS2d 304 [2000]; ***Williams v Beemiller, Inc.***, 159 AD3d 148, 72 NYS3d 276).

Based on due process concerns, the court rejects the plaintiffs' attempt to subject the Sacklers to jurisdiction under CPLR 302 (a) (3). "[W]here the conduct that forms the basis for the plaintiff's claims takes place entirely out of forum, and the only relevant jurisdictional contacts with the forum are the harmful effects suffered by the plaintiff, a court must inquire whether the defendant 'expressly aimed' [his] conduct at the forum" (*id.*, quoting ***Charles Schwab Corp. v Bank of Am. Corp.***, 883 F3d 68, 87 [2d Cir 2018]). Although the plaintiffs claim that the Sacklers oversaw (and that some of them actively participated in) the deceptive marketing strategies and misinformation campaigns used to perpetuate the alleged fraud at the heart of this action, they do not claim that its effects in New York were anything but incidental. As it does not appear that the Sacklers expressly aimed their conduct at New York, the mere foreseeability or knowledge that allegedly tortious conduct would injure the plaintiffs in New York does not suffice to support the court's exercise of jurisdiction over them (*see* ***Deutsche Bank AG v Vik***, 163 AD3d 414, 81 NYS3d 18 [1st Dept 2018]).

As to CPLR 302 (a) (2), however, the court deems it appropriate to hold its determination in abeyance pending the completion of jurisdictional discovery. Without addressing the continued viability of conspiracy jurisdiction or its applicability to the Sacklers, the court finds that jurisdiction may exist on the ground that some or all of them acted as Purdue's agents in perpetrating the alleged scheme. Under New York law, the "fiduciary shield" doctrine is not available to defeat long-arm jurisdiction; if a corporation subject to jurisdiction in New York engages in one of the listed forms of activity under CPLR 302, jurisdiction can be imputed to an nondomiciliary individual if the corporation acted as agent for the individual relative to that activity (***Kreutter v McFadden Oil Corp.***, 71 NY2d 460, 527 NYS2d 195 [1988]). A plaintiff "need not establish a formal agency relationship" between the corporation and the individual defendant but need only convince the court that the corporation "engaged in purposeful activities in the State" relating to the litigation "for the benefit of and with the knowledge and consent" of the individual defendant, and that the individual defendant "exercised some control" over the corporation in the matter (*id.* at 467, 527 NYS2d at 199). Stated otherwise, a nondomiciliary officer,

director or employee may be subject to jurisdiction under CPLR 302 if he or she was a "primary actor" in the specific matter in question (*id.* at 470, 527 NYS2d at 201; *accord* ***Karabu Corp. v Gitner***, 16 F Supp 2d 319, 323 [SD NY 1998]). Here, although the court recognizes that the allegations as to certain of the Sacklers are lacking in detail, the plaintiffs have made a sufficient start to warrant discovery on the limited issue of whether any of the Sacklers is a "primary actor." Accordingly, to the extent the Sacklers seek dismissal for lack of personal jurisdiction, their motion is denied without prejudice to renewal upon the completion of disclosure on the issue of personal jurisdiction.

The court next addresses the Sacklers' argument that the complaint is subject to dismissal on statute of limitations grounds (*see* CPLR 3211 [a] [5]). The Sacklers contend that the causes of action alleging violation of General Business Law §§ 349 and 350, public nuisance, violation of Social Services Law § 145-b, unjust enrichment, and negligence are each barred by the three-year statute of limitations set forth in CPLR 214. As to those causes of action, they contend that the relevant filing date for limitation purposes is October 23, 2018—the date on which the plaintiffs initially filed their short form complaints and addenda naming the Sacklers as additional defendants—and that the last alleged "act" on their part occurred in July 2013, more than three years prior to the relevant date. Likewise, absent any allegation of a wrongful act within the limitations period, the Sacklers contend that the plaintiffs cannot seek to extend that period by invoking the "continuous wrong" doctrine. As to the plaintiffs' cause of action for fraud, which is governed by the six-year statute of limitations set forth in CPLR 213, the Sacklers contend that it should be dismissed to the extent it is based on alleged acts and injuries that took place on or after October 23, 2012, and that the two-year discovery rule is inapplicable.

The plaintiffs counter that the relevant filing date for limitations purposes is not October 23, 2018 but August 31, 2016, because the short form complaints and addenda "relate back" to the date on which Suffolk County's original complaint was filed against Purdue. As to the causes of action alleging statutory violations as well as those alleging public nuisance, unjust enrichment, and negligence, the plaintiffs dispute the Sacklers' claim that the short form complaints and addenda do not accuse them of any wrongdoing subsequent to July 2013; in fact, the plaintiffs have pleaded that the wrongdoing continues "each and every year" and "to the present," allowing them to recover for all damages incurred within three years prior to commencement. The plaintiffs also contend, relative to their cause of action for fraud, that any determination as to the applicability of the discovery rule must await the development of a factual record.

Before addressing the merits of the parties' arguments, the court is constrained to remark on a misconception apparently shared by the parties. What is pending in this court is not a single action but a multitude of actions which have been joined for coordination, not consolidated. Consequently, there is no single filing date—not October 23, 2018, not August 31, 2016—for the court to employ in its analysis.

"To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing prima facie that the time in which to sue has expired. Only if such prima facie showing is made will the burden then shift to the plaintiff to aver evidentiary facts establishing that the case falls within an exception to the statute of

limitations. In order to make a prima facie showing, the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (***Swift v New York Med. Coll.***, 25 AD3d 686, 687, 808 NYS2d 731, 732-733 [2d Dept 2006] [internal citations and quotation marks omitted]; *accord* ***Pace v Raisman & Assoc., Esqs., LLP***, 95 AD3d 1185, 945 NYS2d 118 [2d Dept 2012]).

"In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief" (***Gaidon v Guardian Life Ins. Co. of Am.***, 96 NY2d 201, 210, 727 NYS2d 30, 35 [2001]). While a claim for breach of contract accrues on the date of the breach, irrespective of the plaintiff's awareness of the breach (***Ely-Cruikshank Co. v Bank of Montreal***, 81 NY2d 399, 599 NYS2d 501 [1993]), a tort claim accrues only when it becomes enforceable, that is, when all the elements of the tort can be truthfully alleged in the complaint (***Kronos, Inc. v AVX Corp.***, 81 NY2d 90, 595 NYS2d 931 [1993]). When damage is an essential element of the tort, the claim is not enforceable until damages are sustained (*id.*). In an action to recover for a liability created or imposed by statute, the statutory language determines the elements of the claim which must exist before the action accrues (***Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 214, 652 NYS2d 584 [1996]).

For many of the same reasons cited in its June 18, 2018 order determining the manufacturer defendants' motions to dismiss (NYSCEF Doc. No. 454 at 14-16), the court finds the Sacklers' arguments insufficient to warrant dismissal on statute of limitations grounds.

Even if, as the Sacklers allege, the pleadings reference no conduct on their part after July 2013, it has not been shown that the plaintiffs' causes of action are untimely. Although, as noted in the June 18, 2018 order, injury is an essential element of the causes of action for deceptive acts and practices pursuant to General Business Law § 349, false advertising pursuant to General Business Law § 350, fraud, and negligence, the Sacklers failed to identify any relevant date of injury—rather, they contend only that the acts on which those causes of action are based did not take place within applicable limitations periods—and, therefore, failed to establish when any of those causes of action accrued. Consequently, it cannot be said at this juncture that any of those causes of action is untimely, although the plaintiffs may recover monetary damages only to the extent that they were sustained within the applicable limitations period immediately preceding the commencement of each action (*see* ***State of New York v Schenectady Chems.***, 103 AD2d 33, 479 NYS2d 1010 [3d Dept 1984]; ***Kearney v Atlantic Cement Co.***, 33 AD2d 848, 306 NYS2d 45 [3d Dept 1969]). As to the cause of action for public nuisance, the court notes that the plaintiffs have alleged a continuing wrong, perpetrated by all the defendants, involving deceptive marketing practices that began over a decade ago and that have continued up to the time of commencement of this action. The rule with respect to nuisance or other continuing wrongs is that the action accrues anew on each day of the wrong, so that the right to maintain the cause of action continues as long as the nuisance exists (***Airco Alloys Div. v Niagara Mohawk Power Corp.***, 76 AD2d 68, 430 NYS2d 179 [4th Dept 1980]; 17A Carmody-Wait 2d § 107:95). That such a nuisance may have existed for more than three years, then, does not bar the cause of action; as before, however, the court notes that damages are recoverable only to the extent they were sustained during the three years prior to the commencement of each action (CPLR 214; ***State of New York v***

Schenectady Chems., 103 AD2d 33, 479 NYS2d 1010; ***Kearney v Atlantic Cement Co.***, 33 AD2d 848, 306 NYS2d 45). Whether, as the Sacklers contend, the "continuous wrong" doctrine may ultimately be found inapplicable to these lawsuits is beyond the narrow scope of inquiry permitted on a motion to dismiss. The Sacklers have likewise failed to demonstrate that the causes of action alleging violation of Social Services Law § 145-b and unjust enrichment are untimely. While the court has already noted, in its June 18 order, that the three-year limitations period applicable to those causes of action began to run upon the occurrence of the alleged misconduct and that the plaintiffs may recover damages only to the extent they arise from misconduct occurring more than three years prior to commencement, here the plaintiffs have pleaded that the subject misconduct continued up to the time each action was commenced.

Parenthetically, to the extent the parties dispute whether the "relation back" doctrine (*see* CPLR 203 [b], [f]; ***LeBlanc v Skinner***, 103 AD3d 202, 955 NYS2d 391 [2d Dept 2012]) may operate to save what the Sacklers refer to as the plaintiffs' "stale claims," the court notes that it need not reach the issue at this time. Only when a defendant has demonstrated that the statute of limitations has expired does the burden shift to the plaintiff to establish the applicability of the doctrine (***Monir v Khandakar***, 30 AD3d 487, 818 NYS2d 224 [2d Dept 2006]; ***Austin v Interfaith Med. Ctr.***, 264 AD2d 702, 694 NYS2d 730 [2d Dept 1999]). The court also notes that the doctrine would apply, if at all, only to those actions in which the Sacklers were added as defendants, not to any actions in which they were originally named as defendants.

In rejecting the Sacklers' arguments relative to the statute of limitations, the court does not reach the question of whether any cause of action is subject to either the discovery rule for actions based on fraud (CPLR 203 [g]; 213 [8]) or the doctrine of equitable estoppel.

The court will now proceed to address the Sacklers' request to dismiss the complaint for failure to state a cause of action. In support of their request, the Sacklers contend, in part, that they cannot be held vicariously liable based on acts attributable to the board of directors as a whole, or on the alleged tortious conduct of any other defendant, but only if any of them personally participated in the wrongdoing; it is their position that the plaintiffs failed to sufficiently plead that any of them participated in making the alleged misstatements complained of, or that any of them acted in concert with any non-Purdue defendant or third party.

What the plaintiffs *have* pleaded, in relevant part, is that the Sacklers, as controlling directors of Purdue Pharma, Inc., knew of, allowed, directed, and oversaw

- Purdue's marketing, including their use of sales representatives to actively misrepresent the risks, benefits, and addictive qualities of its opioids and to promote their use for chronic pain unrelated to surgery, cancer or palliative care, despite their awareness of contradictory research;

- Purdue's hiring of high-prescribing doctors to promote their opioids, to push patients to higher doses for longer periods of time, and to steer them away from

safer alternatives;

- Purdue's targeting of prescribers who lacked special training in opioids and of elderly patients; and

- Purdue's efforts to resist initiatives by public health authorities to save lives threatened by their various strategies, despite numerous reports that patients were being harmed.

The plaintiffs also plead that the Sacklers knowingly aided, abetted, participated in, and benefitted from the wrongdoing of Purdue alleged in the master long form complaint.

Under New York law—and the Sacklers have neither suggested nor shown that the law of any other state applies—a director may be held individually liable for a corporate tort if he or she participated in its commission or else directed, controlled, approved or ratified the decision that led to the plaintiff's injury; this is so regardless of whether he or she acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced (***Stinner v Epstein***, 162 AD3d 819, 79 NYS3d 212 [2d Dept 2018]; ***Fletcher v Dakota, Inc.***, 99 AD3d 43, 948 NYS2d 263 [1st Dept 2012]; ***Peguero v 601 Realty Corp.***, 58 AD3d 556, 873 NYS2d 17 [1st Dept 2009]; ***Espinosa v Rand***, 24 AD3d 102, 806 NYS2d 186 [1st Dept 2005]). There is no "safe harbor from judicial inquiry for directors who are alleged to have engaged in conduct not protected by the business judgment rule" (***Fletcher v Dakota, Inc.***, 99 AD3d at 49, 948 NYS2d at 267).

As the court previously determined that the master long form complaint was adequately pleaded against Purdue, and since the plaintiffs have now adequately pleaded that the Sacklers, through their control of Purdue and ratification of its conduct, participated in the commission of the torts alleged, the court finds the pleadings sufficient to state a claim for individual liability.

The Sacklers' further claim that the plaintiffs have failed to adequately allege a causal link between the Sacklers' "personal" activities and the plaintiffs' damages—a claim similarly premised on the argument that none of the Sacklers is alleged to have made or participated in making the misstatements which the plaintiffs claim to have caused their loss—is rejected for the same reasons. Also notable is that the court, in its June 18, 2018 order, found the allegations of proximate cause in the master long form complaint relative to the causes of action for public nuisance and negligence sufficient to withstand the manufacturer defendants' respective motions to dismiss (NYSCEF Doc. No. 454 at 27-28, 34-35).

As for the Sacklers' claims of legal insufficiency, the court will address each cause of action separately, except insofar as they reiterate their argument that the causes of action alleging violation of General Business Law §§ 349 and 350, public nuisance, and fraud are insufficient for failure to set forth facts demonstrating that any of them personally participated in the conduct at issue, an argument which is again rejected for the reasons discussed above.

Regarding the causes of action alleging violation of General Business Law §§ 349 and 350, the Sacklers argue that the plaintiffs cannot recover on a theory of indirect economic harm, *i.e.*, loss arising solely as a result of injuries sustained by another party. The court finds this argument unpersuasive. In fact, the court rejected the same argument in its June 18, 2018 order, noting that the plaintiffs were not simply seeking to recoup medical and drug costs incurred by their employees and Medicaid beneficiaries, but that they had adequately alleged direct injury in the form of payment for prescriptions that were not medically necessary and would not have approved but for the manufacturer defendants' deceptive conduct, as well as allocation of resources to reduce opioid abuse and opioid-related crime and to combat opioid addiction and overdoses (NYSCEF Doc. No. 454 at 24-26; *see* ***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 746 NYS2d 858 [2002]; ***North State Autobahn, Inc. v Progressive Ins. Group Co.***, 102 AD2d 5, 953 NYS2d 96 [2d Dept 2012]; *see also* ***In re Pharm. Indus. Average Wholesale Price Litig.***, 2007 WL 1051642, 2007 US Dist LEXIS 26242 [D Mass, Apr. 2, 2007]; *cf.* ***Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.***, 3 NY3d 200, 785 NYS2d 399 [2004]; ***Stutman v Chemical Bank***, 95 NY2d 24, 709 NYS2d 892 [2000]).

The Sacklers argue that the cause of action alleging public nuisance fails because nuisance relates only to interests in land, and cannot be based on the sale of consumer products such as FDA-approved prescription drugs. That argument is likewise rejected. A public nuisance does not necessarily relate to land, but is an unreasonable interference with a public right (Restatement [Second] of Torts § 821B). It "is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency. It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons" (***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 568, 394 NYS2d 169, 172 [1977] [citations omitted]). Like the manufacturer defendants previously, the Sacklers have failed to establish why public health is not a right common to the general public, nor why such continuing, deceptive conduct as alleged would not amount to interference; it can scarcely be disputed, moreover, that the conduct at the heart of this litigation, alleged to have created or contributed to a crisis of epidemic proportions, has affected "a considerable number of persons" (***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d at 568, 394 NYS2d at 172). And even if, as the Sacklers contend, nuisance claims predicated on the sale of consumer products have been rarely upheld—indeed, the Court of Appeals has expressed a general reluctance to "open the courthouse doors to a flood of limitless, similar theories of public nuisance" in matters involving commercial activity (***People v Sturm, Ruger & Co.***, 309 AD2d 91, 96, 761 NYS2d 192, 196 [1st Dept], *lv denied* 100 NY2d 514, 769 NYS2d 200 [2003])—here the court remains open to the possibility that public nuisance may be an appropriate tool to address the consequential harm from the defendants' concerted efforts to market and promote their products for sale and distribution, particularly as such efforts are alleged to have created or contributed to a crisis of epidemic proportions (*see* NYSCEF Doc. No. 454 at 27-28).

The Sacklers further claim that the cause of action for violation of Social Services Law § 145-b fails to plead facts establishing that any of them made a false statement or representation to the plaintiffs in an attempt to obtain payment from public funds, or that any of them personally obtained such payment. For the reasons that follow, the court is constrained to disagree.

Social Services Law § 145-b states that "[i]t shall be unlawful for any person, firm or corporation knowingly by means of false statement or representation, or by deliberate concealment of any material fact, or other fraudulent scheme or device, on behalf of himself or others, to attempt to obtain or to obtain payment from public funds for services or supplies furnished or purportedly furnished" under the Social Services Law. A "statement or representation" includes, but is not limited to

> a claim for payment submitted to the State, a political subdivision of the state, or an entity performing services under contract to the state or a political subdivision of the state; an acknowledgment, certification, claim, ratification or report of data which serves as the basis for a claim or a rate of payment[;] financial information whether in a cost report or otherwise[;] health care services available or rendered[;] and the qualifications of a person that is or has rendered health care services.

(Social Services Law § 145-b [1] [b]; *see generally* ***State of New York v Lutheran Ctr. for the Aging***, 957 F Supp 393 [ED NY 1997]). A person, firm or corporation "has attempted to obtain or has obtained" payment from public funds "when any portion of the funds from which payment was attempted or obtained are public funds, or any public funds are used to reimburse or make prospective payment to an entity from which payment was attempted or obtained" (Social Services Law § 145-b [1] [c]). The statute vests the local social services district or the State the right to recover civil damages for Medicaid and Medicare fraud equal to "three times the amount by which any figure is falsely overstated or in the case of non-monetary false statements or representations, three times the amount of damages which the state, political subdivision of the state, or entity performing services under contract to the state or political subdivision of the state sustain as a result of the violation or five thousand dollars, whichever is greater" (Social Services Law § 145-b [2]).

Contrary to the Sacklers' claim, it cannot be said that the plaintiffs failed to plead a "false statement or representation." While the Sacklers correctly note that a "statement or representation" within the definition of the statute may include a "claim for payment" or an "acknowledgment, certification, claim, ratification or report of data" which serves as the basis for such a claim, the statute does not exclude, by its terms, statements and representations which are just that—statements and representations—and the Sacklers do not explain why the allegedly false statements and representations underlying the plaintiffs' other causes of action based in fraud and deceit would not serve to support this cause of action as well. Nor is there any statutory requirement that the plaintiffs plead facts showing that the defendants obtained or attempted to obtain public funds directly from the plaintiffs. Under subdivision (1) (a), it is unlawful for a person to fraudulently obtain or attempt to obtain public funds, whether "on behalf of himself or others"; under subdivision (1) (c), a person has obtained or attempted to obtain public funds when such funds "are used to reimburse or make prospective payment to an entity from which payment was obtained or attempted." If, then, a defendant indirectly receives public funds by making a fraudulent statement to assist a Medicaid provider in procuring such funds, such conduct would seem to fall within the ambit of the statute (*cf.* ***In re Pharm. Indus. Average Wholesale Price Litig.***, 339 F Supp 2d 165 [D Mass 2004]). Even if ***People v Pharmacia Corp.*** (2004 WL 5841904,

2004 NY Misc LEXIS 3325 [Sup Ct, Albany County, June 1, 2004]), cited by the Sacklers, may be to the contrary—and this court is not persuaded that it is—it suffices to note at this juncture that a decision of a court of equal jurisdiction, though entitled to respectful consideration, is not controlling (McKinney's Cons Laws of NY, Book 1, Statutes § 72 [b]). Whether, then, the plaintiffs may have failed to identify specifically any "claim for payment" made to a county is immaterial for purposes of this determination.

The Sacklers contend that the cause of action for fraud is deficient in that it fails to plead that any of them made any particular misrepresentation, and because it is not and cannot be alleged that the plaintiffs relied on any such statements. The court disagrees on both counts.

CPLR 3013 requires, in pertinent part, only that statements in a pleading "be sufficiently particular to give the court and parties notice" of the transactions and occurrences to be proved. Even CPLR 3016 (b), which provides that the circumstances constituting the wrong "be stated in detail," requires "only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of" (***Lanzi v Brooks***, 43 NY2d 778, 780, 402 NYS2d 384, 385 [1977]; *see also* ***Mandarin Trading Ltd. v Wildenstein***, 16 NY3d 173, 919 NYS2d 465 [2011]; ***Mikulski v Battaglia***, 112 AD3d 1355, 977 NYS2d 839 [4th Dept 2013]). "Necessarily, then, [the mandate of CPLR] 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (***Pludeman v Northern Leasing Sys., Inc.***, 10 NY3d 486, 492, 860 NYS2d 422, 425 [2008]). And even in fraud, a plaintiff is not required to allege specific details of an individual defendant's participation where those details are peculiarly within the defendant's knowledge (*id.*; ***Jered Contr. Co. v New York City Tr. Auth.***, 22 NY2d 187, 292 NYS2d 98 [1968]).

Here, the plaintiffs allege that the Sacklers, acting in concert with their co-defendants, purposefully misrepresented that opioids improve function and quality of life, that addiction risks can be managed, that withdrawal is easily managed, and that higher doses of opioids pose no greater risks to patients, and deceptively downplayed or omitted material information concerning the adverse effects of opioids while overstating the risks of NSAIDs (nonsteroidal anti-inflammatory drugs). The plaintiffs also allege that the defendants' "misrepresentations were material to, and influenced, plaintiffs' decisions to pay claims for opioids for chronic pain" and, therefore, "to bear [the] consequential costs [of] treating overdose, addiction, and other side effects of opioid use." The court finds such allegations sufficient to satisfy the relevant pleading requirements. Notably, an alleged fraudulent misrepresentation need not be made directly to a plaintiff, and a defendant will be held liable to any person who is intended to rely on it and who does so rely to his or her detriment (*see* ***John Blair Communications v Reliance Capital Group***, 157 AD2d 490, 549 NYS2d 678 [1st Dept 1990]; *cf.* ***Pasternack v Laboratory Corp. of Am. Holdings***, 27 NY3d 817, 37 NYS3d 750 [2016]).

As to the cause of action for unjust enrichment, the Sacklers contend that the parties lack a direct commercial relationship to support such a cause of action, and that it is not pleaded that any purported benefit to the Sacklers was received at the plaintiffs' expense. Again, the court disagrees. As for the relationship between and among the parties, the plaintiffs allege, in relevant part, that the Sacklers, in concert with their co-defendants, created a body of false and misleading literature intended to shape the

perceptions of third-party payors such as the plaintiffs, encouraging them to pay for long-term opioid prescriptions and effectively depriving them of the chance to exercise informed judgment; implicit in those allegations is that the Sacklers knew the plaintiffs were to be the source of a significant portion of their profits. Accepting those facts as true and according the plaintiffs the benefit of every favorable inference (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]), it is evident that the plaintiffs have pleaded a relationship—or "at least an awareness" by the Sacklers of the plaintiffs' existence (***Mandarin Trading v Wildenstein***, 16 NY3d at 182, 919 NYS2d at 472)—sufficient to maintain their cause of action. As for the receipt of benefits, it is adequately pleaded that the Sacklers profited from opioid sales, that such profit was wrongfully obtained and, therefore, that it would be unjust and inequitable to permit them to enrich themselves at the plaintiffs' expense. Unlike ***Levin v Kitsis*** (82 AD3d 1051, 920 NYS2d 131 [2d Dept 2011]), cited by the Sacklers, in which an equity owner was alleged to have received only indirect benefits arising from the fraudulent assignment of a mortgage to her corporation, here it is alleged that the Sacklers were personally enriched to the detriment of the plaintiffs (*cf.* ***Norex Petroleum Ltd. v Blavatnik*** (48 Misc 3d 1226[A], 22 NYS3d 138 [Sup Ct, New York County 2015], *affd* 151 AD3d 647, 59 NYS3d 11 [1st Dept], *lv denied* 30 NY3d 906, 70 NYS3d 446 [2017]).

Finally, as to the cause of action for negligence, the Sacklers contend that it must be dismissed because they owe no legally cognizable duty to the plaintiffs. To the extent they argue that the plaintiffs cannot recover in negligence on a theory of indirect economic harm, that argument is rejected for the same reasons discussed above in the court's analysis regarding the legal sufficiency of the causes of action alleging violation of General Business Law §§ 349 and 350.

The court finds the negligence cause of action to be sufficiently pled. In its June 18, 2018 order, the court determined, in accordance with the analysis below, that the plaintiffs had adequate pleaded facts sufficient to support the existence of a duty of care on the part of the manufacturer defendants—an analysis equally applicable to the individuals alleged to have controlled Purdue and its associated companies.

> "A critical consideration in determining whether a duty exists is whether 'the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm'" (***Davis v South Nassau Communities Hosp.***, 26 NY3d 563, 572, 26 NYS2d 231 [2015], quoting ***Hamilton v Beretta U.S.A. Corp.***, 96 NY2d 222, 233, 727 NYS2d 7 [2001]). Unlike ***Hamilton***, where the Court of Appeals found that gun manufacturers were not in the best position to protect against the risk of harm from the misuse of its product by third parties, here the plaintiffs allege facts sufficient to support the existence of a duty of care. Specifically, the plaintiffs allege that because the manufacturer defendants had knowledge of the actual risks and benefits of their products, including their addictive nature, which they did not disclose, they were in the best position to protect the plaintiffs against the expenses incurred for opioids prescribed for their employees and for Medicaid beneficiaries that would not have been approved for payment, and against the extraordinary amounts expended to combat the opioid crisis allegedly caused by the deceptive marketing campaigns.

> Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public polices affecting the expansion or limitation of new channels of liability" (***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 586, 611 NYS2d 817, 821 [1994]; *see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]). In balancing these factors, the plaintiffs have adequately pled that their expectations and those of society would require different behaviors on the part of the manufacturer defendants, that there is a finite number of counties in the State of New York with potential claims against said defendants, that the allegedly negligent acts and omissions of said defendants do not create unlimited liability, that the risks allegedly created by said defendants do not disproportionally outweigh the possible reparations to be awarded herein, and that public policy must address the issues raised in the complaint.

(NYSCEF Doc. No. 454 at 33-34).

Accordingly, the court finds the complaint sufficient to withstand dismissal at this juncture. The court notes that it has considered the "supplemental authority" filed by the Sacklers on May 29, 2019—subsequent to the return date of their motions—and finds it unpersuasive.

The Sacklers shall serve their answer(s) to the complaint within 10 days after the date on which this order is uploaded on the NYSCEF site (*see* CPLR 3211 [f]).

Dated: June 21, 2019

J.S.C.
HON. JERRY GARGUILO