INDIANA COMMERCIAL COURT

STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D01-1811-PL-045447

FILED
August 12, 2019
Myla A. Eldridge
CLERK OF THE COURT
MARION COUNTY
RB

STATE OF INDIANA,	)
	)
Plaintiff,	)
	)
v.	)
	)
PURDUE PHARMA L.P., PURDUE PHARMA, INC., and THE PURDUE FREDRICK COMPANY, INC.,	)
	)
Defendants.	)

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants', Purdue Pharma L.P., Purdue Pharma, Inc., and The Purdue Fredrick Company, Inc. (collectively "Purdue"), Motion to Dismiss Plaintiff's, State of Indiana ("State"), Complaint. Purdue filed a Brief in Support of its Motion to Dismiss on February 22, 2019. In response, State filed a Brief in Opposition to Defendants' Motion on April 22, 2019. Following State's response, Purdue filed an Amended Reply in Support of its Motion to Dismiss on May 21, 2019. On July 1, 2019, Purdue filed a Notice of Supplemental Authority. On July 3, 2019, State filed a Notice of Supplemental Authority. A hearing on this matter was held on July 12, 2019. On July 22, 2019, State filed a Response to Purdue's Supplemental Submission.

The State's Complaint for Damages alleges six counts:

- Count One: Violations of the Indiana Deceptive Consumer Sales Act ("DCSA")
- Count Two: Knowing Violations of The Deceptive Consumer Sales Act
- Count Three: Incurable Deceptive Acts
- Count Four: Violations of The Prescription Drug Discount and Benefit Cards Statute, Ind. Code § 24-5-21, et seq.
- Count Five: False Claims in Violation of the Indiana False Claims Act ("IFCA"), Ind. Code § 5-11-5.5, et seq.
- Count Six: False Claims in Violation of the Indiana Medicaid False Claims Act ("IMFCA"), Ind. Code § 5-11-5.7, et seq.

Having been fully briefed on the issues set forth in this matter, the Court finds now as follows:

I. GENERAL FACTS AS ALLEGED

A. The parties

1. The Attorney General of Indiana is charged with the responsibility of enforcing the State laws at issue, including the DCSA and all regulations promulgated thereunder, as well as the FCA and the MFCA. The Attorney General has standing on behalf of the State as *parens patriae* to protect the health and well-being, both physical and economic, of its residents and its municipalities. (Complaint, ¶ 43).

2. Defendant Purdue Pharma L.P. is a Delaware limited partnership. Defendant Purdue Pharma Inc. is a New York corporation that is the general partner of Purdue Pharma L.P. Defendant The Purdue Frederick Company is a New York corporation. Defendants operate as an integrated enterprise with its principal place of business at One Stamford Forum, 201 Tresser Boulevard, Stamford, Connecticut 06901. (Complaint, ¶ 44).

3. Purdue manufactures, promotes, and sells the opioids OxyContin, Butrans, and Hysingla ER, as well as MS Contin, Dilaudid, and Dilaudid HP in the United States and

Indiana. OxyContin is Purdue's best-selling opioid. Purdue has generated sales estimated at more than $35 billion since it launched OxyContin in 1996. (Complaint, ¶ 45).

B. Background on the opioid epidemic

4. The opioid epidemic is a recognized public health crisis of resulting from the abuse of prescription drugs across the United States. (Complaint, ¶ 5).

5. The opioid crisis in Indiana has claimed thousands of lives and damaged countless more. (Complaint, ¶¶ 6-7).

C. Purdue's alleged culpability of the opioid epidemic

6. The State alleges that Purdue bears significant responsibility for the opioid crisis in Indiana because it promoted widespread overprescribing through a deceptive and misleading marketing campaign, specifically downplaying the addictive potential of opioids and overstating their benefits in treating chronic pain. (Complaint, ¶ 12).

7. The State claims that Purdue's campaign of deception was to change the long-standing medical consensus and public perception that opioids were dangerous, addictive drugs. (Complaint, ¶ 13).

8. The State alleges that prescription opioids like OxyContin, Butrans, and Hysingla—manufactured and marketed by Purdue—are narcotics, closely related to heroin and its root ingredient, opium. (Complaint, ¶ 14).

9. The State claims that Purdue co-opted aspects of an otherwise appropriate and compassionate patient-centered care model to engage in a campaign of deception and concealment that promoted opioids as safer, more effective, and more appropriate than alternatives (like Tylenol and Advil) for long-term use to treat routine and moderate pain

associated with common conditions like back pain, migraines, and arthritis. (Complaint, ¶ 17).

10. The State also claims that Purdue has spent hundreds of millions of dollars on an array of promotional efforts that falsely denied or deceptively minimized the risk of addiction and overstated the benefits of opioids. (Complaint, ¶ 18).

11. In 2007, Purdue and three of its executives pleaded guilty to federal criminal charges for deceptive conduct in the sale and marketing of opioids, and Purdue took the plea and paid $635 million to resolve federal and state government enforcement actions ("the 2007 Settlements"). The State alleges that to this day, Purdue has failed to correct—and in fact built upon and continued to profit from—its prior deceptions and the foundation of misunderstanding the company created. (Complaint, ¶¶ 20-21).

12. The State claims that Purdue's deceptive marketing to Indiana health care providers, patients, and the general public falsely and misleadingly mispresented the risks and benefits of opioids. (Complaint, ¶¶ 22, 23).

13. The State alleges that Purdue has known that its longstanding and ongoing misrepresentations of the risks and benefits of opioids are unsupported by (and, in some cases, directly contrary to) the scientific evidence. (Complaint, ¶ 24).

i. In-person visits with healthcare providers

14. In particular, Purdue spent a substantial amount of its marketing resources on directing its sales personnel, known as "detailers," to make frequent visits with health care providers. (Complaint, ¶¶ 53, 56, 58).

15. By one measure, Purdue directed its sales representatives to make 7.5 in-person sales visits to prescribers, two to three in-person sales visits to pharmacies, and one in-person sales visit to a hospital or other institutional target each day. (Complaint, ¶ 57).

16. Purdue's internal documents show that its sales representatives detailed at least 5,502 different Indiana prescribers between 2010 and 2017, and that these prescribers were visited by Purdue sales representatives in excess of 207,640 times. (Complaint, ¶ 58).

17. Most of these prescribers were visited regularly and repeatedly—according to one former Purdue sales representative in Indiana; offices housing multiple prescribers, including nurse practitioners and physician assistants, were visited weekly. On average, Purdue's sales force in Indiana made a total of more than 22,000 prescriber visits per year. (Complaint, ¶ 58).

18. In 2012, at the peak of opioid prescribing, Purdue's highest achieving sales representative—nationwide—worked in Indiana. This detailer, who was assigned to the Fort Wayne area, was ranked No. 1 out of all 525 sales representatives in the country based on sales of OxyContin and Butrans. (Complaint, ¶ 60).

19. A key sales strategy was to persuade prescribers to convert patients from other, non-opioid pain relievers to the lowest dose of OxyContin, without discussing that the dose would need to be increased over time. Indiana sales representatives used the patient vignette of Sam, an elderly patient on non-steroidal anti-inflammatory drugs ("NSAIDs") to gain a prescriber's commitment to convert patients from nonopioid medications to the lowest dose of OxyContin. (Complaint, ¶ 128).

ii. Purdue's alleged marketing efforts toward elderly and vulnerable

20. The State also claims that Purdue has engaged in unfair and abusive practices by targeting untapped patient populations—the elderly and the opioid-naïve—to create and capture a new market of long-term customers. (Complaint, ¶ 26).

21. Training materials and sales goals for Purdue's sales representatives, as well as Indiana detailer call notes and sales manager "ride-along" reports from 2011 through 2014, include multiple references to Purdue's efforts to persuade doctors to start prescribing OxyContin and Purdue's other ER/LA opioids to elderly patients. As one former Indiana sales representative stated, Purdue encouraged its representatives to remind all Indiana prescribers that OxyContin was covered for Medicare part D patients: "[the elderly was] an approved ... patient population to go after." (Complaint, ¶ 178).

22. Call notes from Indiana also show that detailers told prescribers that OxyContin was "safe in the elderly" while simultaneously reminding them of all OxyContin dosage levels available. Managers evaluating the performance of sales representatives in Indiana noted favorably when sales representatives "Bridged to Oxycontin and asked for those med d pts [Medicare part D patients]." (Complaint, ¶ 178).

23. When Indiana sales representatives were confronted by a reluctant prescriber, they were trained to promote (and did, in fact, promote) 10mg and 15mg OxyContin to allay the prescriber's concerns. As one Indiana detailer recorded in her call notes, "Shared the Oxycontin med D grid and asked for consideration for 65+ patients with chronic pain. Discussed Nursing home patients too. Noel said she shy [sic] away from C2 products. But she likes the idea of Oxycontin lower doses with Q12h control." (Complaint, ¶ 180).

24. Purdue's targeting of elderly patients overlapped with Purdue's broad marketing push to persuade doctors to prescribe OxyContin and Butrans to opioid-naïve patients—even when faced with reluctant practitioners. For example, an October 2012 sales representative training bulletin provided suggested questions for prescribers designed to elicit their commitment to converting opioid-naïve patients to OxyContin. Manager ride-along notes from detailing visits made in Indiana during 2014 reflect Purdue's focus on expanding prescriptions through the conversion of opioid-naïve patients to OxyContin. One manager praised a sales representative for getting a prescriber to try Butrans for a particular patient after challenging the prescriber with: "when was the last time you initiated a new start for an opioid?" Another manager praised his detailer in 2012 when he "positioned Butrans for the opioid naïve," and obtained the Indiana doctor's prescribing "commitment for these types of patients." (Complaint, ¶ 182).

iii. Purdue's prescription discount cards

25. The State further claims that Purdue offered savings cards (a/k/a prescription discount cards) to encourage long-term opioid use by creating low-cost or free trial periods for OxyContin, Butrans, and Hysingla. (Complaint, ¶ 26).

26. Purdue used Savings Cards to encourage new patients to try its opioids, by making the drugs significantly cheaper. In a 2012 sales training presentation, Purdue described its rationale for subsidizing a $0 (i.e., free) Butrans copayment through Savings Cards for new patients: that a Savings Card was "effectively acting as a sample." (Complaint, ¶ 191).

27. Purdue marketed, promoted, advertised, or distributed Savings Cards to Indiana prescribers and pharmacies for use by Indiana patients, who could present the cards at participating pharmacies for discounts on out-of-pocket pharmacy costs. Detailers met with prescribers and pharmacists and advised them to inform their opioid patients / customers about available discounts that would reduce the out-of-pocket price. (Complaint, ¶ 192).

28. In the 2007 Settlements, Purdue expressly agreed to stop distributing samples of OxyContin. Indiana, moreover, strictly regulates the distribution of free narcotic samples. Nonetheless, Purdue used the promotion of Savings Cards to eliminate or steeply discount patient co-payments—effectively making these drugs free (or very inexpensive) to patients—as a way to drive long-term use. (Complaint, ¶ 194).

iv. Medicaid payments of claims for opioid prescriptions

29. Indiana has incurred significant costs due to the payment of false claims for chronic opioid therapy under the State's (a) Medicaid programs; (b) Employee Health Plans; and (c) Workers' Compensation Program. The State has also been damaged by the payment of additional claims for drugs and medical services to treat conditions and injuries caused by chronic opioid use. (Complaint, ¶ 224).

30. The State provides comprehensive health care benefits—including prescription drug coverage—to low- and moderate-income residents through its Medicaid programs. Approximately 1.44 million Indiana residents are enrolled in these programs, which are administered through four managed care entities: Anthem, MDwise, MHS, and CareSource ("Medicaid Contractors"). The State pays the Medicaid Contractors a

capitated rate—per beneficiary, per month—to provide the services covered under the IHCP (Complaint, ¶ 225).

31. Coverage under each of the above State-funded programs includes opioids, when prescribed by a doctor as medically necessary, as well as office visits for pain management (including toxicology screens), and treatments related to any adverse outcomes from chronic opioid therapy (such as overdose or addiction). (Complaint, ¶ 235).

32. Purdue undertook a systematic marketing campaign to encourage prescribers to use opioids as the first line of treatment for chronic pain. In doing so, Purdue caused prescribers and pharmacies to submit, and the State to pay, claims to the State's Medicaid program, Employee Health Plans, and Workers' Compensation Program that were false. (Complaint, ¶ 236).

33. The State would not have knowingly reimbursed claims for prescription drugs that were not eligible for coverage. (Complaint, ¶ 238).

34. During the years 2012-2018, the State paid substantial funds for prescription opioids: more than $100 million for opioids covered through Medicaid; more than $8 million for opioids covered by State employee insurance programs, and workers' compensation for State employees. (Complaint, ¶ 239).

35. Purdue's misrepresentations were material to and influenced the State's decisions to pay claims for opioids for chronic pain and, subsequently, to bear consequential costs in treating overdose, addiction, and other side effects. (Complaint, ¶ 242).

v. Purdue's alleged concealment of their potential culpability

36. The State alleges that Purdue has profited immensely from its deceptive marketing campaign, at the expense of Indiana and its citizens, on whom Purdue's misconduct has imposed catastrophic harm. (Complaint, ¶¶ 21, 27, 36, 39, 40).

37. The State claims that Purdue attempts to conceal its culpability in causing the opioid crisis by portraying itself as a responsible, compassionate corporate citizen by falsely depicting the opioid epidemic as a problem of illicit drug diversion and abuse. The State further claims that, in fact, Purdue's misrepresentations have led to vast overprescribing and addiction. (Complaint, ¶¶ 32, 34, 66, 195, 249)

38. The State alleges that Purdue has known all along that many of its marketing messages were, at best, misleading and, at worst, not supported by good evidence. Yet, Purdue continues to deny its responsibility. (Complaint, ¶¶ 51 37).

39. The State contends that Purdue's conduct is illegal in Indiana and violates the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5 et seq. (DCSA); the Indiana False Claims Act, Ind. Code § 5-11-5.5 et seq. (FCA); and the Indiana Medicaid False Claims Act, Ind. Code § 5-11-5.7 (MFCA). (Complaint, ¶ 41).

II. MOTION TO DISMISS STANDARD

A motion to dismiss under Trial Rule 12(B)(6) tests the legal sufficiency of a complaint; specifically, "whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief." *Veolia Water Indianapolis, LLC v. Nat 'l Trust Ins. Co.*, 3 N.E.3d 1, 4 (Ind. 2014). Thus, the sufficiency of the facts alleged in the complaint are tested "with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred." *Trail v. Boys and Girls Clubs of Northwest Ind.*, 845 N.E.2d 130, 134 (Ind. 2006). "When ruling

on a T.R. 12(B)(6) motion, the court should consider all of the allegations in the complaint to be true." *Watson v. Auto Advisors, Inc.*, 822 N.E.2d 1017, 1023 (Ind. Ct. App. 2005). And, if "the complaint states a set of facts that, even if true, that would not support the relief requested therein," the Court should dismiss the complaint. *Id.* Motions to dismiss under Trial Rule 12(B)(6) are disfavored "because such motions undermine the policy of deciding causes of action on their merits." *Wertz v. Asset Acceptance, LLC*, 5 N.E.3d 1175, 1178 (Ind. Ct. App. 2014) (citations omitted).

III. DISCUSSION

A. Counts arising under the Indiana Deceptive Consumer Sales Act

Claims I-III of the State's Complaint against Purdue related to the Indiana Deceptive Consumer Sales Act (DCSA). *See* Ind. Code § 24-5-0.5, *et seq.* The DCSA prevents suppliers of products from engaging in "unfair, abusive, or deceptive act[s], omission[s], or practice[s]" in connections with a consumer transaction. Ind. Code § 24-5-0.5-3(a).

i. Whether the State's claims should be dismissed under the DCSA's Safe Harbor Provisions

Purdue argues that the Deceptive Consumer Sales Act ("DCSA") does not apply because FDA regulations permit it to promote its medications consistent with the FDA-approved labeling. In support of its argument, Purdue relies on the language of the Indiana Code and *Koehlinger v. State Lottery Comm'n of Indiana* to say that, the DCSA does not apply to "an act or practice ... required or expressly permitted by federal law, rule or regulation ... [or] state law, rule, regulation, or local ordinance." ("Safe-Harbor provision") Ind. Code § 24-5-0.5-6; 933 N.E.2d 534, 541-42 (Ind. Ct. App. 2010). Purdue alleges that the practices the State claims were improper were all consistent with FDA

regulations and the FDA-approved product labeling. Purdue further relies on *Koehlinger* which, Purdue alleges, affirmed summary judgment because the State Lottery Commission's promotion of scratch-off-games, while not "required," was an "activity expressly permitted" by Indiana statute. 933 N.E.2d at 542. Purdue also relies on *Anderson v. Gulf Stream Coach, Inc.*, in which the Seventh Circuit Court of Appeals held, as alleged by Purdue, that acts permitted by the Federal Trade Commission fall squarely within the DCSA exemption, but acts deemed noncompliant with its regulations may be subject to liability under the DCSA. 662 F.3d 775, 788 (7th Cir. 2011). Purdue argues that the State cannot state a claim under the DCSA, for FDA regulations expressly permit Purdue to promote its products in a manner consistent with the FDA-approved labeling.

In response, the State argues that Purdue's "safe-harbor provision" argument fails for two reasons: first, the specific deceptive statements and activities that form the basis of the State's allegations were never approved by the FDA, and second, the safe-harbor provision does not categorically exempt all conduct of a regulated actor, like Purdue, from the DCSA. The State claims that absent clear legislative intent to exempt an act or practice, the Court should follow an interpretation of the DCSA's scope in favor of coverage. The State argues that the DCSA is to be "liberally construed and applied to promote its purposes and policies, [which] are to: (1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices; (2) protect consumers from suppliers who commit deceptive and unconscionable sales acts; and (3) encourage the development of fair consumer sales practices." Ind. Code § 24-5-0.5-1. The State also argues that Purdue cannot persuasively argue that FDA approval of a

drug or its label creates an exemption for any drug marketing as such a conclusion would be contrary to the purposes of the DCSA and to the principles of Indiana statutory construction, which require that statutes be construed to "prevent absurdity or a result the legislature, as a reasonable body, could not have intended." *Chavis v. Patton*, 683 N.E.2d 253, 258 (Ind. Ct. App. 1997).

The State goes on to distinguish *Koehlinger* and argue in favor of *Anderson*. The State points out that in *Koehlinger*, although the court affirmed—after concluding that the promotional activity of the State Lottery Commission was permitted by statute, the court did not include in its analysis the type of allegation presented here: that the defendant engaged in deceptive conduct that was not authorized by law. 933 N.E.2d at 543. The State also points out that in *Anderson*, the court held Section 6 inapplicable unless the conduct complained of was expressly permitted, and opined that holding otherwise would result in consequences that the FTC did not intend. 662 F.3d at 788. The State concludes that the deceptive marketing statements alleged in the Complaint were either not approved by the FDA or inconsistent with the FDA-approved label, and is thus consistent with the court's reasoning in *Anderson*. Therefore, Purdue can be held liable for those misrepresentations under the DCSA.

In return, Purdue claims that the State tries to avoid the preclusive effect of the DCSA safe-harbor provision in two ways. First, Purdue alleges that in an attempt to avoid the safe-harbor provision, the State redefines its claims. Purdue argues that, now, the State's case is limited to marketing. Purdue claims that at a minimum, the State has abandoned any claim based on branded promotional materials, and any claim based on promotion of opioids to treat chronic pain. Purdue alleges that the only remaining claims

relate to unbranded materials and in-person visits to physicians. Purdue argues that even these remaining allegations fail to state a claim.

Second, Purdue argues that the State ignores the clear language and holding in the only Indiana case cited by either party—*Koehlinger*. Purdue points out that in *Koehlinger*, the Indiana Code permitted the Lottery Commission to "promote and advertise the lottery," and therefore the Court did not need to examine further whether the allegedly misleading advertisement was contrary to law. 933 N.E.2d at 541-42. Because the lottery promotion was an "activity expressly permitted by [the] Indiana Code," the conduct was within the safe harbor and the DCSA did not apply. *Id.* at 542. Purdue claims that the State instead reaches outside Indiana, to a 7th Circuit case that involved the much different allegation that the applicable federal regulations did not permit a manufacturer to identify a Tourmaster RV as a "2009 model" when in fact the Tourmaster at issue was completed during the 2008 production cycle and shared the characteristics of the 2008 model. *Anderson*, 662 F.3d at 777. Purdue concludes that *Anderson* is not analogous to the case at hand, and thus should not be applied to this case.

According to *McKinney v. State*, "[t]he Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-1 et seq., provides remedies to consumers and the attorney general for practices that the General Assembly deemed deceptive in consumer transactions." 693 N.E.2d 65, 67 (Ind. 1998). "The language and structure of the Indiana Deceptive Consumer Sales Act does not require intent as an element of every deceptive act. The stated purpose of the Act is to protect consumers from suppliers who commit deceptive and unconscionable sales acts and to encourage the development of

fair consumer sales practices." *Id.* at 68. Indiana Code § 24-5-0.5-1 specifically states that, "[t]he purposes and policies of the DCSA are to: (1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices; (2) protect consumers from suppliers who commit deceptive and unconscionable sales acts; and (3) encourage the development of fair consumer sales practices." The Indiana Code further explains that "[t]his chapter does not apply to an act or practice that is: (1) required or expressly permitted by federal law, rule, or regulation; or (2) required or expressly permitted by state law, rule, regulation, or local ordinance. Ind. Code § 24-5-0.5-6.

In the *Koehlinger* case, the Court found (on summary judgment) that promoting and advertising the lottery was an activity expressly permitted by the Indiana Code, and thus was immune from the DCSA. Although the case at hand makes arguments regarding an Indiana statute and the DCSA, as in *Koehlinger*, the case at hand is about the marketing of opioid medications (not advertising the lottery), and is at the motion to dismiss stage (not the summary judgment stage-which has a different standard). *Anderson* is a federal summary judgment case. The case at hand is a state motion to dismiss case which is applying a different standard than *Anderson*. The Court finds it unnecessary to address whether *Anderson* favors Purdue or the State's arguments more. The Court acknowledges that the allegations at issue contain numerous questions of fact in which the Court is not able to determine at the motion to dismiss stage. Based on the arguments, this Court finds that there is a set of circumstances or facts which may entitle the Plaintiff to relief that being that the DCSA applies and thus the safe-harbor provision would not apply. In order to make this determination, the Court

would require additional designated evidence. The Court, therefore, finds it improper to dismiss this claim at the motion to dismiss stage.

The Court hereby DENIES Defendants Motion to Dismiss with respect to the DCSA and Safe-Harbor provision argument.

ii. Whether the State may seek disgorgement damages under the DCSA

In addition, Purdue has also asked the Court to find that the State cannot seek relief in the form of disgorgement of Purdue's profits under the DCSA.

Purdue alleges that the State cannot receive disgorgement damages for two primary reasons. First, the DCSA does not explicitly provide for disgorgement as a remedy within the language of the statute. Without the explicit statutory authorization, Purdue argues that the State is left with only the remedies specifically enumerated in the DCSA. Second, the State cannot seek disgorgement through the remedy of restitution because the State does not account among the consumers who "actually suffered...as a result of the deceptive act." Ind. Code § 24-5-0.5-4(c). The State was not the actual consumer allegedly deceived into purchasing Purdue's products pursuant to the DCSA and thus cannot seek restitution because the State was not subject to the resulting harm. Purdue contends that the State's request for disgorgement damages is improper because the State seeks to recover damages for itself and not on behalf of consumers as permitted by statute.

The State defends its right to seek disgorgement damages by challenging Purdue's reading of the DCSA. With respect to the lack of a specific reference to disgorgement, the State argues that the Court is still permitted to exercise its inherent authority to fashion damage awards to carry out the effect of Indiana laws even when

the specific statute is silent a particular remedy. See Ind. Code § 33-28-1-5; *Atkins v. Niermeier*, 671 N.E.2d 155, 157 (Ind. Ct. App. 1996) (citations omitted). As long as the DCSA does not explicitly restrict the State from seeking disgorgement damages, then the Court would still have the authority to award disgorgement upon finding that Purdue violated the DCSA. Additionally, the DCSA does permit the Court to award an injunction resulting from violations of the DCSA. The State contends that the Court may follow the statute's language on injunctions and award disgorgement damages under Ind. Code § 24-5-0.5-4(c)(1). The State highlights the Federal Trade Commission Act (FTCA), 15 U.S.C. § 41 et seq., which has injunctive relief language similar to DCSA. Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts —have ruled that disgorgement is available under the injunctive relief provision of the FTCA, despite the statute's silence on that specific form of relief. See, e.g., FTC v. Bronson Partners, LLC, 654 F. 3d 359, 365 (2d Cir. 2011). Based on the absence of any statutory language limiting disgorgement and the explicitly listed remedy of injunctive relief, the State argues that the Court has the authority to award disgorgement damages and that Purdue's Motion should be denied.

The Court agrees with the State and finds that it may award disgorgement damages under the DCSA. The Court is vested with the authority to issue judgments intended to carry out the intent of statutes, and the DCSA permits the Court to award damage related to earnings from any deceptive consumer sales that violate the Act.

In addition to the reasons listed by the State, the Court disagrees with Purdue's interpretation of Ind. Code § 24-5-0.5-4(c)(2). The Court reads this provision to mean that the Attorney General may bring a suit under the DCSA and seek to recover any

money unlawfully received from the deceptive sales, i.e. profits, to be held on behalf of those harmed by the deceptive sales. Here, the statute explicitly authorizes the Attorney General to bring an action seeking Purdue's profits from any deceptive acts related to consumer transactions, which is what the State has alleged in its Complaint. As acting on behalf of the people of Indiana, any disgorgement award issued to the State necessarily will be held for disbursal to the harmed consumers, i.e. the people of Indiana. Whether the State is entitled to these damages or can tie any profits to the alleged deceptive sales remains to be seen, but for the purposes of this motion, the Court must find that the State can proceed with its claim for disgorgement damages.

The Court hereby DENIES Defendant's Motion to Dismiss the State's claim for the remedy of disgorgement for Counts I-III related to violations of the DCSA.

B. Statute of Limitations & Prescription Drug Discount Card Statute

Purdue draws attention to the fact that, "[t]he DCSA has an occurrence-based statute of limitations, which means that the statutory period commences to run at the occurrence of the deceptive act." *State v. Classic Pool & Patio, Inc.*, 777 N.E.2d 1162, 1165 (Ind. Ct. App. 2002) (citing Ind. Code § 24–5–0.5–5(b)). Purdue argues that the majority of the DCSA claims are untimely, because they were brought more than two years after the occurrence of the deceptive act. Purdue also argues that Count IV is time barred because a claim for violation of the Prescription Drug Discount Card Statute "must be brought within two years after the date on which the violation ...occurred." Ind. Code § 24-5-21-7(d). Purdue claims that the State does not allege any facts to suggest any purported violations occurred in the two years prior to November 11, 2018. Purdue points to the fact that the Complaint included photographs of the savings cards that

allegedly violate the Prescription Drug Discount Card Statute. Purdue argues that those photos show the OxyContin card expired on 3/31/2015 and the Butrans card expired on 3/31/2016, and thus are not actionable.

In response, the State claims that it entered an agreement with Purdue setting December 23, 2016 as the tolling date, making the statutory period, absent tolling, December 2014 through the present. The State also claims that Purdue actively hid its continued illegal conduct from the State, and that absent investigation, the State could not have discovered the facts that form the basis of its claims. The State alleges that the Indiana General Assembly has codified the common-law doctrine of fraudulent concealment in Indiana Code § 34-11-5-1, which states, "[i]f a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action." The State notes that the Indiana Supreme Court held that, "if the legislature intends to create a time limitation that will not be tolled by fraud, it must do so expressly. . . . [C]ourts should presume fraud will toll any time period, be it a statute of limitation or condition precedent, and the burden is on the tortfeasor to demonstrate contrary legislative intent." *Alldredge v. Good Samaritan Home, Inc.*, 9 N.E.3d 1257, 1263–64 (Ind. 2014). The State alleges that Purdue has not offered any such evidence of legislative intent. In further support of its argument, the State cites to *Mitchell v. Collagen Corp.* which found that the company's fraudulent concealment tolled the running of the DCSA until the plaintiff learned of Collagen's responsibility for her injuries. 870 F. Supp. 885, 888 (N.D. Ind. 1994). The State argues, with respect to the photos in the Complaint that show the OxyContin card expired 3/31/2015 and the

Butrans card expired 3/31/2016, that both dates on the cards are after December 23, 2014, and are thus within the limitations period, even absent any tolling under the doctrine of fraudulent concealment. Lastly the State cites to *Lyons v. Richmond Cmty. Sch. Corp.* in concluding that disputes over fraudulent concealment are questions of fact, which cannot be resolved on a motion to dismiss, and thus must survive the motion to dismiss stage. 19 N.E.3d 254, 262 (Ind. 2014).

In turn, Purdue argues that the limited tolling agreement does not save many of the State's claims. Purdue claims that the agreement—and subsequent extension—only tolled the statute of limitations from December 23, 2016 (the effective date) through December 23, 2018 (the expiration date), a period of two years. Purdue acknowledges that alleged conduct that occurred prior to December 23, 2014 is not actionable. Purdue also argues that the equitable doctrine of fraudulent concealment does not apply to the State's claims. Purdue alleges that to invoke the doctrine, "plaintiffs must establish that the concealment or fraud was 'of such character as to prevent inquiry, or to elude investigation, or to mislead' the plaintiff claiming the cause of action." *Doe v. Shults-Lewis Child & Family Servs., Inc.*, 718 N.E.2d 738, 747 (Ind. 1999). Purdue further alleges that, "Indiana law narrowly defines concealment," and the "concealment must be active and intentional; passive silence is insufficient." *Tolen v. A.H. Robins Co., Inc.*, 570 F. Supp. 1146, 1151 (ND. Ind. 1983). Purdue argues that the State pleaded no facts to demonstrate that the alleged misrepresentations made by Purdue sales representatives to Indiana physicians were somehow fraudulently concealed from the State. Purdue claims that the State misreads *Lyons* to stand for the proposition that fraud-based claims may never be disposed of on a motion to dismiss as long as the

plaintiff asserts the doctrine of fraudulent concealment. Purdue argues that *Lyons* does not establish that bright-line rule. Lastly, with respect to the Prescription Drug Discount Statute, Purdue argues that regardless of the expiration date on the face of the prescription savings cards, the State has not pleaded that any of Purdue's prescription savings cards were actually distributed or used in Indiana within the statute of limitations period (or at all).

According to Indiana Code § 24-5-0.5-5, "[a]ny action brought under [the DCSA] may not be brought more than two (2) years after the occurrence of the deceptive act. Also, pursuant to Indiana Code § 24-5-21-7, "[a]ll actions brought under [the Prescription Drug Discount Card chapter] must be brought within two (2) years after the date on which the violation of this chapter occurred." According to the Chapter 5 Tolling of Statute of Limitations: Concealment, "[i]f a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action." Ind. Code § 34-11-5-1. The Indiana Supreme Court has stated that, "[f]raudulent concealment is an equitable doctrine that operates to estop a defendant from asserting the statute of limitations as a bar to a claim whenever the defendant, by his own actions, prevents the plaintiff from obtaining the knowledge necessary to pursue a claim." *Doe*, 718 N.E.2d at 744-45 (Ind. 1999) (quoting *Fager v. Hundt*, 610 N.E.2d 246, 251 (Ind. 1993)). "In such cases, equity will toll the commencement of the applicable time limitation until such time as the plaintiff discovers, or in the exercise of ordinary diligence should discover, the existence of the cause of action." *Lyons*, 19 N.E.3d at 260. "The plaintiff then has a reasonable amount of time after that date to file his complaint."

Alldredge, 9 N.E.3d at 1261. Our Supreme Court has further stated that, "[t]he application of the fraudulent concealment doctrine is a question of equity, but it may depend upon questions of fact, which are properly answered by the fact-finder. Mixed questions of law and fact are best handled through carefully drafted jury instructions." *Lyons*, 19 N.E.3d at 262.

The State cited to *Lyons* in its response to say that disputes over fraudulent concealment are questions of fact, which cannot be solved on a motion to dismiss, and thus must survive the motion to dismiss stage. Purdue claimed that the State misread this statement in *Lyons*. This Court understood *Lyons* to say that, "[t]he application of the fraudulent concealment doctrine is a question of equity, but it may depend upon questions of fact, which are properly answered by the fact-finder." *Id. Lyons* goes on to say, "[m]ixed questions of law and fact are best handled through carefully drafted jury instructions." *Id.* The State's restatement of *Lyons* is not completely accurate, however, it does appear to come to the same conclusion as this Court. The Court notes that in order to make a decision regarding the statute of limitations argument, the Court would first have to determine whether fraudulent concealment has occurred. The Court acknowledges that the fraudulent concealment allegation is a question of fact in which, based on the language in *Lyons*, the Court is not able to determine at the motion to dismiss stage. Again, based on the arguments, this Court finds that there is a set of circumstances or facts which may entitle the Plaintiff to relief that being that there was fraudulent concealment and thus the statute of limitations did not begin to run until the State discovered the fraudulent concealment. In order to make this determination, the

Court would require additional designated evidence. The Court, therefore, finds it improper to dismiss this claim at the motion to dismiss stage.

The Court hereby DENIES Defendants Motion to Dismiss with respect to the statute of limitations argument.

C. Violation of the IFCA or IMFCA

i. Language of the statute

Under the Indiana False Claims Act (IFCA), a person is liable if they "(1) presented a false claim to the State for payment; (2) made or used a false record or statement to obtain payment; or (3) caused or induced another to make a false claim." Ind. Code § 5-11-5.5-2(b). Additionally, a party is liable under the Indiana Medicaid False Claims Act (IMFCA) if they "(1) presented or caused to be presented a false or fraudulent claim; (2) made or used a false record that is material to a false or fraudulent claim; or (3) caused or induced another to make a false claim." Ind. Code § 5-11-5.7-2(a). The State has alleged counts under both statutes arising from the State's fraudulently induced reimbursement of medically unnecessary Medicaid resulting from Purdue's marketing efforts.

ii. Whether the State has pleaded its IFCA/ IMFCA claims with particularity

Purdue has asked the Court to dismiss both counts on several bases. First, Purdue argues that the State has failed to plead a cause of action under either of these statutes with sufficient particularity. Claims under the IFCA and IMFCA sound in fraud and thus are subject to a heightened pleading standard under Ind. Trial Rule 9. *State ex rel. Harmeyer v. Kroger Co.,* 114 N.E.3d 488, 492 (Ind. Ct. App. 2018); *United States v. Wagoner*, 2:17-CV-478-TLS, 2018 WL 4539819, at *4 (N.D. Ind. 2018). Purdue

contends that the State has failed to provide a particular instance of Purdue engaging in any fraudulent activity that caused a healthcare provider to determine that OxyContin or other Purdue opioid treatment was medically necessary. Purdue also argues that the State has pleaded no facts showing that the State relied on any alleged misrepresentations by Purdue when deciding to reimburse Medicaid claims for opioid treatments. Finally, to the extent the Complaint contains allegations relevant to the IFCA or IMFCA, there are none of the necessary specifics to satisfy the heightened particularity requirements for a fraud-based claim. Instead, Purdue characterizes the State's complaint as relying wholly on conclusory statements about Purdue's allegedly deceptive messaging and frequent visits to healthcare professionals to satisfy the pleading requirements, but such claims are contradicted. Purdue notes that by the State's own administrative rules, reimbursement for opioid prescriptions could not occur unless they prescriptions were medically necessary. 405 IAC 5-2-17 ("For a service to be reimbursable by the office, it must: (1) be medically necessary, as determined by the office,..."). By the State's own admission then, the approved Medicaid reimbursements for OxyContin and other Purdue opioids were all "medically necessary."

In response, the State contends that Purdue has mischaracterized both its argument and its burden at this stage. The State argues that its claim goes beyond the thousands of individual claims submitted to Medicaid and instead concerns Purdue's overall efforts in aggressively marketing OxyContin to healthcare professionals over the course of several years that led to the filing of false claims. Citing both Indiana and persuasive federal authority, the State argues that its burden on the Complaint need only allege "what the representations were, who made them, [and] or when or where

they were made," *McKinney v. State*, 693 N.E.2d 65, 73 (Ind. 1998), and does not need "to plead the specifics with respect to each and every instance of fraudulent conduct." *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. 318, 333 (D. Conn. 2004). The pleading requirement can be met by "alleg[ing] particular details of a scheme to submit false claims," *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 156–58 (3rd Cir. 2014), by "provid[ing] some representative examples of [Defendant's] alleged fraudulent conduct." See, e.g., *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) (emphasis in original).

Rather than including each and every instance of alleged fraudulent contact, the State argues that it included sufficient representative examples. The State has provided allegations that Purdue knowingly misrepresented risks of its opioids, reached out to thousands of prescribers with its alleged deceptive practices that resulted in additional, unnecessary prescriptions of opioids for pain management—particularly among the most vulnerable—, and foresaw or should have foreseen that false claims for reimbursement would be submitted to the State for payment. For these allegations, the State provided representative examples of Purdue's impact on directing healthcare providers to prescribe medically unnecessary opioids that resulted in Medicaid claims. The State also challenges Purdue's reliance on the Indiana Administrative Code and instead notes that the substantial allegations should be weighted to find against dismissal at this stage of proceedings.

Based on the standards in Indiana Trial Rule 12(B)(6), the Court finds that the State has adequately pleaded claims for violations of the IFCA and IMFCA sufficient to satisfy the heightened pleading standards under Ind. Trial Rule 9. The Court agrees

with the State that allegations of a years-long scheme involving potentially hundreds of thousands of individual bad actions need not all be contained in the Complaint. The Court finds that the Ind. Trial Rule 9 pleading standards are satisfied as long as the State alleged facts about Purdue's overall scheme supplemented with some illustrative representative examples. The State adequately outlines the scheme by which its bases its claims under the IFCA and IMFCA and includes specific representative examples that do contain the who, what, where, and how necessary to sustain a fraud-based claim. (*See* Complaint, ¶ 238).

Purdue challenges that sufficiency of the details of the allegations, but the Court finds that the State has included enough specifics such as the allegations involving the marketing representatives and Purdue's self-interest work with certain non-profits to facilitate increases sales of its opioids. The Court is satisfied that the State's Complaint adequately meets the standards of the Indiana Trial Rules and finds Count V and Count VI to be pleaded sufficiently to survive a motion to Dismiss.

iii. Whether Purdue can seek dismissal of the IFCA/IMFCA claims for lack of proximate cause

Finally, Purdue has argued that the State's claims under the IFCA/ IMFCA act should be dismissed because the Complaint fails to adequately plead how Purdue could be the proximate cause of the State's injuries.

In Indiana, proximate cause is found where the plaintiff's injury is "the natural and probable consequence of the [defendant's] act and should have been reasonably foreseen and anticipated in light of the circumstances." *See Hassan v. Begley*, 836 N.E.2d 303, 308 (Ind. Ct. App. 2005); *Straley v. Kimberly*, 687 N.E.2d 360, 364–65 (Ind. Ct. App. 1997). Whereas determining legal duty is a question of law, proximate cause is

a question of fact, *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 389 (Ind. 2016), and thus rarely appropriate to be resolved on a motion to dismiss under Ind. Trial Rule 12(B)(6).

Purdue argues that prescribers serve as the intervening cause that truly lead to the false claims because they were the ones who actually saw patients, wrote prescriptions, and filed claims for reimbursement from Medicaid. Regardless of what its representatives are said to have done, Purdue contends that the ultimate liability should be placed on those directly responsible for ultimately shepherding the false claims to the State and not Purdue.

The State again points to its allegations to show that there is at least a possibility of recovery for the State under these claims. The State contends that Purdue was substantially involved in the increased marketing and pressure that ultimately created an environment where healthcare professionals were pressured into prescribing medically unnecessary opioid treatments, and that involvement at the very least creates a possibility that Purdue is the proximate cause of the increase in unnecessary opioid treatments. As detailed in the Complaint, Purdue's sales force made over 207,000 visits to Indiana physicians and provided misrepresentations about opioids for the purposes of pressuring healthcare providers to prescribe those opioids.

The Court finds the State to be correct and holds the Complaint adequately pleads that Purdue may be a proximate cause of the damages related to the surge in false claims related to opioid prescriptions filed with Indiana's Medicaid program. The State's case presents a possibility that the prescriptions increases were the result of Purdue's marketing efforts within the State. Purdue had a substantial presence in the

State and made frequent visits to healthcare professions over the recent years. At the same time, there has been a spike in the number of opioid prescriptions that has since levelled. While Purdue may eventually show that intervening forces are actually responsible for the increase in prescription, the Court must resolve differences in favor of the non-moving party this matter, which is the State, and find that the issue of proximate cause for the State's IFCA/ IMFCA claims will have to be determined at a later stage in this litigation.

IV. ORDER

The Court hereby DENIES Defendants' Motion to Dismiss Plaintiff's Complaint in its entirety.

SO ORDERED, ADJUDGED, AND DECREED this 12th day of August, 2019.

Heather A. Welch

Hon. Heather A. Welch
Judge, Marion Superior Court
Marion County Commercial Court

Distribution:

Eric Riegner (Atty. No. 14057-49)
Jenai Brackett (Atty. No. 30025-49)
FROST BROWN TODD LLC
201 North Illinois Street, Suite 1900
P.O. Box 44961
Indianapolis, IN 46244-0961
Telephone: (317) 237-3821
eriegner@fbtlaw.com
jbrackett@fbtlaw.com

Lori Hammond (Atty No. 5021-95-TA)
FROST BROWN TODD LLC
400 West Market Street, Suite 3200
Louisville, Kentucky 40202
Telephone: (502) 589-5400
Fax: (502) 581-1087
lhammond@fbtlaw.com

Sheila L. Birnbaum
Mark S. Cheffo
Hayden A. Coleman
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, NY 1036
Tel. (212) 698-3500
Fax: (212) 698-3599
Sheila.Birnbaum@dechert.com
Mark.Cheffo@dechert.com
Hayden.Coleman@dechert.com

Will W. Sachse
DECHERT LLP
Cira Centre 2929 Arch Street
Philadelphia, PA 19104
Telephone: (215) 994-4000
Fax: (215) 994-2222
Will.Sachse@dechert.com

Carolyn G. Anderson
June P. Hoidal
ZIMMERMAN REESE LLP
1100 IDS Center, 80 South 8th Street
Minneapolis, MN 55402
carolyn.anderson@zimmreed.com
june.hoidal@zimmreed.com

Betsy A. Miller
Victoria S. Nugent
Maya Sequeira
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW, Fifth Floor
Washington, DC 20005
bmiller@cohenmilstein.com

vnugent@cohenmilstein.com
msequeira@cohenmilstein.com

Betsy M. DeNardi
Corinne Gilchrist
Scott Barnhart
Cory C. Voight
Amanda Lee Gallagher
OFFICE OF INDIANA ATTORNEY GENERAL
CURTIS HILL
302 West Washington Street
IGCS -5th Floor
Indianapolis, IN 46204
Betsy.DeNardi@atg.in.gov
Corinne.Gilchrist@atg.in.gov
Scott.Barnhart@atg.in.gov
Cory.Voight@atg.in.gov
Amanda.Lee@atg.in.gov