DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: December 12, 2018 1:52 PM FILING ID: 18671609EFB1C CASE NUMBER: 2018CV33300
THE STATE OF COLORADO *ex rel.* CYNTHIA H. COFFMAN, ATTORNEY GENERAL, Plaintiff, v. PURDUE PHARMA, L.P., et al. Defendants.	▲ **COURT USE ONLY** ▲
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OPPOSITION OF THE STATE OF COLORADO TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, The State of Colorado *ex rel* Cynthia H Coffman ("the State"), submits the following Opposition to Defendants' Motion to Dismiss dated November 5, 2018 ("Purdue's Motion").[1]

INTRODUCTION

Purdue's Motion should be denied because:

- The State's assertions that Purdue engaged in deceptive marketing practices are not preempted by federal law, and are not exempt under the Colorado Consumer Protection Act's "safe harbor" provision;
- The State has sufficiently pled causation for all of its claims and for its request for restitution; and
- Purdue's Motion presents facts outside the Complaint that are not appropriate for consideration on a motion to dismiss.

Purdue's Motion should be denied because all of the arguments for dismissal are premised upon an incorrect portrayal of the State's claims. The Complaint is replete with factual allegations upon which the State bases its claims that Purdue used misleading marketing practices to flood Colorado with highly-addictive opioid drugs, causing and continuing the opioid crisis, and ultimately claiming the lives of thousands of Coloradans and costing the State valuable resources. *See, e.g.,* Compl. ¶¶ 4-13, 142-220, 260-74.

[1] Defendants, Purdue Pharma LP and Purdue Pharma, Inc., are collectively referred to herein as "Purdue."

Contrary to Purdue's assertions, the State's claims arise from, and seek relief for, a host of deceptive marketing practices beyond simply promoting opioids as a treatment for chronic pain. *See, e.g.,* Compl. ¶¶ 142-213, 260-74. Purdue's deceptive practices include minimizing the risk of prescription opioid addiction, overstating the efficacy of opioid treatment for long-term pain, and concocting a fake syndrome called "pseudoaddicition." *See, e.g.,* Compl.¶¶ 9, 142-62, 179-201.

APPLICABLE LEGAL STANDARD

Motions to dismiss brought under C.R.C.P. 12(b)(5), for failure to state a claim upon which relief can be granted, are viewed with disfavor. *Titan Indem. Co. v. Travelers Property Cas. Co. of America*, 181 P.3d 303, 306 (Colo. App. 2007). "A complaint should not be dismissed for failure to state a claim so long as the claimant is entitled to some relief upon any theory of the law." *Colorado Ins. Guar. Ass'n v. Menor*, 166 P.3d 205, 212 (Colo. App. 2007).

In addressing a motion to dismiss for failure to state a claim, every factual allegation in plaintiff's complaint is to be accepted as true, and the facts are viewed in the light most favorable to the plaintiff. *City & Cnty. of Denver v. Dennis*, 418 P.3d 489, 494 n.4 (Colo. 2018). The complaint should be liberally construed and all doubts resolved in favor of the plaintiff. *Hemmann Mgmt. Servs. v. Mediacell, Inc.*, 176 P.3d 856, 859 (Colo. App. 2007).

"[W]hen reviewing a motion to dismiss a complaint, the court may only consider matters stated within the complaint itself, and may not consider information outside of the confines of that pleading. . . . If matters outside of the complaint are submitted to the trial court, but not considered in review of the 12(b)(5) motion to dismiss, the trial court need not convert the motion to dismiss into a motion for summary judgment." *Public Service Co. of Colorado v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001).

ARGUMENT

I. THE STATE'S ALLEGATIONS THAT PURDUE ENGAGED IN DECEPTIVE MARKETING PRACTICES NEGATE PURDUE'S PREEMPTION AND SAFE HARBOR ARGUMENTS FOR DISMISSAL

Purdue's U.S. Food and Drug Administration ("FDA")-approved labels are not grounds to dismiss the State's claims under a theory of preemption or under the "safe harbor" provision at C.R.S. §6-1-106(1)(a). Moreover, Purdue's assertions that its conduct complied with FDA requirements present facts outside the Complaint which are not properly considered on a motion to dismiss.

A. The FDA's Labeling Requirements Do Not Preempt the State's Claims

Purdue's Motion suggests that the State's claims are barred because Purdue's opioid drugs "are FDA-approved [for the treatment of chronic pain] and any statements that are consistent with the FDA approval cannot be deceptive or

fraudulent as a matter of law."[2] Mot. Dismiss 2. This argument fails because State law claims of false and deceptive marketing practices are not preempted by federal law.

Implied preemption can occur either: (1) "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation (known as field preemption)"; or (2) "to the extent [state law] actually conflicts with federal law (known as conflict preemption)." *Armstrong v. Accrediting Council for Continuing Edu. & Training, Inc.,* 168 F.3d 1362, 1369 (D.C. Cir. 1999) (internal quotations omitted). Here, there is no implied field or conflict preemption.

There is no field preemption because it is well established that Congress intended to preserve state consumer protections laws and, "[the FDA] long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation." *Wyeth v. Levine*, 555 U.S. 555, 579 (2009).

There is no conflict preemption because the State did not simply allege that Purdue marketed opioids for the treatment of chronic pain. Rather, the State alleges that Purdue, maker of the opioid painkiller OxyContin, originated and

[2] Although Purdue's Motion does not specifically identify this argument as pre-emption, Purdue is in fact asserting conflict preemption.

spearheaded a comprehensive and deceptive marketing campaign that led to the current opioid epidemic. *See, e.g.,* Compl. ¶¶ 54-213, 221-25.

The Complaint alleges that Purdue seized on and manipulated unsubstantiated statements regarding opioids, *see* Compl. ¶¶ 101-10, and used what appeared to be independent health care providers and third party organizations that Purdue paid and controlled to spread the false and misleading message to prescribers and the public at large that chronic pain was a vastly undertreated condition that could be safely treated with opioids. *See* Compl. ¶¶ 76-119. Using an army of sales representatives, promotional materials, Purdue-sponsored Front Groups, and Purdue-funded Key Opinion Leaders ("KOLs"), Purdue misrepresented the risk of addiction associated with opioids, exaggerated the benefits of opioids to improve functionality and quality of life, concocted a fake syndrome called "pseudoaddiction" to encourage prescriptions of higher doses of opioids, misrepresented the risks of higher doses of opioids, overstated the efficacy of supposed abuse-deterrent formulas of opioids, misrepresented the severity of opioid withdrawal, and misrepresented the risks and benefits of opioids compared to alternative pain treatments. *See* Compl. ¶¶ 9, 142-220, 275-313. Purdue's misinformation marketing campaign successfully duped the medical community and the public into believing that opioids were safe and effective for the long-term treatment of chronic pain. *See*, *e.g.,* Compl. ¶¶ 10, 221-25. Consequently, Purdue

flooded Colorado (and the nation) with millions of prescription opioids. *See, e.g.*, Compl. ¶¶ 11, 261-64.

State law claims of false and deceptive marketing practices are not preempted by the FDA's regulation of opioids. Courts have consistently refused to find preemption of deceptive marketing claims involving FDA-approved drugs. *See, e.g., Arters v. Sandoz, Inc.*, 921 F. Supp. 2d 813, 819-20 (S.D. Ohio 2013) (state law fraud claims based on defendants' allegedly fraudulent or unreasonably dangerous promotion of generic drug not preempted); *Priest v. Sandoz, Inc.* 2016 WL 11162903, at *7 (W.D. Tex. Dec. 29, 2016), *report and recommendation adopted*, 2017 (WL 8896188 (W.D. Tex. Jan 31, 2017) (recognizing nothing in the FDCA is at odds with state law fraud claims); *Beavers-Gabriel v. Medtronic, Inc.*, 2015 WL 143944, at *5-6 (D.Haw. Jan 9, 2015) (no preemption for fraud claims); *Elmore v. Gorsky*, 2012 WL 6569760, at *3 (S.D. Tex. Dec. 17, 2012).

An Alaska state court that considered a motion to dismiss filed by Purdue in a case alleging the same deceptive marketing practices by Purdue in Alaska denied Purdue's federal preemption arguments on the grounds they are premature in a motion to dismiss. *See State of Alaska v. Purdue Pharma L.P., et al.*, Case No. 3AN-17-09966CI (Alaska Sup. Ct. July, 12, 2018). Courts in similar cases filed against Purdue analyzed the same preemption arguments and determined that plaintiffs' claims brought under state consumer protection laws were not preempted by federal

law. *See, e.g., State of New Hampshire v. Purdue Pharma Inc., et al.,* No. 217-2017-CV-00402 (N.H. Sup. Ct. Sept. 18, 2018); *Gurbir Grewal, Attorney General of the State of New Jersey v. Purdue Pharma, L.P., et al.,* No. C-245-17 (Sup. Ct. of N.J., Oct. 2, 2018); *State of Ohio, ex Rel. Mike Dewine, Ohio Attorney General v. Purdue Pharma L.P., et al.,* Case No. 17 CI 261 (Aug. 22, 2018); *State of Washington v. Purdue Pharma, L.P., et al.,* No. 17-2-25505-0 SEA, slip op. (Wash. Sup. Ct. May 14, 2018).

Moreover, the FDA's enabling statutes, the Food, Drug and Cosmetic Act ("FDCA") and its implementing regulations expressly prohibit false and misleading marketing. *See* 21 U.S.C. §§ 352 (a), (n), (bb), 355(d) (2018); 21 C.F.R. § 202 1(e)(3), (6); 21 C.F.R. § 201.56(a)(2) (2015); 21 C.F.R. § 314.125(b)(6) (2016). Given the courts' clear message that the FDA does not prohibit state law claims of fraud and deception, and the FDCA's express prohibition of false and misleading marketing of FDA-regulated products, there is no conflict between the State's claims and the FDA's regulation of opioids. Thus, the State's claims are not preempted.

Purdue's conflict preemption argument also fails because it presents facts outside the Complaint that are not suitable for determination on a motion to dismiss. For example, Purdue's assertion that "the FDA has concluded that the benefits of Purdue's opioid medications outweighs the benefits" is subject to debate, as the assertion appears to be contradicted by Purdue's acknowledgement that, in

response to the 2012 PROP petition, "the FDA required Purdue to conduct additional studies and further assess [the risks in the label] along with the benefits of use, and those studies are underway." (Mot. Dismiss 7, 11, Ex. 4, at 1-2, 6-10.)

Similarly, Purdue's assertion that it "generally comport[ed]" with FDA-approved labeling is contradicted by Complaint allegations describing conduct of Purdue surrogates and Purdue sales representatives that conflicted with and/or exceeded the FDA-approved label. *See, e.g.,* Compl. ¶¶ 62-63, 144-46, 150, 154, 158, 163, 166, 171. In addition, a determination of whether or not Purdue in fact "generally comport[ed]" with FDA-approved labelling would require determination of factual issues outside the Complaint. *See State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 15 (Colo. App. 2009) ("The conclusion that [a] solicitation as a whole was not deceptive [is] a factual issue . . .").

The authorities Purdue cites regarding conduct that "generally comports" with the FDA-labels are not applicable here because the Complaint alleges in detail conduct of Purdue that conflicted with and or exceeded the FDA-approved labels for opioids. *Compare* Mot to Dismiss 9-10 (citing *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51 (2d Cir. 2016); *Prohias v. Pfizer, Inc.*, 490 F. Supp. 2d 1228 (S.D. Fla. 2007); *Cytyc Corp. v. Neuromedical Sys., Inc.,* 12 F. Supp. 2d 296 (S.D.N.Y. 1998)) *with, e.g.,* Compl. ¶¶ 62-63, 144-46, 150, 154, 158, 163, 166, 171, *and with* Mot. Dismiss, Exs. 1-3.

Thus, Purdue's conflict preemption arguments fail because they are contrary to statutes and case law prohibiting deceptive marketing of FDA approved drugs, and because they present facts outside the Complaint.

B. The Colorado Consumer Protection Act's ("CCPA") "Safe Harbor" Exemption Does Not Protect Deceptive Marketing Practices

Because the State alleges that Purdue engaged in deceptive and misleading conduct in its promotion of opioids, which would not comply with the FDA or its enabling statutes, Purdue also cannot avail itself of the "safe harbor" exemption under C.R.S. § 6-1-106(1)(a). Mot. Dismiss 10. The "safe harbor" exemption only applies to conduct that is "in compliance" with a regulatory scheme of another government entity. *See Showpiece Homes Corp. v. Assurance Co. of America*, 38 P.3d 47, 56 (Colo. 2001) ("[W]e hold that section 6-1-106(1)(a) exempts only those actions that are 'in compliance' with other laws.") As noted above, the FDCA expressly prohibits deceptive conduct which, in itself, defeats Purdue's claim of compliance.

Colorado courts have consistently held that conduct amounting to deceptive trade practices is not in compliance with any laws. *See id.*; *Crowe v. Tull*, 126 P.3d 196, 207 (Colo. 2006) ("[C]onduct that constitutes deceptive or unfair trade practices is not 'in compliance' with the rules of professional conduct and is not exempted from CCPA liability by section 6-1-106(1)(a)."); *Gilles v. Ford Motor Co.*, 24

F.Supp.3d 1039, 1050 (D. Colo. 2014) (applying Colorado law) (reasoning that conduct exceeding regulations is not exempted by the CCPA's "safe harbor" provision, and the gravamen of the complaint was that defendant went further than applicable federal law and regulations in its advertisements). Where, as here, the Complaint alleges that Purdue engaged in fraudulent and deceptive marketing practices, it cannot be said that Purdue's conduct was in compliance with another government regulatory scheme.

Suarez v. United Van Lines, Inc., 791 F. Supp. 815, 817 (D. Colo. 1992), cited by Purdue, is distinguishable because it involved a federal statute that expressly preempted plaintiff's claims. In contrast, the State alleges here that Purdue's deceptive conduct evaded FDA review, conflicted or exceeded FDA-approved labels, and therefore does not fall under any federal statute that would implicate § 6-1-106(1)(a) of the CCPA. (*See, e.g.,* Compl. ¶¶ 62-63, 68-75, 144-46, 150, 154, 158, 163, 166, 171; Mot. Dismiss, Exs. 1-3.) Under *Showpiece Homes, Crowe* and *Gilles,* Purdue's conduct is not in compliance with another government regulatory scheme, and Purdue is not exempt under § 6-1-106(1)(a) from the State's CCPA claims.

II. THE COMPLAINT SUFFICIENTLY PLEADS THE STATE'S CLAIMS FOR RELIEF

The Complaint is comprised of 96 pages containing 341 paragraphs describing Purdue's overall strategy to increase all opioid prescriptions, and alleges

detailed facts about the deceptive and fraudulent marketing practices Purdue used to achieve its goal and the harm caused by Purdue's deception.[3] The Complaint details the devastation to Colorado as well as the costs the State has borne in addressing the opioid epidemic including, without limitation, providing myriad healthcare services for opioid-related ailments, substance use treatment, increased costs of the criminal justice system, provision of naloxone to first responders, and increased state worker's compensation benefits. *See, e.g.* Compl. ¶ 219, 260-74.

Thus, the State has adequately pled how Purdue caused the opioid crisis, including pleading causation for the State's common law claims and claim for restitution under the CCPA.

A. The Complaint Sufficiently Pleads Causation

Purdue's dismissal arguments that the Complaint does not sufficiently plead causation should be denied because the Complaint sufficiently pleads causation, and because Purdue's causation arguments present factual questions.

1. The State's Allegations Sufficiently Plead "But-For" Causation

"As to causation in fact, 'the test … is the 'but for' test–whether, but for the alleged [conduct], the harm would not have occurred. The requirement of 'but for' causation is satisfied if the negligent conduct in a 'natural and continued sequence, unbroken by an efficient, intervening cause, produce[s] the result complained of,

[3] Supported by documents as referenced in in 375 footnotes.

and without which the result would not have occurred.'" *Reigel v. Savaseniorcare, L.L.C.*, 292 P.3d 977, 985 (Colo. App. 2011).

The allegations in the Complaint satisfy this standard. Beginning in the 1990's, Purdue implemented a strategy to increase opioid prescriptions. *See, e.g.,* Compl. ¶¶ 4-11, 54-213. Purdue's marketing strategy was designed to drive up sales of opioids by deceiving the medical community about the safety and efficacy of opioids for the long-term treatment of chronic pain. *See, e.g.,* Compl. ¶¶ 4, 66, 84-87, 99-111, 114-19, 226-59. Purdue knew that no reliable scientific or medical evidence existed to support this position. *See, e.g.,* Compl. ¶¶ 33-53, 57-67, 84, 100-10.

Purdue created a massive marketing infrastructure, including using third party surrogates and in-person sales representatives, to spread its messaging about all prescription opioids, not just its own branded drugs. *See, e.g.,* Compl. ¶¶ 76-141. Purdue-sponsored Front Groups and KOLs seeded the marketing campaign with Purdue-funded articles and studies in various medical journals and other publications, and then provided those materials at continuing medical education courses and other presentations to health care providers in Colorado and around the country. *See, e.g.,* Compl. ¶¶63-67, 70-119. Purdue's sales representatives targeted Colorado prescribers that were identified by Purdue as lacking the expertise to question Purdue's promotions, including family practitioners and nurse

practitioners, as well as pain clinics that Purdue knew would be high volume opioid prescribers. *See, e.g.,* Compl. ¶¶ 85, 129, 222-23, 226-59.

The Complaint alleges that Purdue conducted its deceptive marketing scheme in Colorado. *See, e.g.,* Compl. ¶¶ 9, 142-220. The Complaint alleges, by way of example, three health care providers with whom Purdue had direct contacts, the result being that Purdue directly influenced their prescribing habits with disastrous results. *See* Compl. ¶¶ 226-59. The Complaint also alleges in detail, the harms caused to Colorado and its citizens by Purdue's deceptive misinformation campaign. *See, e.g.,* Compl. ¶¶ 260-74.

Taking these averments in the Complaint as true, "but-for" causation is easily satisfied. The State asserts that, but for Purdue's deceptive marketing scheme and practices that changed the way health care providers prescribe opioids, the number of opioids prescribed in Colorado would not have exploded over the past twenty years, and the attendant impacts on the State trying to address the ensuing health care crisis would not have arisen.

Purdue's suggestion that potential intervening events may break the causal chain is inappropriate because Purdue presents facts outside the Complaint to attempt to create factual issues that are not suitable on a motion to dismiss. *See Sanderson v. Heath Mesa Homeowners Ass'n*, 183 P.3d 679, 683 (Colo. App. 2008) ("Causation is a question of fact reserved for the trier of fact."); *Reigel*, 292 P.3d at

985-86 ("Causation is a question of fact for the jury unless the facts are undisputed and reasonable minds could draw but one inference from them.").

2. The Complaint Sufficiently Pleads Proximate Cause

The Complaint sufficiently pleads proximate cause. "The existence of proximate cause is a question of fact for the jury and only in the clearest of cases, where reasonable minds can draw but one inference from the evidence, does the question become one of law to be determined by the court." *Largo Corp. v. Crespin*, 727 P.2d 1098, 1103 (Colo. 1986) (superseded by statute).

"[F]oreseeability is the touchstone of proximate [or legal] cause … the exact or precise injury need not have been foreseeable, but it is sufficient if a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the plaintiff's situation might result from the defendant's conduct." *Boulders at Escalante, LLC v. Otten Johnson Robinson Neff and Ragonetti PC*, 412 P.3d 751, 762 (Colo. App. 2015) (internal citations omitted). "Where the circumstances make it likely that a defendant's negligence will result in injuries to others and where this negligence is a substantial factor in causing the injuries sustained, proximate causation is satisfied." *Sanders v. Acclaim Entertainment, Inc.*, 188 F.Supp.2d 1264, 1276 (D. Colo. 2002). The allegations in the Complaint satisfy this standard.

The Complaint alleges that Purdue has known since at least the introduction of OxyContin that opioids are DEA scheduled drugs due to high risk of abuse, which could lead to addiction, overdose, and death – even when taken as prescribed. *See, e.g.,* Compl. ¶¶ 21, 54-56; Mot. Dismiss 8, Ex. 1, at 40. Nevertheless, Purdue developed and implemented a systematic marketing campaign suggesting that regular use of opioids was safe and effective, and greatly minimized the risk of abuse. *See, e.g.,* Compl. ¶¶ 4-11, 9, 142-213. Purdue aggressively promoted this messaging through multiple channels with the intent of maximizing the use of opioids in Colorado. *See, e.g.,* Compl. ¶¶ 54-141, 222-25, 226-59. The State alleges that Purdue's deceptive marketing scheme caused and perpetuated the opioid epidemic in Colorado, and that the State has suffered injuries and losses as a result. *See, e.g.,* Compl. ¶¶ 219, 260-74.

Purdue's assertion that "multiple independent intervening events and actors" break the causal chain presents facts outside the Complaint and are not appropriately considered on a motion to dismiss. In any event, "[a]n intentionally tortious act or criminal act of a third part does not break the causal chain if it is reasonably foreseeable." *Largo*, 727 P2d. at 1103; *see also Sanders*, 88 F.Supp.2d at 1276 ("The intervening or superseding act of a third party … including a third-party's intentionally tortious or criminal conduct does not absolve a defendant from

responsibility if the third-party's conduct is reasonably and generally foreseeable."); *Ekerberg v. Greene*, 588 P.2d 375, 376-77 (Colo. 1978).

The Complaint sufficiently pleads proximate cause and Purdue's motion to dismiss on these grounds should be denied.

B. The State Has Sufficiently Pled its CCPA Restitution Claim

Purdue asserts that the State's request for restitution relief on its CCPA claims does not allege sufficient facts to, "show what is necessary to restore [the State] to the position that it would have been in but-for Purdue's conduct."

Purdue appears to be suggesting that, in order to seek restitution as relief for Purdue's alleged violations of the CCPA, the State must include a damages calculation in its Complaint. There is no such requirement under the Colorado Rules of Civil Procedure. *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000), cited by Purdue, actually supports the State's position on this issue. In *Salzman*, the court addressed what a plaintiff seeking restitution must "prove" – not what a plaintiff must "plead." *See Salzman*, 996 P.2d at 1265-66.

The Complaint sufficiently pleads the "who," "what," "when," "where," and "how" of Purdue's deceptive marketing practices as grounds for the State's CCPA claims. The Complaint also alleges the types of injuries and losses Colorado has incurred, and continues to incur, as a result of Purdue's flooding Colorado with highly addictive opioids. *See, e.g.,* Compl. ¶¶ 260-74. These costs include providing

services for those suffering from addiction and other ailments associated with opioid use, substance use treatment, increased criminal justice costs, first responder costs, and increased worker's compensation benefits. *See, e.g.,* Compl. ¶¶ 219, 260-74. The costs the State has incurred and continues to incur to address the opioid epidemic would not be necessary but for Purdue's deceptive marketing campaign and misrepresentations.

Because the State has adequately pled a basis for its restitution claims under the CCPA, there is no reason to dismiss the State's request for restitution relief.

C. The Complaint Sufficiently Pleads a Public Nuisance Claim

Purdue's Motion asserts that, "lawful marketing and sale of medications – even though it may be dangerous when misused or over-used – does not constitute a public nuisance." Mot. Dismiss 20. Purdue's argument misses the point. The State's public nuisance claim is based upon factual allegations detailing Purdue's *unlawful* marketing practices. The Complaint alleges how Purdue's deceptive marketing caused an increase in opioid use, overuse, and addiction resulting in injury, death, and other harms to thousands of Coloradans, and significant financial and social harm to the State. *See, e.g.,* Compl. ¶¶ 33-53, 142-213, 260-74, 314-22.

Purdue's arguments against the public nuisance claim are also contrary to Colorado law. The Colorado Supreme Court adopts the Restatement (Second) of Torts § 821B, which broadly defines public nuisance as, "an unreasonable

interference with a right common to the general public." *See Hoery v. United States*, 64 P.3d 214, 218 n.5 (Colo. 2003) (citing Restatement (Second) of Torts § 821B (Am. Law Inst. 1979)). Colorado courts hold that, "[n]uisance is the doing or failure to do something that injuriously affects the safety, health, or morals of the public or works some substantial annoyance, inconvenience, or injury to the public." *State Dep't of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1994); *see also Echave v. City of Grand Junction*, 193 P.2d 277, 280 (Colo. 1948) (same). "A public or common nuisance covers the invasion of public rights, that is, rights common to all members of the public." *Hoery,* 64 P.3d at 218 n.5 (Colo. 2003) (citing Restatement (Second) of Torts §§ 821B, 821D (Am. Law Inst. 1979)).

Purdue's assertions that public nuisance includes only "the right to a public good, such as an indivisible resource shared by the public at large, like air, water, or public rights of way" is likewise contrary to Colorado law. In Colorado, a public right is:

> . . . [O]ne common to all members of the general public. It is collective in nature . . . . It is not, however, necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large.

Restatement (Second) of Torts § 821B cmt. g (Am. Law Inst. 1979).

In Colorado, "conduct constituting a nuisance can include indirect or physical conditions created by defendant that cause harm." *Hoery,* 64 P.3d at 218. The Restatement does not require "that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large." Restatement (Second) of Torts § 821B cmt. g (Am. Law Inst. 1979).[4]

The Complaint alleges that Purdue's conduct has caused and continues to cause significant harm to the State and its citizens. *See, e.g.,* Compl. ¶¶ 260-74, 314-22. "The health, safety, and welfare of the citizens of Colorado, including those who use, have used, or will use opioids, as well as those affected by opioid use, is a matter of great public interest to the State." Compl. ¶ 319. Colorado has suffered and continues to suffer injuries from a public health crisis of opioid addiction, overdose, injury, and death that Purdue knowingly created and perpetuated. *See, e.g.,* Compl. ¶¶ 260-74, 314-22. The Complaint's allegations amply set out a viable public nuisance claim under Colorado law.

Phillips v. Lucky Gunner LLC, 84 F.Supp.3d 1216, (D. Colo. 2015), is not applicable because plaintiffs in that case brought a nuisance claim based upon a

[4] "[I]n many cases the interests of the entire community may be affected by a danger to even one individual." *Id.* For example, the threat of spreading smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic. *See id.*

local municipal code, not a common law public nuisance claim. *Id.* at 1220, n.1. Purdue's reliance on *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004), is also misplaced. In *Beretta*, the City of Chicago sought to enjoin defendants from allowing legal firearms to be diverted into the City based upon a public "right to be free from the threat that some individuals may use an otherwise legal product . . . in a manner that may create a risk of harm to another." *Id.* at 1116. *Berreta* is not applicable here because the Complaint alleges that Purdue interfered with the public health and public safety, which is common to all members of the community. *See* Compl. ¶¶ 314-22.

Finally, Purdue's concerns about the potential impact of permitting the State's public nuisance claim to stand are not relevant to a motion to dismiss, and are also unfounded. The State does not seek to extend public nuisance to include product liability, and the State does not seek to apply public nuisance to *lawful* post-manufacture marketing practices. *See* Compl. ¶¶ 314-22.

D. The State's Negligence Claim, Premised on Purdue's Alleged Deceptive Marketing Scheme, Alleges Purdue's Duty to Honestly and Responsibly Market Highly-Addictive Drugs

Purdue baldly asserts that Purdue does not owe a duty of care to the State and its citizens. Purdue's arguments are once again based upon Purdue's incorrect re-characterization of the State's claims. Contrary to Purdue's assertions, the

State's negligence claim – like all of the State's claims – is based upon Purdue's deceptive marketing practices. *See, e.g.,* Compl. ¶¶ 9, 142-213, 323-30.

The State alleges that Purdue has a duty to exercise reasonable care in the promotion and marketing of opioid drugs, including a duty to promote opioid drugs in an honest and responsible manner, and that Purdue breached that duty of care. *See* Compl. ¶¶ 24, 324-25. "In determining whether the law imposes a duty on a particular defendant, the court should consider many factors, including the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the defendant." *Lopez v. Trujillo*, 399 P.23d 750, 753 (Colo. App. 2016) (citing *Taco Bell, Inc. v. Lannon,* 744 P.2d 43, 46 (Colo. 1987)). "No one factor is controlling, and the question of whether a duty should be imposed in a particular case is essentially one of fairness under contemporary standards—whether reasonable persons would recognize a duty and agree that it exists." *Id.*

The Complaint alleges that at least since OxyContin became available, Purdue knew that its opioids were DEA scheduled drugs due to a high risk of abuse, which could lead to addiction, overdose, and death – even when used as prescribed. *See, e.g.,* Compl. ¶¶ 21, 54-56; *see also* Mot. to Dismiss 8, Ex. 1 at 40. Nevertheless, Purdue deployed a deceptive marketing campaign designed to flood Colorado with

dangerous opioid drugs. *See, e.g.,* Compl. ¶¶ 9, 55, 70, 142-213. Purdue knew that its deceptive marketing would expose greater numbers of people to injury and death, and that the State would have to expend substantial resources to address this foreseeable health care crisis. *See, e.g.,* Compl. ¶¶ 21, 30-56, 143, 260-74. Purdue was negligent in ignoring the crisis it knew it was creating when it initiated and continued its expansive deceptive marketing campaign. *See, e.g.,* Compl. ¶¶ 4-11, 54-213, 259, 323-30.

In an attempt to blame others for the havoc wrought by its marketing scheme, Purdue argues that a duty to prevent intervening events cannot be imposed upon it. As stated above, Purdue's assertions regarding alleged intervening events or actors presents alleged facts that are outside the Complaint and are not appropriately considered on a motion to dismiss.

Purdue's arguments also misapprehend the State's allegations. The Complaint does not allege that Purdue had a duty to prevent intervening events including criminal activity. Instead, the State's negligence claim alleges that Purdue had – and continues to have – a duty to honestly and responsibly market its dangerous and highly addictive drugs, and that Purdue breached that duty. *See, e.g.,* Compl. ¶¶ 24, 323-30.

The cases Purdue relies upon to argue it had no duty to prevent criminal activity are distinguishable. In those cases, the criminal activity was *unrelated* to

the defendants' alleged negligence. *See Molosz v. Hoertz*, 957 P.2d 1049 (Colo. App. 1998); *Davenport v. Community Corrections of the Pikes Peak Region, Inc.*, 942 P.2d 1301 (Colo. App. 1997); *Phillips*, 84 F.Supp.3d at 1227. For example, unlike a tenant who fires a weapon out of his window, here, the Complaint alleges that any illegal activity is *related* to the addictive qualities of opioids, which is at the heart of Purdue's deceptive marketing campaign. *See, e.g.*, Compl. ¶¶ 226-59, 271-72, 322, 330, 335; *and see Molosz*, 957 P.2d at 1050.

The Complaint sufficiently alleges a duty of care owed by Purdue, that Purdue breached its duty of care, and that Purdue's breach caused injuries and damages to the State. Purdue's Motion to dismiss the State's negligence claim should be denied.

CONCLUSION

Purdue mischaracterizes the nature of the State's claims against it and attempts to present factual issues as legal questions in an effort to dismiss the State's claims. For the reasons set forth above, the State of Colorado respectfully requests that this Court enter an Order denying Purdue's Motion to Dismiss in its entirety, and such further relief as the Court deems appropriate.

DATED this 7th day of December, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of *Opposition of the State of Colorado To Defendants' Motion To Dismiss* was filed and served via electronic service to Defendants' counsel listed below, on the 7th day of December, 2018.

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