IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

BROOKE COUNTY COMMISSION, HANCOCK COUNTY COMMISSION, HARRISON COUNTY COMMISSION, LEWIS COUNTY COMMISSION, MARSHALL COUNTY COMMISSION, OHIO COUNTY COMMISSION, TYLER COUNTY COMMISSION, and **WETZEL COUNTY COMMISSION,**

Plaintiffs,

vs.

PURDUE PHARMA L.P.; PURDUE PHARMA INC.; THE PURDUE FREDERICK COMPANY, INC.; MARK RADCLIFFE; MARK ROSS; PATTY CARNES; TEVA PHARMACEUTICALS USA, INC.; CEPHALON, INC.; JANSSEN PHARMACEUTICALS, INC.; ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. n/k/a Janssen Pharmaceuticals, Inc.; **JANSSEN PHARMACEUTICA, INC.** n/k/a Janssen Pharmaceuticals, Inc.; **JOHNSON & JOHNSON; ENDO HEALTH SOLUTIONS INC.; ENDO PHARMACEUTICALS, INC.; ALLERGAN plc; ACTAVIS plc; ACTAVIS, INC.; ACTAVIS LLC; ACTAVIS PHARMA, INC.; WATSON PHARMACEUTICALS, INC.; WATSON PHARMA, INC.; WATSON LABORATORIES, INC.; MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN DRUG CORPORATION; RITE AID OF MARYLAND, INC.; KROGER LIMITED PARTNERSHIP II; CVS INDIANA, L.L.C.; WAL-MART STORES EAST, LP; GOODWIN DRUG COMPANY; WEST VIRGINIA BOARD OF PHARMACY; DAVID POTTERS; EDITA P. MILAN, M.D.; TRESSIE MONTENE DUFFY, M.D.; EUGENIO ALDEA MENEZ, M.D.; SCOTT JAMES FEATHERS, D.P.M.;** and **AMY LYNN BEAVER, P.A.-C,**

Defendants.

Civil Action No. 17-C-248

The Honorable David W. Hummel, Jr.

ORDER DENYING DAVID POTTERS' MOTION TO DISMISS

On November 7, 2018, Plaintiffs and Defendant, David Potters, appeared for a hearing on David Potters' Motion to Dismiss. Having considered the pleadings, the parties' arguments and authorities in support of as well in opposition to the instant motion, the applicable law, other materials filed by the parties, and the entire court record herein, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs, which are comprised of eight West Virginia counties, instituted the instant civil action on December 13, 2017. In their Complaint, Plaintiffs seek to abate the alleged public nuisance caused by the opioid epidemic in their respective counties, and to recoup monies and costs they have spent because of Defendants' alleged false, deceptive and unlawful marketing, unlawful distribution, and/or unlawful diversion of prescription opioids.

2. Plaintiffs filed their Complaint against five (5) classes of Defendants—one of which included the West Virginia Board of Pharmacy and its former Executive Director, David Potters (hereinafter "Potters"). In their Complaint, Plaintiff assert claims against Potters for (1) public nuisance, (2) unjust enrichment, (3) fraud by concealment, and (4) malicious and intentional conduct.

3. As alleged in their Complaint, Defendant Potters was the executive director for the BOP and, in that capacity, he had a specific and mandatory duty imposed upon him by state regulation to "evaluate the overall security system and needs" of wholesale distributors, including the Distributor Defendants, in order to "determine whether the [the wholesale distributors have] provided effective controls against diversion" of opioids. *See* W.Va. Code St. R. § 15-2-5.1.1.

4. Plaintiffs further allege that Potters violated this law, together with other state statutes and regulations, by failing to take *any* action to investigate and evaluate the security controls of wholesale distributors, including the Distributor Defendants, while those entities dumped millions of illegitimate opioid pills into West Virginia. Plaintiffs also allege that Defendant Potters completely ignored over 7,200 reports of "suspicious orders" relating to opioid orders of unusual size or frequency or which otherwise deviated substantially from a normal pattern and just stuffed them in storage.

5. Plaintiffs allege that the conduct of Defendant Potters was malicious and intentional because it was carried out with actual knowledge that millions of highly addictive opioid pills were being illegally dumped into Plaintiffs' counties far in excess of any legitimate medical need leading to addiction, abuse, and diversion. Plaintiffs allege in part that Potters gained this knowledge through his available access to the controlled substance monitoring database and his participation in a lawsuit brought by the State wherein the State alleged that the Distributor Defendants were illegally flooding the State with opioid pills. This, together with the Potters' receipt of more than 7,200 opioid "suspicious orders," were bright-red flags for Potters that opioids were being improperly distributed within the Counties according to Plaintiffs.

6. According to the Complaint, Defendant Potters' actions were so blatantly violative of his duties and responsibilities that he was terminated from his job as Director of the BOP when the aforementioned facts concerning his conduct came to light.

7. On April 30, 2018, Defendant Potters filed the subject motion to dismiss alleging that Plaintiffs' Complaint should be dismissed against him on grounds relating to duty, the economic loss rule, the public duty doctrine, governmental immunity, and statute of limitations.

Legal Standard

8. A motion to dismiss for failure to state a claim "should be viewed with disfavor and rarely granted." *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 606, 245 S.E.2d 157, 159 (1978). "The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the sufficiency of the complaint." *Cantley v. Lincoln Cty. Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007). To that end, a "trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice." *Id. See also*, W.Va. R. Civ. P. 8(f). The trial court's consideration begins, therefore, with the proposition that "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *John W. Lodge Distributing,* 161 W.Va. at 605, 245 S.E.2d at158. The policy of the Civil Rules of Procedure is to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied. *Id..,* 161 W.Va. at 605, 245 S.E.2d at 158–159. All that is required to state a cause of action is a short and plain statement of a claim that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests. *Brown v. City of Montgomery*, 233 W. Va. 119, 127, 755 S.E.2d 653, 661 (2014).

A. Duty

9. In West Virginia, foreseeability of risk is a primary consideration in determining the scope of a duty an actor owes to another. In addition, the existence of duty also involves policy considerations underlying the core issue of the scope of the legal system's protection which include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant. *Robertson v. LeMaster,* 171 W.Va. 607, 301 S.E.2d 563 (1983).

10. In their Complaint, Plaintiffs allege and plausibly plead that it was foreseeable, and in fact known to Defendant Potters, that his actions and inactions would result in injuries and damages to Plaintiffs. The Complaint alleges that Defendant Potters had particular and specialized knowledge concerning, *inter alia*: (1) his duties and obligations to police and investigate the Distributor Defendants to ensure they had effective controls in place to prevent the diversion of opioids, (2) the Distributor Defendants were improperly dumping millions and millions of opioid pills into the State far in excess of the legitimate needs of the State which were thereafter being improperly diverted and abused, (3) the opioid epidemic was raging in West Virginia and the improper diversion of opioid pills was causing addiction, abuse, and/or diversion within West Virginia, and (4) over 7,200 suspicious order were filed with the BOP and Defendant Potters relating to opioid orders of unusual size, which deviated substantially from a normal pattern, or were of unusual frequency. The Complaint further alleges and plausibly pleads that Defendant Potters knew that opioid drug addiction, misuse, abuse and/or diversion bore a direct relationship to the amount and volume of opioids being distributed within the Counties; and that the opioid drugs which were being distributed in the Counties were being misused, abused and diverted across the country, including within the Counties, resulting in harm and injury to Plaintiffs and other counties throughout West Virginia.

11. Under the circumstances alleged in Plaintiffs' Complaint, and described hereinabove, it was foreseeable that Defendant Potters' actions and inactions would result in harm to Plaintiffs and, therefore, Defendant Potters owed a duty of care to Plaintiffs as alleged in Plaintiffs' Complaint.

12. Furthermore, public policy considerations support the imposition of a duty of care here considering, without limitation, the likelihood and risk of injury caused by highly addictive opioids, the minimal burden imposed on Defendant Potters and Defendants to guard against injury and damage, and the absence of adverse consequences of placing the burden on Defendants to guard against the likely injury. *See Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983).

13. Plaintiffs' Complaint further sufficiently alleges that Plaintiffs were damage as a proximate cause of Defendant Potters' actions and inactions.

14. Moreover, Plaintiffs are specifically authorized to take "appropriate and necessary actions" to abate a public nuisance. *See* W.Va. Code § 7-1-3kk ("In addition to all other powers and duties now conferred by law upon county commissions, commissions are hereby authorized to enact ordinances, issue orders and *take other appropriate and necessary actions* for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance . . .") (emphasis added). As such, at the very least, the power to file this lawsuit is implied by Section 7-1-3kk. *See,* e.g., *State ex rel. State Line Sparkler of WV, Ltd. v. Teach*, 187 W. Va. 271, 275, 418 S.E.2d 585, 589 (1992) ("The general rule is that a grant of the police power to a local government or political subdivision necessarily includes the right to carry it into effect and empowers the governing body to use proper means to enforce its ordinances. Pursuant to this rule, it has been held that even in the absence of an express grant of authority, the power to punish by a pecuniary fine or penalty is implied from the delegation by the legislature of the right to enforce a particular police power through ordinances or regulations.").

B. Economic Loss Rule

15. The economic loss rule does not bar Plaintiffs' claims.

16. In *Aikens v. Debow*, *infra*, the West Virginia Supreme Court held "[a]n individual who sustains economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other special relationship between the alleged tortfeasor and the individual." Syl. Pt. 9, *Aikens v. Debow*, 208 W. Va. 486, 489, 541 S.E.2d 576, 579 (2000). The Court in *Aikens* emphasized the holding applied only to plaintiffs alleging purely economic loss from an interruption in commerce caused by another's negligence." *Morrisey v. AmerisourceBergen Drug, Co.*, 2014 WL 12814021, at *20 (Boone Co., Dec. 12, 2014) (quotation marks omitted).

17. The economic loss rule also "does not bar recovery in tort where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 879 (9th Cir. 2007).

18. Notably, arguments similar to those now made by Defendant Potters concerning the economic loss rule have already been rejected by other courts in similar opioid litigations. *See In re Opioid Litigation*, No. 400000/2017, 2018 WL 3115102, at *27 (Sup Ct., Suffolk County June 18, 2018); *Morrisey*, 2014 WL 12814021, at *19.

19. Here, Plaintiffs' Complaint does not allege damages from any interruption in commerce and the duty alleged to have been breached by Defendant Potters is one arising out of tort principles and not from contract. Thus, the economic loss rule does not bar Plaintiffs' claims in this case.

C. Public Duty Doctrine

20. The protections of the public duty doctrine are not limitless and its application to Plaintiffs' claims here is inappropriate. In West Virginia, the public duty doctrine does not apply in cases involving willful, wanton, or reckless behavior. *See Holsten v. Massey*, 200 W. Va. 775, 786, 490 S.E.2d 864, 875 (1997).

21. In *Holsten v. Massey*, the West Virginia Supreme Court recognized that the common law public duty doctrine *must* be applied in a manner consistent with the provisions of the Governmental Tort Claims and Insurance Reform Act and held that the public duty doctrine is coextensive with the immunities in the subject Act. *Holsten v. Massey*, 200 W. Va. 775, 787-788, 490 S.E.2d 864, 876-877 (1997) (citing *Randall v. Fairmont City Police Dept.*, 186 W.Va. 336, 347, 412 S.E.2d 737, 748 (1991)). The *Massey* Court then went on to hold that the Governmental Tort Claims and Insurance Reform Act, therefore, contained an exception for malicious and reckless conduct. Because of this, the common law public duty doctrine—which is based on common law principles—must also contain an exception for malicious, intentional, and reckless conduct.

22. Significantly, West Virginia Code § 30-5-5(o), which governs the BOP's Board, expressly provides that "[t]he members of the board when *acting in good faith and without malice* shall enjoy immunity from individual civil liability while acting within the scope of their duties as board members." (emphasis added). "One of the axioms of statutory construction is that a statute will be read in context with the common law unless it clearly appears from the statute that the purpose of the statute was to change the common law." Syl. Pt. 2, *Smith v. West Virginia Bd. of Educ.*, 170 W.Va. 593, 295 S.E.2d 680 (1982). Thus, reading and applying W.Va. Code § 30-5-5(o) in manner consistent with common law, as required to be done under canons of statutory

construction, there must exist a bad faith exception to the common law public duty doctrine for claims against the BOP's Board Members, which includes Defendant Potters.

23. Furthermore, in cases involving the State and its agencies, the West Virginia Supreme Court has stated that it "will apply to the issue of the State's liability in W.Va. Code § 29–12–5 cases the immunities and defenses that have been sanctioned in analogous governmental tort cases, including cases involving the immunity of local governments not entitled to the sovereign immunity of the State." *Parkulo v. W. Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 176, 483 S.E.2d 507, 522 (1996). Thus, the interpretation given to the Governmental Tort Claims and Insurance Reform Act and its exceptions thereunder, should be applied equally to claims involving the State absent other legislative direction.

24. Moreover, the public duty doctrine is based on principles of negligence and whether a defendant owes a duty. *Holsten*, 200 W. Va. at 782, 490 S.E.2d at 871; *Parkulo v. W. Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 172, 483 S.E.2d 507, 518 (1996)("We recognize that the 'public duty doctrine' does not rest squarely on the principle of governmental immunity, but rests on the principle that recovery may be had for negligence only if a duty has been breached which was owed to the particular person seeking recovery.")("The linchpin of the "public duty doctrine" is that some governmental acts create duties owed to the public as a whole and not to the particular private person or private citizen who may be harmed by such acts.") The public duty doctrine is independent of the doctrine of governmental immunity. As such, the common law public duty doctrine should be applied consistently to the State and political subdivisions and there is no reason to draw a distinction between the two.

25. Notably, numerous other courts and jurisdictions have addressed this issue and have similarly found that there is a willful, malicious, and intentional exception to their respective common law public duty doctrine. *See*, e.g., *Estate of Snyder v. Julian*, 789 F.3d 883, 888 (8th Cir. 2015) (finding that under Missouri law the public duty doctrine is inapplicable in an intentional tort case involving a public employee who acts in bad faith or with malice); *Estate of Graves v. Circleville*, 179 Ohio App. 3d 479 (Ohio Ct. App. 2008) (holding public duty doctrine does not apply to wanton or reckless conduct); L.A. Ray Realty v. Town Council of Town of Cumberland, 698 A.2d 202, 208 (R.I. 1997) ("An exception to the public-duty doctrine exists, however, when the state or its political subdivisions engage in "egregious conduct."); *Chapman v. Rhoney*, No. 1:10CV258, 2011 WL 7971750, at *11 (W.D.N.C. Aug. 3, 2011), report and recommendation adopted, No. 1:10CV258, 2012 WL 1944863 (W.D.N.C. May 30, 2012) ("Defendants' reliance on the public duty doctrine is misplaced. It is well settled that the public duty doctrine does not apply where the conduct of which a plaintiff complains constitutes an intentional tort."); *Vergeson v. Kitsap Cty.*, 145 Wash. App. 526, 544, 186 P.3d 1140, 1149 (2008) (recognizing exception to the public duty doctrine for willful or egregious conduct).

26. Here, Plaintiffs' pleading clearly alleges that the actions and conduct of Defendant Potters were "willful, reckless, intentional, malicious, wanton, and in bad faith." Thus, viewing the averments in the light most favorable to Plaintiffs, and drawing all inferences in their favor, the Plaintiffs have sufficiently alleged a viable cause of action against Defendant Potters that is not barred by the public duty doctrine and falls within the willful, wanton, and malicious exception.

D. Governmental Immunity

27. "[T]he general rule of construction in governmental tort legislation cases favor[s] liability, not immunity [and] unless the legislature has clearly provided for immunity under the circumstances, the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail." *Randall v. Fairmont City Police Dep't*, 186 W. Va. 336, 347, 412 S.E.2d 737, 748 (1991).

28. Further, qualified immunity "is not an impenetrable shield that requires toleration of all manner of constitutional and statutory violations by public officials. Indeed, the only realistic avenue for vindication of statutory and constitutional guarantees when public servants abuse their offices is an action for damages." *Hutchison v. City of Huntington*, 198 W. Va. 139, 148, 479 S.E.2d 649, 658 (1996) (citing Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests,* 81 Iowa L.Rev. 261 (1995)).

29. As adopted and applied in West Virginia, qualified immunity is a common law concept. *State v. Chase Securities*, 188 W.Va. 356, 424 S.E.2d 591 (1992). The West Virginia Supreme Court has observed that "admittedly, our caselaw analyzing and applying the various governmental immunities—sovereign, judicial, quasi-judicial, qualified, and statutory—to the vast array of governmental agencies, officials, employees and widely disparate factual underpinnings has created a patchwork of holdings." *West Virginia Health and Human Services v. Payne*, 231 W.Va. 563, 571, 746 S.E.2d 554, 562 (2013). Further, the existence of immunity "must be determined on a case by case basis." Syl. Pt. 9 *Parkulo v. West Virginia Bd. of Probation*, 199 W.Va. 161, 483 S.E.2d 507 (1996).

30. Qualified immunity analysis entails a two-step inquiry. First, the Court must "identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or otherwise involve discretionary governmental functions." *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014).[1] To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune. *Id.* (citing Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole,* 199 W.Va. 161, 483 S.E.2d 507 (1996)). Thus, if a claim arises from the failure to formulate or enact a law or policy, the governmental entity is immune. *Id.* But liability may exist if the governmental entity violates a law or policy. *Id.*

31. Second, "[t]o the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive. Syl. Pt. 11, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014) (citing Syl. Pt. 7, *Parkulo,* 199 W.Va. at 164, 483 S.E.2d at 510). If it is sufficiently demonstrated that the governmental entity violated established laws which a reasonable person in their position would have known, then the governmental entity may be subjected to liability. *Id.*

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[1] It should be noted the West Virginia Supreme Court long-ago "eschewed" the application of the "'discretionary acts' as opposed to 'ministerial acts'" analysis. *W. Virginia Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, n. 26, 574, 746 S.E.2d 554, 565, n. 26 (2013) (citing *State v. Chase Securities, Inc.,* 188 W.Va. 356, 364, 424 S.E.2d 591, 599 (1992) ("[W]e find the discretionary-ministerial act distinction highly arbitrary and difficult to apply.")).

32. Moreover, if there is a "bona fide dispute as to the foundational or historical facts that underlie the immunity determination," the determination of immunity shifts to a jury. *Maston v. Wagner*, 236 W. Va. 488, 498, 781 S.E.2d 936, 946 (2015) (citing Syl. Pt. 1, in part, *Hutchison,* 198 W.Va. at 144, 479 S.E.2d at 654.) "In this connection, it is the jury, not the judge, who must decide the disputed 'foundational' or 'historical' facts that underlie the immunity determination, but it is solely the prerogative of the court to make the ultimate legal conclusion." *Id.* (citations omitted). Accordingly, a circuit court may not summarily dispose of a claim on grounds of qualified or statutory immunity where there is a genuine issue of material fact underlying the immunity determination. *Id.*

33. Here, Defendant Potters' conduct underlying Plaintiffs' claims does not involve executive or administrative policy-making acts and, therefore, Defendant Potters is not protected by absolute immunity.

34. Plaintiffs' claims are also not barred by qualified immunity as there is no immunity for governmental officials or entities whose acts are fraudulent, malicious, willful, intentional, or otherwise oppressive. *Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659 (citing *Chase*, 188 W.Va. at 365, 424 S.E.2d at 600). This is also consistent with W.Va. Code § 30-5-5(o). *Id.*, ("The members of the board when *acting in good faith and without malice* shall enjoy immunity from individual civil liability while acting within the scope of their duties as board members."). In the present case, Plaintiffs have sufficiently alleged that Defendant Potters' conduct in violating his mandates was intentional, reckless, malicious, willful, wanton, and in bad faith.

35. Specifically, Plaintiffs allege that Defendant Potters had particular and specialized knowledge concerning, *inter alia*: (1) his duties and obligations to police and investigate the Distributor Defendants to ensure they had effective controls in place to prevent the diversion of

opioids, (2) the Distributor Defendants were improperly dumping millions and millions of opioid pills into the State far in excess of the legitimate needs of the State which were thereafter being improperly diverted and abused, (3) the opioid epidemic was raging in West Virginia and the improper diversion of opioid pills was causing addiction, abuse, and/or diversion within West Virginia, and (4) over 7,200 suspicious order were filed with the BOP and Defendant Potters relating to opioid orders of unusual size, which deviated substantially from a normal pattern, or were of unusual frequency. Despite this knowledge, Defendant Potters took no action to ensure that he complied with his legal duties and completely ignored his responsibilities and duties under the law. It is this alleged knowledge, together with the alleged knowledge that grave and severe consequences would inevitably result by his conduct, which elevates Defendant Potters' actions to intentional, reckless, malicious, willful, wanton, and in bad faith.

36. In addition, Plaintiffs' claims are not defeated by qualified immunity because they have sufficiently pled that Defendant Potters' actions and omissions were in violation of clearly established statutory laws of which a reasonable person would have known.

37. With respect to any pleading standards for constitutional immunity torts, the West Virginia Supreme Court has stated that "the label 'heightened pleading' ... has always been a misnomer [and a] plaintiff is not required to anticipate the defense of immunity in his complaint ..." *Hutchins*, 198 W. Va. at 150, 479 S.E.2d at 660 (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923–24, 64 L.Ed.2d 572 (1980)).

38. Here, instead of relying on general allegations (e.g. Defendant Potters was negligent), Plaintiffs pled their claims with sufficient factual detail and particularity which clearly satisfy any immunity-related pleading requirements and identifies the conduct, actions, and omissions of Defendant Potters' underlying Plaintiffs' claims. Plaintiffs' Complaint specifically

identifies the clearly established West Virginia statutes, regulations, and laws that Defendant Potters violated, including: W.Va. Code §§ 30-5-6(d), 30-5-6(f), 30-5-6(o), 60A-3-303, 60A-3-303(a) and W.Va. Code St. R. §§ 15-2-3, 15-2-3.1, 15-2-3.1.1, and 15-2-4. The Complaint also describes in detail Defendant Potters' legal duties created by those laws and otherwise owed to them relating to opioid and controlled substance security. Plaintiffs' Complaint further describes how Defendant Potters had specialized knowledge regarding his duties and concerning the widespread diversion of opioids in West Virginia. Plaintiffs' Complaint further details how Defendant Potters breached his duties by, without limitation: choosing not to review, investigate, or act upon the suspicious orders submitted by the wholesaler distributors; and failing to evaluate the overall security systems and needs of the Distributor Defendants and other wholesale distributors in West Virginia.

39. Defendant Potters is not entitled to qualified immunity for discretionary acts that violate clearly established laws of which a reasonable official/entity would have known. Syl. Pt. 11, *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014) (citing Syl. Pt. 7, *Parkulo,* 199 W.Va. at 164, 483 S.E.2d at 510). "A right is 'clearly established' when its contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right." *A.B.*, 234 W. Va. at 517, 766 S.E.2d at 776 (citations omitted).

40. In the present case, Defendant Potters' conduct as alleged in the Complaint violates clearly established laws.

41. The regulations cited by Plaintiffs are specific and prescribe clear and unequivocal directives to the BOP. For example, W.Va. Code St. R. § 15-2-5.1.1 provides:

> "A [distributor] shall provide effective controls and procedures to guard against theft and diversion of controlled substances. In order

> to determine whether a registrant has provided effective controls against diversion, the Board ***shall*** evaluate the overall security system and needs of the applicant or registrant."

Significantly, Black's Law Dictionary (Deluxe 8th Ed.) defines "shall" as follows: "Has a duty to; more broadly, is required to." Defendant Potters is also alleged to have violated other clearly established laws and regulations, including W.Va. Code § 30-5-1, *et seq.*; W.Va. Code §§ 30-5-6(d), 30-5-6(f), Code 30-5-6(l), 30-5-6(o); W.Va. Code §§ 60A-3-303, 60A-3-303(a); and W.Va. CSR §§ 15-2-3, 15-2-3.1, 15-2-3.11, 15-2-4. Importantly, these obligations are not new to David Potters and the BOP as the BOP and its Director have been charged with investigating wholesale distributors since at least 1982. *See* W.Va. Code R. § 15-2-4 (effective date Dec. 28, 1982).

42. Importantly, the statutes which Defendant Potters is alleged to have violated in the present case are similar to those the Supreme Court has found sufficient to defeat claims of qualified immunity. For example, in *A.B.*, *supra*, the Court reasoned that violations of "existing state regulations which govern certain aspects of the training, supervision, and retention of jail employees set forth in the West Virginia Minimum Standards for Construction, Operation, and Maintenance of Jails" could satisfy the violation of an established law to defeat immunity. *Id.*, 234 W. Va. at 515, 766 S.E.2d at 774. In *Brown*, supra, the Court held that violations of the prohibitions contained in the West Virginia Human Rights Act, 5-11-1 et seq., were sufficient to defeat qualified immunity. Id., 233 W.Va. at 129, 755 S.E.2d at 663. And in *Chase Securities*, *supra*, the Court indicated that alleged violations of traffic laws could serve as a basis to defeat claims of qualified immunity. *Chase Securities*,188 W. Va. at 365, n. 27, 424 S.E.2d at 600, n. 27.

43. Finally, the requirements set forth in the laws and regulations relied upon by Plaintiffs should be known by public employees and Defendant Potters. In *Brown*, *supra*, the Supreme Court stated: "[a state agency] is bound, at a minimum, to know the fundamental public

policies of the state and nation as expressed in their ... statutes[.]" *Brown*, 233 W. Va. at 129, 755 S.E.2d at 663 (holding that a reasonable official of a West Virginia city, such as a mayor, would know the provisions of the Humans Rights Act.") (internal quotations and citations omitted). This holds especially true here because the BOP promulgated the very rules which it is alleged to have violated. *See* W.Va. Code § 60A-8-9 ("The board of pharmacy shall promulgate rules not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of this article pursuant to chapter twenty-nine-a of this code.") Thus, it is not credible for the BOP to claim that it lacks knowledge regarding the contents off the laws relied upon by Plaintiffs—which are laws it promulgated.

E. Statute of Limitations

44. Plaintiffs' claims are not time barred by the statute of limitations.

45. The West Virginia Supreme Court has articulated the following five-step analysis to determine whether a cause of action if time-barred:

> First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court of the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Dunn v. Rockwell, 225 W. Va. 43, 689 S.E.2d 255, Syl. Pt. 5 (2009). The resolution of steps two through five in this case involve questions of material fact. As such, the timeliness of Plaintiffs' claims is a fact-intensive issue, which should be addressed later in the proceeding.

46. Furthermore, the statute of limitations which governs public nuisances in West Virginia "does not accrue until the harm or endangerment to the public health, safety and the environment is abated." Syl. pt. 11, *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 488 S.E.2d 901 (1997); *Rhodes v. E.I. du Pont de Nemours & Co.*, 657 F. Supp. 2d 751, 762 (S.D. W. Va. 2009), *aff'd in part, appeal dismissed in part*, 636 F.3d 88 (4th Cir. 2011) (noting that tortious "refusal to remediate tolls the statute of limitations" only if such behavior constitutes tortious conduct.") Here, Plaintiffs have alleged that the nuisance has not been abated. In order for Defendant Potters to prevail on this legal issue, he must establish that the prescription opiate problems in the Counties are over and/or have been abated—which he has failed to do at this stage of the litigation. At the very least, material issues of fact exist which is a sufficient ground to deny Defendant Potters' motion to dismiss at this stage.

47. The statute of limitations on Plaintiffs' claims are also tolled pursuant to the "discovery rule." The "discovery rule" is generally applicable to all torts unless there is a clear statutory prohibition. In tort actions, absent this clear statutory prohibition, the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury. Syl. pts. 2-3, *Dunn*, 689 S.E.2d 255 (2009).

48. In this case, the second element of *Dunn* forecloses dismissal. The role Defendant Potters played in the opioid epidemic and its alleged unlawful conduct was not public knowledge and such information was in the exclusive possession of the BOP/Potters and/or Distributor Defendants. Plaintiffs did not know (and did not have the means to know) the identity of the entity who owed Plaintiffs a duty to act with due care, and who may have engaged in conduct that breaches that duty, or that the conduct of that entity had a causal relation to the injury prior to the expiration of any statute of limitations.

49. Further, in West Virginia "estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentations or concealment of material fact." *Bradley v. Williams*, 195 W. Va. 180, 185, 465 S.E.2d 180, 185 (1995) (citations omitted). Plaintiffs have pled more than sufficient facts to support tolling the statute of limitations based on equitable estoppel. Under *Dunn*, this matter should be submitted to the finder of fact to determine whether a reasonable person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

50. Finally, West Virginia has adopted the continuing tort theory, which provides, "[w]here a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease." *Graham v. Beverage*, 211 W. Va. 486, 566 S.E.2d 603, Syl. Pt. 11 (2002). And here, Plaintiffs' have alleged a continuing tort and, thus, are permitted to recover damages for the duration of the Potters' wrongdoing.

F. Public Nuisance

51. Defendant Potters asserts that Plaintiffs may not collect damages on their public nuisance claim. But no such limitation exists under West Virginia law for a public nuisance action brought by a public entity.

52. Plaintiffs are also specifically authorized to bring an action to "abate or cause to be abated" a public nuisance. W.Va. Code § 7-1-3kk. And West Virginia caselaw recognizes broad remedies—including the recovery of costs—in abatement. *See, e.g., Witteried v. City of Charles Town*, No. 17-cv-0310, 2018 WL 2175820, at *3 (W. Va. May 11, 2018) (allowing city to recover costs of demolition of building determined to be public nuisance).

53. Furthermore, Restitution is an available remedy in public nuisance cases under the common law. A claim for restitution arises where "[a] person . . . has performed the duty of another, by supplying things or services . . . and (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety." Restatement of Restitution § 115. *See also United States v. Boyd*, 520 F.2d 642, 644–45 (6th Cir. 1975). The "abatement of a serious public nuisance . . . is a[] situation calling for the [award of restitution]." Restatement of Restitution § 115 cmt. b. This common-law doctrine is recognized in West Virginia. *See, e.g., State v. Aaer Sprayed Insulations*, No. 86-cv-458, 1987 WL 1428107 (W. Va. Cir. Ct. Sept. 4, 1987) (permitting restitution in public nuisance action by State seeking to recover costs of asbestos abatement) (citing Restatement of Restitution § 115). It is recognized in other states as well. *See, e.g., State v. Schenectady Chem., Inc.*, 479 N.Y.S.2d 1010 (N.Y. App. 1984) (state could receive restitution of costs for abating public nuisance caused by chemical wastes); *Brandon Township v. Jerome Builders, Inc.*, 263 N.W.2d 326 (Mich. Ct. App. 1977) (town could recover costs of repairing dam as restitution for abating public nuisance); *City of New*

York v. Keene Corp., 505 N.Y.S.2d 782, 784 (Sup. Ct. 1986); *55 Motor Ave. Co. v. Liberty Indus. Finishing Corp.*, 885 F. Supp. 410, 424 (E.D.N.Y. 1994).

54. Moreover, a claim for recovery of costs incurred and costs to be incurred in responding to a nuisance is equitable in nature. Even in circumstances where a legal claim for damages is statutorily prohibited, the allowance of equitable claims allows the recovery of restitution damages. See, e.g., Porter v. Warner Holding Co., 328 U.S. 395, 402 (1946). In such a case, the plaintiff does not seek compensatory damages; rather the plaintiff simply seeks to restore the status quo ante. See id. Courts can create large equitable funds to provide for the costs of abatement. See, e.g., People of the State of California v. Atlantic Richfield Co., No. 100CV788657, 2013 WL 6687953 at *59 (Cal. Super. Ct. Dec. 16, 2013) ("The Defendants against whom judgment is entered, jointly and severally, shall pay to the State of California $1,100,000,000 (One Billion One Hundred Million Dollars) into a specifically designated, dedicated, and restricted abatement fund (the 'Fund'). The payments into the Fund shall be within 60 days of entry of judgment.").

55. Courts have also considered the governmental costs expended to respond to a public nuisance as sufficient to meet the "special injury" requirement. *See, e.g.*, *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1240–41 (D.N.M. 2004) (pecuniary losses arising from existing and future response and remediation costs); *State of N.Y. v. Next Millennium Realty, LLC*, No. 03-cv-5985(SJF)(MLO), 2007 WL 2362144, at *15 (E.D.N.Y. Aug. 14, 2007) (injunctive order directing defendants to pay for or carry out any remediation of the groundwater contamination in the future). And when damages are awarded in nuisance, punitive damages are potentially available under West Virginia law upon a proper evidentiary showing. *See, e.g.*, *Perrine v. E.I. du Pont de Nemours*

& Co., 694 S.E.2d 815 (W.Va. 2010); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 900 (1991).

G. Fraud

56. "Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (W. Va. 2002).

57. Here, Plaintiffs have sufficiently alleged fraudulent concealment.

58. Plaintiffs have alleged concealment and knowledge: "Defendants' . . . concealing . . . their improper . . . regulation of opioid drugs coupled with Defendants' knowledge of the risks and harms created by their actions and conduct, as discussed herein, constitutes fraud[.]" (Compl. ¶ 701.) Plaintiffs allege a duty to disclose: "Defendants BOP and Potters had the ability—and duty—to investigate, inspect, report, alert, limit, stop, and/or restrict the distribution of dangerous and improper opioid drugs into the Counties' communities. Nonetheless, Defendants BOP and Potters intentionally, maliciously, and in bad faith, breached their duties and ignored the 'suspicious' orders by stuffing them in a storage box." (Id. ¶ 790. See also id. ¶¶ 788-89.) As discussed above, Plaintiffs allege intent. Finally, though it is not necessary, Plaintiffs allege that they "did not know or could not have known through the exercise of reasonable diligence of Defendants' tortious and improper conduct and . . . relied upon Defendants' fraudulent conduct to their detriment." (Id. ¶ 702.) The Complaint is full of similar allegations.

59. "Since the pleadings [a]re sufficient to afford [Potter] an opportunity to prepare an adequate defense, the purpose underlying the Rule 9(b) requirement of pleading fraud with particularity . . . was realized[.]" *Pocahontas Min. Co. Ltd. P'ship v. Oxy USA, Inc.*, 202 W. Va. 169, 171 (W. Va. 1998).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court, taking the allegations in the Complaint as true and construing the Complaint in the light most favorable to Plaintiffs, **FINDS** that Plaintiffs' Complaint sufficiently states claims for relief against Defendant Potters and he has not demonstrated beyond doubt that Plaintiffs can prove no set of facts in support of their claims (as it must do to succeed on a motion to dismiss). Accordingly, it is

ORDERED that the Motion of Defendant David Potters to Dismiss is denied in its entirety.

It is further **ORDERED** that all exceptions and objections are noted and preserved.

It is further **ORDERED** that an attested copy of this Order shall be provided to all counsel of record.

ENTERED THIS 28th day of December, 2018.

Honorable David W. Hummel, Jr.
Judge of the Circuit Court
Marshall County, West Virginia

A Copy Teste:
Joseph M. Rucki, Clerk
By Donna Crow Deputy