

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

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2018 DEC 28 AM 11:12

JOSEPH M. RUCKI

(K)
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 ACTAVIS' MOTION TO DISMISS

JAN 04 2019

On November 7, 2018, Plaintiffs and Defendants Watson Laboratories Inc., Actavis LLC, and Actavis Pharma Inc. f/k/a Watson Pharma Inc. (collectively “Actavis”) appeared for a hearing on Actavis’ 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 filed their Complaint in the above Civil Action on December 13, 2017, asserting claims related to the manufacturer, marketing, sale, and/or distribution of opioids in the Plaintiff counties and in the areas surrounding the counties.

2. Plaintiffs’ Complaint asserts the following causes of action against Actavis: Public Nuisance (Count I, Compl. ¶¶ 673-90); Unjust Enrichment (Count II, *id.* ¶¶ 691-99); Fraud by Concealment (Count III, *id.* ¶¶ 700-02); Negligence and Negligent Marketing (Count IV, *id.* ¶¶ 703-14); and Fraud and Intentional Misrepresentation (Count V, *id.* ¶¶ 715-22). Plaintiffs’ Complaint also asserted causes of action for Strict Liability—Defective Design (Count VII, *id.* ¶¶ 745-49) and Strict Liability—Failure to Warn (Count VIII, *id.* ¶¶ 750-54) against Actavis, but Plaintiffs’ subsequently withdrew Counts VII and VIII.

3. On April 24, 2018, Actavis filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure asserting that the above Counts of the Plaintiffs’ Complaint fail to state claims upon which relief can be granted under West Virginia law.

4. Actavis’ Motion to Dismiss argues that Plaintiffs’ claims should be dismissed for the following reasons: Plaintiffs have engaged in group pleading; the Complaint does not plead fraud, including the details of specific misrepresentations, with sufficient particularity; and the allegations in Plaintiffs’ Complaint do not sufficiently allege causation.

5. Plaintiffs oppose Actavis' arguments as follows: Plaintiffs sufficiently plead a fraudulent scheme and provide ample details that identify Actavis' wrongdoing and connection to the scheme; Plaintiffs plead fraud with sufficient particularity; and Plaintiffs' Complaint sufficiently alleges the requisite casual connection between Actavis' actions and Plaintiffs' harms, including numerous allegations of fact from which a jury could conclude that Actavis' acts and omissions were a proximate cause of the Plaintiffs' injuries.

Legal Standard

6. 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 Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978). The policy of Rule 8(f) 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.* at 158-59.

A. Group Pleading

7. The Court finds and concludes that Plaintiffs have sufficiently pled a fraudulent scheme and ample details that identify Actavis' wrongdoing and connection to the scheme. For example, Plaintiffs allege that Actavis distributed its products in the Plaintiff counties and that "Defendants employed the same marketing plans and strategies and deployed the same messages

in [Plaintiffs' counties] as they did nationwide" (Compl. ¶ 132), and that physicians and patients in the Counties were misled. (*Id.* ¶¶ 598, 611, 614, 615, 622.)

B. Fraud

8. The Court finds and concludes that Plaintiffs' Complaint sets forth sufficient facts as to each Defendant to hold each Defendant, including Actavis, liable for its individual misrepresentations and wrongdoing.

9. Plaintiffs' Complaint also pleads concerted action. (Compl., ¶¶ 221 & n.63, 235-40, 253, 277, 291, 300, 305, 334, 504 802, 816.) Thus, the Court further finds and concludes that Plaintiffs has sufficiently pled a basis for collective liability. *See* W. Va. Code § 55-7-13c ("[J]oint liability may be imposed on two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission").

C. Causation

10. Under West Virginia law, proximate cause is defined as that "which, in natural and continuous sequence, produces foreseeable injury and without which the injury would not have occurred." *Hudnall v. Mate Creek Trucking, Inc.*, 200 W.Va. 454, 459, 490 S.E.2d 56, 61 (1997).

11. A plaintiff is not required to show that the negligence of one sought to be charged with an injury was the sole proximate cause of an injury. *Syl. Pt. 2, Everly v. Columbia Gas of West Virginia, Inc.*, 171 W. Va. 534, 534-35, 301 S.E.2d 165, 165-66 (1982). Instead, a plaintiff need only show the defendants actions were a proximate cause of plaintiff's injury. *Id.*

12. Proximate cause is an elastic principle that necessarily depends on the facts of each case. *Mays v. Chang*, 213 W. Va. 220, 224, 579 S.E.2d 561, 565 (2003). Therefore, questions of proximate cause are fact-based issues that should be left for jury determination. *Id. See also Aikens*, 208 W.Va. at 490, 541 S.E.2d at 580.

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13. In the present case, the Court finds and concludes that Plaintiffs have sufficiently
pled allegations to satisfy the requirements for causation with regard to Actavis under West
Virginia law.

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ORDER

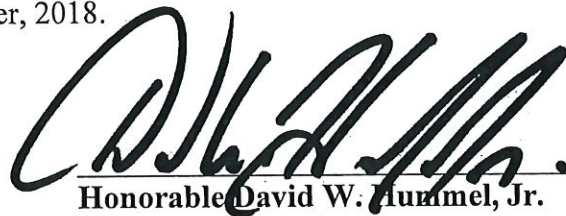
Based upon the foregoing Findings of Fact and Conclusions of Law, the Court, taking the allegations in the Complaint as true and construing the Complaint in the light most favorable to Plaintiffs, **FINDS** that Plaintiffs' Complaint sufficiently states claims for relief against the Defendants and the Defendants have 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 Defendants' Motion 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 Crew Deputy