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 CEPHALON, INC. AND TEVA PHARMACEUTICALS USA, INC.'S MOTION TO DISMISS

On November 7, 2018, Plaintiffs and Defendants Cephalon, Inc. and Teva Pharmaceuticals USA, Inc. (collectively "Teva") appeared for a hearing on Teva's 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 manufacturing, 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 Teva: 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 Teva, but Plaintiffs' subsequently withdrew Counts VII and VIII.

3. On April 24, 2018, Teva 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. In its Motion, Teva argues that the Plaintiffs' claims should be dismissed for the following reasons: Plaintiffs have not pled any actionable misrepresentations by Teva; the allegations in Plaintiffs' Complaint do not sufficiently allege causation; and Plaintiffs' claims are barred by the applicable statutes of limitations.

5. Plaintiffs oppose Teva's arguments as follows: Plaintiffs have pled with sufficient particularity Teva's own misrepresentations and omissions, that Teva controlled and may therefore be held liable for the misrepresentations and omissions of third parties, and that Teva may be held liable for taking part in a fraudulent scheme and conspiracy; Plaintiffs sufficiently allege the requisite casual connection between Teva's actions and Plaintiffs' harms, including numerous allegations of fact from which a jury could conclude that Teva's acts and omissions were a proximate cause of the Plaintiffs' injuries; and Plaintiffs' claims are timely under the discovery rule, the continuing tort theory, and estoppel.

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. Misrepresentations

7. The Court finds and concludes that Plaintiffs have sufficiently pled Teva's misrepresentations with sufficient particularity. Plaintiffs' Complaint alleges details of Teva's deceptive marketing and its connection to the common fraudulent scheme. (*See* Compl. ¶¶ 161-66, 179, 203, 217, 226, 231, 259, 429.) Plaintiffs' Complaint further alleges details of Teva's deceptive marketing specifically directed to its Actiq and Fentora products. (*See id.* ¶¶ 230, 249, 259-60, 312-13, 315-16, 319-22, 324-30, 339.) Plaintiffs' Complaint also includes specific allegations that Teva used its sales force, paid physician speakers, advertisements, and continuing medical education ("CME") programs to convey its misleading marketing. (*See id.* ¶¶ 315, 316, 319-22, 324-27.)

8. The Court further finds and concludes that Plaintiffs have sufficiently pled facts from which the trier of fact may infer that Teva had sufficient control or influence over third parties such that their statements may be attributed to Teva. For example, Plaintiffs allege that "Defendants took an active role in guiding, reviewing, and approving many of the misleading statements issued by . . . third parties, ensuring that the Manufacturer Defendants were consistently aware of their content" (*id.* ¶ 147); that "[b]y funding, directing, editing, and distributing these materials, Defendants exercised control over their deceptive messages" (*id.*); and that "the independence of [the third party] materials was a ruse—the Manufacturer Defendants were in close contact with these third parties, paid for and were aware of the misleading information they were disseminating about the use of opioids to treat chronic pain, and regularly helped them to tailor and distribute their misleading, pro-opioid messaging" (*id.* ¶ 150.) *See also id.* at ¶ 378 ("Cephalon's control over the content of these CMEs is apparent based on its advance knowledge

of their content . . . ."); *id.* at ¶ 379 ("Cephalon not only planned for, but depended upon, . . . activities [of third parties] as a key element of its marketing strategy").

9. Finally, the Court finds and concludes that Plaintiffs properly plead concert of action (Compl. ¶¶ 147 & n.47, 674, 716) and conspiracy (*id.* ¶¶ 629-32) as bases for Teva's collective liability with the other Manufacturer Defendants. *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").

B. 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.

13. In the present case, the Court finds and concludes that Plaintiffs have sufficiently pled allegations to satisfy the requirements for causation under West Virginia law. Specifically, Plaintiffs allege that Teva misrepresented and omitted essential information related to opioids to promote them as a safe, effective, and non-addictive treatment for long-term chronic pain.

Plaintiffs further allege that Teva misrepresented the addictive risks of opioid drugs and failed to take appropriate action when they knew these drugs were highly susceptible to addiction, misuse, abuse, and/or diversion; that opioid drug addiction, misuse, abuse, and/or diversion bore a direct relationship to the amount and volume of opioids being prescribed; and that opioid drugs were being misused, abused, and diverted across the country, including within the counties, which created a nationwide public health crisis and has caused Plaintiffs to incur damages. In addition, the complaint clearly identifies harms that were foreseeable to Teva and that would result from its conduct.

C. Statute of Limitations

14. The West Virginia Supreme Court has articulated the following five-step analysis to determine whether a cause of action is 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).

15. The Court finds and concludes that the resolution of steps two through five in this case involve questions of material fact that will need to be resolved by the trier of fact. Thus, the Court denies Teva's statute of limitation argument on that basis alone.

16. The Court further finds and concludes that the statute of limitations that governs public nuisance claims 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). Here, Plaintiffs have adequately alleged that the public nuisance has not been abated. Therefore, the Court finds and concludes that Plaintiffs' claims are not barred by the statutes of limitations.

17. The Court further finds and concludes that Plaintiffs' claims are timely under the discovery rule for purposes of this motion. In tort actions, 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).

18. Here, the Court finds and concludes that the second factor of *Dunn* forecloses dismissal. As alleged, the identity of the manufacturers and wholesale distributors who engaged in commerce, let alone the conduct of those that may have engaged in unlawful conduct, was not public knowledge. As further alleged, this information was secreted in two locations: (1) the DEA ARCOS database; and (2) the Defendants' Suspicious Order Monitoring System. Neither of which are publicly available.

19. The Court further finds and concludes that equitable estoppel applies for the purpose of this motion. 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). As such, Plaintiffs have pled sufficient facts to support tolling the statute of limitations based on equitable estoppel.

20. The Court further finds and concludes that 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). Here, Plaintiffs have alleged a continuing tort. (Compl. ¶ 10.) Therefore, Plaintiffs' claims are not barred by the statutes of limitations under the continuing tort theory.

21. Finally, the Court finds and concludes that Plaintiffs allege statements made by, or attributable to, Teva after 2008. For example, Plaintiffs allege statements from 2011:

> In 2011, Cephalon wrote and copyrighted an article titled "2011 Special Report: An Integrated Risk Evaluation and Risk Mitigation Strategy for Fentanyl Buccal Tablet (FENTORA®) and Oral Transmucosal Fentanyl Citrate (ACTIQ®)" that was published in Pain Medicine News. The article promoted Cephalon's drugs for off-label uses by stating that the "judicious use of opioids can facilitate effective and safe management of chronic pain" and noted that Fentora "has been shown to be effective in treatment of [breakthrough pain] associated with multiple causes of pain," not just cancer.

(*Id.* ¶ 339.) To the extent Plaintiffs allege misrepresentations in written publications, the Court further finds and concludes that the date when the statements were first published does not limit Plaintiffs' claims because the misleading materials may continue to circulate and be relied on long after they were initially introduced.

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 Creel Deputy