

FILED

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

2019 DEC 28 AM 11:09

JOSEPH M. RUCKI

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.

Civil Action No. 17-C-248

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.

The Honorable David W. Hummel, Jr.

**ORDER DENYING ENDO HEALTH SOLUTIONS INC. AND ENDO
PHARMACEUTICAL INC.'S MOTION TO DISMISS**

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On November 7, 2018, Plaintiffs and Defendants Endo Health Solutions Inc. and Endo Pharmaceutical Inc.'s (collectively, "Endo") appeared for a hearing on Endo'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. The Plaintiffs' Complaint asserts the following causes of action against Endo: 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 Endo, but Plaintiffs' subsequently withdrew Counts VII and VIII.

3. On April 24, 2018, Endo 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 a claim upon which relief can be granted under West Virginia law.

4. Endo argues in its Motion to Dismiss that Plaintiffs' claims should be dismissed for the following reasons: Plaintiffs engage in improper group pleading; Plaintiffs cannot rely on third-party statements not attributable to Endo; and Plaintiffs have not sufficiently alleged causation.

5. Plaintiffs oppose Endo's arguments as follows: Plaintiffs sufficiently plead a fraudulent scheme and provide ample details that identify Endo's wrongdoing and connection to the scheme; Endo sufficiently controlled third parties such that their misrepresentations can and should be imputed to Endo; and Plaintiffs' Complaint sufficiently alleges the requisite casual connection between Endo's actions and Plaintiffs' harms, including numerous allegations of fact from which a jury could conclude that Endo's 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 sufficiently plead a fraudulent scheme and ample details that identify Endo's wrongdoing and connection to the scheme.

8. For example, Plaintiffs allege that Endo "promoted a 1980 item in the well-respected New England Journal of Medicine, J. Porter & H. Jick, *Addiction Rare in Patients Treated with Narcotics*, 302 (2) New Eng. J. Med. 123 (1980) ('Porter & Jick Letter'), in a manner that makes it appear that the item reported the results of a peer reviewed study . . . [but] failed to reveal that this 'article' is actually a letter-to-the-editor, not a study, much less a peer-reviewed study." (Compl. ¶ 171.) The Porter-Jick letter states that despite widespread use of opioids in hospitals, "addiction is rare in medical patients with no history of addiction." (*Id.*) Plaintiffs allege that statement was never intended to apply to long-term opioid use, the underlying patient situations that led to the original conclusion were "limited to acute or end-of-life situations, not chronic pain," and there is no indication that "caregivers were instructed to assess or document signs of addiction." (*Id.* ¶ 171-72.) Plaintiffs allege that Endo did not disclose these facts.

9. Plaintiffs further allege that "Endo distributed a patient education pamphlet entitled *Understanding Your Pain: Taking Oral Opioid Analgesics* [that] claimed '[a]ddicts take opioids for other reasons [than pain relief], such as unbearable emotional problems.' This implies that patients prescribed opioids for genuine pain will not become addicted, which is unsupported and untrue." (*Id.* ¶ 249(o).) The pamphlet also provided a Q&A which reads as follows: "If I take the opioid now, will it work later when I really need it?" The response is, "The dose can be increased You won't 'run out' of pain relief." (*Id.* ¶ 268(f).) Plaintiffs allege that this was misleading because at a certain point a patient's pain will no longer be treatable by an opioid. (*See id.* ¶ 172.)

10. Plaintiffs allege that “Endo sponsored a website, painknowledge.com, through [the American Pain Foundation], which claimed that ‘[p]eople who take opioids as prescribed usually do not become addicted.’” (*Id.* ¶ 241(i).) The website further “claimed in 2009 that with opioids, ‘your level of function should improve; you may find you are now able to participate in activities of daily living, such as work and hobbies, that you were not able to enjoy when your pain was worse.’” (*Id.*) Plaintiffs allege that Endo sponsored this statement despite knowing information to the contrary: that long-term use of opioids does not improve pain function. (*Id.* ¶ 407.)

11. Plaintiffs allege that Endo sponsored a CME entitled “*Persistent Pain in the Older Adult*,” which “misleadingly indicated that [withdrawal] symptoms can be avoided entirely by tapering a patient’s opioid dose by 10% to 20% per day for ten days.” (*Id.* ¶ 440.)

12. The Court also finds and concludes that Plaintiffs have adequately pled a conspiracy as a basis for Endo’s liability. *See, e.g., Srtahin v. Cleavenger*, 216 W. Va. 175, 189, 603 S.E.2d 197, 211 (2004) (“[T]ortfeasors whose wrongful acts or omissions, whether committed intentionally or negligently, concur to cause injury are joint tortfeasors who are jointly and severally liable for the damages which result from the wrongs so committed.”).

B. Third-Party Statements

13. Plaintiffs’ Complaint contains numerous allegations regarding Endo’s control and influence over third parties and their misrepresentations:

- Endo sponsored a website, painknowledge.com, through the American Pain Foundation (“APF”) and the National Initiative on Pain Control, which, in 2009, claimed that with opioids, “your level of function should improve; you may find you are now able to participate in activities of daily living, such as work and hobbies, that you were not able to enjoy when your pain was worse.” Endo continued to provide funding for this website through 2012, and closely tracked unique visitors to it. (Compl., ¶ 241(i).)
- Endo provided grants to APF to distribute *Exit Wounds* to veterans, which taught that opioid medications “*increase* your level of functioning” (emphasis in the original). *Exit*

Wounds also omits warnings of the risk of interactions between opioids and benzodiazepines, which would increase fatality risk. (*Id.* ¶ 241(m).)

- Endo contracted with the American Geriatrics Society (“AGS”) to produce a continuing education program for physicians promoting the 2009 guidelines for the Pharmacological Management of Persistent Pain in Older Persons. These guidelines falsely claim that “the risks [of addiction] are exceedingly low in older patients with no current or past history of substance abuse.” None of the references in the guidelines corroborates the claim that elderly patients are less likely to become addicted to opioids, and there is no such evidence. Endo was aware of the AGS guidelines’ content when it agreed to provide this funding, and AGS drafted the guidelines with the expectation it would seek drug company funding to promote them after their completion. (*Id.* ¶ 249(p).)
- Endo distributed copies of a book by Dr. Lynn Webster entitled *Avoiding Opioid Abuse While Managing Pain* (2007). Endo’s internal planning documents describe the purpose of distributing this book as to “[i]ncrease the breadth and depth of the Opana ER prescriber base.” The book claims that when faced with signs of aberrant behavior, the doctor should regard it as “pseudoaddiction” and thus, increasing the dose in most cases . . . should be the clinician’s first response.” (*Id.* ¶ 260(c).)
- Endo distributed a patient education pamphlet edited by Dr. Russell Portenoy titled *Understanding Your Pain: Taking Oral Opioid Analgesics*. In Q&A format, it asked: “if I take the opioid now, will it work later when I really need it?” The response was: “The dose can be increased You won’t ‘run out’ of pain relief.” (*Id.* ¶ 268(f).) Plaintiffs allege that is false.
- “Endo’s influence over APF’s activities was so pervasive that APF President Will Rowe reached out to Defendants—including Endo—rather than his own staff, to identify potential authors to answer a 2011 article critical of opioids.” (*Id.* ¶ 429.)

14. Therefore, the Court finds and concludes that Plaintiffs have sufficiently pled facts from which the trier of fact may infer that Endo had sufficient control or influence over third parties such that their statements may be attributed to Endo.

C. Causation

15. 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).

16. 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.*

17. 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.

18. 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 Endo 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 Endo 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, which created a nationwide public health crisis and has caused Plaintiffs to incur damages. (Compl. ¶¶ 705-13.) In addition, the complaint clearly identifies harms that were foreseeable to Endo and that would result from its conduct. *Id.*

19. Notably, Endo previously made similar causation arguments in the face of almost identical allegations which were rejected by that court. See *In re Opioid Litig.*, 2018 WL 3115102, at *24, 2018 N.Y. Slip Op. 31228(U), 31 (N.Y. Sup. Ct. 2018).

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ORDER

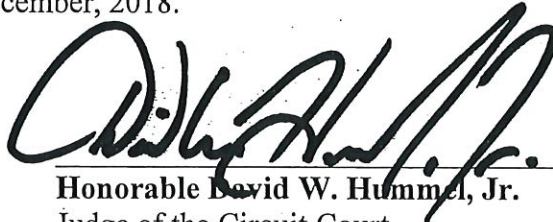
Based upon the foregoing Findings of Fact and Conclusions of Law, the Court, taking the allegations in the Complaint as true and construing the Complaint in the light most favorable to Plaintiffs, **FINDS** that Plaintiffs' Complaint sufficiently states claims for relief against the Defendants and the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