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 JOHNSON & JOHNSON AND JANSSEN PHARMACEUTICAL, INC.'S MOTION TO DISMISS

On November 7, 2018, Plaintiffs and Defendants Johnson & Johnson ("Johnson & Johnson") and Janssen Pharmaceutical, Inc. ("Janssen") (together, "J&J") appeared for a hearing on J&J'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 J&J: 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 the Manufacturer Defendants, but Plaintiffs' subsequently withdrew Counts VII and VIII.

3. On April 24, 2018, J&J f 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, J&J argues that Plaintiffs' claims should be dismissed for the following reasons: Johnson & Johnson is merely the parent company of Janssen and cannot be held liable for Janssen's actions; Plaintiffs do not allege sufficient facts to attribute to J&J

misrepresentations ostensibly made by third parties; the labels on J&J's drugs shield it from liability; J&J's statements were not misleading.

5. Plaintiffs oppose J&J's arguments as follows: J&J exercised control over the development and marketing of opioids by Janssen; J&J sufficiently controlled third parties such that their misrepresentations can be imputed to J&J; FDA labels do not immunize pharmaceutical companies that have engaged in deception; and Plaintiffs sufficiently allege that J&J's marketing was misleading.

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. Control Over Janssen and Third Parties

7. Plaintiffs allege that across the pharmaceutical industry "core message" development was funded and overseen on a national basis by corporate headquarters. (Compl., ¶ 133.) The Complaint explains that Defendants, including J&J, ensure marketing consistency nationwide through national and regional sales representative training; national training of local medical liaisons, the company employees who respond to physician inquiries; centralized speaker training; single sets of visual aids, speaker slide decks, and sales training materials; and nationally coordinated advertising. (*Id.* ¶ 134.)

8. Plaintiffs also allege that documents posted on J&J's websites confirm J&J's control of the development and marketing of opioids by Janssen. For example, the "Ethical Code for the Conduct of Research and Development" posted on the Janssen website is Johnson & Johnson's company-wide Ethical Code, which it requires all subsidiaries to follow. In addition, all Janssen officers, directors, employees, and sales associates must certify that they have "read, understood and will abide by" the Code, which governs all forms of marketing at issue in this case. Consistent with these company-wide requirements, the Complaint expressly alleges that J&J controls the development and sale of Janssen's drugs (*id.* ¶ 17); that J&J deals with the FDA regarding Janssen's products (*id.*); and that the profits from Janssen's drugs inure to the benefit of J&J (*id.*).

9. Accordingly, the Court finds and concludes that Plaintiffs adequately allege that J&J sufficiently controlled Janssen such that Janssen's misrepresentations can be imputed to Johnson & Johnson.

10. The Court further finds and concludes that Plaintiffs have adequately pled concert of action and conspiracy as bases for J&J's collective liability with Janssen. (*Id.* ¶¶ 147 & n.47,

629-32, 674, 716.) *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"); *Dunn v. Rockwell*, 225 W. Va. 43, 57, 689 S.E.2d 255, 269 (2009) ("[A civil conspiracy] is . . . a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s).").

11. The Court further finds and concludes that Plaintiffs plead facts from which the trier of fact may infer that J&J had sufficient control or influence over third parties such that their statements may be attributed to Purdue. (*See* Compl. ¶¶ 137, 147-51.)

B. J&J's Labels

12. In *City of Chicago v. Purdue Pharma L.P.*, No. 14-C-4361, 2015 WL 2208423, at *4 (N.D. Ill. May 8, 2015), a similar opioids case, the court found that FDA labels do not immunize pharmaceutical companies that have engaged in deception.

13. In this case, Plaintiffs have alleged that J&J engaged in a widespread deceptive marketing campaign involving opioids, which drastically increased the number of prescriptions written and dispensed and misled physicians, patients, and Plaintiffs. (Compl. ¶¶ 39-41, 36, 37, 598-99, 611-15, 617-20.)

14. Therefore, the Court finds and concludes that the labels on J&J's drugs do not shield it from liability.

C. J&J's Misrepresentations

15. In its Motion to Dismiss, J&J argues that the AGS Clinical Practice Guideline's recommendation that "all patients with moderate to severe pain . . . should be considered for opioid therapy" is not misleading as a matter of law because it was accompanied by a statement that the

recommendation is based on a low quality of evidence. But, as Plaintiffs allege, that statement is followed by another statement that the recommendation is "strong." Plaintiffs further allege that, when read in context, the "strong recommendation" that "all [older] patients with moderate to severe pain . . . should be considered for opioid therapy" is misleading because it suggests that, based on the available evidence, the risk-benefit profile of opioids supports their widespread use.

16. In its Motion to Dismiss, J&J also argues that statements in American Pain Federation's *Exit Wounds* are not misleading as a matter of law. Plaintiffs allege that J&J sponsored the American Pain Federation's *Exit Wounds*, a marketing effort that targeted veterans suffering from pain, which promoted the idea that long-term exposure to opioids very rarely leads to addiction in people who are not predisposed and omitted warnings about the potentially fatal interactions opioids can have when taken with other medications. (Compl., ¶¶ 230, 231, 233, 234, 241(q), 272(k), 476, 521-22.) J&J contends that the omission from *Exit Wounds* of the risk of potentially fatal interactions between opioids and other drugs is not misleading because, unlike branded material, the FDA does not require unbranded materials to include all of the potential side-effects. But the law is clear that just because a particular disclosure is not mandated by the FDA does not mean that its omission is not misleading as a matter of law. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 573-78 (2009) (FDA regulations are a "floor," not a "ceiling," with respect to warnings); *see also In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings*, No. 14 C 1758, 2016 WL 861213, at *3 (N.D. Ill. Mar. 7, 2016) (plaintiffs entitled to pursue fraud claim based on marketing misrepresentations even where FDA did not require, and would not permit, disclosures to be made in the label).

17. In its Motion to Dismiss, J&J further argues that statements in J&J's "patient education guide," *Finding Relief*, are not misleading as a matter of law. Plaintiffs allege that

Finding Relief contains misrepresentations. (*See* Compl. ¶¶ 496-504.) These alleged misrepresentations include that patients will not become addicted to opioids that are prescribed by a doctor, that many studies conclude that opioids are rarely addictive, that it is a "myth" that opioids are addictive, and that it is similarly a "myth" that "opioid doses have to be bigger over time." (*Id.*) Plaintiffs adequately allege that these representations are misleading, especially as compared to the presentation of risks of non-steroidal anti-inflammatory drugs ("NSAIDs"). (*Id.*) Specifically, Plaintiffs allege that patients frequently become addicted to opioids even when the opioids they are taking have been prescribed by a doctor (*id.* ¶¶ 67-76); that over time, patients develop tolerance and typically require progressively higher doses to obtain the same levels of pain reduction (*id.* ¶ 72); and that NSAIDs are in fact much safer than opioids (*id.* ¶¶ 102-03, 225, 270).

18. In its Motion to Dismiss, J&J claims that statements in *Let's Talk Pain* are neither misleading nor relevant. Plaintiffs allege that *Let's Talk Pain* was one of many places where J&J contributed to the misconception that the risks of addiction and abuse were insignificant, overblown, and a result of physicians' "undertreatment of pain." (*Id.* ¶ 252.) In *Let's Talk Pain*, J&J allegedly misled physicians and patients to believe that addiction-related behavior was actually "pseudoaddiction," which "refers to patient behaviors that may occur when pain is under-treated." (*Id.* ¶ 260(e).) Plaintiffs also allege that *Let's Talk Pain* "misrepresented that the use of opioids for the treatment of chronic pain would lead to patients regaining functionality." (*Id.* ¶ 241(o-r).) Plaintiffs further allege that Defendants invented the concept of "pseudoaddiction" (*see, e.g.*, *id.* ¶¶ 259-60); that any statement or suggestion that "the concept of 'pseudoaddiction' is substantiated by scientific evidence" is false (*id.* ¶ 260); and that "[t]here is no scientific evidence

to support the concept of 'pseudoaddiction,' and any suggestion that addictive behavior masquerades as 'pseudoaddiction' is false" (*id.* ¶ 352).

19. Accepting Plaintiffs' allegations as true and construing the allegations in the light most favorable to Plaintiffs, the Court finds and concludes that Plaintiffs have sufficiently alleged the falsity of the misrepresentations at issue here. At the very least, whether J&J's marketing was misleading is an issue of fact. *See Beattie v. Skyline Corp.*, No. 3:12-2528, 2014 WL 7335148, at *6 (S.D.W. Va. Dec. 19, 2014) (whether an act is unfair or deceptive raises a question of fact).

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 _____ **Deputy**