



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

Civil Action No. 19-C-9000

THIS DOCUMENT APPLIES TO:

MONONGALIA COUNTY
COMMISSION, et al.,

Plaintiffs,

v.

PURDUE PHARMA L.P.,

Defendants.

Civil Action Nos. 18-C-222 MSH
18-C-233 MSH
18-C-234 MSH
18-C-235 MSH
18-C-236 MSH

**ORDER DENYING DEFENDANTS WATSON LABORATORIES, INC.,
ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC., AND
ACTAVIS LLC'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

Pending before the Court is *Defendants Watson Laboratories, Inc., Actavis Pharma, Inc. f/k/a Watson Pharma, Inc. and Actavis LLC's* (collectively, "the Actavis Generic Entities") *Motion to Dismiss Plaintiffs' Complaint* (Transaction No. 63556519), filed in *Monongalia County Commission, et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 18-C-222 MSH and 18-C-233 MSH through 18-C-236 MSH (the *Monongalia County* cases), which has been fully briefed by the parties. The Court has reviewed the parties' briefing of the instant motion, as well as the Circuit Court of Marshall County's *Order Denying Actavis' Motion to Dismiss*, filed in *Brooke County Commission, et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 17-C-248 MSH through 17-C-255 MSH (the *Brooke County* cases). A copy of the Order is attached as Exhibit A.

In addition, the Court has reviewed *Plaintiffs' Motion for Entry of Orders Denying Defendants' Pending Motions to Dismiss* and proposed Orders (Transaction ID 64344046), Defendants' proposed *Order Denying Manufacturer Defendants' Respective Motions to Dismiss*

Plaintiffs' Complaint (Transaction ID 64346482), and Defendants' *Objection to Interlocutory Decision, Notice of Intent to Seek Extraordinary Writ, and Request for Findings of Fact and Conclusions of Law* (Transaction ID 64346834). Having conferred with one another to ensure uniformity of their decision, as contemplated by *Rule 26.07(a)* of the *West Virginia Trial Court Rules*, the Presiding Judges unanimously **DENY** Defendants *Watson Laboratories, Inc., Actavis Pharma, Inc. f/k/a Watson Pharma, Inc. and Actavis LLC's Motion to Dismiss Plaintiffs' Complaint* (Transaction No. 63556519) for the following reasons.

The claims asserted by Plaintiffs in the *Monongalia County* cases are identical to those asserted by the Plaintiffs in the *Brooke County* cases, which are companion Opioid Litigation cases now pending before the Mass Litigation Panel. Prior to referral of the Opioid Litigation to the Panel, both the *Brooke County* cases and the *Monongalia County* cases were pending before the Honorable David W. Hummel, Jr. in the Circuit Court of Marshall County, West Virginia. The Actavis Generic Entities filed a motion to dismiss the Complaint in the *Brooke County* cases, asserting the same arguments and issues raised in the instant motion to dismiss. That motion was fully briefed and argued before Judge Hummel, who denied the motion in its entirety. See Exhibit A.

Thereafter, the Manufacturer Defendants filed a Petition for a Writ of Prohibition with the Supreme Court of Appeals of West Virginia concerning the Marshall County Circuit Court's denial of their motions to dismiss the Complaint in the *Brooke County* cases. The Petition was unanimously refused.

As previously held, Judge Hummel has entered numerous Orders denying motions to dismiss in the *Brooke County* cases which the Court finds are well-founded. Those Orders are the law of the case. The Court will not revisit Judge Hummel's rulings, to the extent the same parties who filed motions to dismiss in the *Brooke County* cases have filed identical motions to

dismiss in the *Monongalia County* cases. See *Order Regarding Rulings Issued During the September 20, 2019 Status Conference* (Transaction ID 64297517). Accordingly, the Court hereby adopts and incorporates by reference, as if fully set forth herein, the findings of fact and conclusions of law set forth in the Marshall County Circuit Court's *Order Denying Actavis' Motion to Dismiss*, filed in the *Brooke County* cases. See Exhibit A.

To the extent the Actavis Generic Entities rely on decisions from other courts rendered after Judge Hummel denied their motion to dismiss the Complaint in the *Brooke County* cases, the Court is not persuaded. The new authority is from trial courts in other jurisdictions that have no precedential value.

Based upon the foregoing, it is accordingly **ORDERED** that *Defendants Watson Laboratories, Inc., Actavis Pharma, Inc. f/k/a Watson Pharma, Inc. and Actavis LLC's Motion to Dismiss Plaintiffs' Complaint* (Transaction No. 63556519) is **DENIED**.

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

A copy of this Order has been electronically served on all counsel of record this day via File & ServeXpress.

ENTERED: October 31, 2019.

/s/ Alan D. Moats
Lead Presiding Judge
Opioid Litigation

FILED

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

2018 DEC 28 AM 11:12

JOSEPH M. RUCKI

C(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

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Exhibit A

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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JOSEPH M. RUCKI

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 Crow Deputy