



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 19-C-9000

THIS DOCUMENT APPLIES TO:

MAYOR ELMER RAY SPENCE ON
BEHALF OF THE TOWN OF DELBARTON, et al.,

Plaintiffs,

v. Civil Action Nos. 20-C-16 MSH through 20-C-27 MSH

CARDINAL HEALTH, INC., et al.,

Defendants.

**ORDER REGARDING DISTRIBUTOR DEFENDANTS'
MOTION TO DISMISS CIVIL CONSPIRACY CLAIM**

Pending before the Court is *Distributor Defendants' Motion to Dismiss the Town's Civil Conspiracy Claim* (Transaction ID 65719331 and 65701090) filed in the above-styled civil actions by Defendants AmersourceBergen Drug Corporation and Cardinal Health, Inc. pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and *Defendant H.D. Smith, LLC's Motion to Dismiss and Joinder in Distributors' Motion to Dismiss the Towns' Civil Conspiracy Claim* (Transaction ID 65701480). Defendants move to dismiss with prejudice all of Plaintiffs' civil conspiracy claims ("Count V"), together with all of Plaintiffs' other claims for the reasons previously given in the Distributors' several motions to dismiss.¹ The motion has been fully briefed by the parties.

¹ To the extent the Distributor Defendants re-state or rely on arguments previously stated in their motions 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 ("*Brooke County*"), and *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 ("*Monongalia County*"), the Court incorporates by reference the Orders denying motions to dismiss, entered on December 28, 2018, in *Brooke Co.*, petitions for writ of prohibition refused, June 6, 2019, Orders, State ex. rel. Cardinal Health v. Honorable David W.

As explained by the Court in *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 604-606, 245 S.E.2d 157, 158-159 (1978):

The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the complaint. For 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. Since common law demurrers have been abolished, pleadings are now liberally construed so as to do substantial justice. W.Va. R.C.P. 8(f). The policy of the rule is thus 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.

* * *

In view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b)(6) motion is a liberal standard, and few complaints fail to meet it. The plaintiff's burden in resisting a motion to dismiss is a relatively light one. *Williams v. Wheeling Steel Corp.*, 266 F.Supp. 651 (N.D.W.Va.1967)

A trial court considering a motion to dismiss under Rule 12(b)(6) must "liberally construe the complaint so as to do substantial justice." *Cantley v. Lincoln Co. Comm'n.*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007) and West Virginia Rule of Civil Procedure, Rule 8(f). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss

Hummel, Jr., et al., No. 19-0204, State ex. rel. Purdue Pharma, et al. v. Honorable David W. Hummel, Jr., et al., No. 19-0205, State ex rel. AmerisourceBergen Drug Corporation, et al. v. Honorable David W. Hummel, Jr., et al., No. 19-0210; and the Orders denying motions to dismiss entered on October 31, 2019, in Monongalia County, petition for writ of prohibition refused, February 3, 2020, Order, State ex rel. AmerisourceBergen Drug Corporation, et al. v. Honorable Alan D. Moats, et al., No. 19-1051.

To the extent the Distributor Defendants re-state or rely on arguments previously stated in their motion to dismiss filed in *County Commission of Mason County, et al. v. Purdue Pharma L.P., et al.*, Civil Action Nos. 19-C-4 MSH through 19-C-9 MSH, the Court incorporates by reference its Order denying Defendants AmerisourceBergen Drug Corporation, Cardinal Health, Inc. and McKesson Corporation's Motion to Dismiss Plaintiffs' Complaint filed on February 5, 2020 (Transaction ID No. 64681554). To the extent the Distributor Defendants re-state or rely on arguments previously stated in their motion to dismiss filed in *Mayor Peggy Knotts Barney, on behalf of the City of Grafton v. Purdue Pharma, L.P., et al.*, Civil Action No. 19-C-151 MSH and *Mayor Phillip Bowers, on behalf of the City of Philippi*, Civil Action No. 19-C-152 MSH, the Court incorporates by reference its Order denying Defendants AmerisourceBergen Drug Corporation, Cardinal Health, Inc. and Cardinal Health 110, LLC's Motion to Dismiss Plaintiffs' Complaint filed on February 5, 2020 (Transaction ID 64681576).

the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at Syl. pt. 2, quoting Syl. pt. 3, *Chapman v. Kane Transfer Company*, W.Va., 236 S.E.2d 207 (1977).

Having reviewed the Motion to Dismiss and all of the briefing, the Presiding Judges **FIND** that, construing the Complaint in the light most favorable to Plaintiffs, and taking the allegations as true, the Complaint sufficiently states claims upon which relief can be granted, and the Distributor Defendants have not demonstrated that Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. Accordingly, the *Distributor Defendants’ Motion to Dismiss the Town’s Civil Conspiracy Claim* (Transaction ID 65719331 and 6570190), filed in the above-styled civil actions, is **DENIED** as to all Counts except Count II of Plaintiffs’ Complaint – Violation of the West Virginia Uniform Controlled Substances Act; W.Va. Code § 60A-8-1 et seq.; W.Va. Code § 55-7-9, which the Court takes under advisement.

The Presiding Judges further **FIND** that Plaintiffs’ claims for negligence and negligent marketing (Count I), violation of the West Virginia Uniform Controlled Substances Act; W.Va. Code § 60A-8-1 et seq.; W.Va. Code § 55-7-9 (Count II), unjust enrichment (Count III), public nuisance (Count IV), civil conspiracy (Count V), and for punitive damages (Count VI) are not subject to the heightened pleading requirements for fraud claims under Rule 9(b) of the West Virginia Rules of Civil Procedure. Inasmuch as these claims are all governed by Rule 8(a) of the West Virginia Rules of Civil Procedure, Plaintiffs’ allegations satisfy the requirements of Rule 8(a) with respect to Count V of Plaintiffs’ Complaint and, therefore, Defendants’ motion to dismiss Plaintiffs’ Civil Conspiracy Claim is **DENIED**.

All exceptions and objections are noted and preserved for the record.

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

It is so **ORDERED**.

ENTERED: October 8, 2020.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation