



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: OPIOID LITIGATION

CIVIL ACTION NO. 19-C-9000

THIS DOCUMENT APPLIES TO:

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, Attorney General,

Plaintiff,

v.

CIVIL ACTION NO. 19-C-105 BNE

JANSSEN PHARMACEUTICALS, INC., et al.,

Defendants.

ORDER

Pending before the Panel is *Defendants' Motion to Dismiss Complaint for Failure to State a Claim and Motion to Strike* (Transaction ID 64749715).¹ The motion has been fully briefed by the parties.² Having reviewed the briefs, the Presiding Judges do not believe oral argument would aid their decision and, therefore, *Defendants' Motion for Leave to Conduct Oral Argument on Pending Motion to Dismiss* (Transaction ID 65789019) is **DENIED**.

¹ "Janssen" or "Defendants" refers collectively to Janssen Pharmaceuticals, Inc., Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc., Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc., and Johnson & Johnson.

² To the extent a party re-states or relies on arguments previously stated in the 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. 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.

Defendants ask the Panel to dismiss the State of West Virginia's First Amended Complaint for failure to state a claim upon which relief can be granted.³ In the alternative, Defendants move to strike: (1) all allegations pertaining to Janssen's alleged conduct prior to December 23, 2010, and (2) all claims for relief deriving in any way from Janssen's alleged conduct before December 23, 2010, as encompassed by its 2010 Settlement Agreement with the State of West Virginia; and to strike Paragraphs 24 and 25 and Paragraphs 87 through 93 as immaterial and impertinent to the State's claims.

The State of West Virginia opposes Defendants' motion to dismiss on the ground that the 2010 Settlement Agreement does not preclude the State's case. Response pp. 3-7. The State acknowledges in Paragraph 35 of the Complaint that it released Johnson & Johnson and Janssen from claims arising out of their conduct regarding Duragesic before December 23, 2010, but contends it did not release claims regarding "violation of state law in the marketing and sale of Duragesic after the dismissal date," nor did it release claims regarding the Janssen Defendants' other opioid medications or their "unlawful conduct in promoting opioids in general through unbranded marketing or third-party promotion." Response, p. 3. The State further contends its claims are timely because the States WVCCPA and public nuisance claims are not barred by statutes of limitation or the doctrine of laches. The State exclusively seeks equitable relief and civil penalties. The State also contends that Defendants' arguments regarding myriad other defects in Plaintiff's First Amended Complaint are without merit. Response, pp. 7-18.

The State also opposes Defendants' motion to strike because there is nothing "insufficient, redundant, immaterial, impertinent or scandalous" in the State's allegations regarding Janssen's promotion of its tramadol opioids. Response, p. 19. The State asserts its

³ The State's First Amended Complaint ("Complaint") was filed on December 20, 2019, in the Circuit Court of Boone County, West Virginia (Transaction ID 64835879).

allegations demonstrate Janssen deceptively marketed its tramadol opioids, just as it deceptively marketed Nucynta, Duragesic, and opioids in general. *Id.*⁴ The State also asserts Defendants have failed to demonstrate the Court should strike the State’s allegations regarding Noramco and Tasmanian Alkaloids, because the State’s allegations provide necessary information regarding Janssen’s extensive role in the opioid market and are tied to its claims for relief. *Id.*, p. 20.

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 the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts

⁴ As asserted in paragraph 93 of the Complaint, “despite having evidence of abuse and diversion of tramadol, Ultram, and Ultracet, and lacking evidence that these drugs were less likely to be abused than other, scheduled opioids, Janssen nonetheless marketed its tramadol products as preferable to or to be tried before other opioids, clearly, and deceptively implying that Ultram and Ultracet were safer alternatives.” *Id.*

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 Plaintiff’s First Amended Complaint in the light most favorable to Plaintiff, and taking its allegations as true, the Complaint sufficiently states claims upon which relief can be granted, and the Defendants have not demonstrated that Plaintiff can prove no set of facts in support of their claims which would entitle them to relief.

Having reviewed the amended complaint filed in *State of West Virginia, ex rel. Darrell V. McGraw, Jr. Attorney General v. Johnson & Johnson and Janssen Pharmaceutia Products, L.P.*, Brooke County Civil Action No. 04-C-156 (the “2004 action”), the December 23, 2010 Settlement Agreement and Release, and the December 23, 2010 Order of Dismissal With Prejudice, attached as Exhibits 1-3 to Defendants’ motion to dismiss, the Presiding Judges **FIND** the State of West Virginia released Johnson & Johnson and Janssen Pharmaceutical Products, L.P. from claims arising out of their conduct regarding the prescription drug Duragesic prior to dismissal of the 2004 action on December 23, 2010, but did not release claims arising out of their conduct regarding the prescription drug Duragesic after the dismissal date. The Presiding Judges further **FIND** the State of West Virginia did not release claims regarding the Defendants’ other opioid medications or claims regarding the Defendants’ conduct in promoting opioids in general through unbranded marketing or third-party promotion. Accordingly, Defendants’ Rule 12(b)(6) motion to dismiss is **DENIED**.⁵

⁵ The Court adopts and incorporates its findings of fact and conclusions of law as set forth in its *Order Regarding Plaintiffs’ Motion to Strike Defendants’ Notices of Non-Party Fault* (Transaction ID 65807300), entered on July 29, 2020, and *Order Regarding the State’s Motion to Strike Defendants’ Notices of Non-Party Fault* (Transaction ID 65820504), entered on August 4, 2020.

The Court may strike pleadings in the Complaint only if Defendants demonstrate the allegations are “redundant, immaterial, impertinent, or scandalous.” W. Va. R. Civ. P. 12(f). Because the Presiding Judges **FIND** that Plaintiff’s allegations, on their face, are not redundant, immaterial, impertinent or scandalous, the Court **DENIES** Defendants’ motion to strike.

Accordingly, *Defendants’ Motion to Dismiss Complaint for Failure to State a Claim and Motion to Strike* (Transaction ID 64749715) 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 & ServeXpress.

ENTERED: September 2, 2020.

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

/s/ Derek C. Swope
Presiding Judge
Opioid Litigation