

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
DIVISION NO. 3
CIVIL ACTION NO. 18-CI-3763

ENTERED
ATTEST, VINCENT RIGGS, CLERK
JUL 19 2019
FAYETTE CIRCUIT CLERK
BY _____ DEPUTY

COMMONWEALTH OF KENTUCKY, ex
rel., ANDY BESHEAR, ATTORNEY
GENERAL,

Plaintiff,

v.

TEVA PHARMACEUTICALS, USA, INC.;
TEVA BRANDED PHARMACEUTICAL
PRODUCTS R&D, INC.; CEPHALON INC.,

Defendants.

ORDER DENYING MOTION TO DISMISS

This matter is before the Court on a motion by Defendants to dismiss the Commonwealth's Complaint for failure to state a claim. The Court, having reviewed the parties' briefs and conducted a hearing on the matter, hereby rules as follows:

With respect to the Commonwealth's common law fraud claim, CR 9.02 applies. Thus, the claim must be stated with particularity. Under *Scott v. Farmers Bank*, "it is enough to plead the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was obtained by the fraud." *Scott v. Farmers State Bank*, 410 S.W.2d 717, 722 (Ky. 1966). "Rule requiring that averments of fraud be made with particularity does not require textbook pleading of all elements of fraud but requires merely that plaintiff set forth facts with sufficient particularity to apprise defendant fairly of charges against him." *Id.* (citation omitted).

The Commonwealth has pled fraud with sufficient particularity to meet the standard. For example, the Commonwealth's specific allegations regarding Teva's sponsorship and dissemination of the 2003 CME (paragraph 53, *inter alia*), the 2007 publication (paragraph 68), and the 2011 journal article (paragraph 42) sufficiently plead the time of the representations. Moreover, the Commonwealth alleges specifically that these statements were made in Kentucky during the time period 2013 to 2016 during 79 visits to Kentucky physicians and/or during 3031 visits to Kentucky physicians during the time period 2012-2017. These allegations are sufficient in this instance to satisfy place and time requirements.

The substance of false representations and facts misrepresented is adequately pled in paragraph 181 of the Complaint. The misrepresentations and omissions include mischaracterizing the risk of opioid addiction and abuse; promoting the misleading concept of pseudoaddiction, thus concealing the true risk of addiction; claiming or implying that opioids have no ceiling dose; promoting Actiq and Fentora for uses that were not approved by the FDA nor shown to be appropriate, safe, or effective; and claiming or implying that opioids would improve patients' function and quality of life despite the lack of evidence supporting this claim.

Finally, the identification of what was obtained by the fraud was also pled; the Complaint states that Teva intended that the Commonwealth and its residents would rely on its misrepresentations and omissions, that they were relied upon and that the Commonwealth suffered damages by paying for prescriptions and through the increases in crime and other consequences of the opioid epidemic. The defendants will have an opportunity to present defenses to these claims. At this stage, the Commonwealth's case is sufficiently pled, and the Motion to Dismiss the common-law fraud count is denied.

With respect to the statements of third parties, including third party publications, CME programs, sponsoring 3d party organizations and key opinion leaders, at this stage of the proceeding, the Court must take those allegations as true. There may ultimately be a factual dispute as to whether those parties were agents of Teva or Cephalon, but at this stage the allegations are assumed to be true and construed in a light most favorable to the Commonwealth. The Motion to Dismiss is denied as to those allegations as well.

With regard to the Kentucky Consumer Protection Act allegations, this Court finds that the Commonwealth has sufficiently pled a case under the KCPA of unfair, false, misleading and deceptive acts and practices, and has set forth sufficient case law and Attorney General standing to bring this action under that act. Therefore, the Motion to Dismiss the KCPA counts is denied.

Likewise, the learned intermediary doctrine is not a basis to dismiss any portion of this action at this time. The pleadings raise questions of fact because the basis of the Complaint is that these pharma companies, including Teva, misled doctors and induced them not to rely on drug packaging warnings. Under *Bruck v. Thompson*, learned intermediary actions could only be a superseding cause if the intervening act was 'of independent origin, unassociated with the original act,' was not 'reasonably foreseeable by the original actor'; and 'involves the unforeseen negligence of a third party.' *Bruck v. Thompson*, 131 S.W.3d 764, 768 (Ky. Ct. App. 2004). Because the act of prescribing was not unassociated with act of misrepresentation, it was reasonably foreseeable that the doctor would prescribe, which was the purpose of the misrepresentation as alleged by the Commonwealth; and as the harm was not caused by the unforeseen negligence of a third party, the learned intermediary doctrine is not a basis to dismiss at this stage.

The Commonwealth has sufficiently stated a claim with respect to generics; Teva's promotion of branded drugs and unbranded marketing benefitted Teva and Cephalon to extent they had generics on the market.

This Court finds that the Commonwealth has sufficiently pled the Medicaid Fraud claim. This Court agrees that KRS 205.8463 applies. It states, "No person... shall knowingly ...devise a scheme... or aid another in obtaining payments from any medical assistance program..." The plain text of that statute is broad enough to encompass the allegations with respect to Teva and Cephalon: that they are alleged to have aided another in obtaining payments from the medical assistance program.

Similarly, under the assistance program fraud statute KRS 194A.505, Section 6, "No person shall, with intent to ... deceive, devise a scheme or plan a scheme or artifice to obtain benefits from any assistance program by means of false or fraudulent representations or intentionally engage in conduct that advances the scheme...." This statute is broad enough to encompass the allegations here that there was conduct to advance a scheme to obtain a benefit. Section 7 states that no person should aid or abet another in so obtaining such benefit, and under section 8 the Attorney General has standing to bring the action.

The Attorney General's allegations of public nuisance are sufficient to withstand the Motion to Dismiss. Public Nuisance Restatement of Torts 821 B identifies a number of circumstances that may constitute a public nuisance including conduct that involves significant interference with public health, conduct that is proscribed by statute, and conduct that is of a continuing nature and has a long-lasting effect and the actor knows or has reason to know that it has a significant effect on a public right. This Court finds that all three of those circumstances

arguably apply in this instance; the Commonwealth has adequately pled its public nuisance claim.

Finally, Defendants also moved to dismiss the claims based on failure to report suspicious prescribing. The Commonwealth has acknowledged that that claim is not intended to be an independent cause of action. The motion to dismiss based on any failure to report suspicious orders is granted without prejudice.

**Refused to Attest
Trent Spurlock
Attorney for Defendants**

THIS THE 16 DAY OF July, 2019

/S/ LUCYA VANMETER

Judge, Fayette Circuit Court

**A TRUE COPY
ATTEST: VINCENT RIGGS, CLERK
FAYETTE CIRCUIT COURT
BY: [Signature] DEPUTY**

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