



THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., and)
MIKE HUNTER)
ATTORNEY GENERAL OF OKLAHOMA,)
)
Plaintiff,)

v.)

PURDUE PHARMA L.P.; PURDUE PHARMA)
INC.; THE PURDUE FREDERICK COMPANY,)
INC.; TEVA PHARMACEUTICALS USA, INC.;)
CEPHALON, INC.; JOHNSON & JOHNSON;)
JANSSEN PHARMACEUTICALS, INC.;)
ORTHO-McNEIL-JANSSEN)
PHARMACEUTICALS, INC., n/k/a JANSSEN)
PHARMACEUTICALS, INC.; JANSSEN)
PHARMACEUTICA, INC., n/k/a JANSSEN)
PHARMACEUTICALS, INC.;)
ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a)
ACTAVIS, INC., f/k/a WATSON)
PHARMACEUTICALS, INC.; WATSON)
LABORATORIES, INC.; ACTAVIS LLC; and)
ACTAVIS PHARMA, INC., f/k/a WATSON)
PHARMA, INC.,)

Defendants.)

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk

NOV 27 2017

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816

Honorable Thad Balkman

JURY TRIAL DEMANDED

**DEFENDANTS PURDUE PHARMA L.P., PURDUE PHARMA INC.,
AND THE PURDUE FREDERICK COMPANY INC.'S REPLY
IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM AND MEMORANDUM OF LAW IN SUPPORT**

The State failed to respond specifically to Purdue's individual motion to dismiss, and instead simply relies on the arguments included in its "Omnibus Response" to Defendants' Joint Motion to Dismiss for Failure to State a Claim. That Response, however, fails even to address a multitude of the core pleading deficiencies that entitle Purdue to dismissal. For the reasons set forth below and in Purdue's opening brief, the claims against Purdue must be dismissed.¹

I. The State Has Failed to Plead With Particularity Any Misrepresentation or Omission By Purdue.

The State's claims against Purdue fail because they are not pled with sufficient particularity. The majority of the alleged misrepresentations identified in the Petition are not attributed to any particular Defendant, but rather are asserted generally against all "Defendants." Yet it is well-settled under Oklahoma law that when a plaintiff asserts claims sounding in fraud, it "must plead facts from which fraud may reasonably be inferred *as to each defendant.*" *Gay v. Akin*, 1988 OK 150, ¶ 8, 766 P.2d 985, 990 (emphasis added). This principle is particularly important in a case like this one, where the State alleges that several different Defendants—including four distinct corporate families, and multiple distinct entities within each corporate family—engaged in a grand conspiracy involving various different opioid medications and a critical and complex public health issue. The State's improper method of group pleading violates well-established Oklahoma law and denies Purdue fair notice of the claims against it.

¹ In addition to the arguments addressed herein, Purdue argued in its Individual Motion to Dismiss for Failure to State a Claim that the State's claims must be dismissed because they are preempted by federal law. The State addressed that argument in its Omnibus Response to (1) Defendants' Joint Motion to Dismiss Based on Preemption, (2) Purdue's Motion to Dismiss Based on Preemption, and (3) Defendants' Joint Motion to Stay This Case Under the Primary Jurisdiction Doctrine and the Court's Inherent Authority to Stay Proceedings. Purdue's arguments in reply to the State's position on preemption are encompassed by the arguments in Defendants' Joint Reply in Support of Their (1) Joint Motion to Dismiss Based on Preemption and (2) Joint Motion to Stay This Case Under the Primary Jurisdiction Doctrine and the Court's Inherent Authority to Stay Proceedings. This memorandum addresses all of Purdue's additional arguments other than those related to preemption.

Even in the few instances in which the State does attribute an alleged misrepresentation to Purdue, those claims fail because the State has not alleged sufficient facts to establish the “time, place and content” of the alleged misrepresentation, and to connect those alleged misrepresentations to the State’s alleged injury. *Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, ¶ 11, 861 P.2d 308, 310–11; *Dani v. Miller*, 2016 OK 35, ¶ 25, 374 P.3d 779, 791, *cert. denied*, 137 S. Ct. 481 (2016). The Petition does not identify any Purdue representatives who made any of the alleged misrepresentations, any prescribers or State agents who received the alleged misrepresentations, the actual content of any specific alleged misrepresentations, when or where the alleged misrepresentations were made, or how the alleged misrepresentations affected any physician’s opioid prescribing practices or the State’s decision regarding any opioid prescription for which it paid. Without this information, the State’s allegations fall far short of providing sufficient facts regarding the “time, place, and content” of any alleged fraud by Purdue, and therefore must be dismissed.

II. The Petition Does Not Adequately Plead a Causal Connection Between Any Alleged Misrepresentation by Purdue and Any Alleged Injury by the State.

A. The State Fails to Plead Facts Showing Causation Concerning Reimbursement or Prescribing Practices.

The Petition fails to adequately plead a causal nexus between any alleged misrepresentations attributed to Purdue and a harm allegedly suffered by the State. The Petition does not identify any instance in which an Oklahoma physician received, let alone was misled by, any misrepresentation by Purdue or any third-party over which Purdue exercised editorial control. Nor does it allege facts to establish that any such misrepresentations caused any such physician to write any “improper” opioid prescription for which the State seeks to recover. Absent these factual allegations, the Petition fails to establish the necessary causal connection between statements made by Purdue and the State’s alleged injuries. *See, e.g., Eckert v. Flair*

Agency, Inc., 1995 OK CIV APP 151, ¶ 7, 909 P.2d 1201, 1204 (to establish actionable fraud, a plaintiff must prove a false, material misrepresentation that “proximately causes injury or damage to another”); *TKO Energy Servs., LLC v. M-I L.L.C.*, 539 F. App’x 866, 873 (10th Cir. 2013) (affirming dismissal of fraud-based claim where Petition failed to allege sufficient facts to state that plaintiff actually relied on defendants’ representations and that representations thereby caused plaintiff’s injury); *see also City of Chi. v. Purdue Pharma L.P.*, No. 14 C 4361, 2015 WL 2208423, at *13–14 (N.D. Ill. May 8, 2015) (dismissing all claims that court found required proof of causation and actual injury).

B. The State’s Alleged Injuries are Too Remote to Establish Proximate Cause.

There are multiple, independent intervening factors that break the causal chain between the State’s alleged injuries—including costs of health care, criminal justice, and loss of productivity, Pet. ¶ 31—and any statement by Purdue, including, *inter alia*, doctor/patient treatment decisions, individual decisions concerning how to use opioid medications or illicit substances, and the intervening criminal acts of illegal opioid use and drug trafficking. These intervening factors render the State’s alleged injuries far too remote from Purdue’s conduct to establish proximate cause. *Woodward v. Kinchen*, 1968 OK 152, ¶ 12, 446 P.2d 375, 377–78 (“[L]iability cannot be predicated on a prior and remote cause which merely furnishes the condition for an injury resulting from an intervening, unrelated and efficient cause.”); *Butler ex rel. Butler v. Okla. City Pub. Sch. Sys.*, 1994 OK CIV APP 22, ¶ 8, 871 P.2d 444, 446; *Henry v. Merck & Co.*, 877 F.2d 1489, 1494 (10th Cir. 1989) (“The law in Oklahoma is clear that before a defendant will be liable for a plaintiff’s injuries, the plaintiff must prove that his injuries resulted directly and proximately from the defendant’s carelessness.”); *see also Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1306 (2017) (“[P]roximate cause ‘generally bars suits for

alleged harm that is “too remote” from the defendant’s unlawful conduct.”) (quoting *Lexmark Int’l v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014)).

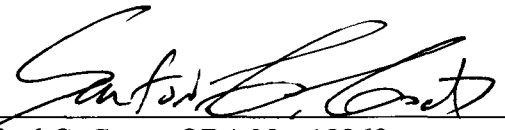
C. The Petition Fails to Allege Facts Demonstrating That Purdue Controlled the Content of Third-Party Publications and Statements.

The allegations against Purdue relating to purported misrepresentations by third parties also fail. The State nowhere alleges that Purdue exercised control over the content of any third-party statements referenced in the Petition. For example, the State does not claim that Purdue wrote any promotional materials on behalf of third parties, told any third-party speakers or organizations what to say, or exercised any editorial control over the content of third-party publications. The State’s speculative and conclusory allegation that Purdue “sponsored” a 2007 treatment guide by the American Pain Foundation (“APF”) and that APF “was controlled and influenced by Defendants,” Pet. ¶ 64, do not satisfy the heightened pleading requirements applicable to the State’s claims, all of which sound in fraud. *See, e.g., Weston v. Acme Tool, Inc.*, 1968 OK 7, ¶¶ 17–18, 441 P.2d 959, 963; *TKO Energy Servs.*, 539 F. App’x at 873; *accord City of Chi.*, 2015 WL 2208423, at *11–12 (holding that allegations of financial support given to third parties by Purdue do not establish that Purdue exercised “editorial control” over the purported misrepresentations, and therefore are legally insufficient to state a claim for fraud based on purported misrepresentations contained in third-party publications). The State’s claims against Purdue based on statements by third parties therefore must be dismissed.

III. CONCLUSION

For the foregoing reasons, Purdue respectfully requests the Court to dismiss all claims against Purdue.

Dated: November 27, 2017

By: 

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 27th day of November, 2017 to:

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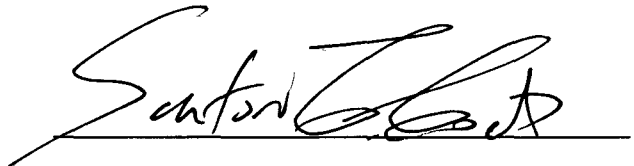
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