



IN THE DISTRICT COURT OF CLEVELAND COUNTY

STATE OF OKLAHOMA

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.
FILED

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

NOV 27 2017

vs.

In the office of the
Court Clerk MARILYN WILLIAMS

- (1) PURDUE PHARMA L.P.;
- (2) PURDUE PHARMA, INC.;
- (3) THE PURDUE FREDERICK COMPANY;
- (4) TEVA PHARMACEUTICALS
USA, INC.;
- (5) CEPHALON, INC.;
- (6) JOHNSON & JOHNSON;
- (7) JANSSEN PHARMACEUTICALS, INC.;
- (8) ORTHO-McNEIL-JANSSEN
PHARMACEUTICALS, INC., n/k/a
JANSSEN PHARMACEUTICALS, INC.;
- (9) JANSSEN PHARMACEUTICA, INC.,
n/k/a JANSSEN PHARMACEUTICALS,
INC.;
- (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC,
f/k/a ACTAVIS, INC., f/k/a WATSON
PHARMACEUTICALS, INC.;
- (11) WATSON LABORATORIES, INC.;
- (12) ACTAVIS LLC; and
- (13) ACTAVIS PHARMA, INC.,
f/k/a WATSON PHARMA, INC.,
Defendants.

Case No. CJ-2017-816

Honorable Thad Balkman

**DEFENDANTS JANSSEN PHARMACEUTICALS, INC.
AND JOHNSON AND JOHNSON'S REPLY IN SUPPORT OF MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

I. INTRODUCTION

The State's Omnibus Response to Defendants' Motions to Dismiss ("Response" or "Resp.") devotes less than five pages to the arguments raised by Defendants Janssen and Johnson & Johnson in their Motion to Dismiss. *See* Resp. at 88-92. As to Janssen, the State argues that its claims are "not about" the FDA-approved labels for Janssen's three opioid products, each of which contained detailed information about the drugs' risks and approved indications. *Id.* at 91. Instead, the State says that its claims focus on Janssen's "marketing and advertising practices targeting the medical community and consumers in Oklahoma." *Id.* But the State's Petition contains no allegations about Janssen activities in Oklahoma at all, a fatal pleading deficiency that the State's Response does not address.

As to Johnson & Johnson, a holding company that does not manufacture or market any medications at all, the State argues first that its conclusory allegation that Janssen and Johnson & Johnson "acted in concert with" or "as agents and/or principals" "put Defendants on notice of the State's claims and its intent to disregard the corporate form based on agency theories." *Id.* at 88. But Oklahoma law requires more than the threadbare allegations in the State's Petition. Recognizing as much, the State argues in the alternative that it should be allowed to conduct discovery on the relationship between Janssen and Johnson & Johnson to attempt to learn facts sufficient to satisfy its pleading requirements. But Oklahoma does not allow discovery where a plaintiff fails to plead facts sufficient to state a claim.

II. ARGUMENT

A. The State's Response Fails to Remedy its Failure to Plead Actionable Conduct by Janssen.

The Petition contains only one allegation about Janssen's promotion of any opioid medication: "Defendant Janssen made unsubstantiated representations that Nucynta was appropriate for broader pain conditions than indicated and downplayed its risks." Pet. ¶ 53. That

is it.¹ The Petition does not allege that Janssen undertook any specific activity in Oklahoma, nor anything close to the facts required to allege “the time, place, and content of an alleged false representation.” *Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, ¶ 11, 861 P.2d 308, 310-11 (internal quotation marks omitted); *see* Okla. Stat. tit. 12, § 2009(B); *see also* Joint Motion § III.B; Janssen Motion at 3. In fact, the Petition contains none of that information. It does not allege when or where Janssen made the allegedly “unsubstantiated representations” about Nucynta or what Janssen supposedly said. The State does not identify a single Oklahoma physician who received a communication from Janssen, let alone a doctor who relied on any Janssen misrepresentation. The State fails, in turn, to identify any medically unnecessary or inappropriate opioid prescription for an Oklahoma patient.

The State similarly fails to identify a single opioid prescription that should not have been reimbursed by Oklahoma Medicaid, a glaring failure in a case purporting to advance claims under the Oklahoma Medicaid False Claims Act (OMFCA). This pleading deficiency is fatal to claims against all Defendants,² but it is particularly acute as to Janssen. The State’s Petition acknowledges that Oklahoma reimbursed only 2,600 prescriptions for Janssen opioids over ten years, or an average of just 260 per year. Pet. ¶ 38.³ Yet the State has not identified even one of those 260 prescriptions per year that was medically unnecessary, false, fraudulent, or even written as a result of Janssen promotion. It is no answer to simply state that “Defendants” as a

¹ The State makes no allegations whatsoever about Duragesic and Nucynta ER, the other two opioid medications Janssen sold, other than alleging that the OHCA reimbursed some prescriptions for them. Janssen Motion at 4.

² The lack of specificity in its Petition means that its claims against all Defendants should be dismissed for the reasons set out in Defendants Joint Motion to Dismiss, which Janssen and Johnson & Johnson join.

³ This includes prescriptions for Nucynta and Nucynta ER that were written after Janssen divested those medications in 2015. The actual number is only 2,100, or just 210 per year. *See* Janssen Motion at 4 n.4.

group “misrepresented the risks of opioid addiction,” Resp. at 92, suggesting that all prescriptions were somehow tainted by some wrongful conduct. Court after court has rejected similar attempts by plaintiffs to circumvent pleading and proof requirements. *See, e.g., In re Bextra & Celebrex Marketing Sales Practices & Prod. Liab. Litig.*, 2012 WL 3154957, at *7 (N.D. Cal. Aug. 2, 2012) (“Without more specific allegations of reliance by physicians whose prescriptions Plaintiff reimbursed, there is no way to know if any of those prescriptions resulted from deception”); *see also* Reply in Support of Joint Motion at 5-10 (causation requirement), 10-13 (insufficiency of group pleading under Oklahoma law).

The dearth of specific allegations against Janssen stands in stark contrast to the robust and detailed information about the risks and benefits of Janssen’s opioids found in their FDA-approved labels and FDA-mandated Risk Evaluation and Mitigation Strategy (“REMS”). *See* Janssen Motion at 4-8. The State ignores this information except to argue that “[t]his case is not about product labeling,” but instead about “Defendants’ false and deceptive marketing and advertising to doctors and consumers.” Resp. at 91. In doing so, the State misses the point. The Petition contains no information about Janssen marketing to doctors or consumers beyond the averment in a single paragraph that Janssen “made unsubstantiated representations that Nucynta was appropriate for broader pain conditions than indicated and downplayed its risks.” Pet. ¶ 53.⁴

⁴ The State’s Response (but not the Petition) asserts that Janssen provided financial support for Drs. Perry Fine, Steven Stanos, and Scott Fishman and visited Oklahoma doctors. The State’s allegations must stand on its Petition, not its recent brief. *Zaharias v. Gammill*, 1992 OK 149 ¶ 6, 844 P.2d 137, 138 (“a petition . . . should disclose the existence of the necessary elements of a legally recognized claim or cause of action”) (citation omitted). But considering the State’s effort to salvage its claims against Janssen with the allegations in its Response serves only to emphasize the deficiencies in the State’s case. With respect to any financial support Janssen may have provided key opinion leaders, the Petition fails to allege that this support influenced these doctors or that Janssen intended to do so. The State does not identify Oklahoma doctors who were exposed to information from these key opinion leaders. With respect to any visits made or meals provided to Oklahoma doctors, the mere fact that Janssen employed sales representatives to promote its medications in Oklahoma (the Petition fails to identify who undertook these visits,

When viewed in the context of the detailed information about Janssen’s opioids provided to doctors within the highly-regulated federal and state framework governing prescriptions opioid medications, the State’s single, non-specific allegation against Janssen cannot plausible state a claim. *See* FTC Policy Statement on Deception, 103 F.T.C. 110, 4 (to determine whether a representation is deceptive, a court must examine “the entire mosaic, rather than each tile separately”).

For all of these reasons, as well as those set out in Defendants’ Joint Motion to Dismiss, the Petition fails to state a claim against Janssen or Johnson & Johnson and should be dismissed.

B. The State Fails to State a Claim Against Johnson & Johnson.

The State’s claims against Johnson & Johnson should be dismissed for the separate reason that the Petition fails to allege any conduct at all by Johnson & Johnson, a holding company that does not manufacture or market any medications. Janssen Mot. at 9. The absence of allegations about Johnson & Johnson is fatal to the State’s effort to advance claims on the theory that Johnson & Johnson “acted in concert with” Janssen. Resp. at 88. There are no facts alleged about concerted activity. *See Tanner v. W. Pub. Co.*, 1984 OK CIV APP 22 ¶ 11, 682 P.2d 239, 241 (“conclusions are to be ignored” when evaluating the sufficiency of a petition).

So too the State’s alternative theory that Johnson & Johnson is Janssen’s “alter ego,” Resp. at 89, finds no support in the Petition. The State argues that the Court should let its claims against Johnson & Johnson proceed because the Court cannot consider factors enumerated by the Oklahoma Supreme Court in *Frazier v. Bryan Mem. Hosp. Auth.*, 1989 OK 73, ¶ 17, 775 P.2d 281, 288, until trial. Not so. Nothing in *Frazier* stands for the proposition that in the absence of

simply referring to “Janssen”) does not identify a specific misrepresentation, to which anonymous doctors it may have been made, or that any doctor relied on a Janssen misrepresentation.

allegations sufficient for a Court to consider alter ego liability, the Court must nevertheless allow a case to proceed beyond the pleading stage. *See also Lewis v. Am. Gen. Assur. Co.*, 2001 WL 36160929, at *3 (W.D. Okla. Feb. 26, 2001) (“When analyzing the sufficiency of the facts pled to pierce the corporate veil, [a c]ourt will analyze [a petition] with respect to each factor of the *Frazier* test”).⁵

In this case, the State alleges nothing that could meet the *Frazier* standards. The State does not allege that Janssen and Johnson & Johnson have common directors and officers, that Johnson & Johnson provides financing to Janssen, that Janssen is undercapitalized, that Johnson & Johnson pays salaries, expenses or losses of Janssen, that any of Janssen’s business is with Johnson & Johnson, that Johnson & Johnson refers to Janssen as a division or department, or that Johnson & Johnson and Janssen fail to observe legal formalities for keeping the entities separate. *See Frazier*, 775 P.2d at 288. In short, the Petition contains no facts that would support the State’s contention that the Court should disregard the corporate form to allow its case to proceed against Johnson & Johnson.⁶ *See Lewis*, 2001 WL 36160929, at *3 (dismissing complaint where plaintiff did not “come forward with the showing of actual domination required to pierce the corporate veil.”).

As a result of these pleading failures, the Court should reject the State’s alternative plea that it be permitted to “conduct discovery on the relationship between and among Janssen/J&J...to

⁵ Neither *Gilbert v. Sec. Fin. Corp. of Okla, Inc.*, 2006 OK 58, ¶ 22, 152 P.3d 165, 175 nor *Oliver v. Farms Ins. Grp. of Cos.*, 1997 OK 71, ¶ 8, 941 P.2d 985, Resp. at 89, stand for the proposition that the State does not need to state allegations sufficient to establish “control” at the pleading stage.

⁶ The State argues that its allegation “that Defendant Janssen is a wholly owned subsidiary of [Johnson & Johnson] speaks to the first *Frazier* factor.” Resp. at 90. But if that were enough to state a claim, all parent corporations would be subject to litigation over claims against their subsidiaries, whether or not there were any allegations that the corporate form had been disregarded. There is no authority supporting such a proposition.

support its agency and instrumentality theories.” Resp. at 90. The State is not entitled to discovery in the mere hopes that it will discover facts sufficient to properly plead its claims. *Murchison v. Progressing Northern Ins. Co.*, 572 F. Supp.2d 1291, 1284 (E.D. Okla. 2008) (dismissing negligence claim and declining to permit discovery where “allowing Plaintiff to conduct further discovery, as she maintains is necessary, also would not remedy the defects Defendant argues are inherent in Plaintiff’s claims”).


Fanning v. Brown, 2004 OK 7, 85 P.3d 841, does not compel a different result. In contrast to the State’s Petition, the *Fanning* plaintiff raised specific allegations about the individual shareholder defendants’ actions operating a nursing home in support of her claim for injuries suffered by a physically and mentally incapacitated resident. The plaintiff alleged that the shareholders used the corporate entity to “defeat the public policy of protecting a resident from neglect and abuse, that they failed to secure and maintain liability insurance, and that they allowed [the corporate operating company] to become suspended from doing business within the state.” *Id.* ¶ 17. There are no comparable allegations here, and there are no grounds for discovery to allow the State to attempt to rectify its pleading failure. The Court should dismiss the State’s claims against Johnson & Johnson.

III. CONCLUSION

For the foregoing reasons and the reasons described in Defendants’ Joint Reply, the Court should dismiss the State’s Petition in its entirety as to both Janssen and J&J.

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Respectfully submitted,



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CERTIFICATE OF MAILING

Pursuant to Okla. Stat. tit. 12, § 2005(D), this is to certify on November, 27, 2017, a true and correct copy of the above and foregoing has been served via the United State Postal Service, First Class postage prepaid, to the following:

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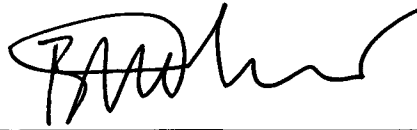
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