[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice

PART 57

Joshua DeLoray

- v -

Pfizer Inc

INDEX NO. 117852/04

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1a, 1b
Answering Affidavits — Exhibits	2
Replying Affidavits	
Memos of Law	M1–M4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6-29-07

MARCY S. FRIEDMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

IN RE: Neurontin
PRODUCT LIABILITY LITIGATION

JOSHUA DELANEY,

Plaintiff,

Index No. 117852/04

- against -

DECISION/ORDER

PFIZER INC., PARKE-DAVIS, a division of Warner-Lambert Company and Warner-Lambert Company LLC, WARNER-LAMBERT COMPANY and WARNER-LAMBERT COMPANY LLC,

Defendants.

THIS DOCUMENT APPLIES TO ALL CASES

Plaintiffs in this mass tort litigation seek damages for personal injuries allegedly sustained as a result of defendants' wrongful marketing of the prescription drug Neurontin for off-label uses such as the treatment of bipolar disorder. Each plaintiff's complaint pleads products liability causes of action as well as causes of action for common law fraud, breach of express warranty, and consumer protection violations. Defendants Pfizer Inc., Warner-Lambert Company LLC, Parke-Davis, a division of Warner-Lambert Company, and Warner-Lambert Company (collectively "Pfizer") move, pursuant to CPLR 3211(a)(7), to dismiss the non-products liability causes of action.[1] Defendants made a substantially similar motion to dismiss

---

[1]Defendants motion is made as to two representative complaints, Hoekman v Pfizer Inc. (Sup Ct, New York County Index No. 110553/05) and Biernacki v Pfizer Inc. (Sup Ct, New York County Index No. 104458/05). As of the time the motion was served, Hoekman was one of 222 complaints filed by Finkelstein & Partners, LLP ("Finkelstein complaints"), and Biernacki was one of 46 complaints filed by Westermann, Hamilton, Sheehy, Aydelott & Keenan, LLP ("Westermann complaints"). It is undisputed that each complaint is representative of the other complaints filed by the same firm, except as to the

the state law causes of action pleaded in the federal multi-district Neurontin litigation. This court and the federal court jointly held oral argument of the motions to dismiss. The federal court has since issued a decision dismissing the fraud cause of action with leave to replead and denying the motion as to the other causes of action. (Matter of Neurontin Mktg. & Sales Practices Litig., US Dist Ct., Mass, Feb. 23, 2007, Saris, J., MDL 1629, 04 Civ 10981 ["District Court Decision"].)

Plaintiffs' complaints allege that defendants marketed Neurontin for off-label uses for which FDA approval had not been obtained, including treatment for bipolar disorder; that defendants knew or should have known that Neurontin caused symptoms or risk factors associated with suicidal behavior by persons suffering from bipolar disorder; and that defendants affirmatively misrepresented that Neurontin was safe and effective in the treatment of bipolar disorder. (Hoekman Complaint, ¶¶ 108, 148, 206; Biernacki Complaint, ¶¶ 38, 54-55, 102-103.) The complaints set forth details of a nationwide marketing program allegedly conducted by defendants to induce physicians to prescribe Neurontin for unapproved uses such as the treatment of bipolar disorder, and allege that defendants knew that physicians would rely on defendants' misrepresentations in prescribing Neurontin for the treatment of this disorder. (Hoekman Complaint, ¶¶ 161-192, 209; Biernacki Complaint, ¶¶ 74-100.) The Hoekman complaint further alleges, upon information and belief, that plaintiffs' physicians, in reliance upon defendants' marketing, prescribed Neurontin to treat plaintiffs' bipolar disorder; that plaintiff relied upon defendants' misrepresentations and consumed Neurontin as prescribed by his physician; and that plaintiff sustained injuries as a result. (Hoekman Complaint, ¶¶ 119, 210, 211.) The Biernacki

---

personal information given for each plaintiff, and that the allegations made in the complaints filed by the Finkelstein and Westermann firms are substantially similar. Hoekman pleads a violation of the Illinois consumer fraud act, while Biernacki pleads a violation of the New York consumer fraud act.

complaint further alleges that defendants made the misrepresentations to plaintiff and her prescribing physicians; that plaintiff and her prescribing physicians relied upon defendants' misrepresentations; and that plaintiff was injured as a result. (Biernacki Complaint, ¶¶ 241, 245, 246, 248.)

In moving to dismiss, defendants argue that the complaints plead wholly conclusory allegations as to plaintiffs' physicians' reliance on defendants' wrongful marketing of Neurontin for off-label uses, and that plaintiffs fail to allege any connection between defendants' general marketing practices and each plaintiff's particular physicians's decision to prescribe Neurontin. Plaintiffs contend that the complaints are adequately pleaded and, in the alternative, that discovery is needed to particularize their claims and that leave should be granted to replead the complaints following discovery.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].)

In order to prevail on a claim of fraud, "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996].) CPLR 3016(b) further provides that where a cause of action is based

on fraud, "the circumstances constituting the wrong shall be stated in detail." Each of the essential elements of the fraud claim "must be supported by factual allegations sufficient to satisfy CPLR 3016(b)." (Monaco v New York Univ. Med. Ctr., 213 AD2d 167, 169 [1st Dept 1995], lv dismissed in part and denied in part 86 NY2d 882; Megaris Furs, Inc. v Gimbel Bros., Inc., 172 AD2d 209 [1st Dept 1991].)

This burden is not met by plaintiffs' complaints, as they lack specific factual allegations about each plaintiff's or plaintiff's physician's reliance on specific misrepresentations by defendants. Nor is relaxation of the pleading standard authorized. It has long been settled that CPLR 3016(b) "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud.'" (Lanzi v Brooks, 43 NY2d 778, 780 [1977], quoting Jered Contr. Corp. v New York City Tr. Auth., 22 NY2d 187, 194 [1968].) However, such impossibility has ordinarily been found "where those circumstances are peculiarly within the knowledge of the party against whom [the fraud claim] is being asserted." (Id. at 194; Houbigant, Inc. v Deloitte & Touche, LLP, 303 AD2d 92 [1st Dept 2003]; P.T. Bank Central Asia v ABN AMRO Bank N.V., 301 AD2d 373 [1st Dept 2003].) In the instant cases, plaintiffs' physicians have control over information as to whether there is a nexus between defendants' alleged misrepresentations in a general marketing campaign and the physicians' individual decisions to prescribe Neurontin for off-label uses. (District Court Decision at 3.)

Nevertheless, as the District Court held, there is ample support for leave to replead the

fraud claim with particularity after discovery is conducted. Although plaintiffs' physicians are in control of essential information regarding the circumstances under which they prescribed Neurontin, it cannot be presumed that plaintiffs are in control of their physicians who are not parties to these actions. The usual presumption in personal injury litigation is that a physician who is still treating the plaintiff at the time of the litigation is "of good will" to the plaintiff and therefore within the plaintiff's control. (See Dukes v Rotem, 191 AD2d 35, 41 [1st Dept 1993], appeal dismissed 82 NY2d 886 [presumption applied for purposes of determining whether defendant is entitled to missing witness charge for plaintiff's failure to call treating physician]; Chandler v Flynn, 111 AD2d 300 [2d Dept 1985], appeal dismissed 67 NY2d 647 [1986].) As plaintiffs pointed out at the oral argument, this presumption is inapplicable because plaintiffs' treating physicians were potentially subject to malpractice actions for prescribing Neurontin.

In addition, defendants are in exclusive possession of certain documents, including sales documents showing contacts between defendants' sales representatives and plaintiffs' physicians and documents regarding defendants' role in generating scientific articles on which plaintiffs' physicians may have relied. Under discovery orders in this case (see Case Management Order No. 2; District Court Decision at 4), defendants are obligated to produce these documents which may be useful to plaintiffs in conducting depositions of plaintiffs' individual physicians. It is noted that this discovery would proceed even absent leave to replead, as plaintiffs' strict liability causes of action are not a subject of this motion to dismiss and, as held below, the motion should denied as to certain causes of action to which this motion is directed.

Significantly, moreover, plaintiffs have alleged with particularity that defendants engaged in an extensive national marketing program, using medical liaisons, presentations to local

medical societies, payments of expenses for physician participants, and generation of scientific articles, to promote Neurontin for off-label uses. It is undisputed that defendant Warner-Lambert Company LLC was indicted and pled guilty in 2004 to felony counts for inadequately labeling Neurontin and introducing Neurontin into interstate commerce for unapproved purposes, and agreed to pay over $400 million in criminal fines and damages for civil liabilities to 50 states. (See United States v Warner-Lambert Co. LLC, US Dist Ct, Mass, Crim. No. 10150/04 RGS, Sentencing Memorandum at 4.)

CPLR 3211(d) expressly provides that where it appears in opposition to a motion to dismiss "that facts essential to justify opposition may exist but cannot then be stated, the court * * * may order a continuance to permit * * * disclosure to be had and may make such other order as may be just." Based on plaintiffs' showing in opposition to the motion, the court finds that plaintiffs' claim of fraud is not wholly conclusory or speculative, and that plaintiff's have "a reliable factual basis" for their claim that additional discovery is necessary to oppose the motion to dismiss. (See Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114, 116 [1st Dept 1998]; IDC (Queens) Corp. v Illuminating Experiences, Inc., 220 AD2d 337 [1st Dept 1995]; Glassman v Catli, 111 AD2d 744 [2d Dept 1985].)

Further, the record does not support a finding as a matter of law that plaintiffs cannot state a fraud claim. Generally, although leave to amend pleadings should be freely granted in the absence of prejudice, a motion for leave to amend will be denied where the cause of action "plainly lacks merit" (Crimmins Contr. Co. v City of New York, 74 NY2d 166, 170 [1989]) or is "palpably insufficient as a matter of law." (Bank Leumi Trust Co. v D'Evori Intl., Inc., 163 AD2d 26, 28 [1st Dept 1990]; Detrinca v DeFillippo, 165 AD2d 505, 509 [1st Dept 1991].)

Similarly, a request for leave to replead in response to a motion to dismiss will be denied where a cause of action cannot be stated even upon repleading. (See, e.g., Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114, supra; Megaris Furs, Inc. v Gimbel Bros., Inc., 172 AD2d 209, supra; Jaro Constr. Corp. v Weiner, 209 AD2d 585 [2d Dept 1994].) Bearing in mind that CPLR 3016(b) should not be applied so as to result in the dismissal of an otherwise valid cause of action (see Lanzi, 43 NY2d at 780), a violation of this statute should not result in dismissal without leave to replead, absent a showing, akin to that on a summary judgment motion, that the cause of action is patently lacking in merit. (See Siegel, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B CPLR C3016:3, 2007 Pocket Part at 15-16.) Given the documentary evidence that defendants engaged in an illegal marketing campaign, the court does not find as a matter of law that plaintiffs will be unable to plead a nexus between defendants' alleged misrepresentations and plaintiffs' individual physicians. Plaintiffs' fraud cause of action should accordingly be dismissed with leave to replead.[2]

The court reaches a different result as to plaintiffs' breach of express warranty and consumer protection statute causes of action. Defendants contend that these causes of action are also defectively pleaded because they do not contain specific factual allegations of a nexus between defendants' alleged misrepresentations and plaintiffs' particular physicians' determinations to prescribe Neurontin for the treatment of bipolar disorder. CPLR 3016 does not

---

[2]The court declines to follow Baron v Pfizer, Inc. (12 Misc 3d 1169[A] [Sup Ct Albany County 2006] to the extent that it is to the contrary. Baron, also an action based on defendants' marketing of Neurontin for off-label uses, dismissed the fraud cause of action, pursuant to CPLR 3016(b), based on the lack of specific allegations as to whether plaintiff's physician relied on information from defendant in prescribing the drug. The court denied a motion to compel discovery as "academic" (id. at *5), without discussion of the standards for leave to conduct discovery or to replead.

on its face apply to these causes of action. Rather, they are subject to CPLR 3013, which imposes the lesser requirement that the pleading give notice of the claim. The courts have thus assessed the sufficiency of the pleading of express warranty claims under this statute. (See Hicksville Dry Cleaners, Inc. Stanley Fastening Sys., L.P., 37 AD3d 218 [1st Dept 2007]; Murrin v Ford Motor Co., 303 AD2d 475 [2d Dept 2003].) As to consumer protection claims, it has expressly been held that New York General Business Law § 349, which prohibits deceptive practices, does not require proof of reliance and that a deceptive practice "need not reach the level of common-law fraud" to be actionable under this section. (Stutman v Chemical Bank, 95 NY2d 24, 29 [2000].) Rule 9(b) (Fed Rules Civ Pro), the federal analog of CPLR 3016(b), has therefore been held inapplicable to a General Business Law § 349 claim. (Pelman v McDonald's Corp., 396 F3d 508 [2d Cir 2005].)[3]

While CPLR 3013 requires that the statements in a pleading shall be "sufficiently particular" to give notice of the transactions or occurrences on which the cause of action is based, this pleading requirement is less stringent than that imposed by CPLR 3016(b). (See Edison Stone Corp. v 42nd St. Dev. Corp., 145 AD2d 249, 257 [1st Dept 1989], citing Lanzi v Brooks, 54 AD2d 1057, 1058, affd 43 NY2d 778 [1977].) Under this lesser pleading standard, the causes of

---

[3]Gale v International Bus. Machs. Corp. (9 AD3d 446 [2d Dept 2004]), on which defendants rely, is not to the contrary. This case held that a General Business Law § 349 claim was not pleaded with "sufficient specificity" to withstand dismissal. (Id. at 447.) This requirement is consistent with the language of CPLR 3013, which requires that the pleading shall be "sufficiently particular" to give notice of the claim.

Defendants have not cited, and this court's research has not located, any authority which holds that a General Business Law section § 350 claim is subject to the pleading requirements of CPLR 3016(b). While this claim involves proof of reliance (Gale, 9 AD3d at 447), express warranty claims also require proof of reliance and are not subject to CPLR 3016. (See Hicksville Dry Cleaners, Inc. Stanley Fastening Sys., L.P., 37 AD3d 218 , supra.)

action are adequately pleaded.

Finally, defendants argue that the New York consumer protection statute claims under General Business Law §§ 349 and 350 are barred as a matter of law by the learned intermediary doctrine. This doctrine, which has been adopted in New York, provides that a manufacturer or distributor of prescription drugs will be absolved from liability to the patient where it gives "adequate warning" to the prescribing physician of all potential dangers of the drug of which it knows or, in the exercise of reasonable care, should have known. (See Martin v Hacker, 83 NY2d 1, 8-9 [1993].)

It appears that no New York appellate court has considered the applicability of the learned intermediary doctrine to the consumer protection statute. (See Colacicco v Apotex, Inc., 432 F Supp 2d 514, 552 [ED Pa 2006].) The parties' briefs do not discuss whether, on a motion to dismiss where the adequacy of the warnings to the physician is not shown as a matter of law, the doctrine should be found to bar a consumer protection claim, or whether the doctrine applies in the case of impermissible marketing of a drug for off-label purposes or of "overpromotion of a drug that nullifies otherwise adequate warnings." (See Matter of Zyprexa Prods. Liability Litig., ___ F Supp 2d ___, 2007 WL 1678078, * 31 [ED NY 2007].) Given the parties' cursory briefing of these novel issues, as well as the absence of any showing that the discovery to be conducted on the consumer protection cause of action will differ in any significant respect from the discovery on the other causes of action, the court declines on this record to reach the issue of whether the learned intermediary doctrine is a defense to plaintiffs' cause of action under the New York consumer protection statute.

The parties are currently conducting discovery on what has been referred to as the general

causation issue (i.e., whether Neurontin was a cause of injuries to plaintiffs treated with Neurontin for bipolar disorder), and the court has set a schedule for summary judgment motions on this issue. The parties have also agreed to conduct discovery in the multi-district litigation of 10 pilot plaintiffs for purposes of addressing individual causation issues (i.e., whether there is a nexus between defendants' general marketing campaign and plaintiffs' individual physicians' decisions to prescribe Neurontin for off-label uses). The parties have further agreed that the discovery of the individual plaintiffs in the federal litigation will be applicable to this state litigation. Upon completion of the discovery of the individual plaintiffs, the court will set schedules for motions, if needed, regarding any further pleading issues in this litigation. (See District Court Decision at 5.)

It is accordingly hereby ORDERED that the motion of defendants are granted to the following extent: The fraud cause of action in the Hoekman and Biernacki complaints, respectively, is denied with leave to replead upon completion of the discovery of the 10 pilot plaintiffs in the federal multi-district litigation, and the motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 29, 2007

MARCY FRIEDMAN, J.S.C.