IN THE CHANCERY COURT OF CHICKASAW COUNTY, MISSISSIPPI

JIM HOOD, ATTORNEY GENERAL OF
THE STATE OF MISSISSIPPI
EX REL, THE STATE OF MISSISSIPPI — PLAINTIFF

V. — CAUSE NO.: 2014-2124-C

BRISTOL-MYERS SQUIBB CO.;
SANOFI-AVENTIS U. S. L.L.C.;
SANOFI-AVENTIS, U. S., INC.;
SANOFI-SYNTHELABO, INC.,
AND DOE'S 1-100 — DEFEDNANTS

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM IN PART

CAME ON for consideration, Defendants' MRCP Rule 12(b) Motion to Dismiss and MRCP Rule 56 Motion for Summary Judgment asserting that Plaintiff's fee arrangement is unlawful, as well as Plaintiff's Motion to Dismiss Defendant's Counterclaim, and all responses thereto. Having considered the pleadings, oral arguments and applicable law, the Court finds as follows:

Background

This is an action filed by the Mississippi Attorney General, on behalf of the State of Mississippi, against Defendants seeking civil penalties pursuant to Miss. Code Ann. §75-24-19 of the Mississippi Consumer Protection Act or "MCPA", and to obtain an injunction against future alleged acts of unfair methods of competition and unfair and deceptive trade practices and alleged acts in Defendants' promotion and sale of the drug, Plavix®, pursuant to the MCPA and

Miss. R. Civ. P. 65(a). Plavix® is a prescription antiplatelet drug. According to Plaintiff, Defendants' have engaged in unfair, false and deceptive labeling and promotion of said drug, as well as a false and misleading marketing strategy, all of which was designed to replace over-the-counter aspirin with Plavix®, which costs one hundred times more than aspirin, in treating patients at risk for heart attacks and strokes. It is also Plaintiff's contention that for some time Defendants have continued to market Plavix® as more effective and safer than aspirin, despite having data to the contrary. As a result of the alleged marketing strategy and cover-up, Plaintiffs state that Plavix® has produced billions of dollars in profits for Defendants.

1. Defendants' MRCP Rule 12(b) Motion

Standard of Review

Mississippi Rule of Civil Procedure 12(b)(6) allows a defendant to test the legal sufficiency of the complaint by seeking a dismissal for the plaintiff's failure to state a claim on which relief can be granted. "When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond reasonable doubt that the [movant] will be unable to prove any set of facts in support of [their] claim." ***Howard v. Estate of Harper ex rel. Harper***, *947 So.2d 854, 856 (Miss.2006) (citations omitted)*. Rule 12(b)(6) motions "are decided on the face of the pleadings alone." ***Hartford Cas. Ins., Co. v. Halliburton Co.***, *826 So.2d 1206, 1211 (Miss.2001)*.

With the adoption of the Mississippi Rules of Civil Procedure, and more specifically Rule 8, Mississippi became a "notice pleading" state. Rule 8 requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, if the complaint gives the defendant notice of the claims against it, the complaint is sufficient as a matter of law. However, in pleading special matters, such as "fraud", Miss. R. Civ. P. 9(b) states

that the "circumstances constituting fraud...shall be stated with particularity", with "[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally.

In 1994, the legislature adopted §75-24-9 of the MCPA, which provides:

> Whenever the Attorney General has reason to believe that any person is using, has used, or is about to use any method, act or practice prohibited by Section 75-24-5[1], and that proceedings would be in the public interest, he may bring an action in the name of the state against such person to restrain by temporary or permanent injunction the use of such method, act or practice. The action shall be brought in the chancery or county court of the county in which such person resides or has his

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[1] Miss. Code Ann. §75-24-5:

(1) Unfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce are prohibited. Action may be brought under Section 75-24-5(1) only under the provisions of Section 75-24-9.

(2) Without limiting the scope of subsection (1) of this section, the following unfair methods of competition and unfair or deceptive trade practices or acts in the conduct of any trade or commerce are hereby prohibited:
   (a) Passing off goods or services as those of another;
   (b) Misrepresentation of the source, sponsorship, approval, or certification of goods or services;
   (c) Misrepresentation of affiliation, connection, or association with, or certification by another;
   (d) Misrepresentation of designations of geographic origin in connection with goods or services;
   (e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
   (f) Representing that goods are original or new if they are reconditioned, reclaimed, used or secondhand;
   (g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
   (h) Disparaging the goods, services, or business of another by false or misleading representation of fact;
   (i) Advertising goods or services with intent not to sell them as advertised;
   (j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
   (k) Misrepresentation of fact concerning the reasons for, existence of, or amounts of price reductions;
   (l) Advertising by or on behalf of any licensed or regulated health care professional which does not specifically describe the license or qualifications of the licensed or regulated health care professional;
   (m) .....

> principal place of business, or, with consent of the parties, may be brought in the chancery or county court of the county in which the State Capitol is located. The said courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this chapter, and such injunctions shall be issued without bond.

Discussion

In support of its 12(b)(6) motion, Defendants assert that Plaintiff has pled what amounts to a claim based in fraud, and therefore, MRCP Rule 9(b) is applicable and requires that such a claim be pled with particularity. According to Defendant, this requires a pleading of "who, what, when, where and how" as to each individual who has essentially prescribed and/or used Plavix®. Defendants contend that Plaintiff failed to plead accordingly, and as result, its claim should be dismissed. In that same vein, Defendants argue §75-24-19(1) of the MCPA requires civil penalties to be assessed on a "per violation" basis, and Plaintiff has failed to specify in its complaint any individual violations that may be assessed.

Finally, Defendants argue that any request for an injunction pursuant to Miss. R. Civ. P. 65(d) requires specificity, that is, individualized violations which are necessary to recover civil penalties, as well as a showing of continuing, irreparable harm, all of which they aver the Plaintiff has not done.

In contrast, Plaintiff contend that Rule 9(b) is applicable only to common law actions of fraud, which require nine elements. Plaintiff argues that its claim is a "MCPA" case and not one of "fraud", and therefore, it must plead act(s) and/or practices(s) that are prohibited by §75-24-5 of the MCPA, which it has done. To require otherwise, Plaintiff contends would defeat the purpose of the MCPA, which is to focus on the conduct of the defendants, not the reaction that conduct had with any particular doctor or patient or whether or not any particular patient suffered certain injuries as a result of that conduct. Ultimately, Plaintiff asserts that the MCPA is a

prophylactic act that is able to identify the prohibited conduct, provide a mechanism to stop such conduct, and to deter such conduct in the future.

With regard to Defendant's argument that Plaintiff fails to specify any individual violations so that civil penalties can be assessed pursuant to §75-24-19(1), Plaintiff relies on the case of ***United States v. Readers Digest Association***, *662 F.2d 955 (3d Cir. 1981)* for the point that at the appropriate time, the Court will apply the appropriate factors[2] to determine the per violation penalties. Plaintiff asserts that such a determination at this point in the litigation is premature, and that it has adequately alleged per violation penalties as a form of relief so that the Court can undertake such an evaluation at the appropriate time and in the appropriate manner.

As to the injunctive relief it requested, Plaintiff contends that it is adequately pled as required by the express language of the MCPA and the Mississippi Rules of Civil Procedure.

Conclusion

Simply put, the parties dispute the underlying nature of the Plaintiff's claim, and it's this "nature" that will determine the standard of law that is required. For the Court to determine that the specificity that is required by MRCP Rule 9, it will in essence have to ignore the enactment and purpose of the MCPA. That is not an option for this Court. Plaintiff has pled a claim(s) pursuant to the MCPA, not common law fraud, and has set forth alleged violations in accordance with §75-24-5. Taking Plaintiff's claim(s) as true, it does not appear that Plaintiff will be unable to prove any set of facts in support of its claim(s). Defendants' motion to dismiss with regards to a failure to plead fraud with particularity is denied.

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[2]Defendants' good and bad faith, the injury to the public, the Defendants' ability to pay, the desire to eliminate any benefit the Defendants received because of the violation, and the necessity of vindicating the Attorney General's authority.

The Court is also in agreement with Plaintiff as to the assessment of civil penalties on a per violation basis. Plaintiff has pled sufficiently to put Defendants on notice that it will be seeking civil penalties pursuant to the MCPA. *See Miss. R. Civ. P. Rule 8.* More specificity is not required. Defendants' motion to dismiss for failure to identify individual violations necessary to assess civil penalties is denied.

Turning to Defendants motion to dismiss Plaintiff's request for injunctive relief, Defendants misstate the pleading requirement for said relief. The Mississippi Rules of Civil Procedure state that the Plaintiff does not have to plead specifically for injunctive relief. *Miss. R. Civ. P. 8 & 9.* Plaintiff has properly pled its demand for injunctive relief and, this pleading has properly put the Defendants on notice that it seeks injunctive relief.

Furthermore, courts have long distinguished between a private party's burden of proof in obtaining a traditional injunction and the government's burden of proof in obtaining an injunction pursuant to statutes comparable to the MCPA, which seeks to protect the public's health and interest. See ***USA v. Shelton Wholesale, Inc.***, *34 F.Supp. 1147 (U.S.D.Ct. MO, 1999);* ***State of Wisconsin v. Fonk's Mobile Home Park and Sales, Inc.***, *343 N.W.2d 820 (Wic. App. 1983);* ***SEC v. Mgmt. Dynamics, Inc.***, *515 F.2d 81 (2d Cir. 1975);* ***FTC v. U.S. Oil & Gas Corp.***, *83-1702-CIV-WMH 1987 U.S. Dist. Lexis 16137, *50 (S.D. Fla. July 10, 1987)(quoting* ***U.S. v. Richbert***, *398 F.2d 523, 530-31 (5th Cir. 1968).* Essentially, these cases state that the traditional perquisites for obtaining injunctive relief[3] become more flexible and the need to demonstrate irreparable harm or the inadequacy of other remedies significantly diminishes when the government is seeking to protect the public health and interest. The government only has to

[3] 1) there exists a likelihood that the person seeking injunction will prevail on the merits of the case; 2) injunction is necessary to prevent irreparable harm; 3) threatened injury to the person seeking an injunction outweighs the harm an injunction might do to the defendants; and 4) entry of a preliminary injunction is consistent with the public interest.

show a probable cause of a statutory violation for a statutory injunction. ***Atchison, T & S.F.Ry. Co. v. Lennen***, *640 F.2d 255, 259-60 (10th Cir. 1981)*. Plaintiff has done so.

As to Defendants argument that there is no threat of continuing, eminent, irreparable harm because patent protection for Plavix® was lost in 2012, Plaintiff alleges violations (false and misleading marketing conduct, including labeling) under the MCPA that occur prior to 2012, and are still ongoing. *See Plaintiff's First Amended Complaint and Motion for Preliminary Injunction Pursuant to Miss. R. Civ. P. 65(a).*

Taking into account the standard to be applied to Plaintiff as a government official, as well as the allegations contained in Plaintiff's First Amended Complaint as true, this Court finds that there are sufficient allegations to support this Court's entry of an injunction pursuant to MRCP 65 and/or §75-24-9 of the MCPA. Therefore, Defendant's Motion to Dismiss the injunctive relief is also denied.

2. **Defendants' Motion for Summary Judgment**

Standard of Review

A Rule 56(b) motion for summary judgment should not be granted unless "no genuine issues of material fact exist." *Miss. R. Civ. P. 56(b)*. The moving party must be entitled to judgment as a matter of law, and "the burden of demonstrating that there is no genuine issue of material fact falls on the party requesting the summary judgment." ***Mozingo v. Scharf***, *828 So.2d 1246, 1249 (Miss. 2002), citing,* ***Short v. Columbus Rubber & Gasket Co.***, *535 So.2d 61, 63 (Miss. 1988)*. "The evidence is viewed in the light most favorable to the non-moving party." ***Watts v. Tsang***, *828 So.2d 785, 791 (Miss. 2002), quoting,* ***Conley v. Warren***, *797 So.2d 881, 882 (Miss. 2001).*

Discussion

To pursue claims against Defendants for alleged violations of the MCPA, Mississippi Attorney General, Jim Hood, signed a contingency-fee contract ("Retention Agreement") with Bailey Perrin Bailey, PLLC, and its attorneys F. Kenneth, Jr., Fletcher V. Trammell, Robert W. Cowan, and Justin C. Jenson (collectively "BPB"), which in turn associated Willie Howard Gunn of W. Howard Gunn & Assoc. Said agreement was dated May 1, 2012. Thereafter, and prior to July 1, 2012, Jim Hood, acting as the Mississippi Attorney General, and on behalf of the State of Mississippi, filed suit against the Defendants.

Defendants are seeking to have the contingent fee arrangement set aside as unlawful. First, Defendants argue that the Due Process Clause of the United States Constitution bars the Plaintiff's use of financially interested private lawyers in the enforcement of the MCPA. Second, it is their contention that the Retention Agreement violates Miss. Code Ann. §7-5-8(2)(c). Third, Defendants claim that the Retention Agreement would divert civil penalty recovery to a use not authorized by Mississippi law. Fourth, any promise to pay a portion of any recovery as contingency fees by the Attorney General is prohibited by Article, I, Section 2 of the Mississippi Constitution. Lastly, the Retention Agreement provided private counsel with a personal pecuniary benefit in violation of Miss. Code §25-4-105(1).

As to the first point, that the Retention Agreement is illegal because it is a violation of the Due Process Clause, Defendants argue that this Court should apply a categorical rule as set forth in ***Young v. United State ex rel. Vuitton et Fils S.A.***, *481 U.S. 787 (1987)*, that if there is a prosecutor with an interest in the outcome of a case, that is "per se" invalid. Here, Defendants contend that BPB is essentially a prosecutor for hire by the State, who has a financial interest in the outcome of the case, and unlike the government salaried defendants in ***Marshall v. Jerrico,***

446 U.S. 238 (1980), its "salary" will increase the more civil penalties are recovered. In addition, Defendants argue that any oversight by the Attorney General conflicts with the categorical rule set forth in ***Young*** and would be unwise, and that the use of contingent fee arrangements creates an appearance of impropriety.

In contrast, Plaintiff contends that Defendants fail to identify any constitutional protected liberty or property right that affords due process protection. In short, Plaintiff states that there is no constitutional right not to be sued. Plaintiff also argues that the cases of ***Young*** and ***Marshall*** stand for the premise that judges and judicial officers cannot have a financial stake in the outcome of civil litigation, but that prosecutors are "permitted to be zealous in their enforcement of the law." Instead, Plaintiff points to ***Int'l Paper Co. v. Harris County***, *445 S.W.3d 379 (Tex. App. 2013)*, wherein said court declined to become the first court to hold that there is a due process violation in a contingency fee arrangement such as in the case sub judice. Plaintiff also points to the fact that the Retention Agreement explicitly preserves to the Attorney General decision-making and ultimate control over the litigation and deny any appearance of impropriety.

As to the second point, Miss. Code Ann. §7-5-8(2)(c) became effective July 1, 2012, and provides that "contingency fees shall not be based on penalties or civil fines awarded or any amounts attributable to penalties or civil fines." Defendants contend that because the only economic damages sought by Plaintiff are civil penalties pursuant to Miss. Code Ann. §75-24-19 of the MCPA, this Court should declare the Retention Agreement unlawful.

At the heart of this argument, is whether or not said provision is applicable to the subject Retention Agreement signed May 1, 2012, approximately two months prior to the enactment of Miss. Code Ann. §7-5-8(2)(c) and the lawsuit, also filed prior to the enactment of the amendment. Defendants argue that it was the legislature's intent to apply said section to all

contingency "payments" made after its effective date, and that the general rule under Mississippi law is to apply statutory amendments to ongoing cases. Defendants cite ***Bell v. Mitchell***, *592 So.2d 528, 532 (Miss. 1991) and* ***USCPI of Miss. Inc. v. Miss. Ex rel McGown***, *688 So.2d 783, 786-87 (Miss. 1997)* in support of this premise.

Plaintiff's position is that Miss. Code Ann. §7-5-8(2)(c) did not take effect until after July 1, 2012, and even if the statute is applied retroactively, the Retention Agreement is not void for various reasons, including the Contracts Clause of the U.S. and Mississippi Constitutions. To support its position that §7-5-8(2)(c) should be construed prospectively, Plaintiff cites several Mississippi Supreme Court decisions that held that in interpreting statutes, the rule to be applied is that they will be construed to have a prospective operation unless a contrary intention is manifested by the clearest and most positive expression. *See* ***City of Belmont v. Miss. State Tax Comm'n***, *860 So.2d 289, 302 (Miss. 2003),* ***City of Starkville, v. 4-County Elec. Power Ass'n***, *909 So.2d 1094, 1109 (Miss. 2005), and* ***Mladinich v.Kohn***, *186 So.2d 481, 483 (Miss. 1966).*

As to the argument that the amendment applies to ongoing cases, Plaintiff points out that statutory amendments have been applied to pending lawsuits where the underlying claims were based solely on rights created by the statutes prior to the amendment. Plaintiff contends that the Attorney General had common law authority to enter into the Retention Agreement in May 2012, and that said agreement was not dependent on the continued existence of any statute, specifically Miss. Code Ann. §7-5-8.

Thirdly, Defendants contend that Miss. Code Ann. §75-24-19(1)(b) provides that half of any civil penalty award is payable to the State treasury for general use outside of the Attorney General's office, and the other half must go to fund specific operations of the Attorney General office itself. According to Defendants, the statute does not allocate civil penalty awards to go to

pay a private law firm directly out of litigation recoveries and to do so is a violation of Miss. Code Ann. §7-5-7.

To counter Defendants' argument, Plaintiff asserts that Miss. Code Ann. §75-24-19(1)(b) authorizes an award of attorneys' fees to the Attorney General separate and apart from any penalties awarded under the statute. Further, in the event that only penalty fees were awarded and no attorneys' fees, the Retention Agreement allows for attorney fees to be paid out of funds appropriated by the Mississippi Legislature or out of the Attorney General's contingent funds. In addition, Plaintiff points out that should the lawsuit settle then the issue of civil penalties would be moot. And finally, since the Retention Agreement does not require the attorneys' fees be paid out of monies recovered in this lawsuit, the same does not violate Miss. Code Ann.§7-5-7.

As to their fourth point, Defendants contend that the Retention Agreement violates the separation of powers doctrine contained in Article I, Section 2 of the Mississippi Constitution because the Attorney General's promise to pay a portion of any recovery to private counsel as a contingency fee payment is an improper appropriation of funds belonging to the State. According to Defendants, Article I, Section 2 of the Mississippi Constitution, only the state legislature has the power to approve the expenditure of public funds through the appropriation process. Plaintiff's again argue, as in point three above, that the Attorney General has not promised to pay a portion of any recovery to outside counsel in the Retention Agreement.

As to their last point, Defendants state that the Retention Agreement violates the Use of Office provision, Miss. Code §25-4-105, of the Ethics in Government Act which provides that "[n]o public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law." *Miss. Code Ann. §25-4-105(1)*. Plaintiff contends that any attorney fees to be paid in the lawsuit would be derived from

legally authorized sources and that although the Retention Agreement does not require that attorneys' fees be paid out of monies recovered in this lawsuit, the Attorney General is authorized to pay retained counsel from the Attorney General's contingent fund and funds appropriated from the Attorney General's contingent fund and funds appropriated by the Mississippi Legislature. *Miss. Code Ann. §7-5-7 (Rev. 2002).*

Conclusion

Summary Judgment is authorized by Rule 56 of the Mississippi Rules of Civil Procedure if there is no genuine issue of material fact and that a party is entitled to prevail as a matter of law. *Miss. R. Civ. P. 56.* If there are issues of genuine material fact, summary judgment will not be granted. The Court has examined the pleadings and the responses, and is of the opinion, that based on the many issues before the Court, that Summary Judgment is not appropriate and will not be granted.

The Court is unconvinced that Defendants' due process rights were violated by the contingent fee arrangement by and between the Attorney General and BPB. It is apparent that such arrangements have and continue to take place, and are even sanctioned by this state's Legislature. See *Miss. Code Ann. §7-5-8.* Without absolutely any case law to the contrary, this Court, like the Texas court cited herein, will not be the first to void such an arrangement. *See* ***Int'l Paper Co. v. Harris Cnty.****, 445 S.W.3d 379 (Tex. App. 2013).* However, the Court is convinced that Miss. Code Ann. §7-5-8(2)(c) should be applied prospectively, as opposed to retroactively, and thus, so much as Defendants are requesting summary judgment as to this point, the same is also denied.

As to all remaining points that Defendants assert in support of their Motion for Summary Judgment, there exist a genuine issue of material fact, as evidenced by the counter points,

arguments and differing interpretations of the law as applied to the facts herein raised by Plaintiff, thereby precluding a rendering of summary judgment.

Therefore, Defendants' Motion for Summary Judgment is and shall be denied as to all issues.

3. Plaintiff's MRCP Rule 12(b) Motion

Plaintiff is requesting this Court dismiss Defendants' Counterclaim on the basis that Defendants lack standing because they have experienced no adverse effect as a result of the Retention Agreement, and that Defendants have no "colorable interest" in the subject matter of their Counterclaim. Defendants' Counterclaim seeks a declaratory judgment that the Attorney General's retention of private counsel to prosecute the subject lawsuit violates federal and state law, and essentially sets forth in their separate counts under the Counterclaim, the same basis as argued in its Motion for Summary Judgment previously discussed herein.

As stated previously, "When considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond reasonable doubt that the [movant] will be unable to prove any set of facts in support of [its] claim." ***Howard v. Estate of Harper ex rel. Harper***, *947 So.2d 854, 856 (Miss.2006) (citations omitted*). Rule 12(b)(6) motions "are decided on the face of the pleadings alone." ***Hartford Cas. Ins., Co. v. Halliburton Co.***, *826 So.2d 1206, 1211 (Miss.2001).*

Based on the its' reasoning as set forth above when considering Defendants' Motion for Summary Judgment, and taking the Counterclaim as true, the Court hereby dismisses Count I & II of the Defendants' Counterclaim. As to the remaining counts, taking Defendants' claims as true, it does not appear that Defendants will be unable to prove any set of facts in support of their claims.

Therefore, Plaintiff's Motion to Dismiss is granted as to Defendants' Counts I & II of their Counterclaim, and denied as to the remaining counts.

SO ORDERED and ADJUDGED on this the 21st day of September, 2015.

Sandra W. Calvert
CHANCELLOR