

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**PENNSYLVANIA EMPLOYEES BENEFIT  
TRUST FUND,**

**Plaintiff,**

**-vs-**

**Case No. 6:09-cv-5003-Orl-22DAB**

**ASTRAZENECA PHARMACEUTICALS  
LP,**

**Defendant.**

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**ORDER**

This cause comes before the Court for consideration of Defendant's Motion to Dismiss (Doc. 12), filed April 20, 2009, to which Plaintiff responded in opposition (Doc. 14). After careful review of the parties' submissions and the pertinent law, the Court determines that Defendant's motion is due to be granted.

**I. BACKGROUND**

Plaintiff Pennsylvania Employees Benefit Trust Fund ("PEBTF"), established in 1988, is a health and welfare trust fund that provides health insurance and prescription drug coverage to active employees of the Commonwealth of Pennsylvania, their dependents, Commonwealth retirees and their dependents, and employees of certain independent agencies. Doc. 3 at 3-4. In all, PEBTF provides coverage for approximately 325,000 individuals. *Id.* at 4. As with many employers and health insurance carriers, PEBTF's prescription drug benefit program is administered by a Pharmacy Benefit Manager (PBM), and extends coverage only to prescriptions that are "medically necessary, and in accordance with medically recognized uses." *Id.* at 5-6.

This action centers on Defendant's marketing of Seroquel, an atypical antipsychotic drug approved for use in individuals suffering from schizophrenia and bipolar disorder. Plaintiff alleges that Defendant "engaged in wide-spread fraudulent statements and conduct, and pervasive false and misleading marketing, advertising and promotion of Seroquel" which involved "deceiv[ing] physicians, consumers, the PEBTF, and others regarding the comparative efficacy of Seroquel to other atypicals and traditional antipsychotics," and "actively market[ing] and promot[ing] Seroquel for unapproved uses in several populations where the efficacy and safety of the drug had not been established . . . ." Doc. 3 at 9. Plaintiff further alleges that Defendant's conduct in this regard resulted in "both the submission of claims for medically unnecessary uses of Seroquel to the PEBTF as well as adverse health effects among PEBTF participants." Doc. 3 at 10-11.

As a result of Defendant's conduct, Plaintiff claims that it was duped into expending millions of dollars in reimbursements for Seroquel prescriptions issued for medically unnecessary uses. Plaintiff further maintains that it must now pay significant additional health care costs for participants who developed serious side effects and adverse reactions as a result of their use of Seroquel. Finally, Plaintiff claims that it unnecessarily paid the cost of Seroquel prescriptions where less expensive, safer and more effective medication was available.

Plaintiff's complaint consists of only two claims: (1) breach of express warranty; and (2) unjust enrichment. Defendant now seeks to have these claims dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

## **II. LEGAL STANDARD**

In deciding a motion to dismiss, the court must accept as true all the factual allegations in the complaint, drawing all inferences derived from those facts in the light most favorable to the plaintiff.

*Brown v. Crawford County*, 960 F. 2d 1002, 1010 (11th Cir. 1992). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) *overruled on other grounds by Davis v. Sherer*, 468 U.S. 183 (1984); *Little v. N. Miami*, 805 F. 2d 962, 965 (11th Cir. 1986). However, a plaintiff must supply more than just any conceivable set of facts tending to support a claim, but “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

### III. DISCUSSION

#### A. Count I: Breach of Express Warranty

In Count I, Plaintiff alleges that Defendant, “[t]hrough its labeling, as well as its sales and marketing practices and documents given or shown to physicians treating PEBTF participants and/or the PEBTF itself” expressly warranted that Seroquel: (1) was fit and appropriate for adult patients suffering from conditions other than those for which the drug was approved; (2) was fit and appropriate for pediatric use; (3) had no significant risks or side effects other than those identified in the label; and (4) was safer and more effective than less expensive alternative treatments. Doc. 3 at 32. In fact, Plaintiff urges, Seroquel was *not* appropriate for use in pediatric patients, nor for treatment of conditions other than those for which it was approved. Plaintiff further maintains that Seroquel is “far less safe” than warranted by Defendant, and is no more safe or effective than other alternative treatments. Doc. 3 at 33. Thus, Plaintiff pleads, Defendant breached its express warranties with respect to Seroquel’s safety and effectiveness, prompting Plaintiff to expend millions of dollars

for Seroquel prescriptions written for medically unnecessary uses, as well as forcing the fund to cover the increased health care costs associated with treatment of participants who have been injured by the drug.

In order to prevail on a claim for breach of warranty in Pennsylvania, “a plaintiff must establish that a breach of warranty occurred and that the breach was the proximate cause of the specific damages sustained.” *Price v. Chevrolet Motor Div. of Gen. Motors Corp.*, 765 A.2d 800, 809 (Pa. Super. Ct. 2000). An express warranty is defined as follows:

- (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

13 Pa. Cons. Stat. § 2313(a). “[E]xpress warranties are bargained, ‘dickered,’ individualized promises that the goods will perform up to the specific standards set forth in that warranty,” and are created only where the seller expressly communicates the terms of the warranty to the buyer “in such a manner that the buyer understands those terms and accepts them.” *Goodman v. PPG Indus., Inc.*, 849 A.2d 1239, 1243, 1245 (Pa. Super. Ct. 2004).

In support of dismissal of this claim, AstraZeneca advances two core arguments: (1) Plaintiff has not sufficiently alleged that it ever saw or heard the terms of the alleged express warranties, either first-hand or through an intermediary, as the law requires; and (2) Plaintiff’s alleged injury is too remote from the company’s alleged bad acts and, therefore, does not meet the proximate cause

requirement for a valid breach of warranty claim. The Court agrees with AstraZeneca on both grounds.

In Pennsylvania, a plaintiff can properly bring an express warranty claim either as the direct recipient of the terms of the warranty or as an intended third-party recipient. *Goodman*, 849 A.2d at 1246 n. 6 (“[P]rivacy of contract is not required between the party issuing a warranty and the party seeking to enforce the warranty.”). Plaintiff pursues both theories in its response to the motion, first arguing that the complaint demonstrates that it received direct communications from Defendant containing express warranties, and then maintaining that its members’ prescribing physicians acted as intermediaries through which Defendant’s express warranties were extended to Plaintiff. A close reading of the complaint, however, reveals that Plaintiff cannot succeed on either theory.

As to any *direct* communication of express warranties from Defendant to Plaintiff, Defendant points out that the complaint is devoid of facts supporting even an inference that the terms of any alleged warranties were received by Plaintiff directly from the company. Plaintiff counters by referring to four paragraphs in the complaint containing allegations that AstraZeneca conveyed its alleged warranties “[t]hrough its labeling, as well as its sales and marketing practices and documents given or shown to physicians treating PEBTF participants and/or the PEBTF itself . . . .” *See* Doc. 3 at 32. Notably, however, the allegations of direct communication are entirely unsupported by facts contained elsewhere in the complaint. As the Supreme Court of the United States recently clarified, a federal complaint does not “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 129 S. Ct. at 1949.

Furthermore, even Plaintiff’s “naked assertions” of direct contact with Defendant are vaguely stated; Plaintiff indicates that AstraZeneca’s marketing materials and Seroquel labeling were “given

or shown to physicians treating PEBTF participants *and/or* PEBTF itself.” Doc. 3 at 32. Such equivocal allegations suggest that PEBTF itself is unsure whether it received any direct marketing information from AstraZeneca regarding uses of Seroquel that were unapproved by the FDA. Indeed, a close reading of the complaint strongly suggests that AstraZeneca’s alleged warranties reached PEBTF only by way of a treating physician’s prescription pad, if at all. *See* Doc. 3 at 31 (“Pennsylvania physicians who treat, and prescribe medications for, PEBTF participants necessarily act as the intermediary between Defendant and the Plaintiff.”); *id.* at 6 (“The PEBTF and its PBM [“pharmacy benefit manager”] rely on persons causing claims to be submitted for payment by the Plaintiff to recognize and honor the permissible scope of reimbursement and to obey the governing law and regulations in activities that cause such claims.”); *id.* at 32 (“Defendant breached the express warranties it made to the PEBTF, *through physicians participating in PEBTF . . .*”)(emphasis added). In sum, the Court need not credit Plaintiff’s bald allegations of any direct communication of express warranties from Defendant for purposes of the motion to dismiss.

Perhaps recognizing the complaint’s pleading deficiencies with respect to its alleged first-hand receipt of express warranties regarding Seroquel’s safety and effectiveness for certain uses, Plaintiff advances an alternative theory of recovery on its breach of warranty claim: Plaintiff was an intended third-party recipient of AstraZeneca’s alleged warranties. Under this theory, Plaintiff maintains that its members’ prescribing physicians acted as intermediaries through which Defendant’s alleged warranties were transmitted to Plaintiff. According to Pennsylvania law, “third parties may enforce express warranties only under circumstances where an objective fact-finder could reasonably conclude that: (1) the party issuing the warranty intends to extend the specific terms of the warranty to the third party (either directly, or through an intermediary); and (2) the third party is aware of the specific terms

of the warranty, and the identity of the party issuing the warranty.” *Goodman*, 849 A.2d at 1246.

To be sure, the complaint contains extensive allegations regarding AstraZeneca’s promotional efforts within the medical community. For example, Plaintiff alleges that Defendant carried out its alleged unlawful marketing scheme by “employing the illegal direct solicitation of physicians to prescribe Seroquel for medically unnecessary uses” and “making [] false statements to physicians and pharmacists concerning the efficacy and safety of Seroquel for medically unnecessary uses . . . .” Doc. 3 at 10. Plaintiff contends that physicians received alleged express warranties regarding the safety and efficacy of Seroquel largely through their attendance at “medical education seminars, advisory boards, consultants’ meetings, speakers bureaus and similar events.” Doc. 3 at 18. Despite voluminous such allegations, however, the complaint is notably devoid of facts indicating whether and how Plaintiff itself became apprised of the alleged promises made by Defendant at events targeting physicians, and, further, how such alleged promises became part of the “basis of the bargain” with respect to Plaintiff’s reimbursement of the costs of Seroquel prescriptions. The caselaw is clear: the third party recipient of an express warranty must be aware of the *specific terms* of the warranty in order to sustain a claim for breach of that warranty. Thus, Plaintiff cannot simply rely on the prescription pads of physicians or claims for reimbursement from pharmacies as a means by which express warranties were conveyed. Absent facts indicating any other means were used, the Court must find that the complaint fails to set forth facts sufficient to state a third party claim for breach of express warranty.

The deficiencies of Count I of the complaint do not end here, however. Plaintiff’s warranty claim also fails to survive a proximate cause inquiry. As previously explained, a showing of proximate cause is essential to a claim for breach of express warranty. *Price*, 765 A.2d at 809. In the

negligence context, “[p]roximate cause is a term of art denoting the point at which legal responsibility attaches for the harm to another arising out of some act of defendant; and it may be established by evidence that the defendant’s negligent act or failure to act was a substantial factor in bringing about the plaintiff’s harm.” *Hamil v. Bashline*, 392 A.2d 1280, 1284 (Pa. 1978) (citations omitted).

Whether conduct constitutes a substantial factor depends on consideration of the following “important” factors:

[T]he number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; whether the conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is responsible; and lapse of time.

*Wisniewski v. Great Atl. & Pac. Tea Co.*, 323 A.2d 744, 748 (Pa. Super. 1974). Importantly, “[p]roximate cause . . . serves as a means by which courts are able to place practical limits on liability as a matter of policy. It involves a determination that the nexus between a defendant’s wrongful acts or omissions and the injury sustained is of such a nature that it is socially and economically desirable to hold that defendant liable.” *Galullo v. Fed. Exp. Corp.*, 937 F. Supp. 392, 395 (E.D. Pa. 1996) (citation omitted).

Approximately one year ago, this Court considered an economic damages case presenting facts and allegations closely resembling the facts presented here. In *Ironworkers Local Union No. 68 v. AstraZeneca Pharmaceuticals LP*, 585 F. Supp. 2d 1339 (M.D. Fla. 2008), various health and welfare benefit funds sought economic damages for alleged excess payments made for Seroquel prescriptions filled by their participating members. As in this case, the alleged overpayment for Seroquel was said to have stemmed from Defendants’ unlawful promotion of the drug for unapproved uses and misrepresentation of its relative safety and efficacy. This Court dismissed the complaint for Plaintiffs’

failure to establish that their economic injuries were proximately caused by Defendants' alleged unlawful conduct, citing serious concerns about the difficulties inherent in determining, on a transaction-by-transaction basis, whether, and to what extent, Defendants' unlawful conduct caused each Seroquel prescription to be written by Plaintiffs' members' physicians.

Though this Court's opinion in *Ironworkers* examined the issue of proximate cause primarily in the context of Plaintiffs' federal RICO claims, the reasoning underlying that opinion applies with equal force to the state claims presented in this case.<sup>1</sup> There, this Court explained:

The key independent factor in this case stems from the fact that consumers may only obtain Seroquel through a prescription from a physician. Presumably, these physicians use their independent medical judgment to decide whether Seroquel is the best treatment for a given patient. This independent judgment can be influenced by a number of things, only one of which may be representation by a manufacturer as to a particular drug's relative safety and efficacy. Thus, in the context of this case, establishing that Plaintiffs' injuries were caused by Defendants' misconduct would require an inquiry into the specifics of each doctor-patient relationship implicated by the lawsuit. In other words, each physician who prescribed Seroquel to an individual consumer or health and welfare fund member would have to be questioned as to whether his or her independent medical judgment was influenced by Defendants' misrepresentations, and to what extent. Furthermore, . . . this individualized inquiry would likely have to be conducted with regard to each consumer purchase transaction or third-party reimbursement payment made over the last approximately ten years.

*Ironworkers*, 585 F. Supp. 2d at 1344.

This case presents no fewer difficulties in ascertaining the cause of Plaintiff's alleged injury. In fact, as Defendant observes in its motion, the complexity of the causation determination is even

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<sup>1</sup> Indeed, the first of the *Wisniewski* policy considerations, i.e., the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it, *see Wisniewski*, 323 A.2d at 748, closely resembles the *Holmes* factor this Court found weighed most heavily against a finding of proximate cause in *Ironworkers*. *See Ironworkers*, 585 F. Supp. 2d at 1344.

further compounded here by Plaintiff's added request for damages related to treating its members for injuries allegedly stemming from their use of Seroquel. Such claims would require onerous individualized inquiries into the specifics of each patient's medical history and the circumstances of each patient's alleged injury. Therefore, here, as in *Ironworkers*, Plaintiff's alleged harm is simply too remote from Defendant's alleged unlawful acts to permit a "socially and economically desirable" outcome. Count I of the complaint must be dismissed.

**B. Count II: Unjust Enrichment**

Plaintiff's second and final claim alleges that Defendant received an unjust "financial windfall" from Plaintiff when the company employed its alleged deceptive marketing practices to substantially inflate the number of Seroquel prescriptions filled by Plaintiff's members, the cost of which was ultimately reimbursed by Plaintiff. Defendant seeks to have this claim dismissed both on remoteness grounds and for failure to establish critical elements of the claim.

On the issue of remoteness, the Court is guided, as it was in *Ironworkers*, by the Third Circuit Court of Appeals' decision in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999).<sup>2</sup> In that case, the court, applying Pennsylvania law, found that plaintiffs could not proceed on their unjust enrichment claim once it had been determined that all other tort claims failed for lack of proximate cause. In finding so, the *Steamfitters* court reasoned: "In the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim (i.e., if defendant is permitted to keep the benefit of his tortious conduct, he will be unjustly enriched.)" *Id.* at 936. Therefore, the court could "find no justification" for allowing the plaintiffs' unjust

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<sup>2</sup> See *Ironworkers*, 585 F. Supp. 2d at 1346-47.

enrichment claims to go forward once all traditional tort claims had been dismissed on remoteness grounds. *Id.* at 937. Other federal courts have similarly approached the issue. *See Perry v. Am. Tobacco Co., Inc.*, 324 F.3d 845, 851 (6th Cir. 2003) (dismissing group health insurance subscribers' unjust enrichment claim against tobacco manufacturers on remoteness grounds); *Boring v. Google*, 598 F. Supp. 2d 695, 702 (W.D. Pa. 2009) (observing that treatment of unjust enrichment claims as indistinct from traditional tort claims "is supported by the fact that the Restatement of Torts does not recognize unjust enrichment as an independent cause of action."); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 484 F. Supp. 2d 973, 985 (D. Minn. 2007) (dismissing third party payor unjust enrichment claim under Pennsylvania law because the alleged harm was "too remote."); *Blystra v. Fiber Tech Group, Inc.*, 407 F. Supp. 2d 636, 644 n.11 (D.N.J. 2005) (treating plaintiffs' unjust enrichment claims as "subsumed by their other tort claims, and not as an independent cause of action."). In light of the foregoing authority, Count II of the complaint must be dismissed.

#### IV. CONCLUSION


Based on the foregoing discussion, it is **ORDERED** as follows:

1. Defendant's Motion to Dismiss (Doc. 12) is **GRANTED**.
2. All of Plaintiff's claims against Defendant are hereby **DISMISSED**.
3. The Clerk is directed to **CLOSE** the case.

**DONE** and **ORDERED** in Chambers, in Orlando, Florida on July 18, 2009.

Copies furnished to:

Counsel of Record

  
ANNE C. CONWAY  
United States District Judge