IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MICHAEL L. WINSTON,

Plaintiff,

v. OPINION & ORDER

JANSSEN PHARMACEUTICAL, INC. and JOHN DOES, 16-cv-23-jdp

Defendants.

Pro se plaintiff Michael L. Winston is a prisoner in the custody of the Wisconsin Department of Corrections currently housed at the Columbia Correctional Institution (CCI). Plaintiff has filed a complaint alleging that for years he has taken the prescription drug Risperdal/risperidone, and it has caused him to grow painful breasts. Plaintiff sues defendant Janssen Pharmaceutical, Inc., presumably because it manufactures the drug, and unidentified John Doe defendants. The court determined that plaintiff qualifies for *in forma pauperis* status, and plaintiff paid the initial partial filing fee set by the court. Dkt. 5 and Dkt. 9.

Plaintiff has filed two proposed amended complaints. Dkt. 12 and Dkt. 14. I will grant plaintiff's motion for leave to file an amended complaint, Dkt. 13, and I will accept plaintiff's second amended complaint as the operative pleading. Dkt. 14. The next step is for me to screen plaintiff's operative complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915, 1915A. When screening a pro se litigant's complaint, the court construes the allegations liberally and in the plaintiff's favor. *McGowan v. Hulick*, 612 F.3d 636, 640 (7th Cir. 2010). Now that I have reviewed the second amended complaint, I will grant plaintiff leave to proceed on

several of his claims against Janssen, but I will deny him leave to proceed against the John Doe defendants.

ALLEGATIONS OF FACT

I draw the following facts from plaintiff's second amended complaint. Dkt. 14.

Plaintiff is mentally ill. In 2004, when he was housed at the Wisconsin Resource Center, plaintiff began taking Risperdal/risperidone. Plaintiff took the drug on and off for years, and, as a result, plaintiff experienced chest pain and breast growth.

In 2006, while incarcerated at the Milwaukee Secure Detention Facility, plaintiff continued to take Risperdal/risperidone. A physician at that facility, Dr. Kenneth Erdmann (not named as a defendant), informed plaintiff about common side effects associated with the drug, but the list did not include chest pain or breast growth. Plaintiff took the medication for about two weeks before Dr. Erdmann discontinued it because it was not effective. But during those two weeks, plaintiff experienced chest pain and developed a small, painful mass in his left breast.

Soon after, plaintiff was transferred to the Winnebago Mental Health Institute. There he discovered that he had high levels of prolactin in his system, a hormone associated with breast growth. No one told him what was causing this condition, but staff suspected that he might have mild gynecomastia (i.e., enlarged male breasts).

Plaintiff continued to take Risperdal/risperidone on and off between 2007 and 2013. Plaintiff began a more regular regimen in 2013, at the Milwaukee County Jail, and again he experienced breast tenderness and growth. A painful mass formed in his breast. Eventually unidentified health officials (not named as defendants) determined that plaintiff was

experiencing serious side effects attributable to Risperdal/risperidone. The drug left plaintiff "disfigured" and caused plaintiff emotional distress, to the point that he attempted suicide.

Plaintiff specifically accuses Janssen of: (1) misbranding and promoting off-label use; (2) targeting vulnerable patients (including the mentally ill); (3) encouraging healthcare entities to make false statements regarding the safety and efficacy of Risperdal; (4) paying kickbacks to physicians to prescribe Risperdal; and (5) failing to update its labeling to include warnings for additional health risks, including the side effects that plaintiff experienced.

ANALYSIS

Plaintiff lists a number of causes of action in his second amended complaint, including negligence, assault and battery, infliction of emotional distress, misrepresentation, fraud, conspiracy, strict products liability, negligent products liability, breach of warranty, failure to adequately test, breach of implied warranty, false claims, and equal protection. Many of these theories overlap. Construing plaintiff's allegations liberally and applying those allegations to the most appropriate legal theories, I will grant plaintiff leave to proceed on claims for products liability and, relatedly, breach of implied warranty; fraudulent misrepresentation and fraudulent concealment; and negligent infliction of emotional distress.

A. Federal claims

Because this is federal court, I will begin by considering plaintiff's federal claims. Plaintiff alleges claims for conspiracy and equal protection violations, pursuant to 42 U.S.C. § 1985. Under § 1985, "[i]f two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such

injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3). To state a claim for conspiracy under § 1985(3), plaintiff must allege: "(1) the existence of a conspiracy, (2) a purpose of depriving a person or class of persons of equal protection of the laws, (3) an act in furtherance of the alleged conspiracy, and (4) an injury to person or property or a deprivation of a right or privilege granted to U.S. citizens." *Brokaw v. Mercer County*, 235 F.3d 1000, 1024 (7th Cir. 2000) (citation and internal quotation marks omitted). Not only has plaintiff failed to allege that Janssen conspired with any other person or entity (a conspiracy requires at least two participants), but he has not alleged that Janssen conspired with a *state* actor. *See Fairley v. Andrews*, 578 F.3d 518, 526 (7th Cir. 2009) ("The function of § 1985(3) is to permit recovery from a private actor who has conspired with state actors.").

Nor has plaintiff alleged that Janssen violated his right to equal protection under the law. Setting aside the fact that 42 U.S.C. § 1983 only provides a cause of action against state actors (Janssen is a private entity), plaintiff still has not alleged that Janssen discriminated against plaintiff or treated plaintiff differently than other similarly situated individuals, either as a class of one or as a member of a protected class. "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citations and internal quotation marks omitted). The facts that plaintiff has alleged simply do not implicate equal protection or conspiracy concerns. I will deny plaintiff leave to proceed on claims for conspiracy and equal protection violations.

The remaining causes of action that plaintiff identifies are state law claims, which raises a jurisdictional concern. "Federal courts are courts of limited jurisdiction." *Int'l Union of Operating Eng'rs, Local 150 v. Ward*, 563 F.3d 276, 280 (7th Cir. 2009) (citation omitted). Unless the party invoking federal jurisdiction establishes complete diversity of citizenship among the parties and an amount in controversy exceeding $75,000, or raises a federal question, the court must dismiss the case for lack of jurisdiction. *Smart v. Local 702 Int'l Bhd. of Elec. Workers*, 562 F.3d 798, 802 (7th Cir. 2009). Federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). The party invoking federal jurisdiction bears the burden of establishing that jurisdiction is proper. *Smart*, 562 F.3d at 802-03.

Here, plaintiff does not state any federal claims, so the only way to invoke this court's jurisdiction is to establish diversity jurisdiction pursuant to 28 U.S.C. § 1332. Diversity jurisdiction exists when: (1) the amount in controversy exceeds $75,000; and (2) the parties are citizens of different states. Plaintiff alleges that he is a citizen of Wisconsin and that Janssen is a citizen of New Jersey. And plaintiff alleges an amount in controversy that exceeds $75,000 (he seeks millions of dollars for his injuries). At this point, I am satisfied that I may exercise subject matter jurisdiction over any potential state law claims plaintiff brings.

B. Products liability

Most obviously, plaintiff brings products liability claims against Janssen, presumably for manufacturing and distributing Risperdal. "Wisconsin case law allows plaintiffs to seek recovery from a manufacturer for the defective design of a product under a strict liability theory and/or a negligence theory." *Morden v. Cont'l AG*, 2000 WI 51, ¶ 42, 235 Wis. 2d 325,

611 N.W.2d 659. Under a strict liability theory, "manufacturers of defective products can be liable for the injuries their products cause, regardless of the care taken by the manufacturer or the foreseeability of the harm[.]" *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, ¶ 27, 319 Wis. 2d 91, 768 N.W.2d 674. To prevail on a strict products liability claim, a plaintiff must demonstrate that: (1) the product was defective when it left the seller's possession or control; (2) the product was unreasonably dangerous to the consumer; (3) the defect caused the plaintiff's injuries or damages; (4) the seller engaged in the business of selling the product; and (5) the product was one which the seller expected to and did reach the consumer without substantial change in its condition. *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, ¶ 23, 245 Wis. 2d 772, 629 N.W.2d 727 (quoting *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55, 63 (1967)).

Wisconsin case law recognizes three types of product defects: manufacturing defects, design defects, and defects based on failure to warn:

> A product has a manufacturing defect when it deviates from the manufacturer's specifications, and that deviation causes it to be unreasonably dangerous. A product has a design defect when the design itself is the cause of the unreasonable danger. Finally, a product is defective based on a failure to adequately warn when an intended use of the product is dangerous, but the manufacturer did not provide sufficient warning or instruction.

Godoy, 768 N.W.2d 674, ¶ 29. Here, plaintiff specifically alleges design defect and failure to warn, and these theories appear to be the best fit: the drug, as designed, caused plaintiff physical injury, and Janssen failed to adequately warn plaintiff that the drug could produce dangerous side effects. At this point, construing plaintiff's allegations generously, I will grant plaintiff leave to proceed on a strict products liability claim.

Wisconsin also allows consumers to bring products liability claims based on the manufacturer's negligence. Under this theory, a plaintiff would need to demonstrate: "(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." *Morden*, 611 N.W.2d 659, ¶ 44. At this point, plaintiff alleges facts that could implicate negligent acts or omissions by Janssen. I will grant plaintiff leave to proceed against Janssen on a negligent products liability claim, based on design defect and failure to warn.

Plaintiff also brings a claim for breach of implied warranty, which appears to be directly related to plaintiff's products liability claims. Thus, at this point, I will also grant plaintiff leave to proceed on this claim.

C. Fraud

Plaintiff brings related claims for fraudulent misrepresentation and fraudulent concealment.

> Under Wisconsin law, a claim for fraud (more commonly known as intentional or fraudulent misrepresentation) has five elements: "(1) the defendant made a factual representation; (2) which was untrue; (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) the defendant made the representation with intent to defraud and to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment."

Land's End, Inc. v. Remy, 447 F. Supp. 2d 941, 952 (W.D. Wis. 2006) (quoting *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 12, 283 Wis. 2d 555, 699 N.W.2d 205). The elements of a claim for fraudulent concealment are similar, but in lieu of establishing that the defendant has made false representations, the plaintiff must show that the defendant failed to disclose a material fact, and that the defendant had a duty to do so. *See Ollerman v.*

O'Rourke Co., Inc., 94 Wis. 2d 17, 288 N.W.2d 95, 100 (1980) ("If there is a duty to disclose a fact, failure to disclose that fact is treated in the law as equivalent to a representation of the non existence of the fact.").

Here, plaintiff appears to allege that Janssen both intentionally made false statements regarding the safety and efficacy of the drug and concealed information concerning its side effects. Rule 9 of the Federal Rules of Civil Procedure requires plaintiffs to plead claims for fraud with particularity. Typically this requires plaintiffs to identify the who, what, where, and when of the alleged fraud. *See Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994). Construing plaintiff's allegations generously, plaintiff has stated claims for fraudulent misrepresentation and fraudulent concealment and has satisfied Rule 9, for purposes of screening. Plaintiff alleges that Janssen made misrepresentations and withheld information concerning Risperdal during the time that plaintiff was taking the drug.

D. Remaining tort claims

Plaintiff also brings several miscellaneous tort claims, including assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress.

To state a claim for battery, "plaintiff must establish the following three elements: (1) an unlawful use of force or violence upon another; (2) the intentional direction of such force or violence at the person of another; and (3) bodily harm sustained on the part of the person against whom such force or violence is directed." *Vandervelden v. Victoria*, 177 Wis. 2d 243, 502 N.W.2d 276, 278 (Ct. App. 1993); *see also Trogun v. Fruchtman*, 58 Wis. 2d 569, 207 N.W.2d 297, 310 (1973) ("A battery or assault and battery in this state has been defined as an intentional contact with another which is unpermitted."). I am not aware of any Wisconsin cases that have considered assault and battery claims in this context—i.e., a

products liability case against a pharmaceutical company. Common law assault and battery is a poor fit for plaintiff's allegations.

Plaintiff also claims that Janssen inflicted emotional distress. Wisconsin law recognizes two varieties. To state a claim for intentional infliction of emotional distress, a plaintiff must allege: "(1) that the defendant's conduct was intentioned to cause emotional distress; (2) that the defendant's conduct was extreme and outrageous; (3) that the defendant's conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) that the plaintiff suffered an extreme disabling emotional response to the defendant's conduct." *Rabideau v. City of Racine*, 2001 WI 57, ¶ 33, 243 Wis. 2d 486, 627 N.W.2d 795. A plaintiff must allege that the defendant acted not only intentionally, but with the specific intent to cause emotional harm. *Id.* ¶ 36. Here, plaintiff alleges that Janssen acted intentionally in some respects, including when it encouraged providers to make false statements about its drug, but plaintiff does not allege any facts that suggest that Janssen intended to cause plaintiff emotional distress. This, too, is a poor fit.

But plaintiff may proceed on a claim for negligent infliction of emotional distress, the elements of which are negligent conduct, causation, and injury (i.e., emotional distress). *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 517 N.W.2d 432, 442 (1994). Under Wisconsin law, plaintiff does not need to prove "physical manifestation of severe emotional distress." *Id.* at 443. Wisconsin also considers several public policy factors before awarding damages for negligent infliction of emotional distress, *id.* at 444, but those considerations are not immediately relevant at the screening stage. At this point, plaintiff implicates potentially negligent conduct by Janssen, that the conduct physically injured plaintiff, and that, as a result, plaintiff experienced severe emotional distress.

E. Doe defendants

Plaintiff includes "John Does" as defendants in this case. The John Does are presumably individuals associated with Janssen because plaintiff alleges that they, like Janssen, are citizens of New Jersey. Dkt. 14, at 1. But plaintiff does not allege any facts that specifically implicate unidentified Janssen individuals. The "John Doe" placeholder is typically reserved for individual defendants who have committed some specific, identifiable wrongdoing against plaintiff but whom plaintiff does not know by name. *See Donald v. Cook Cty. Sheriff's Dep't*, 95 F.3d 548, 555 (7th Cir. 1996) ("[W]hen the substance of a pro se civil rights complaint indicates the existence of claims against individual officials not named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint."). Plaintiff does not allege any facts that suggest the existence of claims against unidentified Janssen individuals, and so I will deny plaintiff leave to proceed against the John Doe defendants.

ORDER

IT IS ORDERED that:

1. Plaintiff Michael L. Winston's motion for leave to file an amended complaint, Dkt. 13, is GRANTED. I will accept his second amended complaint, Dkt. 14, as the operative pleading.

2. Plaintiff is GRANTED leave to proceed on claims for products liability, breach of implied warranty, fraudulent misrepresentation, fraudulent concealment, and negligent infliction of emotional distress against defendant Janssen Pharmaceutical, Inc.

3. Plaintiff is DENIED leave to proceed against the John Doe defendants, and they are DISMISSED.

4. The clerk of court will make sure that the United States Marshals Service serves defendant with a copy of plaintiff's second amended complaint and this order. Plaintiff should not attempt to serve defendant on his own at this time.

5. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendant, he should serve the lawyer directly. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's attorney.

6. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

7. If plaintiff moves or is transferred while this case is pending, it is his obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his case may be dismissed for his failure to prosecute it.

Entered July 8, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge