

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(NEWARK VICINAGE)**

DEBORAH FELLNER,	:	CIVIL ACTION NO. 2:06-CV-688 (DMC)-MF
	:	
Plaintiff,	:	CERTIFICATION OF KENNETH A.
v.	:	SCHOEN IN SUPPORT OF MOTION TO
	:	DISMISS PLAINTIFF'S AMENDED
TRI-UNION SEAFOODS, L.L.C.,	:	COMPLAINT
d/b/a CHICKEN OF THE SEA,	:	
	:	
Defendant.	:	AUGUST 31, 2009

Kenneth A. Schoen hereby certifies as follows:

1. I am an attorney admitted to practice law in the state and federal courts of New Jersey and a partner with the law firm of Bonner Kiernan Trebach & Crociata, LLP, counsel for defendant Tri-Union Seafoods, L.L.C. d/b/a/ Chicken of the Sea in the above-captioned matter. I am fully familiar with the factual and procedural history of this case.

2. I submit this certification in support of Defendant Tri-Union's motion to dismiss plaintiff's Complaint pursuant to Fed R. Civ. P. 12(b)(6) for failure to state a claim. As Tri-Union's motion requesting the Court to take judicial notice was granted, we annex copies of some of the judicially noticed documents as part of this Certification.

3. A true and correct copy of plaintiff's Complaint against Tri-Union is annexed as Exhibit "A" to the motion.

4. A true and correct copy of all unpublished decisions to which Tri-Union cites in its memorandum in support of its motion to dismiss plaintiff's Amended Complaint is annexed as Exhibit "B" to the motion.

5. A true and correct copy of plaintiff's Amended Complaint against Tri-Union is annexed as Exhibit "C" to the motion.

6. A true and correct copy of "What You Need to Know About Mercury in Fish and Shellfish," published by the United States Department of Health and Human Services and the United States Environmental Protection Agency is annexed as Exhibit "D" to the motion.

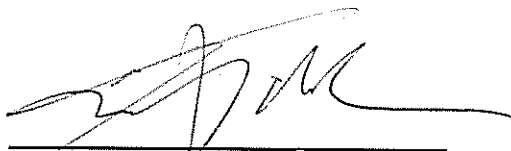
7. A true and correct copy of "Backgrounder for the 2004 FDA/EPA Consumer Advisory: What You Need to Know About Mercury in Fish and Shellfish," published by the United States Department of Health and Human Services and the United States Environmental Protection Agency is annexed as Exhibit "E" to the motion.

8. A true and correct copy of the Letter from Lester M. Crawford, D.V.M., Ph.D., United States Commissioner of Food and Drugs, to Bill Lockyer, Attorney General of the State of California, dated August 12, 2005, re: a suit filed on June 21, 2004 in San Francisco Superior Court is annexed as Exhibit "F" to the motion.

9. A true and correct copy of Section 540.600 of the FDA's Compliance Policy Guide allowance of one part of methyl mercury per million non-mercury parts of the edible portion of seafood is annexed as Exhibit "G" to the motion.

I certify that the foregoing statements made by me are true, and I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: August 31, 2009



Kenneth A. Schoen (#KS-7180)

Exhibit A

EICHEN LEVINSON, LLP
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff

FILED
MORRIS COUNTY
CLERK OF SUPERIOR COURT
EICHEN LEVINSON

DEBORAH FELLNER,
individually and on behalf of those
similarly situated,

Plaintiffs

vs.

TRI-UNION SEAFOODS, L.L.C.,
dba CHICKEN OF THE SEA,

Defendant.

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION – MORRIS COUNTY
: DOCKET No. L-232-06
:
:
: Civil Action
:
:
: CLASS ACTION COMPLAINT,
: JURY DEMAND, AND
: DESIGNATION OF CLASS COUNSEL
:
:
:

Plaintiff, Deborah Fellner, individually and as class representative, by and through her counsel, Eichen Levinson, LLP, hereby makes this claim against the Defendant as follows:

1. This is a class action brought on behalf of all individual New Jersey consumers, and on behalf of all individual consumers throughout the United States, who purchased Tuna Products canned or distributed by the Defendant, Tri-Union, and which the Defendant canned or distributed in violation of the New Jersey Products Liability Act (“NJPLA”), N.J.S.A. 2A:58C-1, *et seq.*, and in violation of the New Jersey Consumer Fraud Act (“CFA”), N.J.S.A. 56:8-1 *et seq.* Included in the unlawful acts and practices committed by the Defendants are the following:

- a. Failure to disclose that the Defendant’s tuna contained Methylmercury and other harmful compounds that could result in mercury poisoning;

- b. Canning and distributing Tuna Products that were not reasonably fit, suitable, and safe; and
- c. Material misrepresentations or omissions regarding the safety of the of the Tuna Products canned or distributed by the Defendant;

Each of the aforesaid acts constitutes a violation of the NJPLA, N.J.S.A. 2A:58C-1, *et seq.*, a violation of the CFA, N.J.S.A. 56:8-1 *et seq.*, or common law fraud. This action seeks, *inter alia*, damages and compensation to all class members from the Defendant, interest, punitive damages, costs of suit, treble damages and attorneys' fees, and any other damages deemed just and proper by the Court.

PARTIES

2. Plaintiff Deborah Fellner is a citizen of New Jersey and resides at 14 Bassett Avenue, Township of Mine Hill, County of Morris, and State of New Jersey.

3. Defendant Tri-Union Seafoods, dba Chicken of the Sea, is a California corporation duly organized and operating under the laws of New Jersey. It is through its officers, agents, and employees engaged in the business of distributing and/or selling Tuna Products to class members in New Jersey and nationwide, and its address is 9330 Scranton Boulevard, in San Diego, California.

4. At all times material hereto, the Defendant acted by and through its employees, agents and servants, actual or ostensible, who then and there were acting within the course and scope of their duties, agency, employment and/or authority.

JURISDICTION AND VENUE

5. Jurisdiction is proper because Plaintiff is a citizen of the State of New Jersey and the Defendant purposefully avails itself of and regularly conducts business in

New Jersey and has sufficient minimal contacts therewith that maintenance of suit against said Defendant in this State does not offend traditional notions of fair play and substantial justice.

6. Venue is proper pursuant to New Jersey Court Rule 4:3-2(a) and (b) because the Defendant regularly conducts business in Middlesex County, and many of the class members are located in Middlesex County.

FACTS UNDERLYING PLAINTIFF'S INDIVIDUAL COMPLAINT

7. During the period 1999 through 2004, Plaintiff's diet consisted almost exclusively of Tuna Products canned and distributed by the Defendant.

8. Although aware that its Tuna Products contained methylmercury and other harmful compounds that could result in mercury poisoning, the Defendant canned and distributed its Tuna Products without warning or adequately disclosing the harmful effects of such compounds.

9. The Defendant, acting negligently, directly manufactured, processed, tested, canned, marketed and sold its Tuna Products.

10. Pursuant to N.J.S.A. 2A:58-C, *et seq.*, (New Jersey Products Liability Act) Plaintiff asserts all claims and causes of action against the Defendant, including but not limited to negligence, breach of implied warranty of merchantability, breach of implied warranty of fitness, strict liability, for failure to warn and/or inadequate warning on theories of both negligence and strict liability, all claims and causes of action pertaining to the design, manufacture, sale and distribution of the defective Tuna Products which were not reasonably fit, suitable or safe for their intended purposes as they were

defectively designed, manufactured and/or failed to contain adequate warnings and/or instructions.

FACTS COMMON TO ALL COUNTS AND CLASS CERTIFICATION

11. Although aware that its Tuna Products contained methylmercury and other harmful compounds that could result in mercury poisoning, the Defendant negligently canned and distributed Tuna Products without warning or adequately disclosing to Plaintiff and members of the class the harmful effects of such compounds.

12. The Defendant, acting negligently, directly manufactured, processed, tested, canned, marketed and sold its Tuna Products to Plaintiff and members of the class without adequate warning.

CLASS ACTION ALLEGATIONS

13. Plaintiff hereby incorporates the allegations of ¶¶ 1 through 12 as if fully set forth at length.

14. This action is brought by Plaintiff as a class action pursuant to New Jersey Court Rule 4:32, on behalf of herself and a class of all similarly situated individuals.

15. Plaintiff and millions of individuals have purchased Tuna Products from the Defendant.

16. The proposed classes consist of a class of all New Jersey individuals ("New Jersey Class"), and a class of all individuals in the United States ("Nationwide Class"), who purchased Tuna Products from the Defendant, and whom Defendant failed to apprise via adequate warnings of the methylmercury and other harmful compounds that could result in mercury poisoning, that Defendant knew and should have known were contained in its Tuna Products. Specifically excluded from the class are the Defendant,

any entity in which the Defendant has a controlling interest, and the Defendant's officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries and their assigns or any such entity, together with any immediate family members of any officer or employee of said companies.

17. The proposed classes are so numerous that the individual joinder of all their members is impractical. The exact number of class members is unknown at this time and can only be ascertained through appropriate investigation and discovery of Defendant's records. Plaintiff believes that the number of class members in the New Jersey Class is in the millions, and that the number of class members in the Nationwide Class is in the tens of millions. As a result, joinder of all class members in a single action is impractical.

18. The classes are manageable, and their members are identifiable through the Defendant's business records. The New Jersey Class members are concentrated in the State of New Jersey, and many or most of the Nationwide Class members are located in the State of New Jersey.

19. There exists in this matter questions of law and fact arising out of the Defendant's conduct which are common to all members of the classes and which questions predominate over individual questions. Among the numerous common questions of law and fact are:

- a. whether the actions and activities of the Defendant violated the New Jersey Product Liability Act, N.J.S.A. 2A:58-C, *et seq.*;
- b. whether the actions and activities of Defendant violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.*;

- c. whether Defendants made material misrepresentations of fact, or omitted to state material facts to Plaintiff and the class regarding the harmful mercury compounds contained in their Tuna Products, which operated as a fraud and deceit upon the class; and
- d. whether Plaintiff and members of the class sustained damage and loss.

20. Plaintiff's claim is typical of the claims of the class members she seeks to represent. Plaintiff and all other class members sustained damages arising out of the Defendant's common course of conduct as complained of herein. The amount of money is such that proceeding by way of class action is the sole economically feasible and sensible means for vindicating the injuries sustained by Plaintiff and the class.

21. The prosecution of separate actions by individual members of the class would risk inconsistent or varying adjudications which would establish incompatible standards of conduct for the Defendant and incompatible rights for members of the class.

22. Adjudication with respect to individual class members would, as a practical matter, prove dispositive of the interests of other class members not parties to the individual adjudications and/or substantially impede the ability of the non-party class members to protect their interests.

23. The questions of fact and law common to the class predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this action.

24. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained experienced counsel in complex civil litigation and said counsel has

no adverse interests and is qualified to serve as class counsel. Plaintiff understands the nature of the claims herein, has no disqualifying factors, and will vigorously represent the interests of the class. Plaintiff, by agreement with counsel, has the resources available to prosecute this class fully and completely.

COUNT I

INDIVIDUAL COMPLAINT

VIOLATION OF THE NEW JERSEY PRODUCTS LIABILITY ACT

25. Plaintiff hereby incorporates the allegations of ¶¶ 1 through 24 as if fully set forth at length.

26. The Defendant, acting negligently as aforesaid, directly manufactured, processed, tested, canned, marketed and sold its Tuna Products to Plaintiff without adequate warning regarding the harmful mercury compounds contained in said Tuna Products.

27. Pursuant to N.J.S.A. 2A:58-C, *et seq.*, (New Jersey Products Liability Act) Plaintiff asserts all claims and causes of action against the Defendant, including but not limited to negligence, breach of implied warranty of merchantability, breach of implied warranty of fitness, strict liability, for failure to warn and/or inadequate warning on theories of both negligence and strict liability, all claims and causes of action pertaining to the design, manufacture, sale and distribution of the defective Tuna Products which were not reasonably fit, suitable or safe for their intended purposes as they were defectively designed, manufactured and/or failed to contain adequate warnings and/or instructions.

28. Due to the negligence and statutory violations of the Defendant, Plaintiff Deborah Fellner contracted severe mercury poisoning and suffered extreme physical and emotional injuries.

WHEREFORE, Plaintiff Deborah Fellner demands judgment on this count against the Defendant for damages, costs of suit, interest, attorneys' fees pursuant to N.J.S.A. 2:15-3, *et seq.*, and other relief as this Court deems just and proper.

COUNT II

CLASS COMPLAINT

VIOLATION OF THE NEW JERSEY PRODUCTS LIABILITY ACT

29. Plaintiff hereby incorporates the allegations of ¶¶ 1 through 28 as if fully set forth at length.

30. The Defendant, acting negligently as aforesaid, directly manufactured, processed, tested, canned, marketed and sold its Tuna Products to Plaintiff and members of the classes without adequate warning regarding the harmful mercury compounds contained in said Tuna Products.

31. Pursuant to N.J.S.A. 2A:58-C, *et seq.*, (New Jersey Products Liability Act) Plaintiff asserts all claims and causes of action on her behalf and that of the classes against the Defendant, including but not limited to negligence, breach of implied warranty of merchantability, breach of implied warranty of fitness, strict liability, for failure to warn and/or inadequate warning on theories of both negligence and strict liability, all claims and causes of action pertaining to the design, manufacture, sale and distribution of the defective Tuna Products which were not reasonably fit, suitable or safe

for their intended purposes as they were defectively designed, manufactured and/or failed to contain adequate warnings and/or instructions.

32. Plaintiff and members of the class suffered damage and loss due to Defendant's actions.

WHEREFORE, Plaintiff demands judgment on her behalf and that of the classes against the Defendant for damages, costs of future medical monitoring, costs of suit, interest, attorneys' fees pursuant to N.J.S.A. 2:15-3, *et seq.*, and other relief as this Court deems just and proper.

COUNT III

CLASS COMPLAINT

VIOLATION OF THE NEW JERSEY CONSUMER FRAUD ACT

33. Plaintiff hereby incorporates the allegations of ¶¶ 1 through 32 as if fully set forth at length.

34. The Defendant, acting as aforesaid, violated the New Jersey Consumer Fraud Act (hereinafter, "CFA"), N.J.S.A. 56:8-1 *et seq.*, by knowingly misrepresenting, concealing, suppressing, omitting and failing to disclose material information regarding the presence of methylmercury and other harmful compounds in their Tuna Products, with the intent that Plaintiff and members of the class rely upon such concealment, suppression, omission and failure to disclose in purchasing the Defendant's Tuna Products.

35. Defendant, acting as aforesaid, violated the CFA by failing to disclose to Plaintiff and members of the class that its Tuna Products contained unreasonably high

levels of methylmercury and other harmful compounds that could result in mercury poisoning.

36. Defendant, acting as aforesaid, violated the CFA by the knowing use of false and misleading representations regarding the safety of its Tuna Products and the presence therein of harmful levels of methylmercury and other harmful compounds that could result in mercury poisoning.

37. Pursuant to the Defendant's misrepresentations and omissions, Plaintiff and members of the class were falsely led to believe that Defendant's Tuna Products did not contain unsafe levels of methylmercury and other harmful compounds that could result in mercury poisoning.

38. Plaintiff and members of the class suffered an ascertainable loss as a result of the Defendant's actions in violation of the CFA.

WHEREFORE, Plaintiff demands judgment against Defendants, on her own behalf and that of the class, for compensatory damages, costs, treble damages, reasonable attorneys' fees, and any other relief as this Court deems just and proper.

COUNT IV

CLASS COMPLAINT

COMMON LAW FRAUD

39. Plaintiff hereby incorporates the allegations of ¶¶ 1 through 38 as if fully set forth at length.

40. The actions of the Defendant as set forth above constitute fraudulent conduct, including but not limited to, knowingly making material misrepresentations and/or omissions regarding the Defendant's Tuna Products and their freedom from

unreasonably high levels of methylmercury and other harmful compounds, upon which misrepresentations and/or omissions Plaintiff and members of the class reasonably relied.

41. Defendant knowingly made material misrepresentations and/or omissions to Plaintiff and members of the class by concealing and failing to disclose the presence of unsafe methylmercury and other harmful compounds in the Defendant's Tuna Products.

42. Defendant knew or should have known that the above-referenced misrepresentations and/or omissions were false and misleading.

43. Plaintiff and members of the class reasonably relied on the Defendant's misrepresentations and/or omissions, and as a result thereof Plaintiff and members of the class suffered loss in the amount of the monies conveyed to the Defendant for Tuna Products containing unsafe methylmercury and other harmful compounds that could result in mercury poisoning.

WHEREFORE, Plaintiff demands judgment against the Defendant, on her own behalf and that of the class, for compensatory damages, including interest, punitive damages, costs of future medical monitoring, costs of suit, and any other relief as this Court deems just and proper.

CERTIFICATION PURSUANT TO RULE 4:5-1

I certify that the matter in controversy is not subject to a proceeding in another jurisdiction pending in New Jersey.

DESIGNATION OF TRIAL COUNSEL

In accordance with Rule 4:5-1, Barry R. Eichen, Esquire, is hereby designated as trial counsel.

JURY DEMAND

Plaintiff demands trial of all issues by jury.

EICHEN LEVINSON, LLP
Attorneys for Plaintiff and Plaintiff Class

Dated: January 16, 2006

By:



BARRY R. EICHEN, ESQ.

Exhibit B

Not Reported in F.Supp.2d, 2000 WL 1689081 (D.N.J.)
(Cite as: 2000 WL 1689081 (D.N.J.))

H Only the Westlaw citation is currently available.

United States District Court, D. New Jersey.
James DAMIANO, Plaintiff,

v.

SONY MUSIC ENTERTAINMENT, INC. and Bob
Dylan, Defendants.
No. CIV. A. 95-4795 JBS.

Nov. 13, 2000.

Mr. James Damiano, Mine Hill, NJ, pro se.

Steven D. Johnson, Esq., Hecker Brown Sherry Johnson, Haddonfield, NJ, Orin S. Snyder, Esq., Parcher, Hayes & Snyder, New York, NY, for defendants.

OPINION

SIMANDLE.

*1 This matter comes before the Court upon plaintiff Damiano's motion for reconsideration of this Court's December 16, 1996 Order granting summary judgment in favor of defendants, plaintiff's motion for reconsideration of this Court's November 23, 1999 and August 18, 2000 Orders finding plaintiff in contempt of earlier confidentiality orders issued in this case, and plaintiff's motion to vacate such confidentiality orders entered by Magistrate Judge Joel B. Rosen in 1996. For the reasons stated herein, plaintiff's motions will be denied.

I. BACKGROUND

The present case commenced over five years ago when plaintiff Damiano filed a complaint alleging that the acts of defendants Sony Music Entertainment, Inc. and Bob Dylan ("Defendants") constituted copyright infringement in violation of federal copyright law, 17 U.S.C. § 101, (Compl. Count I), and false designation of origin, misappropriation of property, breach of confidence, fraud, and mail fraud in

violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1051, et seq. (Compl., Counts II, III, IV, V, VI). On March 14, 1996, Magistrate Judge Joel B. Rosen issued the first of two protective orders in this case designating certain information and proprietary material possessed by defendants as confidential. On August 6, 1996, Judge Rosen granted Defendants' motion to designate all discovery materials and deposition transcripts as confidential. See Damiano v. Sony Music Entm't, 168 F.R.D. 485, 493 (D.N.J.1996)(finding that evaluation of the facts under the Pansy^{FN1} balancing test supported a blanket protective order). Judge Rosen concluded that a blanket protective order was appropriate because it was likely that plaintiff would publicize depositions and other documents for financial profit and further reasoned that "using raw discovery materials for financial profit is not what this court considers to be a legitimate purpose for disclosure." Damiano, 168 F.R.D. at 492-93. The two confidentiality orders issued by Judge Rosen instructed all parties to keep all discovery materials confidential, and directed that any violation of the Orders would be punishable by contempt.

FN1. Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir.1994).

On September 16, 1996, Defendants filed a motion for summary judgment on all of plaintiff's claims. In a December 16, 1996 Opinion and Order, this Court granted Defendants' motion for summary judgment after finding that no reasonable jury could conclude that the words and phrases allegedly copied by Dylan and published by Sony were quantitatively or qualitatively important to the whole of plaintiff's allegedly infringed works or that the melodies contained in Defendant Dylan's "Dignity" were substantially similar in total concept and feel to Damiano's "Steel Guitars." This Court found that plaintiff's proofs failed to demonstrate that his works attained a threshold of originality sufficient to be protected by the copyright laws, and that no reasonable factfinder could conclude that there was an appropriation by defendants of the lyrics or melodies that Damiano had created. The Court further found that plaintiff's complaint was

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a deceptive "cut and paste job" that portrayed plaintiff's verses as if they were contiguous writings when in fact the verses had been edited, rearranged and titled in a misleading attempt to more closely resemble Dylan's works for purposes of this litigation. Damiano v. Sony Music Entm't, 975 F.Supp. 623 (D.N.J.1996).^{FN2}

FN2. Plaintiff's original motion for reconsideration of this Court's grant of summary judgment was denied on August 20, 1997. See 975 F.Supp. 633 (D.N.J.1997)(Opinion upon reconsideration). Plaintiff's appeal was dismissed by the Third Circuit in 1998. See 166 F.3d 1204 (3d Cir.1998).

*2 At an October 29, 1999 hearing, after plaintiff published by use of the Internet confidential discovery materials protected under Judge Rosen's August, 1996 Order, this Court found plaintiff to be in contempt of the protective Orders and directed him to immediately cease all such dissemination. (See Order filed October 29, 1999.) At the hearing on October 29, 1999, Mr. Damiano apologized to defendants and to the Court for his contempt of the confidentiality orders,^{FN3} and asked for the Court to be lenient, indicating, "It makes no sense. I want to come on-off-I don't want to be on the internet. It's senseless, it's senseless and I don't want to hurt-I just want to forget the whole thing. I give you my word I won't even put up the story. I just want to end it, I really do," by which he meant discontinuing his Internet war against Sony and Dylan. (See Tr. Oct. 29, 1999 at 26:19-24.)

FN3. Typical of the contrition expressed by Mr. Damiano at the hearing on October 29, 1999 is this exchange with the Court, at Tr. Oct. 29, 1999 at 24:12 to 25:13:

THE COURT: ... I'm also hearing Mr. Damiano say that he's anxious to stop doing these offending things and to put the whole thing behind him and to promise to never again, in the future, violate the orders of this Court.

MR. DAMIANO: Yes, your Honor. I give you my word to you, your Honor, that this

is over now.

I spent all week, besides trying to prepare for the court, I was also trying to get all-as many websites that were linked to my website off the internet too, and that's not very easy. And if someone could supply me with a little help to do that, I could even work more efficiently in getting everything that I could possibly get off the internet. I could do that, but I need a little help because I don't have that expertise as far as computers are concerned. I've gotten a lot off and I think I would comply with anything that you see fit.

I really do want to end everything now. And I hope you Honor understands that I was very hurt that they took my songs for 11 years and then they did that to me. But now I understand that I just want to-I just want to continue my life and forget about this whole thing, I really do.

I was hurt that they even admitted that they lied to me, you know, in depositions and I wasn't able to post that on the internet. I mean, that hurt. But it doesn't matter any more. I understand the severity of this at this point, and I can comply. I give your Honor my word that it's over on my part....

In a November 4, 1999 Memorandum Opinion, augmenting the Oral Opinion of October 29, 1999 (see *id.* at 38:8 to 47:24), this Court reviewed the full scope of plaintiff's contemptuous activities, which included the posting of confidential discovery materials on various websites, disseminating such confidential discovery information via e-mail and in chat rooms, and offering such materials for sale, just as Judge Rosen had predicted three years before when entering the confidentiality order.^{FN4} Further, the Court explicitly relied upon Mr. Damiano's promise to completely discontinue his publication of protected materials, deciding to not impose a contempt fine at the October 29, 1999 hearing.^{FN5} On November 23, 1999, following a final hearing to determine the appropriate contempt remedy on November 18, 1999,

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this Court Ordered plaintiff to pay defendants' attorney fees related to the contempt proceeding, which were calculated as \$14,651.69 in this Court's Judgment filed December 20, 1999. That remedy did not suffice to deter Damiano's violations, as became apparent this year.

FN4. Indeed, as found in the Memorandum Opinion of November 4, 1999, slip op. at 9, Damiano defiantly posted the confidential discovery material at his website in 1999 and dared the attorneys for Sony and Dylan to download the materials and seek a contempt remedy before this Court.

FN5. The Court found on October 29, 1999, *inter alia*:

I'm imposing no fine today, though, because the purpose of my order that I'm entering today is to look forward. I'm taking Mr. Damiano at his word that he intends to never again violate this Court's order, that he wants to put this behind him, but I do find that it is necessary that there be this additional inducement to comply with this Court's order under penalty of financial fine being imposed.

Tr. Oct. 29, 1999 at 44:16-22.

On August 1, 2000, after learning that plaintiff had resumed posting confidential discovery materials on his websites, defendants again requested that Plaintiff be held in contempt, and in response this Court entered an Order to Show Cause directed to Damiano, filed on August 3, 2000. On August 11, 2000, this Court conducted a hearing at which plaintiff was to show cause why he should not be held in contempt for his continued activities in violation of the Confidentiality Orders. (Order, Aug. 3, 2000.) Plaintiff Damiano submitted no substantive opposition and admitted that his conduct violated this Court's orders despite his promises in 1999 not to do so. At the hearing, plaintiff again represented to the Court his desire to end his contemptuous activities and promised that he would permanently remove the subject websites in their entirety, including the confidential discovery materials contained therein. (Order, Aug.

18, 2000.) On August 18, 2000, this Court issued an Order finding plaintiff's continued dissemination of court ordered confidential discovery materials via his websites to be willful contempt of this Court's October 29, 1999 Order for Contempt and Injunctive Relief. (Order, Aug. 18, 2000.) Further, the court found that plaintiff had made no payment toward the 1999 contempt judgment which had required him to pay the reasonable legal fees of defense counsel which his contempt had provoked, in the sum of \$14,651.69. The August 18, 2000 Order thus also directed plaintiff to pay to defendants the previously imposed civil contempt judgment (from December 20, 1999) in the amount of \$14,651.69, which remained unpaid, together with a civil contempt fine of \$1,000.00 to the Clerk of the Court. The same Order directed plaintiff to pay an additional sum for Defendants's attorney's fees associated with the second contempt hearing, which was calculated as \$14,967.31 in the Court's Order filed October 18, 2000.

*3 Plaintiff filed the present reconsideration motions on August 30, 2000, for reconsideration of this Court's December 16, 1996 Order granting summary judgment to defendants, for reconsideration of this Court's November 23, 1999 and August 18, 2000 Orders, and for relief from Judge Rosen's 1996 Confidentiality Orders. On October 16, 2000, this Court issued an Order sealing plaintiff's instant motion and all the supporting documentation, since some of plaintiff's submissions themselves included confidential discovery material protected by the prior Orders of Judge Rosen and this Court. Although sealed, the Court has reviewed these documents. For the reasons stated herein, plaintiff's motions will be denied.

II. DISCUSSION

Plaintiff now moves for reconsideration of this Court's December 16, 1996 Order granting summary judgment in favor of defendants, for reconsideration of this Court's November 23, 1999 and August 18, 2000 Orders, and for relief from Judge Rosen's 1996 Confidentiality Orders. In support of his motions, plaintiff argues that there are genuine issues of material fact to be decided regarding his copyright infringement claim against Defendants and that his actions during the course of this litigation did not constitute contempt. (Pls.' Certification at 101.) ^{ENG}

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Defendants maintain that plaintiff never created anything that copyright laws protect and cite to this Court's summary judgment opinion and the Third Circuit's dismissal of plaintiff's appeal to that decision. For the reasons stated herein, plaintiff's motions will be denied.

FN6. Instead of submitting a separate brief in support of his motion for reconsideration, plaintiff included it at the end of his certification with continuous pagination. The brief runs from page 99 to 105 of the package of documents submitted by plaintiff and this opinion will cite to the brief using those page references.

A. Standards for Reconsideration and Reargument

According to Fed.R.Civ.P. 59(e), a party seeking to alter and amend a judgment must file a motion within ten days of the judgment and must show one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. Max's Seafood Café by Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir.1999) (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir.1995)). Similarly, pursuant to Local Civil Rule 7.1(g),^{FN7} a motion for reargument (often referred to as a "motion for reconsideration") will be granted only when "dispositive factual matters or controlling decisions of law" were presented to the court but not considered. Damiano v. Sony Music Entm't, 975 F.Supp. 623, 634 (D.N.J.1997) (quoting Pelham v. United States, 661 F.Supp. 1063, 1065 (D.N.J.1987)). Only where the district court overlooked matters that might have led to a different result had they been considered will a motion for reconsideration be granted. G-69 v. Degnan, 748 F.Supp. 274, 275 (D.N.J.1990) (quoting Carteret Savings Bank, F.A. v. Shushan, 721 F.Supp. 705, 709 (D.N.J.1989)).

FN7. See NI Indus. v. Commercial Union Ins. Co., 935 F.Supp. 513, 515-16 (D.N.J.1996) (noting similarity of motion to alter and amend judgment under Rule 59(e))

and motion for reargument under the predecessor of L.Civ.R. 7.1(g)).

1. December 16, 1996 Summary Judgment Opinion

*4 On December 16, 1996, following a hearing and full consideration of all plaintiff's claims, this Court granted defendants' motion for summary judgment and dismissed the complaint in its entirety. Damiano v. Sony Music Entm't, 975 F.Supp. 623 (D.N.J.1996), *recons. denied*, 975 F.Supp. 633 (D.N.J.1997), *app. dismissed*, 166 F.3d 1204 (3d Cir.1998). Plaintiff's motion for reconsideration under Fed.R.Civ.P. 59(e) and reargument under L.Civ.R. 7.1(g) of this Court's December 16, 1996 grant of summary judgment in favor of defendants, which is his second motion for such reconsideration, is time barred and therefore must be denied.

Plaintiff first filed a motion for reconsideration of this Court's December 16, 1996 summary judgment opinion on January 21, 1997, after this Court permitted an extension of the time in which such a motion could be filed. At that time, plaintiff was represented by attorney Steven M. Kramer. This first motion for reconsideration was denied by this Court on August 20, 1997. See Damiano v. Sony Music Entm't, 975 F.Supp. 633 (D.N.J.1997). On September 25, 1998, the Third Circuit dismissed plaintiff's appeal to that decision. See 166 F.3d 1204 (3d Cir.1998).

In his present motion for reconsideration of this Court's 1996 Opinion granting summary judgment, filed almost four years after the challenged Order was issued and over two years after his appeal to the Third Circuit was dismissed, plaintiff does nothing more than recycle arguments previously considered by this Court in his opposition to the motion for summary judgment and in his first motion for reconsideration. For example, plaintiff argues that this Court should allow him to amend his complaint to include a different version of his song, "Steel Guitars," so that it might be compared to Dylan's song "Dignity," see Damiano, 975 F.Supp. at 630-31; Pls.' Certification at 101-03, and that summary judgment was improper because "[t]his court never addressed the similarity of the background melodies" in "Dignity" and "Steel Guitars." (Pls.' Certification at 100). There is no complaint to amend; it was dismissed in

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1996. This type of conduct is typical of this plaintiff's inability to accept that his claims were litigated carefully and fully and found to be without merit. Because plaintiff has not cited an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error of law by this court, no reopening or reconsideration of this Court's December 16, 1996 Judgment is appropriate, and the motion is denied for untimeliness under Fed.R.Civ.P. 59 and L.Civ.R. 7.1(g).

2. The November 23, 1999 Order Imposing Contempt Sanctions

Plaintiff's motion for reconsideration under Fed.R.Civ.P. 59(e) and reargument under L.Civ.R. 7.1(g) of this Court's November 23, 1999 Order is time barred because it was filed more than ten days after the entry of the order being challenged. Any Motion for Reconsideration or Reargument of this Court's November 23, 1999 Order was due no later than December 7, 1999. Plaintiff filed the instant motion on August 30, 2000, more than eight months late. This lateness is compounded by the fact that Damiano appeared before this Court in the intervening period on August 11, 2000 and never raised objection to the November 23, 1999 Order.

*5 Further, if Damiano actually presented some issue that the Court had overlooked, in deference to his *pro se* status this Court could relax the strict timetable for a reconsideration motion concerning the 1999 contempt order, but he has not done so. Plaintiff simply seeks to relitigate stale issues. Even assuming that plaintiff had timely filed this motion, plaintiff would be unable to meet his burden of showing that reconsideration was proper. Plaintiff has not cited an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error of law. Because plaintiff has not met his burden under Fed.R.Civ.P. 59(e) or L.Civ.R. 7.1(g), no reconsideration of the November 23, 1999 Order is appropriate.

3. The August 18, 2000 Order Imposing Contempt Sanctions

Plaintiff also moves for reconsideration of this Court's August 18, 2000 Order. Although this motion

was timely filed within the requisite ten day period, it must nonetheless be denied because plaintiff fails to meet either the burden under Fed.R.Civ.P. 59(e) or under L.Civ.R. 7.1(g) and he argues only that this Court improperly found him to be in contempt of Confidentiality Orders entered by this Court in 1996. Plaintiff offers no evidence of an intervening change in law, the availability of new evidence, or a clear error of law in support of his motion to alter this Court's judgment. Plaintiff argues only that "[i]t is illegal and unconstitutional for this court to accept as truth the biased contention of Bob Dylan's attorney, Orin Snyder, when no unbiased facts exist to support Mr. Snyders [sic] contention that James Damiano attempted to commercially exploit his claims against Mr. Dylan" (Pls.' Cert., para. 1), and reargues his position that no confidentiality orders should have been granted and that he was improperly held in contempt of such orders. This Court did not "overlook" arguments that Damiano never made at the August 11, 2000 hearing. Plaintiff, therefore, has not met his burden of demonstrating that the court "overlooked" a dispositive factual matter or a controlling decision of law and his motion to alter and amend this Court's judgment must be denied.^{FNB}

FNB. Independent of this Court's denial of reconsideration of the contempt findings made at the August 11, 2000 hearing and memorialized in the August 18, 2000 Order, this Court will consider whether the confidentiality orders under which Damiano received discovery should continue in the future to preclude his distribution or use of the protected information, or whether the need for such protection, while present in 1996, has dissipated over time so that the public interest is better served by dissolving the confidentiality orders, in section B, subpart 2 below.

4. Judicial Estoppel

In addition to being time barred and without merit, plaintiff's motion for reconsideration of this Court's November 23, 1999 and August 18, 2000 Contempt Orders is barred by judicial estoppel. Plaintiff presently seeks to have this Court reconsider the imposition of contempt sanctions in 1999 and 2000, despite

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the fact that plaintiff himself recently agreed with the Court that his claim lacked merit and promised in October, 1999 and August, 2000 to refrain from publishing protected discovery materials against Sony and Dylan in order to secure more lenient treatment from the Court. Because the Court finds that plaintiff previously relied on a position inconsistent with his instant motion for reconsideration in bad faith, plaintiff is judicially estopped from moving for reconsideration of the Contempt judgments from November 23, 1999 (including the Order determining the amount of the attorney fee sanction filed December 20, 1999) and August 18, 2000 (including the Order determining the amount of the attorney fee sanction and contempt fine filed October 18, 2000).

*6 The doctrine of judicial estoppel is "an equitable doctrine which vests considerable discretion in the court," McNemar v. Disney Store, Inc., 91 F.3d 610, 617 (3d Cir.1996), and "serves a consistently clear and undisputed jurisprudential purpose: to protect the integrity of the courts." Id., 91 F.3d at 616. When finding that a party is judicially estopped from raising a particular position, a district court must "focus attentively on the particularity distinctive features of the case before the court, since 'each case must be decided on its own particular facts and circumstances.'" Klein v. Stahl GMBH & Co., 185 F.3d 98, 108 (3d Cir.1999)(quoting McNemar, 91 F.3d at 617)(citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 360 (3d Cir.1996)). Further, the sanction of judicial estoppel should be "tailored to address the harm identified." Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 73 (3d Cir.1994).

Judicial estoppel may be invoked "to preserve the integrity of the judicial system by preventing parties from playing fast and loose with the courts in assuming inconsistent positions." McNemar, 91 F.3d at 617. The Third Circuit articulated a two prong test to be used by a district court prior to applying the doctrine of judicial estoppel; the district court must first determine whether the litigant's present position is inconsistent with a position formerly asserted, and must next determine whether either or both of the inconsistent positions were asserted in bad faith. Ryan Operations, 81 F.3d at 361.

Plaintiff's own words clearly show that he has attempted to reap the benefits of adopting two inconsistent positions before this Court, each when it suited him, in bad faith. For example, at the August 11, 2000 contempt hearing, Damiano stated:

I do give you my word, your Honor, it's over. I know I gave it to you before, and, like I said, I felt bad about saying that to you and I'm very sincere at this point-I respect what you are giving me at this point. So I would not renege on my word to you.

(Contempt Hr'g, Aug. 11, 2000, T 101-18 to 101-22.) By his own admission, plaintiff previously "promised" the court that he would cease disseminating confidential discovery information and end his campaign against defendants in exchange for the Court's leniency. The Court relied upon Mr. Damiano's professed contrition. Despite his earlier promises in 1999, quoted at length at pp. 5-6, above, Mr. Damiano again began disseminating information protected by the confidentiality Orders, which led to the second contempt hearing on August 11, 2000. When faced with the prospect of another judgment imposing severe fines, plaintiff adopted the above-quoted repentant position in another attempt to minimize his liability. This Court accepted Mr. Damiano's last promise to "end it all" and imposed a minimum contempt fine of \$1,000.00. Additionally, defendants' attorneys relied on Mr. Damiano's promise and did not seek to have more severe contempt fines imposed by this Court. Then, just nineteen days later, as predicted by defendants' attorney at the second contempt hearing, plaintiff changed his position again in the instant "certification" and motion for reconsideration.

*7 In his brief in support of the instant motion, plaintiff admits that the position he adopted at the August 11, 2000 contempt hearing was inconsistent with his current position and that he used the repentant position to gain leniency. Plaintiff now attempts to persuade the Court that he should nonetheless be permitted to continue on with his crusade in violation of law. Specifically, plaintiff wrote:

I apologize to Judge Simandle for making a decision to drop everything as far as this situation however I was under duress in court knowing that I was unrepresented by counsel during my hearing for con-

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tempt and the outcome could have been incarceration.

(Pls.' Certification at 103.) Again, Plaintiff's own words reveal that he is attempting to resurrect and perpetuate this meritless lawsuit indefinitely and disregard this Court's confidentiality orders, all while avoiding more severe contempt sanctions. Plaintiff's actions demonstrate his utter bad faith and are a prime example of a litigant playing "fast and loose with the court," and will not be tolerated.

Plaintiff's chameleon-like conduct concerning his position regarding the merits and continuance of this litigation is inconsistent, and his continued contemptuous behavior, including his persistent inability to tell the Court the truth, even about his home address,^{FN9} demonstrates the requisite bad faith for imposition of judicial estoppel on the issue of reconsideration. Plaintiff's disturbing behavior throughout the duration of this litigation chronicles his efforts to "play fast and loose with the courts," even in the face of monetary sanctions. Plaintiff's twice-repeated broken promises to "end it all" and his false apologies for "wasting [the Court's] time," interspersed with his claims that "[t]his court cannot ignor [sic] defendants [sic] massive eleven year solicitation of plaintiff James Damiano's songs, defendants [sic] admissions of guilt and the similarities between works," (Pls.' Certification at 105), clearly warrant preclusion of the instant motion for reconsideration.

^{FN9}. It is appropriate to note that plaintiff has caused ongoing confusion about his own address. On November 29, 1999, plaintiff advised the Court that he had not received the Court's recent Orders. Plaintiff then indicated that his address was 215 Route 46, Mine Hill, New Jersey, 07803. At the August 11, 2000 hearing, plaintiff was asked, on the record, to clarify his address. Plaintiff stated that he lived at "115 Route 46, Mine Hill." The Court confirmed that plaintiff lived at "115" and confirmed his telephone number. In his brief in support of the instant motion, plaintiff listed his address as "215 Rt 46" in Mine Hill, New Jersey. (Pls.' Certification at 99.) This Court will accept plaintiff's sworn testimony on August 11,

2000 relating to his address as the truth and will direct all correspondence to 115 Route 46, Mine Hill, New Jersey.

As the Third Circuit recently wrote, "[j]udicial estoppel is one arrow in the quiver of sanctions at the court's disposal. Each of those arrows is a defensive weapon, loosed to protect the integrity of the court's processes." *Klein*, 185 F.3d at 109. This Court has fully considered plaintiff's claims and has attempted to halt his contemptuous behavior by repeatedly imposing monetary sanctions. Even after being fined by the Court, plaintiff returns now with his motion for reconsideration, in another attempt to make a mockery of the integrity of this Court. Such blatant disregard for the judicial process will not be tolerated and clearly justifies this Court's decision to bar his current motion for reconsideration of the November 23, 1999 and August 18, 2000 Orders imposing contempt sanctions.

Based on the law of the Third Circuit concerning judicial estoppel, this Court holds that a plaintiff, such as Mr. Damiano, who twice adopts one position that is relied upon by a court in his favor, namely, his promise to cease harassment of defendants through violation of this Court's Orders, is judicially estopped from contradicting that position in a bad faith attempt to repeatedly reargue meritless positions while contemning the prior judgments of the court. Plaintiff is therefore estopped from asserting a position inconsistent with the one relied on by this Court at his October, 1999 and August, 2000 contempt hearings.

B. Motion to Vacate the 1996 Confidentiality Orders

1. Standard for relief from judgment or order under Rule 60(b)

*8 According to Fed.R.Civ.P. 60(b)(1), the court may relieve a party from a final judgment or order for, among other reasons, mistake, inadvertence, surprise or excusable neglect, and, under Fed.R.Civ.P. 60(b)(3), the court may relieve a party from a final judgment or order for fraud, misrepresentation, or other misconduct of an adverse party. The rule also requires that any motion for relief "be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or pro-

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ceeding was entered or taken.” Fed.R.Civ.P. 60(b). Relief under Fed.R.Civ.P. 60(b) is available “only under such circumstances that the ‘overriding interest in the finality and repose of judgments may properly be overcome.’” “ Dietsch v. United States, 2 F.Supp.2d 627, 631 (D.N.J.1998)(citing Harris v. Martin, 834 F.2d 361, 364 (3d Cir.1987)). The Rule 60(b) remedy is “extraordinary, and [only] special circumstances may justify granting relief under it.” Dietsch, 2 F.Supp.2d at 631 (quoting Moolenaar v. Government of Virgin Islands, 822 F.2d 1342, 1346 (3d Cir.1987)).

Plaintiff moves to vacate the 1996 Confidentiality Orders entered by Judge Rosen, which will be analyzed by this Court under Fed.R.Civ.P. 60(b)(1) as a Motion for Relief From the 1996 Orders. Plaintiff argues that Judge Rosen’s decision to grant the confidentiality orders was incorrect and that the orders were based only on defense counsel’s unsubstantiated allegations. (Pl.’s Cert., para. 2.) In his motion plaintiff essentially recapitulates arguments previously considered and ruled upon by this Court.

Plaintiff’s Motion to vacate the 1996 Orders of Judge Rosen first appears to be time barred. Although plaintiff does not cite to a particular subsection of Fed.R.Civ.P. 60(b), his argument suggests that he is alleging mistake under Rule 60(b)(1) or fraud under Rule 60(b)(3). As set forth above, motions for relief under those two sections must be filed not more than a year after the order was entered. In the instant case, Judge Rosen’s Confidentiality Orders were entered on March 14, 1996 and May 10, 1996, and the time for filing motions for relief from those orders passed over two years ago.

Even if plaintiff’s motion was timely under Rules 60(b)(1) or 60(b)(3), plaintiff would be unable to successfully overcome his burden of demonstrating that the overriding interest in the finality and repose of judgments may properly be overcome by vacating the confidentiality orders. Plaintiff claims that the court erred when it took the statement made by defense counsel that “[f]or several years preceding this lawsuit, Mr. Damiano sought to commercially exploit his meritless allegations against Bob Dylan” (Pl.’s Cert., para. 2), as the truth when considering defendants’ motion to hold Damiano in contempt, and that

the court should now correct that error. In fact, as discussed in subpart 2 below, it has been plaintiff’s own contemptuous actions since the inception of this litigation that have justified the need for continuing protection of confidential discovery information. The Court next considers whether the confidentiality orders of 1996 should be vacated due to changed circumstances or other reasons.

2. Pansy Analysis: Whether the 1996 Confidentiality Orders Should Have Continuing Validity

*9 In the interest of completeness, this Court will now evaluate the continuing validity of the confidentiality orders originally issued in 1996 and maintained during the long duration of this litigation. Under the law of the Third Circuit, this Court finds that the continuation of the confidentiality orders issued by Judge Rosen in 1996 was necessary and proper to protect the privacy interests of the parties in this litigation. It is well established law that courts have the power to grant confidentiality orders over discovery materials. The Supreme Court in Seattle Times Co. v. Rhinehart, held that there is “no question as to the court’s jurisdiction to [enter protective orders] under the inherent ‘equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices.’” “ 467 U.S. 20, 35 104 S.Ct. 2199, 2209; 81 L.Ed.2d 17 (1984)(quoting International Products Corp. v. Koons, 325 F.2d 403, 407-08 (2d Cir.1963)).

The power to grant confidentiality orders, however, is not unlimited, and the Third Circuit has written that such orders should not be granted arbitrarily. Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir.1994). Specifically, the Third Circuit directed that “whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be shown to justify the order.” Pansy, 23 F.3d at 786. The Pansy opinion requires district courts to clearly articulate the good cause justifying that the subject discovery be protected, *id.* at 786, and that the district court’s analysis reflect a balancing of private and public interests. *Id.* Specifically, the court wrote:

Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. By focusing on the particular cir-

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cumstances in the cases before them, courts are in the best position to prevent both the overly broad use of [protective] orders and the unnecessary denial of confidentiality for information that deserves it.

Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir.1995)(quoting Arthur R. Miller, "Confidentiality, Protective Orders, and Public Access to the Courts," 105 Harv.L.Rev. 427, 492 (1991)); see also Damiano v. Sony Music Entm't, 168 F.R.D. 485 (D.N.J.1996).

The *Pansy* court articulated several factors, which are neither mandatory nor exhaustive, to be considered by a district court when determining whether "good cause" exists. Those factors include:

- i. whether disclosure would violate the privacy interests of the party seeking protection;
- ii. whether the information is being sought for a legitimate purpose;
- iii. whether disclosure of the information will cause a party embarrassment;
- iv. whether confidentiality is being sought over information important to public health and safety;
- v. whether the sharing of information among litigants will promote fairness and efficiency;
- *10 vi. whether a party benefitting from the order of confidentiality is a public entity or official; and
- vii. whether the case involves issues important to the public.

Pansy, 23 F.3d at 787-91; Glenmede, 56 F.3d at 483; Damiano, 168 F.R.D. at 490-91. When Judge Rosen modified the initial protective order in August, 1996, and directed that all discovery material in this case be kept confidential, he thoroughly weighed the factors against disclosure with the factors in favor of disclosure. See Damiano, 168 F.R.D. at 491-93 (weighing that Dylan is a private citizen involved in a private case of no legitimate public concern and that both

parties have equal access to all discovery materials against plaintiff's intent to inappropriately exploit discovery materials for financial gain).

As noted previously in this Court's November 4, 1999 Memorandum Order, Judge Rosen's determination that plaintiff sought the discovery material so that he could publicize and commercially exploit those materials was absolutely correct.^{FN10} Beginning in 1997 and continuing through the present time, plaintiff has attempted to disseminate discovery materials covered by the protective orders in a number of different ways. In 1997, plaintiff posted confidential discovery material on virtue@planet.net and, after this Court advised plaintiff that such postings violated the Protective Orders, plaintiff removed the information from that site and later re-posted the same information on www.w.geocities.com/SOHO/Gallery/1238. That site, which is now unavailable, had been viewed 1,423,054 times between 1997 and September 28, 1999. Damiano, No. 95-4795, slip op. at 7 (D.N.J. Nov. 4, 1999). Plaintiff also offered confidential discovery information at www.themusicvine.com/users/JAGGAR/Virt34385. Plaintiff continued this type of exploitative behavior after he was first held to be in contempt of court by posting protected deposition testimony in a chat room. During the year 2000, plaintiff "broadcast" e-mail transmissions to several thousand attorneys, including the confidential discovery information, purporting to be seeking legal representation but in fact succeeding only in an artifice in violation of this Court's orders.

^{FN10}. The evidence catalogued by Judge Rosen in his August 6, 1996 Opinion that supported this determination included plaintiff's manuscript about plaintiff's allegations, a written contract to sell the manuscript, an advertisement in *Rolling Stone* magazine offering to sell the unpublished manuscript, and plaintiff's submission of the manuscript to "A Current Affair" and *The New Yorker* magazine.

Now it appears that plaintiff, after being held in contempt for again violating the clear and thoroughly discussed protective orders, is again trying to defeat the procedures implemented by this Court by submit-

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ting confidential materials as a part of his certification in support of the instant motion and related exhibits in an attempt to have such materials included in the public record. Plaintiff Damiano's present application (baldly publishing the protected materials), just like his conduct in fabricating lyrics to resemble Dylan's and then claiming infringement, demonstrates bad faith and fraud.

Furthermore, plaintiff's sole purpose for gaining access to the commercially sensitive information about Sony and Dylan, including the organization of their business, profit and royalty information, and private financial data, in addition to the creative process of Dylan, was to inflict harm on defendants by embarrassing them and exposing confidential business information. Exposure of Sony and Dylan's business practices could threaten their competitiveness and financial position within the recording industry. See Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir.1986)(requiring businesses to show with some specificity that embarrassment and dissemination will result in financial harm); Glenmede, 56 F.3d at 484. This, coupled with the plaintiff's continued attempts to publish the confidential materials on his websites and with the Clerk of this Court, although such materials pertain only tangentially to his claims and motions, show that this Court was justified in continuing the confidentiality orders.

*11 In addition to the *Pansy* factors previously articulated by Judge Rosen and carefully considered by this Court, it is now necessary to highlight two points which further demonstrate plaintiff's continuing bad faith and improper motives for accessing the discovery in this case and weigh heavily in favor of this Court's decision to affirm the continuing validity of the 1996 Confidentiality Orders and deny plaintiff's motions. First, Plaintiff gained access to many of the discovery materials in this case solely because of the confidentiality orders issued by Judge Rosen. He would not otherwise have gained access to materials relating to Sony and Dylan's business, both professional and private, were it not for the existence of the protective orders, for the reasons found by Judge Rosen. If anything, the passage of time has not dissipated the need for continued confidentiality, but has instead enhanced that need in view of Mr. Damiano's continued harassing conduct and attempts to sensa-

tionalize and exploit these discovery materials gathered in his meritless case. By willfully disseminating these confidential materials to the public which had been disclosed to him for the sole purpose of litigating his claims against Defendants, in direct contravention to this Court's orders, Plaintiff attempts to tailor the procedures of this litigation as he alone sees fit. This type of behavior is completely improper and supports Defendant's request for continuing confidentiality.

Second, Plaintiff is not now, and has never been, prohibited under the confidentiality orders from using the discovery materials from this litigation in his motion practice, so long as the portions of such motions containing protected material are filed under seal with the Clerk of this Court. Indeed, as Defendants themselves profess, plaintiff may exercise his First Amendment right to speak about his claims with whomever he so desires, and he is only prohibited from exploiting the discovery materials obtained during the course of this litigation for publicity, profit or collateral gain. Irrespective of these facts, plaintiff chose to file the instant motion, buried deep inside a "certification" made up of discovery materials protected by the orders.^{FN11} By doing so without filing the confidential portions of the motion under seal, Plaintiff attempts once again to circumvent the protective orders in this case by having such confidential materials become part of the public record, which could then be posted on Plaintiff's website by anyone who chooses to view the Clerk's file. This type of behavior justifies this Court's continuation of the existing protective orders in this case.

FN11. In connection with the instant motion, Plaintiff has filed a 105 page certification, plus exhibits, and a 322 page supplemental certification, plus exhibits with the Clerk of this Court. The bulk of these "certifications" are the gross text of deposition transcripts and other protected discovery material produced in connection with this case, which do not directly support the motions before the court. This conduct, when considered in conjunction with his past willful disregard of this Court's orders, demonstrates once again that Plaintiff's motives for filing such "certifications" are not proper.

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Finally, the limited nature of the 1996 protective orders does not preclude Damiano from publishing his own version of reality to whomever he chooses, so long as the materials and testimony that came to Damiano under the discovery process in this case are not themselves disclosed. He remains as free as ever to continue his diatribes on any subject of his choice. Because plaintiff was permitted to use any and all of the discovery obtained during the course of this litigation for purposes of this case, plaintiff cannot claim that this Court has in any way hindered his ability to fully and exhaustively litigate the merits of his claims.

*12 Because plaintiff is unable to meet his burden for relief from Judge Rosen's 1996 Confidentiality Orders under Fed.R.Civ.P. 60(b)(1), his motion will be denied.

III. CONCLUSION

For the reasons set forth above, plaintiff's motion for reconsideration of this Court's December 16, 1996 Order granting summary judgment in favor of defendants, plaintiff's motion for reconsideration of this Court's November 23, 1999 and August 18, 2000 Orders finding plaintiff in contempt of earlier confidentiality orders, and plaintiff's motion to vacate the confidentiality orders entered by Judge Rosen on March 14, 1996 and August 6, 1996 must be denied.

The accompanying Order has been entered.

ORDER

This matter having come before the court upon the plaintiff's motion for reconsideration of this Court's December 16, 1996 Order granting summary judgment in favor of defendants, for reconsideration of this Court's November 23, 1999 and August 18, 2000 Orders finding plaintiff in contempt of earlier confidentiality orders, and plaintiff's motion to vacate such confidentiality orders entered by Judge Rosen on March 14, 1996 and August 6, 1996; and the court having considered the submissions of the parties; and for the reasons set forth in the Opinion of today's date;

It is this __ day of November 2000, hereby

ORDERED that plaintiff's motion for reconsideration of this Court's December 16, 1996 Order granting summary judgment in favor of defendants be and hereby is *DENIED*; and it is

FURTHER ORDERED that the plaintiff's motions for reconsideration of this Court's November 29, 1999 and August 18, 2000 Orders be, and hereby are *DENIED*; and it is

FURTHER ORDERED that plaintiff's motion to vacate the confidentiality orders entered by Magistrate Judge Rosen on March 14, 1996 and August 6, 1996 be, and hereby, is *DENIED*, and those Orders remain in full force and effect.

D.N.J.,2000.

Damiano v. Sony Music Entertainment, Inc.

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END OF DOCUMENT

Slip Copy, 2009 WL 564243 (D.N.J.), 68 UCC Rep.Serv.2d 57
(Cite as: 2009 WL 564243 (D.N.J.))

Only the Westlaw citation is currently available. NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
Brian F. DELANEY, Plaintiff,
v.

STRYKER ORTHOPAEDICS, formerly known as Howmedica/Osteonics, a wholly owned subsidiary of Stryker Corporation, ABC Corporations 1-10 (a fictitious name), John Does 1-10 (a fictitious name), individually, and as agents, servants, or employees of Stryker Corporation and/or Stryker Orthopaedics and/or Howmedica/Osteonics, Defendants.
Civil Action No. 08-03210 (DMC).

March 5, 2009.

West KeySummary
Products Liability 313A ↪227

313A Products Liability

313AIII Particular Products

313Ak223 Health Care and Medical Products

313Ak227 k. Implants and Prosthetic Devices. Most Cited Cases

States 360 ↪18.65

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.65 k. Product Safety; Food and Drug Laws. Most Cited Cases

A patient's state law claims imposed different or additional requirements on a hip prosthesis and thus was preempted by federal law. The device had been approved by the United States Food and Drug Administration (FDA) under a statutory pre-market approval (PMA) process and thus expressly prohibited by the Medical Device Amendments (MDA) of the Food, Drug and Cosmetic Act (FDCA). After the ceramic femoral ball component of the patient's prosthesis shattered, he alleged that the manufacturer

changed certain design characteristics and the manufacturing process without formal FDA approval. Federal Food, Drug, and Cosmetic Act, § 513(a)(1)(C)(ii), 21 U.S.C.A. § 360c(a)(1)(C)(ii); 21 U.S.C. § 361k(A).

Terrence Smith, Davis, Saperstein & Salomon, PC, Teaneck, NJ, for Plaintiff.

Kim M. Catullo, Gibbons P.C., Newark, NJ, for Defendants.

OPINION

DENNIS M. CAVANAUGH, District Judge.

*1 This matter comes before the Court upon motion by Defendant Howmedica Osteonics Corp. ("HOC")^{FN1} to dismiss Plaintiff Brian Delaney's ("Mr. Delaney") Complaint for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6). Pursuant to FED. R. CIV. P. 78, no oral argument was heard. After carefully considering the submissions of the parties, and based upon the following, it is the finding of the Court that HOC's motion to dismiss is granted in part and denied in part.

FN1. HOC is improperly named in the Complaint as Howmedica/Osteonics; and Stryker Orthopaedics is improperly named in the Complaint as the entity formerly known as Howmedica/Osteonics. Additionally, Plaintiff improperly served Stryker Corporation, HOC's parent corporation, at HOC's corporate offices rather than serving HOC.

I. BACKGROUND^{FN2}

FN2. The facts set forth in this Opinion are taken from the parties' respective papers.

A. Factual Background

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Mr. Delaney underwent total left hip arthroplasty surgery (hip replacement surgery) on March 29, 2005, at which time his hip was replaced with HOC's Trident™ hip prosthesis. Dr. Jonathan Hottenstein performed the surgery at the Sewickley Valley Hospital in Sewickley, Pennsylvania.

On May 28, 2006, the ceramic femoral ball component of Mr. Delaney's prosthesis shattered. The reason for the component failure is currently unknown. Dr. Hottenstein replaced Mr. Delaney's prosthesis on May 29, 2006.

HOC's Trident™ hip prosthesis is a Class III medical device. The United States Food and Drug Administration ("FDA") first approved its use in the United States on February 3, 2003, after performing the statutory pre-market approval ("PMA") process established by the 1976 Medical Device Amendments ("MDA") of the Food, Drug and Cosmetic Act ("FDCA"). Mr. Delaney alleges that HOC has since changed certain design characteristics and the manufacturing process without formal FDA approval.

B. Procedural Background

Mr. Delaney commenced this products liability action in the Superior Court of New Jersey, Bergen County, Law Division on May 13, 2008. HOC removed the case to this Court on June 27, 2008. Thereafter, HOC requested and received an extension of time to respond to Mr. Delaney's Complaint. HOC filed this motion to dismiss on July 22, 2008.

Mr. Delaney alleges causes of action for violation of federal law and regulations, namely the FDCA. Mr. Delaney asserts eight Counts: 1) failure to warn; 2) defective manufacture; 3) defective design; 4) negligence and recklessness; 5) breach of express and implied warranties; 6) breach of implied warranty of fitness; 7) breach of implied warranty of merchantability; and 8) consumer fraud pursuant to the New Jersey Consumer Fraud Act.

II. STANDARD OF REVIEW

When deciding a motion to dismiss under FED. R.

CIV. P. 12(b) (6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. See Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir.1998). In evaluating a Rule 12(b)(6) motion, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the plaintiff's claims are based upon those documents. Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir.1993). While under the liberal notice pleading standard a plaintiff is not required to plead facts sufficient to prove its case, there still must be an underlying claim for relief before the court. Lum v. Bank of America, 361 F.3d 217, 223 (3d Cir.2004). To defeat a 12(b)(6) motion the plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Moreover, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir.1997).

III. DISCUSSION^{FN3}

^{FN3}. Both HOC and Mr. Delaney submitted supplemental authority in support of their arguments. Although the Court reviewed all authority submitted, with the exception of Huber v. Howmedica Osteonics Corp., 2008 U.S. Dist. LEXIS 106479 (D.N.J. Dec. 30, 2008), which the Court was already aware of, none of the supplemental submissions have been relied upon by the Court in formulating the within Opinion.

*2 HOC argues that most of the Counts raised in Mr. Delaney's Complaint must be dismissed because they are preempted by the MDA. HOC further argues that to the extent that some of Mr. Delaney's claims are not preempted, these claims are insufficiently plead and should be dismissed.

A. MDA Preemption

The MDA established a new regime whereby the

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FDA has almost exclusive authority to regulate medical devices. The MDA requires “various levels of oversight for medical devices, depending on the risks they present.” Riegel v. Medtronic, — U.S. —, —, 128 S.Ct. 999, 1003, 169 L.Ed.2d 892 (2008). Under the MDA, medical devices are placed into one of three “classes.” Class I devices, such as elastic bandages, pose little or no risk of illness or injury, and are subject only to “general controls” applicable to all devices. 21 U.S.C. § 360c(a)(1)(A). Class II devices, such as wheelchairs, pose potentially greater risks, and their manufacturers must comply with federal performance regulations known as “special controls.” 21 U.S.C. § 360c(a)(1) (B). Class III devices, such as the Trident™, “receiv[e] the most federal oversight” because they “ ‘present[] a potential[ly] unreasonable risk of illness or injury’ ” or are “ ‘for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health.’ ” Riegel, 128 S.Ct. at 1003 (quoting 21 U.S.C. § 360c(a)(1)(C)(ii)).

Of the Class III devices, only a very small subset undergo the “rigorous regime” of the PMA process. See Riegel, 128 S.Ct. at 1004. The vast majority of Class III medical devices are approved through a less rigorous process known as the § 510(k) pre-market notification process. Riegel, 128 S.Ct. at 1004 (explaining that in 2005 the FDA approved 3,148 devices through the § 510(k) process, but only 32 devices through the PMA process). Congress devised the PMA process to empower the FDA with the ability to ensure the safety and efficacy of the products that fall within its ambit. As part of the MDA, Congress enacted an express preemption provision to prevent states from imposing additional or different medical device requirements whether directly, or through products liability litigation. 21 U.S.C. § 361k(A); see generally Riegel, 128 S.Ct. at 1003-05; H.R.Rep. No. 94-853, at 12, 45 (1976) (noting the MDA’s “general prohibition on nonfederal regulation”).

The PMA process entails extensive evaluation that is entirely different from the 510(k) pre-market notification process. The FDA retains control of the device even after approval. A manufacturer may not change “design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety

or effectiveness” without first obtaining the FDA’s approval. Riegel, 128 S.Ct. at 1005 (citing 21 U.S.C. § 360e(d)(6)(A) (i)). A manufacturer must receive supplemental PMA from the FDA for any changes, and the FDA evaluates the proposed changes “under largely the same criteria as an initial application.” *Id.* (citing 21 U.S.C. § 360e(d)(6)). Even after FDA approval, PMA devices are subject to reporting requirements, including informing the FDA of studies and investigations, or incidents where a PMA device caused or could have caused serious injury. *Id.* The FDA retains the authority to withdraw approval based on new information. *Id.*

*3 In Riegel, the Supreme Court established that the small number of Class III medical devices approved pursuant to the FDA’s exacting and comprehensive PMA process are exempt from all common law claims that impose requirements that are different from, or in addition to the FDA’s requirements. 128 S.Ct. at 1007, 1011. The Supreme Court in Riegel instructed that the MDA preempts products liability claims, including claims for (1) failure to warn; (2) defective design; (3) negligence and recklessness; and (4) breach of implied warranties including warranties of fitness; and warranties of merchantability. *Id.* at 1006-7.

The Supreme Court reached its conclusion in Riegel in reliance on the MDA’s express preemption provision, which mandates “that no state ‘may establish or continue in effect with respect to a device ... any requirement’ relating to safety or effectiveness that is different from, or in addition to, federal requirements.” *Id.* at 1010 (citation omitted). Specifically, the express preemption clause provides:

[N]o state or political subdivision of a state may establish or continue in effect with respect to a device intended for human use any requirement-

- (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and
- (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

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21 U.S.C. § 360k(a). The *Riegel* Court acknowledged that Congress enacted this express preemption provision to prevent states from imposing additional or different medical device requirements, whether directly or through products liability litigation. *See 21 U.S.C. § 360k(a)*; *see generally Riegel*, 128 S.Ct. at 1006, 1010; *see also Colacicco v. Apotex Inc.*, 521 F.3d 253, 261-2 (3d Cir.2008).

B. The Preempted Claims

Before HOC marketed the Trident™, the device underwent the FDA's comprehensive PMA process. After demonstrating that the device was safe and effective for its intended use, the Trident™ received FDA approval. HOC asserts that each change or modification of the Trident™ has undergone the supplemental PMA process.

Counts One and Three of Plaintiff's Complaint assert claims for failure to warn and defective design. Count Four raises claims of negligence and recklessness. Counts Five, Six and Seven raise claims of implied warranties. Count Seven specifically raises a claim of breach of an implied warranty of fitness. Here, the FDA imposed the same requirements regarding safety and effectiveness as were imposed on the *Riegel* device. As in *Riegel*, these claims are expressly preempted because they assert "general tort duties of care," allege that "a device was designed, labeled, or manufactured in an unsafe or ineffective manner," and impose different or additional requirements related to the safety and effectiveness of the Trident™ device. *Riegel*, 128 S.Ct. at 1010.

*4 Mr. Delaney argues that HOC's assertions in its brief, including that the Trident™ went through the rigorous PMA process and all changes went through the PMA alterations process, are not a matter of public record nor established by indisputable documents and should therefore be ignored. Mr. Delaney further argues that discovery is needed to determine if all or only part of the Trident™ was subject to the PMA process. Discovery is not required in this instance because HOC has sufficiently demonstrated that the Trident™ underwent the PMA process. Moreover, any changes not submitted to FDA for PMA review would constitute a violation of the MDA or rather the

FDCA, which the Supreme Court has made clear does not constitute a private right of action. *Buckman Co. v. Pl.'s Legal Comm.*, 531 U.S. 341, 121 S.Ct. 1012, 1018 n. 4, 148 L.Ed.2d 854 (2001).

Mr. Delaney argues that before the Court can determine preemption, a choice of law analysis must be performed. Mr. Delaney states that he is a Pennsylvania resident and that his operation took place in Pennsylvania. Despite raising this issue, Mr. Delaney does not undertake a full choice of law analysis in his brief. Nonetheless, the Court agrees that a choice of law analysis would be needed to determine the New Jersey PLA issues raised by HOC, however, HOC correctly argues that MDA preemption is a federal issue and is unaffected no matter which state law is determined to apply.

Just as in *Riegel*, Plaintiff's state law claims impose different or additional requirements on a device approved by the FDA under the PMA process, this is expressly prohibited by the MDA. *See id.* at 1007. Accordingly, these Counts are preempted and are therefore dismissed.

C. The Remaining Claims

Mr. Delaney further argues that there are "a wide array of causes of action against manufacturers of defective medical products that are not preempted." Mr. Delaney provides two examples to support this contention. The first is that defects resulting from manufacturing anomalies are not preempted. *Riegel v. Medtronic's, Inc.*, 451 F.3d 104, 106 (2d Cir.2006). The second is that state actions that are "parallel" to a Federal legislative scheme may also be brought against defective medical products. The Court recognizes that while the two exceptions discussed by Mr. Delaney do not constitute a "wide array" of non-preempted causes of actions, they do constitute claims that may not be preempted. Mr. Delaney, after suggesting that the meaning of the term "parallel" is unclear, argues that some of his claims are based on violations of Federal law, specifically the FDCA, and are therefore parallel. This argument is based on the Supreme Court's holding in *Medtronic v. Lohr*. The *Lohr* Court held that a plaintiff may maintain a cause of action based on claims that the manufacturer violated FDA regulations. 518 U.S. 470, 495, 116 S.Ct.

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2240, 135 L.Ed.2d 700 (1996). HOC responds to Mr. Delaney's parallel claims argument with two assertions. First, that the Supreme Court has clearly articulated that there is no private right of action based upon alleged violations of the FDCA. Buckman, 121 S.Ct. at 1018 n. 4. Second, that the FDCA violations cited by Plaintiff in his Complaint are not relevant to his claims and alleged injuries.

*5 Mr. Delaney further argues that MDA preemption does not apply to claims for breach of the Uniform Commercial Code ("UCC") meaning his claims of breach of expressed and implied warranties of fitness, deceptive trade practices, and negligent misrepresentation. Riegel, 128 S.Ct. at 1010.

i. Breach of An Express Warranty

In Count Five of his Complaint, Mr. Delaney in part claims that HOC breached an expressed warranty. Whether New Jersey or Pennsylvania law applies, in order for a plaintiff to establish that there has been a breach of an express warranty, the plaintiff must demonstrate that there was some form of promise or affirmative statement made. Compare N.J.S.A. § 12A:2-313 with 13 Pa.C.S. § 2313. Mr. Delaney's Complaint does not sufficiently allege that any promise, either verbal or written was made by HOC. The Complaint does not establish how or by whom a promise was made nor what exactly was promised. As the Supreme Court explained in Bell Atlantic v. Twombly, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." 127 S.Ct. 955, 1964-65.

HOC contends that Mr. Delaney's claim could only be based on product labeling. HOC argues that any claims arising from product labeling are preempted because the Trident™ product labeling and any subsequent changes were approved through the PMA process. See Adkins v. Cytvc Corp., 2008 WL 2680474, at *2 (W.D. Va. Jul.3, 2008).

Riegel did not specifically address preemption with regard to a claim for breach of an express warranty.

128 S.Ct. at 1006 n. 2. In Riegel, at the district court level, the Court found that the MDA did not preempt a breach of express warranty claim but later granted summary judgment to Medtronic on that claim for other reasons. *Id.* Without addressing the issue of preemption, the Third Circuit affirmed the grant of summary judgment. As a result, preemption of express warranty claims based on product packaging was not and has not been considered by the Supreme Court. *Id.* As discussed in Huber v. Howmedica Osteonics Corp., the absence of Supreme Court guidance means that the Michael v. Shiley opinion controls. 2008 U.S. Dist. LEXIS 106479, at * 10 (D.N.J. Dec. 30, 2008) (referring to Michael v. Shiley, 46 F.3d 1316 (3d Cir.1995) (overruled on other grounds)).

In Shiley, the Third Circuit held that the MDA did not preempt a breach of express warranty claim based on statements found on product packaging. 46 F.3d at 1325. The Shiley Court found that express warranties arise from a contractual commitment and not from the independent operation of state law. *Id.* "The fact that the FDA approves the label does not undermine 'the doctrine that contractual duties arise from the mutual assent of parties to agreed upon language.'" Huber, 2008 U.S. Dist. LEXIS 106479, at *8 (citing Shiley, 46 F.3d at 1327). The Shiley Court further found that the enforcement of an express warranty arising "from FDA approved packaging does not establish a requirement that is different from, or in addition to, a federally imposed requirement." *Id.* The Shiley Court justifies its holding regarding express warranties by explaining that express warranty claims allow plaintiffs to enforce the very language which the FDA approved. *Id.* In accordance with Shiley, this Court must conclude that express warranty claims based on FDA approved product packaging are not preempted by the MDA.

*6 Nonetheless, the Court agrees with HOC that Mr. Delaney has insufficiently plead his express warranty claim. In Shiley, the plaintiff clearly plead what affirmative statement he was relying on to substantiate his express warranty claim. See 46 F.3d at 1326. Indeed the Shiley Court at several places provided at length the affirmative statement the defendants made. "Shiley represented: Shiley warrants that reasonable care has been used in the manufacture of this device."

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Id. Mr. Delaney has not alleged any facts to demonstrate that HOC made an express warranty. Above, the Court noted that HOC assumes that Mr. Delaney's express warranty claim is based on product packaging but Mr. Delaney did not specify this in his Complaint. Mr. Delaney failed to provide the grounds upon which his breach of express warranty claim is based. Although Mr. Delaney is only required to provide a short and plain statement of his claims, he must provide more than labels and conclusions. See Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (2007). Given the concerns outlined above, the Court will grant Mr. Delaney leave to amend his Complaint as to his express warranty claim only.

ii. Manufacturing Defect

Count Two of Mr. Delaney's Complaint raises a manufacturing defect claim. Specifically, the Complaint asserts that an "impurity, imperfection, and/or another product defect" occurred. To maintain a manufacturing defect cause of action in New Jersey, "a plaintiff must prove that the product was defective, that the defect existed when the product left the manufacturer's control, and that the defect proximately caused injuries to the plaintiff, [who must be] a reasonably foreseeable or intended user." Myrlak v. Port Authority of N.Y. and N.J., et al., 157 N.J. 84, 97, 723 A.2d 45 (1999). To establish proximate causation, a plaintiff must show that the "product constituted a 'substantial factor' in bringing about" the injury alleged. Reiff v. Convergent Techs., 957 F.Supp. 573, 578 (D.N.J.1997).

The Complaint does not specify in what way HOC deviated from the manufacturing process that the FDA approved. No facts have been asserted to support the bald allegation that the Trident™ fractured because of a manufacturing defect. The Complaint does not allege that the Trident™ implanted in Mr. Delaney left HOC's custody in a defective condition. Mr. Delaney cannot avoid *Riegel* preemption simply by labeling a product defect claim a "manufacturing defect" claim. In order to properly allege a manufacturing defect claim, Mr. Delaney must allege that "something was wrong" with the product. The mere

occurrence of an accident and the mere fact that someone was injured are not sufficient to demonstrate the existence of a defect." Myrlak, 157 N.J. at 98, 723 A.2d 45 (citation omitted).

Likewise, Mr. Delaney's cause of action for strict liability manufacturing defect cannot survive under Pennsylvania law. Pennsylvania law mirrors New Jersey law in that under Pennsylvania law, to substantiate a product defect claim the plaintiff must demonstrate that the product was defective, that the alleged defect existed when the product left the manufacturer's control, and that the alleged defect proximately caused the plaintiff's injury. Soufflas v. Zimmer, Inc., 474 F.Supp.2d 737, 749 (E.D.Pa.2007). Additionally, Pennsylvania has adopted Section 402A of the Restatement (Second) of Torts, which imposes strict liability on manufacturers of products sold "in a defective condition unreasonably dangerous to the user or consumer." Mazur v. Merck & Co., 964 F.2d 1348, 1353 (3d Cir.1992). This notwithstanding, Mr. Delaney cannot maintain a strict liability manufacturing defect claim against a manufacturer of a medical device under Pennsylvania law. Comment k of Section 402A denies application of strict liability to products considered "unavoidably unsafe," such as prescription drugs. Hahn v. Richter, 543 Pa. 558, 673 A.2d 888, 889-90 (Pa.1996). This prohibition has been extended to medical devices. See Creazzo v. Medtronic, Inc., 903 A.2d 24, 31 (Pa.Super.Ct.2006).

*7 As Mr. Delaney has not pointed to a defect or a deviation from the FDA-reviewed Trident™ manufacturing specifications regarding the Trident™ implanted in him, the Court dismisses Mr. Delaney's manufacturing defect claim.

iii. Consumer Fraud

In Count Eight of his Complaint, Mr. Delaney argues that HOC violated New Jersey consumer fraud law. Mr. Delaney argues that a choice of law analysis is required to see whether New Jersey or Pennsylvania law applies to his other claims, but for some reason thinks that he is able to elect to the application of New Jersey law to his consumer fraud claim. Without addressing the obvious choice of law issues this presents, the Court will apply New Jersey law to Mr.

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Delaney's consumer fraud claim for the purposes of this motion.

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END OF DOCUMENT

The New Jersey Products Liability Act ("PLA") requires that Mr. Delaney's consumer fraud claim be subsumed by the PLA and cannot be brought as a separate cause of action. N.J.S.A. § 2A:58C *et seq.* The PLA provides the sole method of prosecuting a New Jersey consumer fraud claim when the claim is based on harm caused by a product. *Tirrell v. Navistar*, 248 N.J.Super. 390, 398-99, 591 A.2d 643 (App.Div.1991), *cert. denied*, 126 N.J. 390, 599 A.2d 166 (1991). Pursuant to the PLA, any claim that falls within its scope, as consumer fraud does, is subsumed by it, and a strict liability claim is the only surviving cause of action. *Id.* at 399 n. 5, 591 A.2d 643. This has been reaffirmed by the New Jersey Supreme Court in *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51, 948 A.2d 587, 589, 595-96 (N.J.2008). The New Jersey Supreme Court explained that "[t]he language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products." *Id.* at 595 (citation omitted). The Third Circuit has similarly held that product-based claims are subsumed by the PLA and therefore must be dismissed. *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 492 (3d Cir.1991).

Mr. Delaney's claim of consumer fraud is a product liability action within the ambit of the PLA. It is therefore subsumed by the PLA leaving only a strict liability claim that is preempted by the MDA.

IV. CONCLUSION

Based on the foregoing, Defendants' motion to dismiss Mr. Delaney's Complaint pursuant to FED. R. CIV. P. 12(b)(6) is granted in part and denied in part. Mr. Delaney shall have thirty (30) days from the issuance of this Opinion and the corresponding Order to amend his Complaint regarding his express warranty claim. An appropriate Order accompanies this Opinion.

D.N.J.,2009.

Delaney v. Stryker Orthopaedics

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Only the Westlaw citation is currently available. NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
Deborah FELLNER, Individually and on Behalf of
Those Similarly Situated, Plaintiffs,
v.
TRI-UNION SEAFOODS, L.L.C., d/b/a: Chicken of
the Sea, Defendant.
Civil Action No. 06-CV-0688 (DMC).

Jan. 9, 2007.

Barry R. Eichen, Eichen Levinson, LLP, Edison, NJ,
for Plaintiffs.

Kenneth Andrew Schoen, Bonner, Kiernan, Trebach
& Crociata, Parsippany, NJ, for Defendant.

OPINION

DENNIS M. CAVANAUGH, U.S. District Judge.

*1 This matter comes before the Court on motion by Tri-Union Seafoods, L.L.C. ("Defendant") to dismiss the complaint of Deborah Fellner ("Plaintiff") and motion requesting judicial notice in support of its motion to dismiss. For the reasons set forth below, Defendant's motions are granted.

BACKGROUND

Plaintiff's Complaint alleges violations of the New Jersey Products Liability Act, N.J.S.A. 2A-58C-1, *et seq.*, ("NJPLA"), the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.* ("NJCFA") and common law fraud for failing to warn the public that consumption of Defendant's tuna, purportedly containing methylmercury, could result in mercury poisoning. Plaintiff states that her diet consisted "almost exclusively" of canned tuna for five years between 1999 and 2004. She has been diagnosed with mercury poisoning.

Defendant moves for dismissal, arguing that (1) the United States Food and Drug Administration ("FDA") preempts state law in the areas of establishing the maximum allowable concentration of methylmercury in fish and of warning consumers about the potential effects of methylmercury in tuna when consumed; (2) Defendant is not liable under New Jersey law for injuries incurred by Plaintiff for abnormal consumption of its product; (3) New Jersey law does not impose a duty upon Defendant to warn potential plaintiffs about a product that may be dangerous only if over-consumed; and (4) Plaintiff's claim for common law fraud is subsumed by the NJPLA.

DISCUSSION

Motion Requesting Judicial Notice

In support of its motion to dismiss, Defendant requests that this Court take judicial notice of several publicly available reports and articles on methylmercury in fish. The reports are as follows:

- "What You Need to Know About Mercury in Fish and Shellfish," published by the United States Department of Health and Human Services and the United States Environmental Protection Agency.
- "Backgrounder for the 2004 FDA/EPA Consumer Advisory: What You Need to Know About Mercury in Fish and Shellfish," published by the United States Department of Health and Human Services ("DHHS") and the United States Environmental Protection Agency. ("EPA").
- Letter from Lester M. Crawford, D.V.M., Ph.D., United States Commissioner of Food and Drugs, to Bill Lockyer, Attorney General of the State of California, dated August 12, 2005, re: a suit filed on June 21, 2004 in San Francisco Superior Court.
- Section 540.600 of the FDA's Compliance Policy Guide allowance of up to one part of methyl mer-

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cury per million non-mercury parts of the edible portion of seafood.

Under Federal Rule of Evidence ("FRE") 201, courts can judicially notice public records. Lum v. Bank of America, 361 F.3d 217, 222 n. 3 (3d Cir.2004). FRE 201 states:

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

*2 Fed.R.Evid. 201

This Court has consistently held that it may take judicial notice of public records on motions to dismiss. Benak v. Alliance Capital Mgmt. L.P., 349 F.Supp.2d 882, 889 n. 8 (D.N.J.2004) (on motion to dismiss court may take judicial notice of publicly available documents and "plaintiffs may therefore be charged with knowledge of relevant public information."). The articles which the Defendant asks this Court to take judicial notice of are all public records and available. This Court, therefore, grants Defendant's motion that this Court take judicial notice of the publicly available information described above.

Methylmercury in Fish

The nature of this action necessitates consideration of the facts regarding mercury in the environment, methylmercury in fish and the FDA's approach to the issue of methylmercury in fish.

Mercury is present in nearly all fish. See "What You Need to Know About Mercury in Fish and Shellfish," U.S. Dept. of Health and Human Serv. and the United States Env'tl. Prot. Agency EPA-823-R-04-005 (March 2004) (hereinafter "The Advisory"). Mercury is a naturally occurring element in the environment and is also released into the air through industrial pollution. *Id.* Mercury that falls from the air often accumulates in streams, oceans and other bodies of water. *Id.* Fish absorb the mercury as they feed in these waters. *Id.* As a result, mercury becomes part of

the fish meat and cannot be removed. *Id.*

The FDA has established tolerance levels for methylmercury in fish through nutritional guidelines. See Fed. Food and Drug Admin. Compliance Policy Guide, § 540.600 (May, 2005). The FDA has also noted that "[r]esearch shows that most people's fish consumption does not cause a health concern." See Backgrounder for the 2004 FDA/EPA Consumer Advisory: What You Need to Know About Mercury in Fish and Shellfish at p. 2 (2004) (hereinafter, "Backgrounder"). Additionally, the FDA states that "[f]ish and shellfish can be an important part of [a recommended] diet." *Id.* at 2-3.

Motion to Dismiss

Legal Standard for Granting a Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." In deciding a motion to dismiss under Rule 12(b)(6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. Warth v. Seldin, 422 U.S. 490, 501 (1975); Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir.1998). However, legal conclusions offered in the guise of factual allegations are given no presumption of truthfulness. Chugh v. Western Inventory Serv., Inc., 333 F.Supp.2d 285, 289 (D.N.J.2004) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). While a court will accept well-pled allegations as true for the purposes of the motion, it will not accept bald assertions, unsupported conclusions, unwarranted inferences or sweeping legal conclusions cast in the form of factual allegations. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997).

Claims Under New Jersey Product Liability and Consumer Fraud Acts

*3 Plaintiff's complaint alleges violations of the NJPLA and NJCFA on behalf of herself individually and on behalf of those similarly situated. The allegations are that Defendant knowingly misrepresented, concealed, suppressed, omitted and failed to disclose

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material information regarding the presence of methylmercury and other harmful compounds in their tuna products with the intent that Plaintiff and members of the class rely upon such concealment. The complaint also accuses Defendant of negligence, breach of the implied warranty of fitness, and strict liability for failure to adequately warn consumers about the mercury compounds contained in its products.

Defendant argues for dismissal of Plaintiff's complaints under the NJCFA and NJPLA because they are preempted by FDA regulations and advisories which specifically address and regulate the issues of allowable amounts of mercury in its product and whether or not the Defendant is required to warn consumers of the dangers of mercury consumption.

The basis for federal preemption is the Supremacy Clause of the Constitution. Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 77 (1990). The clause provides that federal law is the "supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. This preemption applies equally to state common law and statutory law. Feldman v. Lederle Lab., 125 N.J. 117, 134 (1991) cert. denied, 505 U.S. 1219 (1992).

Whether a federal statute preempts state law turns on the intent of Congress when it passed the law and that intention may be either express or implied. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Federal law overrides state law when (1) Congress expressly preempts state law; (2) Congressional intent to preempt can be inferred from the existence of a pervasive federal regulatory scheme; or (3) state law conflicts with federal law or its purposes. English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

In this case, there is a pervasive federal regulatory scheme implemented by and through the FDA. The FDA has stated that state laws which require warnings regarding methylmercury in fish are preempted under federal law. See Letter from Lester M. Crawford, D.V.M., Ph.D., United States Commissioner of Food and Drugs ("Commissioner Crawford"), to Bill Lockyer, Attorney General of the State of California,

dated August 12, 2005, re: a suit filed on June 21, 2004, in San Francisco Superior Court ("FDA Letter").

On June 21, 2004, the Office of the Attorney General of California filed suit seeking an injunction and civil penalties against the Tri-Union Seafoods, LLC, for failing to warn consumers that canned and packaged tuna products were exposing consumers to mercury compounds. The People of the State of California v. Tri-Union Seafoods, LLC, et al., 2006 WL 1544377 (Cal.Super. Case No.: CGC-04-432394). In response to the suit, Commissioner Crawford wrote the FDA Letter which explained that the warnings sought by California would "frustrate the carefully considered federal approach to advising consumers of both the benefits and possible risks of eating fish and shellfish." See FDA Letter at p. 1.

*4 The FDA Letter also explained that the "FDA has been studying the issue of methylmercury in fish for several years. In so doing, it has compiled substantial data, and has developed significant expertise in analyzing the pertinent scientific issues, together with the consumer education aspects of this matter. As a result, the agency believes that it is uniquely qualified to determine how to handle the public health concerns related to methylmercury in fish. After many years of analysis on this issue, [the] FDA has chosen to issue an advisory rather than to require a warning on fish and shellfish product labels for several reasons." See FDA Letter at p. 2.

The FDA issued its 2004 methylmercury advisory to, "inform women who may become pregnant, pregnant women, nursing mothers, and parents of young children as to how to get the positive health benefits from eating fish and shellfish, while minimizing their mercury exposure." See FDA Letter at p. 4. The Advisory specifically regulates the levels of methylmercury allowed in canned tuna and specifically rejected the notion that warning labels should be included on cans of tuna. *Id.*

Plaintiff argues that the FDA does not preempt New Jersey state law for failure to warn of the dangers of mercury in the Defendant's tuna. There is a presumption in the law against preemption. New York Conference of Blue Shield and Blue Cross Plans v. Travel-

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ers Ins. Co., 514 U.S. 645, 655 (1995). The burden is on the proponent of preemption to overcome the presumption against finding that areas traditionally regulated by the states, such as products liability or consumer protection laws, have been preempted. Hillsborough County v. Automated Med Lab., 471 U.S. 707, 716 (1985).

Plaintiff suggests that the Defendant has failed to carry its burden to overcome the presumption against a finding that either the NJPLA or NJCFA have been preempted by the FDA's actions. In support of its position, Plaintiff states that The Advisory and Backgrounder are not entitled to deference and that the FDA Letter is not persuasive.

Plaintiff explains that the FDA has not officially prohibited mercury warnings on cans of tuna regarding methylmercury. For this proposition, Plaintiff argues that the FDA Letter is not entitled to deference from this Court. "Interpretations contained in formats such as an opinion letter are entitled to respect, ... but only to the extent that those interpretations have the power to persuade." Christensen v. Harris County, 529 U.S. 576, 587 (2000).

The New Jersey Supreme Court ruled that the lack of a formal FDA requirement for additional warnings on a product does not create a conclusive presumption that labeling which satisfies the FDA also constitutes an adequate warning under state law. Feldman v. Lederle Lab., 125 NJ 117 (NJ 1991), cert. den., 505 U.S. 1219 (1992). As such, if this Court finds that the FDA's regulatory scheme, as described in the Advisory and Backgrounder, is not entitled to deference and that the FDA Letter is not persuasive, then Defendant could comply with both New Jersey and federal law by placing warning labels on their tuna products.

*5 The essential issue is whether the FDA's regulatory scheme as explained and embodied in the FDA Letter, Advisory and other materials is entitled to deference from this Court. In arguing that this Court should not defer to the FDA's interpretation of its regulatory scheme in this area, Plaintiff points to the FDA Letter and calls it too informal. In her brief, Plaintiff states that the FDA Letter "appears to have been solicited for the express purpose of derailing

litigation against [Defendant] and other seafood companies." Therefore, Plaintiff reasons, the FDA Letter and arguments contained therein are not the product of independent analysis by the FDA, but are simply the parroting of arguments designed to benefit the Defendant and other industry members in this and other potential lawsuits.

An examination of the FDA's response to the potential health hazards of methylmercury in food reveals that the FDA has been collecting data and addressing this concern for years. The FDA issued its first methylmercury fish advisory in the mid 1990s. See FDA Letter at p. 3. Since that time, the FDA has compiled more data and has developed significant expertise in analyzing the scientific issues and consumer education aspects of this matter.

After studying the data, the Foods Advisory Committee ("FAC") recommended that the FDA and EPA jointly issue an advisory about mercury in fish for women who might become pregnant, women who are pregnant, nursing mothers and young children. See Advisory at p. 1.

On March 19, 2004, the FDA and EPA released The Advisory, with the following message:

Message to Consumers:

Fish and shellfish are important parts of a healthy and balanced diet. They are great sources of high quality protein and other nutrients. However, depending on the amount and type of fish you consume it may be prudent to modify your diet if you are planning to become pregnant; pregnant; nursing; or a young child. With a few simple adjustments, you can continue to enjoy these foods in a manner that is healthy and beneficial and reduce your unborn or young child's exposure to the harmful effects of mercury at the same time.

See Advisory at p. 1.

The Backgrounder to the Advisory, released simultaneously, clearly emphasizes the importance of continuing to eat fish as part of a healthy diet:

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The Difference Between this Advisory and Previous Advisories:

1. The advisory emphasizes the positive benefits of eating fish.
2. The advisory provides examples of commonly eaten fish that are low in mercury.

* * *

What's Next:

FDA and EPA want to ensure that women and young children continue to eat fish and shellfish because of the nutritional benefits and encourage them to follow the advisory so they can be confident in reducing their mercury exposure as well.

See Backgrounder at p. 2.

Plaintiff argues that the FDA Letter is merely an *ex parte* communication intended to derail litigation against the seafood industry. However, the FDA Letter aside, both the Advisory and Backgrounder excerpted above were released in March, 2004. The California litigation to which the FDA Letter responds commenced on June 21, 2004. Therefore, the Advisory and Backgrounder which evidence a clear effort by the FDA and EPA to encourage the continued public consumption of fish, were released before the complaint in the California case had even been filed. Clearly, the FDA had already taken the position against blanket warning labels before the California suit which prompted the FDA Letter.

*6 In advocating the position that the Advisory and Backgrounder have no preemptive effect on the NJCFA and NJPLA, Plaintiff argues that the mere existence of a federal regulatory or enforcement scheme does not by itself imply preemption. English, 110 S.Ct. at 2279 (1990). Plaintiff's opposition to Defendant's motion to dismiss characterizes the Advisory and Backgrounder as "minuscule" actions which are not official regulations and, therefore, not sufficient to preempt state law.

However, it is not uncommon for the FDA to specifi-

cally choose the issuance of an advisory rather than an official warning. In his letter to the California Attorney General, Commissioner Crawford explained, "[f]irst, consumer advisories are communicated to the target audience directly, rather than to all consumers. Second, the FDA believes that the advisory approach is more effective than a product label statement in relaying the complex messages about mercury in seafood. Third, a label statement that reaches the public at large can also have unintended adverse public health consequences. FDA focus group results have suggested that people who are not in the target audience ... might eat less fish or refrain from eating fish altogether when they receive information about the mercury content of fish ..."

FDA Letter at p. 2-3.

In holding that a formal explicit agency statement is not necessary for the finding of a preemptive intent, the Supreme Court of the United States explained,

"the Court has never before required a specific formal agency statement identifying conflict in order to conclude that such a conflict in fact exists. Indeed, one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict.

Geier v. Am. Honda Motor Co., 529 U.S. 861, 884-85 (2000).

In *Geier*, the Supreme Court of the United States examined the Department of Transportation's interpretation of the regulation at issue's objectives and the Department's conclusion that tort suits, like the suit against American Honda Motor Co., would stand as an obstacle to the accomplishment and execution of those objectives. The Court reasoned that "the agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Id.* at 883 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996)).

Deference to an agency's interpretation of its own powers is appropriate when the regulatory scheme is silent as to preemption. Barnhard v. Thomas, 540

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U.S. 20, 26 (2003). Here, the FDA Letter in response to the California litigation only crystallizes the already transparent intent of the FDA to preempt state law that might interfere with the FDA's concern that warnings on tuna products may upset the desired balance between informing consumers of both the benefits and risks of fish consumption:

[The] FDA believes that such warnings are preempted under federal law. They frustrate the carefully considered federal approach to advising consumers of both the benefits and possible risks of eating fish and shellfish; accordingly federal law preempts [California's] warnings concerning mercury and mercury compounds in tuna. Furthermore, [the] FDA believes that compliance with both the FDA and [the California warning] is impossible and, as a result, the latter is preempted under federal law.

*7 See FDA Letter p. 1-2

Commissioner Crawford also explained that, "rather than requiring warnings for every single ingredient or product with possible deleterious effects, the FDA has deliberately implemented a more nuanced approach, relying primarily on disclosure of ingredient information and nutrition information ... in order to avoid overexposing consumers to warnings, which could result in them ignoring all such statements, and hence creating a far greater public health problem." *Id.*

For the reasons discussed above, this Court finds that the FDA's Advisory and Backgrounder are entitled to deference and that the FDA Letter is persuasive. Therefore, applying the carefully structured and implemented regulatory scheme of the FDA to Plaintiff's allegations that Defendant was required by New Jersey law to provide warnings about methylmercury and that Defendant's failure to warn constituted a violation of the NJCFA, shows that it would be impossible for Defendant to comply with the FDA and New Jersey law.

It is worth noting that the FDA's regulatory approach has been in effect and has preempted New Jersey state law for the entire period that the Plaintiff's diet consisted almost exclusively of canned tuna (1999-

2004). The FDA's published its first methylmercury in seafood advisory in the mid-1990s. See FDA Letter at p. 3.

The FDA's regulatory scheme is the result of over ten years of data collection and study. Plaintiff suggests that this Court dismiss the FDA's analysis and deliberately nuanced response to the issue of methylmercury found in seafood. To ask that this Court ignore the evidence of the FDA's carefully balanced approach in favor of Plaintiff's claim that the FDA's treatment of this issue is a contrived response to potential lawsuits against the seafood industry distorts logic. This Court will not turn a blind eye to the evidence of the FDA's ten-year deliberately balanced approach to the issue of methylmercury in fish.

This Court, therefore, grants Defendant's motion that Counts I, II and III of Plaintiff's complaint be dismissed.

Claims Under Common Law Fraud

Plaintiff alleges that the actions of Defendant constitute fraudulent conduct, including but not limited to, knowingly making material misrepresentations and omissions regarding Defendant's tuna products upon which Plaintiff reasonably relied. Defendant argues that Plaintiff's common law fraud claims must be dismissed because they are subsumed by the NJPLA.

In *Estate of Brown v. Philip Morris, Inc.*, 228 F.Supp.2d 506 (D.N.J.2002), the decedent's wife brought suit against three cigarette manufacturers asserting that smoking resulted in the death of her husband and alleging both a violation of the NJPLA and common law fraud. *Id.* The court held that the NJPLA "clearly subsumes plaintiff's common-law claims." *Id.* at 516. Put another way, plaintiffs cannot recast a product liability claim as a fraud claim. *Walus v. Pfizer, Inc.*, 812 F.Supp. 41, 45 (D.N.J.1993).

*8 Count IV of Plaintiff's complaint alleges common law fraud asserting exposure to "unsafe methylmercury and other harmful compounds that could result in mercury poisoning." Counts I and II allege a violation of the NJPLA. As was the case in *Estate of*

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Brown, Plaintiff merely “recasts [her] product liability claims” as fraud claims.

Plaintiff's common law fraud claim is pled in violation of the NJPLA's single cause of action rule. This Court, therefore, grants Defendant's motion that Count IV of Plaintiff's complaint be dismissed.

CONCLUSION

Based on the foregoing, Defendant's Motion to Dismiss Plaintiff's complaint is granted. An appropriate Order accompanies this Opinion.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Tommy JOHNSON, Plaintiff-Appellant,
v.
NAVISTAR INTERNATIONAL
TRANSPORTATION CORPORATION, Grandturk
Equipment, Frank Turk, and Merkin, Defendants,
and
Fabrication Labrie, Inc. and Labrie Equipment, Ltd.,
Defendants-Respondents.
Argued May 5, 2008.
Decided July 29, 2008.

West KeySummary
Appeal and Error 30 ↪ 1064.1(8)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1064 Prejudicial Effect

30k1064.1 In General

30k1064.1(2) Particular Cases

30k1064.1(8) k. Negligence

and Torts in General. Most Cited Cases

Products Liability 313A ↪ 203

313A Products Liability

313AIII Particular Products

313Ak202 Automobiles

313Ak203 k. In General. Most Cited Cases

(Formerly 313Ak35.1)

Products Liability 313A ↪ 435

313A Products Liability

313AIV Actions

313AIV(E) Instructions

313Ak433 Defenses and Mitigating Circumstances

313Ak435 k. Contributory and Comparative Fault in General; Apportionment. Most Cited Cases

(Formerly 313Ak98)

Injured sanitation worker was entitled to a new trial on causation where the jury was improperly charged. Worker suffered a brain injury when he fell from a side step of a garbage truck that he alleged was defectively designed and that the manufacturer failed to warn about its dangers. The worker objected to a charge that comparative fault was not a defense to workplace injuries and he further objected to including questions on the verdict sheet asking if he had been negligent and if his negligence had proximately caused the accident. The worker's decision to ride on the side step rather than inside the cab was an analogous workplace choice and not a basis for comparative fault. The error in the charge on the worker's comparative negligence was thus not harmless, because it was clearly capable of producing an unjust result. N.J.S.A. 2A:58C-1 to C-3, 2A:15-5.1 to -5.3.

On appeal from the Superior Court of New Jersey, Law Division, Civil Part, Hudson County, Docket No. L-3343-02.

Laurel A. Wedinger argued the cause for appellant (Barry, McTiernan & Wedinger, attorneys; Ms. Wedinger, on the brief).

Leonard Rosenstein argued the cause for respondents (Braff, Harris & Sukoneck, attorneys; Mr. Rosenstein, on the brief).

Before Judges STERN, C.L. MINIMAN and KESTIN.

PER CURIAM.

*1 Plaintiff Tommy Johnson appeals from a judgment of no cause for action based on a jury finding that the defective LaBrie 200 side-loader garbage truck manufactured by defendants Fabrication

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LaBrie, Inc., and LaBrie Equipment, Ltd. (collectively LaBrie),^{FN1} was not the proximate cause of the plaintiff's fall from the truck. Because the judge erred in admitting certain evidence and in charging the jury, we reverse and remand for a new trial.

FN1. The remaining defendants, Navistar International Transportation Corporation, Grandturk Equipment, Frank Turk, and Merkin, did not participate in the trial and have not responded to this appeal.

I.

Plaintiff was seriously injured ^{FN2} on June 7, 2000, when he fell from a side step by the hopper on the truck manufactured by LaBrie while it was in motion making a left turn at the intersection of Summit Avenue and Smoke Hollow Trail in Franklin Lakes. Police Officer William Colligan, who had extensive experience and training in traffic-accident investigation and reconstruction, was dispatched to investigate plaintiff's accident at 12:17 p.m. Traffic was light and it was a sunny, warm day.

FN2. He had a brain injury and has since been declared incompetent and totally disabled.

When Colligan arrived, plaintiff was lying on Summit Avenue in the center of its intersection with Smoke Hollow Trail. Another officer was attending to him. Garbage was "strewn in the roadway," and a sanitation truck was parked on the side of Smoke Hollow Trail. Henry Denson, the driver of the truck on the day of the accident, gave a formal statement to the police in which he said that he was employed by Frank's Sanitation (Frank's) and was collecting recyclables with plaintiff that day. Denson, who did not see plaintiff fall, related that he was driving north on Summit Avenue, had just pulled off from a stop and was not going fast. He was about to turn left onto Smoke Hollow Trail when he heard noise from the spill plate, a piece of metal on the side of the truck "that keeps the recyclables from falling out." The spill plate "came loose but there was a small chain that holds it." He informed the police that it was common practice to stand on the side step, that his supervisors were aware of it, and that there was a

grab handle to hold on the side of the truck.

In plaintiff's second amended complaint, he alleged that LaBrie negligently designed and manufactured the LaBrie 200 side-loader garbage truck from which he fell. According to plaintiff, the defective design consisted of failing to install grab handles next to an outside step on which to stand during travel. Plaintiff also alleged that LaBrie failed to warn the owners and users of the truck of the inherent dangers of riding on the step without handles. Plaintiff alleged that he was seriously injured on June 7, 2000, as a result of LaBrie's defective design, negligence and failure to warn. LaBrie answered the second amended complaint, denying its material allegations and asserting that plaintiff's own negligence, or the negligence of other persons, caused his injuries.

At trial on January 10, 2007, Colligan described the photographs taken at the scene. Views of the rear and right side of the truck showed the spill plate hanging off the side of the truck, and other photos showed the spill plate returned to its normal position. Colligan measured three-sixteenths of an inch as the distance that the spill plate had to be lifted up out of its channel in order to be removed. He was able to pull the spill plate out "without a significant amount of force," because the channel that held it was small. The handle of the spill plate was the only handle that Colligan observed on the side of the truck, and "[t]here was nothing else really for him to hold onto at that location." Colligan expressed his opinion that plaintiff was riding on the platform on the right side of the truck and holding onto the handle on the spill plate when the spill plate became disengaged and plaintiff fell.

*2 Plaintiff established at trial that LaBrie designed the truck from which he fell, manufactured it in 1990, and sold it to Frank's in 1991. Plaintiff's expert mechanical engineer, Paul Stephens, inspected the truck and related that it was a straight-body truck with a cab in the front. He testified that the truck could be operated from the lower-level right-side seat and steering wheel, which made it easier for the driver to get in and out to collect recyclables, but opined that for longer distances the driver should return to the higher left-side seat and steering wheel.

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Stephens noted that the design of the truck did not include a grab handle for a person riding on the side step. Colligan's photographs of the truck showed the step on the right side behind the cab, with weld marks to the right of the hopper on the side of the truck where handles may have been located at one time. Rust at the location of the weld marks indicated that the handle had been missing for a period of time. Stephens acknowledged that Frank's had installed a grab handle on the truck where the weld marks were located and explained that the cab's sliding right door struck the grab handle when it was opened. Stephens saw worn paint and indentations on the cab door at the point of contact with a missing grab handle.

The truck's manual said:

This vehicle has been constructed to be operated by one person . However, if there is a helper, be sure that he or she is qualified and knows about all the operations and precautions to take, before operating it. In such a case, the operator should make sure that the helper is within view before moving the vehicle ... [h]e should also be sure that the helper is securely positioned on the side step beside the hopper ... firmly holding on to the body. Consequently, do not accelerate fast or brake fast, which could unbalance or throw him off the vehicle.

A subsequent section of the manual stated: "If a helper is used, make sure that he is safely on the side step and that he knows all about the operating instructions and the safety regulations. *It is important to note that this vehicle was built to be operated by one person.*"

Stephens testified that "the usual and customary practice is for refuse [-]collection personnel to use riding steps" for work efficiency between each collection. Denson, too, testified that it was "common practice" to stand on the platform, and that supervisors were aware that workers stood there. However, Denson said that it was not common practice to hold onto the spill plate. Stephens read an interrogatory answer to the jury in which LaBrie admitted that there were no warnings on or attached to the truck about the side step.

Stephens explained to the jury that the American National Standards Institute (ANSI) promulgated safety standards for equipment, including refuse collection equipment, in 1984. According to Stephens, the platform on the truck from which plaintiff fell met all of the criteria for "riding/loading steps" in the code, ANS Z-245.1-1984, § 7.1.10 (location, size, surface and amount of weight that it could support). It was, thus, a "riding step" that required "grab handles" pursuant to § 7.1.6. A grab handle is defined in § 3.2.8 as "[a]n attachment to the body or tailgate to furnish an employee with a handhold."

*3 Stephens opined that a riding step without grab handles was not a safe means for transporting a person, because four points of support—for each hand and foot—are necessary. According to Stephens, a helper standing on the side step could not be securely positioned without grab handles. He explained that holding onto the body required a "pinch grip which is not really an effective wrap around type grasp." Stephens further opined that LaBrie should have installed grab handles and that the LaBrie garbage truck was defectively designed because of their absence. In the absence of grab handles, there should have been a warning not to use the platform as a riding step, another product defect.

At the conclusion of Stephens's testimony, plaintiff's counsel rested without calling his client due to plaintiff's mental incompetency. The judge explained to the jury that plaintiff was not being called to the stand because he had suffered a brain injury as a result of the accident and had subsequently been declared incompetent.

LaBrie disputed that the truck was defective as manufactured or that any warnings were required. Further, as its counsel said in his opening statement, LaBrie contended that Frank's was the cause of the accident because (1) it made a substantial modification to the truck, (2) knew everything required to meet "their obligation to provide [plaintiff] with a reasonably safe environment in which to work," and (3) Denson failed to make sure the truck was safe before he took it out on the road. In concluding his opening remarks, counsel stated that "Frank's Sanitation is the cause of this accident."

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Michael Fillion, a mechanical engineer and LaBrie's vice president of engineering, admitted at trial that LaBrie never installed grab handles by the side step. However, Fillion pointed out that the truck was advertised "as a vehicle to be operated by one person," although he acknowledged that the cab could accommodate two people. Fillion testified that the side step was for loading only and asserted that the vehicle met all of the applicable industry standards at the time of manufacture and sale. Fillion also testified that, for a helper to ride safely on the side step, a grab handle in the proper position was necessary and that, with no grab handle, the truck was unsafe and should not have been in use.

Although LaBrie's counsel had not alleged any fault on the part of plaintiff, he elicited an opinion from Lance Watt, defendant's expert engineer, that plaintiff should not have been riding on the step. He adopted Colligan's conclusion that plaintiff was "holding onto the defectively designed and manufactured spill shield installed by the truck owner, Frank's Sanitation Service." ^{FN3} Watt noted that plaintiff had to bend down to hold onto the handle on the spill plate, which "put his tail out into the wind[,] which is unsafe." Watt testified that the spill shield that Frank's installed "was not solidly engaged on the truck" because a channel three-sixteenths of an inch deep was insufficient. Watt opined that if Frank's intended a helper would ride on the step, it should have installed grab handles on both sides of the step. Watt further opined that Frank's should have trained both plaintiff and Denson how to use the truck properly and that Frank's was responsible for ensuring its truck was in a safe operable condition.

^{FN3}. Watt also testified that Colligan concluded that plaintiff was attempting to operate the compactor controls while holding onto the spill plate, but Colligan did not so testify.

*4 Watt also opined that Denson was responsible, but failed to insure the truck complied with federal motor carrier safety regulations before he drove it. According to Watt, Denson should have done a pre-trip inspection, noticed that the grab handle was missing, and reported that to Frank's, which then should have taken the vehicle out of service. Watt expressed the

opinion that "[t]he actions of Denson, [plaintiff] and Frank's Sanitation Service" caused plaintiff's fall, although elsewhere he identified Frank's and Denson as the two causes of the accident because Frank's should not have allowed the truck to be operated as it was and Denson should have made sure that plaintiff was inside the cab between stops.

After Watt's testimony concluded, LaBrie's counsel read a portion of plaintiff's deposition to the jury in which plaintiff said that, when he was seventeen ^{FN4} and on his first sanitation-truck job, he was taught to hold onto two handles while riding on the back of the truck in order to avoid falling. When he began work at Frank's, it did not give him any safety training because he already knew. Mike Franco told him to ride on the side of the truck because he was a lifter. Plaintiff said that Frank's side loaders had "handles on it where you dump the garbage at. You got a food stander down there and you got two handles." Plaintiff also said that he could not remember whether the truck involved in the accident had grab handles and did not know why he had the accident. He denied that he had ever held onto the spill plate while riding on the sanitation truck "[b]ecause it will come out" and because "I can't stick my hand down there." He also testified that he would never ride on a truck that had only one handle because he would fall off.

^{FN4}. Plaintiff was fifty-two at the time of his deposition.

At the charge conference on January 16, 2007, the last trial day, plaintiff objected to a charge that comparative fault was not a defense to workplace injuries and he further objected to including questions on the verdict sheet asking if he had been negligent and if his negligence had proximately caused the accident. The judge overruled this objection, ruling that it was for the jury to decide whether plaintiff knew of the danger and had a choice to avoid it by riding in the cab of the truck.

After charging the jury on the issues of a defective product under the Products Liability Act (PLA), *N.J.S.A. 2A:58C-1* to -11, the judge charged on proximate cause as follows:

Proximate cause means that the design defect was a

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substantial factor which singly or in combination with another cause or causes brought about the accident. It doesn't have to be the only cause. It has to be a substantial factor which singly or in combination with another cause or causes brought about the accident.

Plaintiff need not prove that this same accident could have been anticipated so long as it was foreseeable that some significant harm could result from the design defect. But [if] the defect does not add to the risk of the occurrence of this accident and therefore is not a contributing factor to the happening of the accident, then plaintiff has failed to establish that the design defect was a proximate cause of the accident.

*5 If plaintiff has proven each element I've explained to you, then you must find for the plaintiff. If on the other hand plaintiff has failed to prove any of the elements, then you must find for the defendant. But again, proximate cause means it was a substantial factor in the cause of the accident, singly or in combination with other causes.

After charging the jury on failure to warn, the judge gave a modified version of this proximate-cause instruction.

In addressing LaBrie's affirmative defenses, the judge charged the jury that LaBrie contended that there were several intervening acts that caused the accident: modification of the truck by Frank's to include a spill plate and grab handle and the subsequent failure to reattach the grab handle, Frank's failure to train Denson properly, and Denson's improper operation of the truck with plaintiff riding on the side step. The judge explained:

Now this intervening cause is the act of an independent agency which destroys the causal connection between the defect in the product and the accident. Ultimately this issue of proximate cause, the connection between the two. Remember I told you about that.

To be an intervening cause, the independent act must be the immediate and sole cause of the acci-

dent. In ... that event liability will not be established because the failure to warn and instruct, or for that matter, design defect is not a proximate cause of the injury.

However, the defendant would not be relieved from liability for its failure to ... instruct by the intervention of acts of third persons if those acts were reasonably foreseeable. Where the intervention of third parties is reasonably foreseeable, then there's a substantial causal connection between the product defect and the accident. Again there's two ultimate theories of the product defect here, design defect and failure to warn.

You must determine whether the actions of the plaintiff's employer of performing modifications in the vicinity of the step and the actions of Frank's Sanitation of the driver of the vehicle was an intervening cause that destroyed the causal connection between the failure to warn/design defect and the accident.

In other words you have to find that those intervening causes were the immediate and sole cause of the accident. And that's the flip side of the proximate cause question which plaintiff has the burden of proving to your satisfaction.

The judge then addressed LaBrie's claim that plaintiff "was at fault for the occurrence of the accident because he should not have been standing on the step while the refuse truck was moving." The judge charged the jury that LaBrie contended that "plaintiff himself was negligent," and that his negligence, not a design defect or failure to warn, was a substantial factor which caused his fall. He explained:

To win on this defense, LaBrie Equipment, Ltd. must prove-again they had the burden of proof, that Tommy Johnson voluntarily and reasonably proceeded to encounter a known danger and that Tommy Johnson's actions were a proximate cause of the accident.

*6 The failure of Tommy Johnson to discover inadequate warnings or instructions or to guard against the possibility of inadequate warnings or

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instructions is not a defense. Rather to win on this defense, LaBrie Equipment, Ltd. must prove that Tommy Johnson had actual knowledge of the particular danger presented by the side loading refuse truck and the plaintiff knowingly and voluntarily encountered the risk.

Obviously plaintiff can't be responsible for a design defect as well. But if he knows this is a known danger and in the face of this known danger he proceeds, he could be found negligent. Again this is for you to determine.

The judge again discussed proximate cause and, for the first time during the charge, explained that "a substantial factor" meant "that it was not a remote, trivial or inconsequential cause."

The judge concluded by instructing the jurors that, if they found (1) LaBrie had designed the truck defectively or failed to warn, (2) plaintiff was also negligent, and (3) the actions of both parties were a proximate cause of the accident, then they must apportion the fault between plaintiff and LaBrie; and a comparative negligence charge was given. No exceptions to the charge were taken by plaintiff or LaBrie.

After the charge was completed, the jury deliberated and found that the truck LaBrie had manufactured and sold to plaintiff's employer was defective, but that the design defect was not a proximate cause of plaintiff's accident. The jury also found that LaBrie's failure "to contain any warning for the truck" was unreasonable, but that the absence of a warning was also not a proximate cause of plaintiff's accident. The jury did not address the remaining questions, whether plaintiff "voluntarily and unreasonably proceed[ed] in the face of known danger"; if so, whether his negligence was a proximate cause of the accident, and if so, what percentages of liability should be assigned to LaBrie and plaintiff. On January 30, 2007, an order was entered dismissing the complaint.

In February 2007, plaintiff filed a notice of motion for judgment notwithstanding the verdict or a new trial, alleging error in the jury charge. The judge heard oral argument on March 2, 2007, rendered an oral opinion and denied the motion. An order was entered accordingly on that same date. On April 4,

2007, plaintiff filed a timely notice of appeal from the two orders.

II.

Plaintiff contends that the judge erred in denying his motion for a new trial. First, he asserts that the judge plainly erred in admitting evidence of, and instructing the jury on, his negligence, which should have been disregarded in this workplace setting. Second, he argues that the judge plainly erred in failing to instruct the jury that it could only consider plaintiff's fault if it was the sole proximate cause of the injury. Third, he urges that the jury should have been instructed, during the trial and at the final charge, that LaBrie had the burden to prove that the negligence of Frank's and Denson was the sole intervening cause of the accident and, if LaBrie failed to do so, their negligence was not relevant. Fourth, he contends that the charge was confusing, especially as the judge failed to separate the concepts of sole proximate cause and intervening cause.

*7 *Rule 2:10-2* governs our review of errors and omissions during trial:

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

An error in a jury charge presents a question of law to be decided by us without deference to the trial judge. However, in reviewing the charge to a jury, "[r]eversible error will not be found where the charge, considered as a whole, adequately conveys the law and would not confuse or mislead the jury, even though part, standing alone, might be incorrect." *Feldman v. Lederle Labs.*, 132 N.J. 339, 345, 625 A.2d 1066 (1993) (quoting *Latta v. Caulfield*, 79 N.J. 128, 135, 398 A.2d 91, (1979)); see also *Mogull v. CB Commercial Real Estate*, 162 N.J. 449, 466, 744 A.2d 1186 (2000); *Rendine v. Pantzer*, 276 N.J.Super. 398, 438, 648 A.2d 223 (App.Div.1994), *aff'd*, 141 N.J. 292, 661 A.2d 1202 (1995).

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III.

In a product liability case, contributory negligence at one time was a defense under some circumstances. *Eitin v. Ava Truck Leasing, Inc.*, 53 N.J. 463, 251 A.2d 278 (1969); *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965).

However, the nature of that contributory negligence is sharply circumscribed. Thus, plaintiff's negligence is unavailable as a defense when it consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. See *Restatement (Second) of Torts § 402A*, Comment n (1965)... Comment n further explains that the "form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger ... is a defense...." Thus, generally[,] where a plaintiff with actual knowledge of the danger presented by the defective product knowingly and voluntarily encounters that risk, a trial court should submit the defense of contributory negligence to the jury. See *Cintrone v. Hertz Truck Leasing & Rental Service, supra*, 45 N.J. at 458-459, 212 A.2d 769. As in any contributory negligence context, it is the defendant's burden to prove that the plaintiff's conduct was improper and was a substantial factor in causing his injury.

[*Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 158-59, 406 A.2d 140 (1979) (footnote omitted).]

The Suter Court held that the Comparative Negligence Act, *N.J.S.A. 2A:15-5.1* to *-5.3*, would apply to product liability actions generally. *Id.* at 162-63, 212 A.2d 769. However, the Court expressed the view that "an employee engaged at his assigned task on a plant machine ... has no meaningful choice. Irrespective of the rationale that the employee may have unreasonably and voluntarily encountered a known risk, we hold as a matter of policy that such an employee is not guilty of contributory negligence." *Id.* at 167, 212 A.2d 769.

The imposition of a duty on the manufacturer to make the machine safe to operate whether by installing a guard or, as in *Cepeda*,^[FN5] by making it

inoperable without a guard, means that the law does not accept the employee's ability to take care of him-self as an adequate safeguard of interests which society seeks to protect. The policy justification for *Bexiga*^[FN6] is sound. We see no reason to depart from *Bexiga*'s elimination of contributory negligence where an employee is injured due to a defect (whether design or otherwise) in an industrial accident while using a machine for its intended or foreseeable purposes. The defendant manufacturer should not be permitted to escape from the breach of its duty to an employee while carrying out his assigned task under these circumstances when observance of that duty would have prevented the very accident which occurred.

FN5. Cepeda v. Cumberland Eng'g Co., Inc., 76 N.J. 152, 386 A.2d 816 (1978).

FN6. Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 281 (1972).

*8 [*Id.* at 167-68, 212 A.2d 769 (footnote omitted).]

The Court in *Suter* explained: "It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against." *Id.* at 167, 406 A.2d 140 (quoting *Bexiga, supra*, 60 N.J. at 412, 290 A.2d 281).

LaBrie contended, and the judge found, that *Suter* should not apply to the facts of this case because, unlike factory workers using plant machinery, plaintiff here had a meaningful choice to ride in the cab. We disagree. The record establishes that riding on the step increased the efficiency of collecting recyclables and it was common practice for lifters to ride on the outside of the truck between collection points and only return to the cab of the truck for longer drives. Indeed, LaBrie's manual anticipated that lifters would ride on the side step when it recommended that drivers "should also make sure that the helper is securely positioned on the side step beside the hopper ... firmly holding on to the body."

The judge's reasoning that plaintiff was responsible for his own safety is contrary to the public policy set

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forth in *Suter* that an employee on the job has no meaningful choice to reject the equipment provided and is unable to take care of himself. *Ibid.* The very anomaly identified by *Suter* came to fruition here: LaBrie had a duty to install grab handles or issue a warning but the breach of that duty resulted in no liability for the very injury the duty was meant to prevent when plaintiff fell from the truck because there were no grab handles and no warning.

Plaintiff's choice to ride on the side step was no more negligent or reckless than *Suter's* choice not to turn off the motor before reaching into the machine or to reach into the other side of the machine. See also *Green v. Sterling Extruder Corp.*, 95 N.J. 263, 270-72, 471 A.2d 15 (1984) (defendant manufacturer may not assert contributory fault as a defense to a worker's negligence action, alleging that a machine lacking a protective guard was defective, when worker's hand was crushed while reaching inside the machine to remove an obstruction). Neither may *Suter* and *Green* be distinguished based on the locus of the accident because a garbage truck is a piece of industrial equipment and the workplace includes the public streets. See *Straley v. United States*, 887 F.Supp. 728, 741-42 (D.N.J.1995) ("Allegations that [Straley] acted negligently in that activity, whether by encountering the known risk of the riding step or by improperly directing the garbage truck in reverse, are barred by *N.J.S.A. 2A:58C-3(a)*.").

The PLA, which was enacted in 1987, is consistent with *Suter* and *Green*. The PLA provides a single cause of action for product liability; common-law negligence actions "are subsumed within the new statutory cause of action." *Tirrell v. Navistar Int'l. Inc.*, 248 N.J.Super. 390, 398, 591 A.2d 643 (App.Div.), certif. denied, 126 N.J. 390, 599 A.2d 166 (1991). Under the PLA, a manufacturer or seller of a product is liable if the claimant proves that the product "failed to contain adequate warnings or instructions," or "was designed in a defective manner." *N.J.S.A. 2A:58C-2(b)* and (c).

*9 The PLA allows manufacturers to defend against design defect claims by showing that the products' characteristics are known to the ordinary user and that the unsafe aspect of the product that caused the harm is an inherent characteristic that the ordinary

user would recognize. *N.J.S.A. 2A:58C-3(a)(2)*. However, that statutory section specifically provides that this defense does not apply "to industrial machinery or other equipment used in the workplace and is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product." *Ibid.*

The plaintiff in *Tirrell* was injured at work on the road. He was hit by a tractor-trailer carrying equipment for the installation of a gas line when the trailer backed up without sounding an alarm. 248 N.J.Super. at 394, 591 A.2d 643. We explained that "by the Legislature's use of the term 'workplace injuries' [in *N.J.S.A. 2A:58C-3(a)*], any limitation of the *Suter* principle to a factory setting would now clearly be inappropriate." *Id.* at 401, 591 A.2d 643. We also interpreted Committee Statements to "indicate that the Legislature did not want to change the comparative fault rules of *Suter*." *Ibid.*

In deciding *Tirrell*, we overruled *Colella v. Safway Steel Products*, 201 N.J.Super. 588, 592-93, 493 A.2d 634 (Law Div.1985), where the court held that comparative negligence was a defense to a product-liability claim because the plaintiff had a meaningful choice to use a ladder instead of an allegedly defective scaffold. *Id.* at 401 n. 8, 493 A.2d 634. Here, plaintiff's decision to ride on the side step rather than inside the cab was an analogous workplace choice and not a basis for comparative fault.

Subsequent cases have repeatedly held that workers injured on the job remained protected from the defense of comparative negligence in product liability actions under the PLA. See *Coffman v. Keene Corp.*, 133 N.J. 581, 605, 628 A.2d 710 (1993); *Johansen v. Makita U.S.A.*, 128 N.J. 86, 94, 607 A.2d 637 (1992); *Saldana v. Michael Weinig, Inc.*, 337 N.J.Super. 35, 49, 766 A.2d 304 (App.Div.2001); *Cavanaugh v. Skil Corp.*, 331 N.J.Super. 134, 182, 751 A.2d 564 (App.Div.1999), *aff'd* 164 N.J. 1, 751 A.2d 518 (2000); *Congiusti v. Ingersoll-Rand Co., Inc.*, 306 N.J.Super. 126, 134, 703 A.2d 340 (App.Div.1997); *Fabian v. The Minster Mach. Co.*, 258 N.J.Super. 261, 278, 609 A.2d 487 (App.Div.), certif. denied, 130 N.J. 598, 617 A.2d 1220 (1992); *Ramos v. Silent Hoist and Crane Co.*, 256 N.J.Super. 467, 478, 607

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A.2d 667 (App.Div.1992).

LaBrie argues that any error in the charge on comparative fault was harmless because the jury never reached this issue. We are not persuaded by this argument because evidence of the plaintiff's conduct remained relevant to the question of proximate cause, Johansen, supra, 128 N.J. at 102, 607 A.2d 637, and the jury was not given adequate instructions on proximate cause. The Johansen Court recognized that a jury "could deny plaintiff recovery if it found he was *entirely* responsible for the accident," but could not deny recovery if it found plaintiff and defendant manufacturer of a defective product both partially responsible. *Ibid.* (emphasis added).

*10 The concept of plaintiff's entire responsibility was not adequately conveyed to the jury when the judge twice charged on proximate cause after instructing the jury on design defect and failure to warn. The judge also never defined the term "substantial factor" when he gave these two proximate-cause charges, leaving the jury in the dark as to how to measure "substantiality" in the context of proximate cause.^{FN7} And the judge never communicated that the jury could only deny recovery if plaintiff was entirely at fault. If the plaintiff was not entirely at fault, then any negligence on his part was not to be considered in deciding whether the defective product and the lack of warning was a substantial factor in proximately causing the accident. Crumb v. Black & Decker (U.S., Inc.), 204 N.J.Super. 521, 528-29, 499 A.2d 530 (App.Div.1985) ("[A] plaintiff's conduct will only be considered if it constitutes a voluntary and unreasonable encountering of a known danger."), appeal dismissed, 104 N.J. 432, 517 A.2d 425 (1986). These nuances, too, were never conveyed to the jury.

^{FN7}. The judge did briefly define "substantial factor" at the end of the charge on comparative fault.

The jury thus could have accepted LaBrie's argument that plaintiff, Frank's and Denson were all partially responsible in finding that neither the design defect nor the failure to warn were a proximate cause of plaintiff's fall. These partial findings of fault could not, however, result in a denial of recovery under

Johansen, supra, 128 N.J. at 102, 607 A.2d 637, and Fabian, supra, 258 N.J.Super. at 276, 609 A.2d 487. We are left to wonder whether the jury concluded that plaintiff, Frank's and Denson mostly caused the accident whereas the defective product only caused the accident partially. The error in the charge on plaintiff's comparative negligence was thus not harmless, because it was clearly capable of producing this unjust result. R. 2:10-2.

This brings us to the charge on intervening cause. Plaintiff contends that the acts of his employer and fellow servants do not relieve a manufacturer from liability for injuries caused while using a defective product unless those acts in fact were the sole cause of the accident. He argues that LaBrie was required to prove that the acts of Frank's and Denson "bore a 100 percent causal relationship to the injuries." Plaintiff contends that the charge was not sufficiently specific to make it clear that the actions of Frank's, and Denson as its employee, needed to be found as the only cause of the accident in order to absolve LaBrie.

In *Fabian* we said: "It is not disputed that defendant's duty was not delegable to plaintiff's employer. A manufacturer cannot delegate its duty to provide safety devices or warnings to a down-stream purchaser." 258 N.J.Super. at 275-76, 609 A.2d 487. *Fabian* claimed that the defense attempted to shift responsibility to his employer. Id. at 276, 609 A.2d 487. We determined that this did not occur and commented:

Even if defendant had tried to shift responsibility to the employer and claimed that the employer's conduct was the sole proximate cause of the accident, such an "empty chair defense" is not improper. This defense, actually a claim that the defendant's conduct was not a substantial contributing factor to the accident, merely focuses the jury's attention upon the plaintiff's duty to prove that defendant's conduct or defective product was a proximate cause of the accident.

*11 [Id. at 276-77, 609 A.2d 487 (citation omitted).]

The *Straley* court followed this ruling and, on a pre-trial motion, allowed the defendants to introduce evidence of the driver's negligence "to prove that it was

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the sole proximate cause of Straley's injuries." Straley, supra, 887 F.Supp. at 743. The court emphasized that the jury had to find that the driver's negligence "bears a 100% causal relationship to the injuries"; if it did not, "the issue of supervening causation will be destroyed and [the driver's] negligence will cease to be relevant." *Ibid*.

Here, the judge did charge that the intervening cause had to be the sole cause of the accident, but he did not explain that the jury could not consider the actions of Frank's and Denson for any other purpose if the jury concluded that those actions were only one of the causes of the accident. Like the charge on comparative negligence, the jury might have considered Frank's and Denson's conduct in comparison with that of LaBrie and disregarded the manufacturer's conduct as a proximate cause because it viewed the conduct of Frank's and Denson to be a more immediate cause of the accident. Thus, the charge on intervening cause was also clearly capable of producing an unjust result. R. 2:10-2.

Because plaintiff is entitled to a new trial on the issue of causation, we must determine whether the issues of product defect and failure to warn must also be retried. Previously, we have ordered a new trial on negligence and causation when the issues are so interrelated that they cannot be tried separately. Ahn v. Kim, 281 N.J.Super. 511, 534-35, 658 A.2d 1286 (App.Div.1995), *aff'd*, 145 N.J. 423, 678 A.2d 1073 (1996). The Supreme Court affirmed this conclusion, stating:

That ruling comports with the general rule that issues in negligence cases should be retried together unless the issue unaffected by error is entirely distinct and separable from the other issues. See Beggs v. Pasalano, 14 N.J.Super. 549, 552, 82 A.2d 640 (App.Div.1951); see also Gasoline Products v. Champlin Refining Co., 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931) (articulating comparable federal standard on partial retrials). The ruling comports also with the proposition that negligence and causation generally intertwine. Conklin v. Hanoach Weisman, 145 N.J. 395, 410, 678 A.2d 1060 (1996). Whether issues are sufficiently separable to warrant a partial retrial ultimately depends on the circumstances of each case.

See Ragusa v. Lau, 233 N.J.Super. 84, 90, 558 A.2d 38 (App.Div.1989), *rev'd on other grounds*, 119 N.J. 276, 575 A.2d 8 (1990).

[Ahn, supra, 145 N.J. at 434-35, 678 A.2d 1073.]

Ahn was a medical malpractice case in which the plaintiff alleged that the defendants had failed to manage the risk that the plaintiff's decedent would commit suicide. The Supreme Court found that "the risk that the patient would commit suicide interrelates with the alleged negligence in such matters as the hospital's admission procedures, custodial care, and search." *Id.* at 435, 658 A.2d 1286 (citing Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 136, 576 A.2d 270 (1990) (ordering new trial on product defects, misuse of product, and proximate cause because issues were interrelated)). The Court noted that the jury finding of a deviation from standards of practice did not "indicate whether the deviation related to the staff's duties pertaining to nursing or security." *Ibid*. Absent that basis, "a second jury could not determine whether the deviation caused the patient's death." *Ibid*.

*12 That is not the case here. The defect in the product was the failure to install grab handles and the failure to warn of the danger of riding on the side step without grab handles. These issues are not so interrelated with proximate cause as to require a retrial on all issues.

Reversed and remanded for a new trial on the issue of proximate cause.

N.J.Super.A.D.,2008.
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United States District Court,
D. New Jersey.
Catherine M. LOPIENSKI, Plaintiff,
v.
CENTOCOR, INC. et al., Defendants.
Civil Action No. 07-4519 (FLW).

June 25, 2008.

Franklin P. Solomon, Weitz & Luxenberg, PC,
Cherry Hill, NJ, for Plaintiff.

Anne Murray Patterson, Riker, Danzig, Scherer,
Hyland & Perretti, Esqs., Morristown, NJ, for Defen-
dants.

OPINION

WOLFSON, District Judge.

*1 Presently before the Court is Plaintiff Catherine M. Lopienski's ("Plaintiff") motion to remand her claims against Defendants Centocor, Inc. ("Centocor, Inc."), Johnson & Johnson ("J & J"), Ortho-McNeil Pharmaceutical, Inc. ("OMP"), and Johnson & Johnson Pharmaceutical Research and Development, LLC ("PRD") (collectively, "Defendants") to New Jersey Superior Court. Defendants removed this case to this Court asserting that Plaintiff fraudulently joined J & J, OMP and PRD to prevent removal since one or more defendants would then be New Jersey citizens. For the reasons set for below, Plaintiff's motion is DENIED.^{FN1}

^{FN1}. While the Court received Plaintiff's motion papers and Defendants' opposition papers, Plaintiff has not filed a reply brief.

BACKGROUND

This is a product liability, consumer fraud and ex-

press warranty action in which Plaintiff alleges that she was injured by the prescription medicine Remicade. Remicade is a prescription drug used in the treatment of rheumatoid arthritis, Crohn's disease and other serious medical conditions. Plaintiff, an Ohio resident, alleges that she was prescribed Remicade on August 16, 2004, for the treatment of her rheumatoid arthritis, and that following her use of Remicade, she "suffered physical illness and injury, including but not limited to histoplasmosis and pancytopenia." Compl. at ¶ 24. Plaintiff claims that Centocor, J & J and OMP "designed, created, manufactured, packaged, labeled, distributed, marketed, sold, promoted and/or advertised Remicade, and/or controlled such processes." *Id.* at ¶ 20. Plaintiff further claims that PRD "provided the Global Safety Officer for Remicade and performed drug safety and surveillance functions for the product, including communications with health care providers and consumers concerning reports of adverse events." *Id.* at ¶ 21. Based on these allegations of harm, Plaintiff asserts claims for compensatory and punitive damages pursuant to strict liability, negligence, fraud and consumer fraud law, that are governed by the New Jersey Product Liability Act ("NJPLA"), N.J.S.A. 2A:58-C1, *et seq.*^{FN2}, New Jersey Consumer Fraud Act ("NJCFA"), N.J.S.A. 56:8-1, *et seq.*, and law of express warranty.

^{FN2}. The following counts in Plaintiff Complaint are subsumed by the NJPLA: First Count of Negligence; Second Count of strict liability in tort; Third Count of Products Liability pursuant to the NJPLA; Fourth Count of strict liability for failure to warn; Fifth Count of breach of implied warranty; Seventh Count of Negligent Misrepresentation; Eighth Count of Fraudulent Misrepresentation; Ninth Count of Consumer Fraud pursuant to NJCFA; and Tenth Count of fraud by concealment action in her Complaint are subsumed by the NJPLA. In enacting the NJPLA, the New Jersey Legislature expressly intended to consolidate all products liability claims into one single statutory cause of action. Herman v. Sunshine Chem.

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Specialties, Inc., 133 N.J. 329, 335, 627 A.2d 1081 (1993). As such, the NJPLA subsumes all causes of action for physical injury caused by a product, including negligence claims. Tirrell v. Navistar Int'l Inc., 248 N.J.Super. 390, 398, 591 A.2d 643 (App.Div.), cert. denied, 126 N.J. 390, 599 A.2d 166 (1991); Brown v. Phillip Morris Inc., 228 F.Supp.2d 506, 517 (D.N.J.2002) (the NJPLA subsumes the plaintiffs common law causes of action, including those grounded in fraud); Repola v. Morbark Indus. Inc., 934 F.2d 483, 492 (3d Cir.1991).

There is no dispute that the Pennsylvania-based corporation, Centocor, manufacturers Remicade, and it conducted the regulatory process that led to the approval of the drug by the Federal Food and Drug Administration. There is also no dispute that Centocor's offices and facilities in the United States are located in Pennsylvania. Based on the information provided by Defendants, not disputed by Plaintiff, Centocor developed and obtained approval to market Remicade for the treatment of Crohn's disease before it became a wholly-owned subsidiary of J & J in October 1999. Mr. Schaible Aff. at ¶¶ 3-4. However, Plaintiff asserts in her Complaint that Centocor is not the only entity that manufactures, markets and sells Remicade, and that J & J, PRD and OMP also assist Centocor.

Plaintiff filed her Complaint on August 9, 2007, in the Superior Court of New Jersey, Middlesex County. Centocor was served on August 24, 2007. Defendants timely removed this action from state court on September 20, 2007, based upon the contention that Plaintiff fraudulently named J & J, PRD and OMP to prevent removal since one or more defendants would be New Jersey citizens. See 28 U.S.C. §§ 1441(b) and (c). In turn, Plaintiff filed the instant motion to remand this case to state court.

DISCUSSION

I. Standard of Review

*2 In a removal matter, the defendant seeking to remove bears the burden of showing that federal subject matter jurisdiction exists; that removal was

timely filed; and that the removal was proper. Bover v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir.1990), cert. denied, 498 U.S. 1085, 111 S.Ct. 959, 112 L.Ed.2d 1046 (1991). Removal statutes are to be strictly construed against removal, and all doubts are to be resolved in favor of remand. Shamrock Oil and Gas Corp. v. Sheets, 313 U.S. 100, 104, 61 S.Ct. 868, 85 L.Ed. 1214 (1941); Brown v. Francis, 75 F.3d 860, 865 (3d Cir.1996).

However, removal is not defeated by the naming of defendants, whose presence would prevent remand, where those defendants have been fraudulently or nominally joined in the action. Blackburn v. UPS, Inc., 179 F.3d 81, 90 n. 3 (3d Cir.1999); see also Steel Valley Auth. v. Union Switch and Signal Div., 809 F.2d 1006, 1009 n. 2 & 1010 (3d Cir.1987). Indeed, a civil action in which jurisdiction is based on diversity of citizenship may be removed "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." Blackburn, 179 F.3d at 90 n. 3 (citing 28 U.S.C. § 1441(b)).^{FN3}

FN3. 28 U.S.C. § 1441(b) states: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b).

Joinder is fraudulent "where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment." Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3d Cir.1992) (quoting Bover, 913 F.2d at 111). A party is nominal when there is no possibility the plaintiff can establish a cause of action against him, and the defendant is not indispensable. Michaels v. New Jersey, 955 F.Supp. 315, 319 (D.N.J.1996). The propriety of removal is to be determined based upon the facts as they are al-

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leged in the complaint. *Steel Valley*, 809 F.2d at 1010. If the court determines that the joinder was “fraudulent,” it can “disregard, for jurisdictional purposes, the citizenship of certain [] defendants, assume jurisdiction over a case, dismiss the [] defendants, and thereby retain jurisdiction.” *In re Briscoe*, 448 F.3d 201, 216 (3d Cir.2006) (citing *Maves v. Rapoport*, 198 F.3d 457, 461 (4th Cir.1999) (citation omitted)). If, however, the court determines that it does not have subject-matter jurisdiction over the removed action because the joinder was not fraudulent, it must remand to state court. See 28 U.S.C. § 1447(c). If warranted, the court’s “order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” *Id.*; *In re Briscoe*, 448 F.2d at 216.

II. Plaintiff's Claims under the NJPLA and the NJCFA

J & J, OMP, and PRD must be *Remicade's* “manufacturer[s] or seller[s],” to be considered proper defendants under the NJPLA. N.J.S.A. 2A:58-C-3; see also *Brown v. Monmouth County Sheriff's Dep't of Corr.*, No. 02-5591, 2005 U.S. Dist. LEXIS 36433, at *7 (D.N.J. Dec. 22, 2005) (“The NJPLA applies to only product sellers and manufacturers”).

*3 The NJPLA defines “manufacturers” as (1) any person who designs, formulates, produces, creates, makes, packages, labels or constructs any product or component of a product; (2) a product seller with respect to a given product to the extent the product seller designs, formulates, produces, creates, makes, packages, labels or constructs the product before its sale; (3) any product seller not described in paragraph (2) which holds itself out as a manufacturer to the user of the product; or (4) a United States domestic sales subsidiary of a foreign manufacturer if the foreign manufacturer has a controlling interest in the domestic sales subsidiary.

Id. at 7-8 (citing N.J.S.A. 2A:58C-2). The NJPLA defines “product sellers” to include:

any person who, in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, in-

attention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce.

Brown, 2005 U.S. Dist. LEXIS 36433, at *8 (citing N.J.S.A. 2A:58C-2).

Similarly, under the NJCFA, in order to properly join J & J, OMP and PRD as defendants, Plaintiff must have alleged that these entities are “persons” within the definition of NJCFA, and that they engaged in an unlawful practice to use an “unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact ... in connection with the sale or advertisement of any merchandise.” N.J.S.A. 56:8-1(d). “Person” is defined to include any natural person, partnership, corporation, or company. *Id.* “Sale” is defined to include “any sale rental, or distribution, offer for sale, rental or distribution or attempt directly or indirectly to sell rent, or distribute.” N.J.S.A. 56:8-1(e). “Merchandise” is defined as “any object, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale.” N.J.S.A. 56:8-1(c).

Plaintiff has not cited to any authority to show that, generally, liability under the NJCFA extends to parent companies.^{FN4} Nevertheless, although the NJCFA does not expressly address this, from the definitions under the statutes set forth above, since any “person” is liable under the NJCFA who made the “sale” of the “merchandise,” it follows logically that these defendants would also be subjected to liability under the NJPLA as a “manufacturer” or “seller” of the product. Accordingly, for the purposes of analyzing the pertinent issues in the motion before the Court, the determination of whether defendants J & J, OMP, and PRD are necessary defendants under the NJPLA and NJCFA involves the same legal analysis. Now, the Court will turn to each of the defendant entities.

^{FN4} Defendants, in their opposition brief, raise the issue that Plaintiff is attempting to pierce the corporate veil and hold J & J liable as a parent company. However, after reviewing the Complaint, Plaintiff does not

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explicitly allege such theory, nor does she argue such theory in her motion. Accordingly, the Court need not address the issue.

A. Johnson & Johnson

*4 Plaintiff alleges several nexuses of interaction between defendant J & J and Centocor to establish the propriety of naming J & J as a defendant. *See Steel Valley*, 809 F.2d at 1010 (“Ruling on whether an action should be remanded to the state court from which it was removed, the district court must focus on the plaintiffs’ complaint at the time the petition for removal was filed”) (citation omitted). Specifically, Plaintiff alleges that J & J owns Centocor as a wholly owned subsidiary; creates standards, policies, and procedures for Centocor; lists sales under pharmaceuticals in general; files 10-Q with the SEC regarding revenues generated from Remicade; funnels employees from J & J to Centocor; and provides documentation preservation practices for Centocor’s legal department.

Even taking these allegations as true, the Court finds these nexuses between J & J and Centocor insufficient to establish that J & J is either a “seller” or “manufacturer” of Remicade. Clearly, under these allegations, J & J does not design, formulate, produce, create, make, package, or label or construct Remicade. Indeed, Plaintiff’s allegations of interactions between J & J and Centocor are no more than a strained attempt at linking the two entities and do not substantiate any colorable claim against J & J under the NJPLA or NJCFA. Therefore, J & J is disregarded as a defendant for the purpose of the Court’s jurisdictional analysis. *See Steel Valley*, 809 F.2d at 1010 (“nominal or fraudulently joined parties may be disregarded”).

B. Ortho-McNeil Pharmaceutical, Inc.

Plaintiff alleges one specific nexus between defendant OMP and Centocor to support her naming OMP as a defendant. Plaintiff alleges that OMP co-promoted Remicade, and co-sponsored clinical studies of the drug’s safety and efficacy with Centocor prior to 2000, four years before Plaintiff was prescribed Remicade. Like the allegations pertaining to J & J, OMP did not design, research, develop, formu-

late, manufacture, package, distribute or sell Remicade. Accordingly, the Court finds that this alleged nexus between OMP and Centocor does not show that OMP is either a “seller” or “manufacturer” of Remicade, and therefore, OMP is not a proper defendant under the NJPLA or NJCFA.

C. Johnson & Johnson Pharmaceutical Research and Development, LLC

Plaintiff alleges the following nexuses between defendant PRD and Centocor to establish the propriety of naming both as defendants: PRD performed drug safety and surveillance (DSS) functions for Centocor; predecessor of PRD, Janssen, commissioned post-marketing studies of adverse events associated with Remicade, which assessed Remicade for the purpose of modifying labels; and PRD initiated post-marketing surveillance studies.

The Court finds that these nexuses between PRD and Centocor also fail to establish that PRD is either a “seller” or “manufacturer” of Remicade. Taking these allegations as true, at most, PRD merely conducted certain studies in order for Centocor to carry out its decision with respect to labeling and post-marketing strategies. Plaintiff has not alleged any facts that demonstrate that PRD assisted Centocor in any manufacturing functions or selling the product. Accordingly, such conduct, as alleged, is nominal in nature. As such, PRD is not a proper defendant under the NJPLA or NJCFA.

II. Express Warranty

*5 Plaintiff also asserts a cause of action against J & J, OMP, and PRD based on breach of an express warranty.

The New Jersey UCC defines “express warranties” as: (a) 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. (b) 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. (c) Any sample or

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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.

Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 171 F.3d 818, 824 (3d Cir.1999) (quoting N.J.S.A. § 12A:2-313(1)). Analogous to the analysis of whether J & J, OMP, and/or PRD constitute “sellers” within the meaning of the NJPLA and NJCFA, they similarly do not meet the definition of “sellers” under the New Jersey UCC. See N.J.S.A § 12A:2-103 (1)(d) (“‘Seller’ means a person who sells or contracts to sell goods”). As such, the Court finds that J & J, OMP, and PRD cannot be held liable to Plaintiff on an express warranty theory.

III. Attorney's Fees and Costs

Because the Court finds that J & J, PRD and OMP are not necessary defendants in this case and that remand is not warranted, the Court denies Plaintiff's request for attorney's fees and costs. See Mints v. Educational Testing Service, 99 F.3d 1253, 1258 (3d Cir.1996); see also In re Briscoe, 448 F.23d at 216.

CONCLUSION

For the reasons set forth above, Plaintiff's motion is denied without prejudice. Based upon the pleadings, J & J, PRD and OMP are either nominal defendants or fraudulently joined, and as such, they are not proper defendants in this case, and they are dismissed. As a result, the only defendant is Centocor, a Pennsylvania incorporation, who is diverse from Plaintiff, and may properly remove this case to this Court. However, should discovery reveal that any one of the New Jersey defendants assisted Centocor, or played a significant role, in manufacturing or selling Remicade, Plaintiff may move the Court to amend her Complaint, and accordingly, move for remand.

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United States District Court, D. New Jersey.
Frank MARINO, Plaintiff,
v.
ADAMAR OF JERSEY, INC., Defendant.
Civil No. 05-4528 (RMB).
Dkt. No. 49.

Feb. 4, 2009.

West KeySummary

Estoppel 156  68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

A former employee was judicially estopped from bringing a disability claim. The employee stated that he could perform his job duties when he brought a claim that his termination was discriminatory, but had also testified that he was unable to perform his job duties on the day he was terminated when he applied for social security benefits. His argument that he was able to work in the beginning of the day, but became totally disabled later in the day was not a sufficient explanation for the inconsistent statements. Age Discrimination in Employment Act of 1967, § 2, 29 U.S.C.A. § 621; Americans with Disabilities Act of 1990, § 2, 42 U.S.C.A. § 12101.

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Eileen O. Muskett, Russell L. Lichtenstein, Cooper Levenson April Niedelman Wagenheim & Levenson, Atlantic City, NJ, for Defendant.

OPINION

RENÉE MARIE BUMB, District Judge.

*1 This matter comes before the Court upon a motion by Defendant, Adamar of New Jersey, Inc., d/b/a Tropicana Casino and Resort ("Defendant" or "Tropicana"), for summary judgment in the above-captioned matter. For the reasons set forth below, Tropicana's motion for summary judgment will be denied.

Factual and Procedural Background ^{FN1}:

FN1. The facts are derived from the Defendant's statement of material facts section of its brief, and Plaintiff's counter-statements of facts contained in his brief. The Court notes for the record that Local Rule 56.1 provides that "[o]n motions for summary judgment, each side shall furnish a statement which sets forth material facts as to which there exists or does not exist a genuine issue." Facts in a submitted statement of material facts which are not contested are deemed admitted. See Hill v. Algor, 85 F.Supp.2d 391, 408 n. 6 (D.N.J.2000).

Plaintiff Frank Marino ("Plaintiff" or "Marino") was employed by Tropicana from November 2, 1981, to September 17, 2003. At the time of his termination, Plaintiff worked as a Floorperson in Tropicana's Table Games Department, consisting of Boxpersons and Floorpersons. Tropicana alleges that because it faced mounting financial challenges and difficulties, it had to reduce its force in the Games Department. Tropicana determined that it could reduce payroll without impacting operations by reducing Boxpersons by six, and Floorpersons by four. Tropicana also determined that one pit boss could be eliminated because of changes on grave shift. (Tropicana Memorandum (Def.Motion, Ex. C) at 1). Plaintiff was part of that reduction in force.

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Tropicana alleges that the individuals selected for layoff were determined by the application of a formula weighing four different criteria: management performance review; time and attendance; total disciplinary action notices; and the individual's last annual evaluation. Points and percentages were assigned and a spreadsheet was prepared with a total score for each individual. The lowest scoring individuals in each position were then selected for lay off. (*Id.*) Plaintiff was the fourth lowest Floorperson and, thus, he was terminated on September 13, 2003.

Plaintiff, who was diagnosed with Hepatitis C in 1991 and had taken medical leaves for complications associated with his medical condition, argues that Defendant intentionally used a formula that would target older and disabled workers for termination. By using a formula that relied heavily on time and attendance, Plaintiff argues, Defendant succeeded in terminating employees who used more sick time because of disabilities or advanced age.

On September 16, 2005, Plaintiff filed his Complaint in this Court alleging that Defendant discriminated against him because of his (1) age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., and (2) disability in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"). Plaintiff also brought related state claims pursuant to the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1, et seq. ("NJLAD").^{FN2}

^{FN2} On August 27, 2008, Plaintiff voluntarily dismissed his claims arising under the Family Medical Leave Act, 29 U.S.C. § 2601 et seq., as well as his claim of retaliation based upon his May 1998 complaint of discrimination. [*See* Dkt. No. 48].

Prior to filing his Complaint in this Court, however, Plaintiff had applied for social security disability benefits with the Social Security Administration ("SSA"). On March 21, 2006, the SSA determined that Plaintiff was disabled as of September 17, 2003.

Defendant filed this motion for summary judgment on August 28, 2008 [Dkt. Nos. 47, 49]; Plaintiff filed an opposition on October 6, 2008 [Dkt. Nos. 57, 58];

and Defendant filed a reply on October 14, 2008 [Dkt. No. 60].^{FN3} The Court held oral argument on October 29, 2008. Thereafter, upon direction of the Court, Plaintiff filed a supplemental brief on November 14, 2008 [Dkt. No. 72] and Defendant filed a response on November 23, 2008 [Dkt. No. 73].

^{FN3} Both Defendant and Plaintiff filed exhibits in support of their papers without any declaration as to their authenticity, as required by Fed.R.Civ.P. 56(e)(1). *See, e.g., Federal Procedure, Lawyers Edition § 62:662 (Sept.2008)* ("Fed.R.Civ.P. 56(e)(1) requires that ... exhibits and documents, like affidavits, must satisfy the requirement that they be made on personal knowledge, sworn, certified, and show affirmatively the creator's competence to offer evidence. *Documents or exhibits should therefore be authenticated by affidavit or by some other means of certification.*") (emphasis added).

Standard for Summary Judgment:

*2 Summary judgment is appropriate when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."^{FN4} Fed.R.Civ.P. 56(c). In deciding whether there is a disputed issue of material fact, the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party; in other words, "the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.' " Hunt v. Cromartie, 526 U.S. 541, 552, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."^{FN5} Liberty Lobby, 477 U.S. at 250; Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 329-30 (3d Cir.1995) (citation omitted).

^{FN4} A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *See*

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Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is “material” only if it might affect the outcome of the suit under the applicable rule of law. *See id.* Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *See id.*

FN5. The moving party always bears the initial burden of showing that no genuine issue of material fact exists, regardless of which party ultimately would have the burden of persuasion at trial. *See Celotex Corp. v. Citrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hugh v. Butler County Family YMCA*, 418 F.3d 265, 267 (3d Cir.2005).

A. Disability Discrimination

The Court turns, first, to Plaintiff's claims of disability discrimination. To establish a prima facie case of discrimination under the ADA and NJLAD, a plaintiff must show:

“(1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) he has suffered an otherwise adverse employment decision as a result of discrimination.”

Taylor v. Phoenixville School Dist., 184 F.3d 296, 306 (quoting Gaul v. Lucent Technologies, Inc., 134 F.3d 576, 580 (3d Cir.1998)).^{FN6} The parties do not dispute that Plaintiff has satisfied the first and third factors; thus, the issue in this case centers on the second factor—that is, whether Plaintiff was otherwise qualified to perform the essential functions of the job. In examining this issue, the Court must first determine whether Plaintiff should be judicially estopped from claiming he was qualified to work on September 17, 2003 because of his prior statements to the SSA that he was disabled as of September 17, 2003.

FN6. The Court notes that both parties inaccurately stated that Plaintiff must also satisfy a fourth factor to set forth a prima facie case

under the ADA—a comparative element. (*See* Def. Motion at 10 (stating that Plaintiff must show that “he was replaced by someone of equal or less qualifications and of a non-protected class ...”); Pl. Opp. at 6 (stating that Plaintiff must show that “non-disabled individuals were retained by Defendant after the alleged reduction-in-force”). As stated in *Taylor* and *Gaul*, for purposes of an ADA claim, such comparative element is not part of the prima facie showing Plaintiff must make.

The procedural history is as follows. On September 30, 2004, about one year after his termination from Tropicana, Plaintiff applied for social security disability insurance benefits from the SSA. (*See* Application for Disability Insurance Benefits (“SSA Application”) (Pl.Aff., Ex. A); *see also* Pl. Aff. ¶ 8). In his application, Plaintiff affirmed, *under penalty of perjury*, that he “became unable to work because of [his] disabling condition on September 17, 2003.” (SSA Application at PAGE 1). Sometime in April 2005, the SSA denied Plaintiff's application. (Pl.Aff.¶ 13). Plaintiff then filed this federal lawsuit on September 16, 2005, alleging, *inter alia*, disability discrimination. [Dkt. No. 1]. Less than two months later, on November 11, 2005, Plaintiff appealed the SSA's denial of benefits. (*See* Disability Report-Appeal (Pl.Opp., Ex. I); Pl. Aff. ¶ 13). At no time during his appeal did Plaintiff alter his prior sworn statement to the SSA relating to his September 17, 2003 alleged onset of disability. On March 21, 2006, the SSA determined that “[b]ased on the application for a Period of Disability and Disability Insurance Benefits filed on September 30, 2004, the claimant is ‘disabled’ under sections 216(I) and 223(d) beginning on September 17, 2003, (*i.e.*, the alleged onset date).” (SSA Order, dated March 21, 2006 (Def.Motion, Ex. G) at 8 (emphasis added)).

*3 As reflected throughout the SSA Order, the administrative law judge (“ALJ”) made the disability determination based upon an alleged onset date of September 17, 2003. First, the ALJ described Plaintiff's medical condition prior to September 2003:

The record reflects that the claimant has a history of chronic back pain status post several surgeries,

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diverticulitis, hepatitis C since 1976 (diagnosed in 1991), cirrhosis with steatosis, esophageal varices, intermittent encephalopathy, thrombocytopenia, migraine headaches and hypertension. In October 2000, an MRI of the lumbar spine showed status post discectomies (sic) and fusions [], laminectomies [], postoperative changes [], spinal stenosis [], and disc protrusion []. In July 2003, Kenneth S. Schwab, M.D., the claimant's treating gastroenterologist and liver specialist, referred him for orthotopic liver transplant evaluation.

(SSA Order at 4). The ALJ then examined the Plaintiff's subsequent medical history. (*Id.* at 4-6). After considering all of this medical evidence, the ALJ found that Plaintiff was under a disability beginning on September 17, 2003, the alleged onset date. As a result of the SSA decision, Plaintiff was awarded benefits by the SSA, and the calculation of his benefits was derived using the September 17, 2003 date.^{FN7}

FN7. Although the ALJ ruled that Plaintiff's onset date of disability was September 17, 2003, the Social Security Act provides that an individual who is awarded benefits is only entitled to such benefits beginning in the first month after a "waiting period" of five months since the established onset date. 42 U.S.C. § 423(c) (2) (defining waiting period as "the earliest period of five consecutive calendar months throughout which the individual with respect to whom such application is filed has been under a disability"). Thus, Plaintiff's waiting period would have expired on March 17, 2004, five months after his onset date, and he would be entitled to benefits beginning in April 2004.

Given the SSA's determination that Plaintiff was disabled as of September 17, 2003, the question now is whether Plaintiff should be judicially estopped from arguing that he was *not* disabled on September 17, 2003, the day his employment was terminated. " 'Judicial estoppel' is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that he or she has previously asserted in the same or previous proceeding." Lincoln v. Momen-

tum Systems, Ltd., 86 F.Supp.2d 421, 427 (D.N.J.2000) (internal quotation omitted). In essence, it is a rule designed to prevent a litigant from playing "fast and loose" with the Court. "Summary judgment is appropriate when operation of judicial estoppel renders a litigant unable to state a prima facie case." Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 779 (3d Cir.2001).

During oral argument in this matter, the Court addressed the issue of judicial estoppel that had been raised by the Defendant. Specifically, the Court expressed its concerns that the Plaintiff had previously represented under oath to the SSA, for purposes of receiving disability benefits, that he was fully disabled as of September 17, 2003, yet now he appears to claim, for purposes of his disability discrimination lawsuit, that he was not disabled on September 17, 2003. Indeed, the record shows that Plaintiff acknowledged as much in his deposition testimony:

Q: ... Mr. Marino, you just testified under oath that you were able to perform your job as of the time of your termination. But you swore to the Social Security Administration, did you not, that as of September 17th, 2003, that you were disabled and unable to perform the functions of your job; isn't that correct?

*4 A: That's correct.

(Pl. Dep. Part II (Pl.Opp., Ex. L), 61:4-11)).

As the law requires, the Court gave Plaintiff an opportunity to provide an explanation for this apparent contradiction. See Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 806, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999) ("a plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case—at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, *she must proffer a sufficient explanation.*") (emphasis added).

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In response to the Court's queries, on November 14, 2008, Plaintiff filed an affidavit and supplemental brief in which he proffered his explanation for the inconsistency as to his disability onset date. In this submission, Plaintiff makes two points. First, he argues that the termination occurred at the time the termination decision was made by management, not at the time he was informed of the decision. Because the decision was made *prior* to September 17, 2003, as evidenced by internal corporate documents revealing discussions and the like ^{FN8}, Plaintiff contends he was not disabled at the time he was terminated. Second, Plaintiff argues that "it was the termination that he believes caused his condition to worsen, rendering him unable to work." (Pl. Supp. Br. at 8). In Plaintiff's words, the termination "sucked the life out of me, I was crushed" and "it was the events of that day that caused me to become unable to work." (Pl. Aff. ¶¶ 7, 10).

^{FN8}. Plaintiff relies upon the deposition testimony of Dawn Clayton, who testified that Plaintiff was terminated only after a severance package was prepared and a date was set to inform Plaintiff of his termination. (See Pl. Opp., Ex. M).

To overcome summary judgment, Plaintiff's "explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier [SSA application] statement, the plaintiff could nonetheless 'perform the essential functions' of [his] job, with or without 'reasonable accommodation.'" Cleveland, 526 U.S. at 807.

Plaintiff's first argument is not legally sound. While it is true that "[t]he determination of whether an individual with a disability is qualified is made at the time of the employment decision[.]" Gaul, 134 F.3d at 580, the law is clear that the "employment decision" occurs at the time that the decision was made and communicated to the employee. Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). "An employer establishes its official position when it decides, unconditionally, to terminate an individual's employment and provides the employee with notice of the unconditional decision to terminate his ... employment." Bailey v.

United Airlines, 279 F.3d 194, 199 (3d Cir.2002) (citing to Delaware State College) (emphasis added). Any other rule would wreak havoc in attempting to ascertain with certainty when the final employment decision was made. ^{FN9}

^{FN9}. The cases Plaintiff relies on are inapplicable here, as they stand for the rule that the determination of whether a disabled person is qualified is made at the time of the decision, *not at the time of the lawsuit*. (See Pl. Supp. Br. at 4). This Court's decision is not inconsistent with this rule; rather, it clarifies that the "employment decision" is deemed to occur when it is *communicated to the employee*.

*5 Plaintiff's second argument requires a more in-depth analysis. In his affidavit, Plaintiff offers the following explanation:

[b]ecause of the nature of my disease, it is impossible to pinpoint an exact date on which I suddenly "became unable to work." However, the SSA required that my wife and I choose a date as part of the application. At the point when I applied, it had been over a year after my termination and I had not worked at all during that time. I was not sure how to determine on what date I became unable to work. I knew that I had been able to work for many years while suffering from Hepatitis C. I knew that I was able to work before I was terminated, and was even able to work the morning of September 17, 2003. It was only after my termination that my condition and depression worsened to the point that I became unable to work. Forced to choose, *I picked the date that I was told I was terminated because I believed, and continue to believe, that it was the events of that day that caused me to become unable to work*. It seemed like a fair date to pick because it was the last day that I had worked and prior to that date, I was able to work (and I have never stated otherwise).

(Pl. Aff. ¶ 10) (emphasis added). The Court interprets Plaintiff's argument to be that he was not unable to work the morning of September 17, 2003, but that Tropicana's discharge of him caused him to become depressed and unable to work later on that same day.

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This explanation stretches the Court's imagination. Plaintiff's medical condition, Hepatitis C, is a gradually deteriorating disease, as Plaintiff himself stated. Yet the explanation he proffers requires the existence of a sudden change in his ability to work. Were this a case in which Plaintiff suffered a sudden physical injury as a result of a severe car accident, for example, in the middle of the day, his explanation would be reasonable. But that is not the case. Here, to find Plaintiff's explanation for the contradiction in his statements to the SSA and this Court to be sufficient, a jury would have to believe that Plaintiff suffered a sudden onset of depression due to his termination and that such depression was so physically devastating as to render him suddenly unable to work. Plaintiff has offered no evidence to support this theory beyond his own allegations and no reasonable jury could find this explanation sufficient.

Moreover, nowhere in his SSA application did Plaintiff state that he suffered from a sudden debilitating depression immediately upon his termination which caused him to become unable to work. The only mention of depression in any of Plaintiff's SSA papers in the record is found in the SSA Order, which notes that in March of 2005 (one and a half years after his termination and six months after his SSA application was submitted), Dr. Lewis Lazarus diagnosed Plaintiff with "adjustment disorder with depressed mood, chronic" after Plaintiff reported that he had been "struggling to perform his job responsibilities and was laid off work probably because of poor attendance." (SSA Order at 4-5).

*6 This situation is analogous to the one presented in Detz v. Greiner Indus., Inc., 346 F.3d 109 (3d Cir.2003). In that case, the plaintiff, who had been terminated from his employment, submitted an SSA application claiming that he was unable to work as of his termination date due to his disability. Id. at 119. His application was denied twice, but eventually he "convinced the [SSA] agency, using statements of doctors to fortify his initial assertions, that as of [his termination date], his condition was severe enough to prevent him from performing any work." Id. He was awarded benefits retroactively based on the finding that he had become disabled on his termination date, as he had alleged in his application. Subsequently,

the plaintiff filed a federal discrimination lawsuit alleging violations of, *inter alia*, the ADEA. In support of his age discrimination claim, the plaintiff argued that "it was not his physical limitations, but rather the fact that [the defendant] laid him off, that rendered him 'unable to work' as of [his termination date]." Id. at 119. Specifically, he asserted that he was disabled after his termination because "he was no longer allowed to continue performing *that* job, and he would not be able to find another job similarly tailored to his physical limitations." Id. at 114.

The District Court rejected the plaintiff's explanation, Detz v. Greiner Indus., Inc., 224 F.Supp.2d 905 (E.D.Pa.2002), and the Third Circuit affirmed, finding the plaintiff's two assertions "patently inconsistent" and his proffered explanation insufficient to reconcile them. Detz, 346 F.3d at 120. As the Third Circuit explained, "the fatal flaw in this attempt by [plaintiff] to explain some consistency in his positions is that it ignores the statements he made repeatedly to the SSA regarding his disability." Id. at 120. Specifically, the record showed that, "nowhere on the SSDI paperwork did [plaintiff] note that he remained physically able to continue doing that job, or that it was his discharge that rendered him 'disabled.' Instead, he unambiguously indicated that his disability prevented him from working at all." Id. at 119. As the Court explained,

[h]ad [plaintiff's] SSA application indicated that, while he could still perform [the particular job he had], his disability prevented him from obtaining most other jobs, we might view his later claim to be reconciled with his earlier assertions. But [plaintiff] indicated nothing of the sort when he described how his disability affected his work. Instead, [plaintiff] appears to have manipulated the facts and perhaps the system, to obtain SSDI benefits. He succeeded in convincing the agency to award benefits based on his first assertion, and his inability to adequately reconcile the patently inconsistent positions dooms his ability to pursue his ADEA claim.

Id. at 120-21. Consequently, the plaintiff was judicially estopped from pursuing his discrimination claim.

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*7 In this case, the record shows that Plaintiff said nothing to the SSA about his termination causing a sudden onset of depression which rendered him unable to work. It is only now, in his pursuit of a discrimination lawsuit, that Plaintiff presents this reason for his disability. The Court is troubled by this after-the-fact explanation and cannot permit Plaintiff to play both sides-i.e., benefitting from the SSA based on his original statement and now benefitting from the Tropicana based on his current statement. Just as the plaintiff in *Detz* was estopped from asserting a new theory of disability for purposes of his lawsuit, Plaintiff here should also be estopped from espousing a new theory of disability, a theory which, the Court notes, is incredible in itself.^{FN10}

FN10. Were the Court to allow Plaintiff to proceed in his discrimination claim based on his proffered and unsupported explanation, any SSA claimant could succeed in obtaining both SSA benefits and discrimination damages by making the same post hoc *argument*-i.e., that his/her termination caused him/her to become depressed and, thus, unable to work. This Court refuses to condone such double-dealing.

To the extent Plaintiff intended to argue that he selected his termination date as the onset date for lack of a better alternative, such argument does not carry the day. The Court recognizes the inherent difficulty in pinpointing a precise date when his slowly degenerative disease reached the point that he became "unable to work." See, e.g., SSR 83-20, 1983-1991 Soc. Sec. Rep. Serv. 49, 1983 WL 31249 (stating that "with slowly progressive impairments, it is sometimes impossible to obtain medical evidence establishing the precise date an impairment became disabling"). However, as one Court of Appeals noted, "*Cleveland* does not stand for the proposition that [claimants] should be allowed to explain why they gave false statements on their SSDI applications ..." *Johnson v. Exxonmobil Corp.*, 426 F.3d 887, 892 (7th Cir.2005); see also *Opsteen v. Keller Structures, Inc.*, 408 F.3d 390, 392 (7th Cir.2005) (stating that "contradictions are unacceptable; a person who applied for disability benefits must live with the factual representations made to obtain them, and if these show inability to do the job then an ADA claim may be

rejected without further inquiry") (emphasis added). Additionally, there is no evidence that Plaintiff made any effort to correct his statement or clarify his onset date in the SSA's records.

Similarly, the Court is unpersuaded by Plaintiff's attempt to blame the SSA for the alleged onset date. In his affidavit, Marino states that the "SSA apparently recorded September 17, 2003 as the date upon which I 'became unable to work.'" (Marino Aff. ¶ 9). All reasonable inferences suggest that the SSA relied upon information provided by Plaintiff. Even if the SSA somehow relied on this date in error, Marino admits that he received a copy of this record shortly after he applied yet he never disabused the SSA of this sworn statement. Indeed, Plaintiff remained silent as to any changes despite the fact that the "receipt of claim" portion of his SSA application explicitly directed him to review his application and correct any errors within ten days: "Review your application to ensure we recorded your statements correctly.... If you disagree with any of your statements, you should contact us within 10 days after the date of this notice to let us know." (SSA Application at PAGE 4). The claim receipt also advised him that "if there is some other change that may affect your claim, you ... should report the change." (*Id.*). Moreover, even when Plaintiff filed this lawsuit on September 16, 2005, alleging that he was *not* disabled on September 17, 2003, he still never informed the SSA of the change in facts in spite of the obvious inconsistency in his theories. Instead, he continued to pursue his earlier SSA claim by filing an appeal less than two months later, thereby perpetuating the contradiction.

*8 In conclusion, the doctrine of judicial estoppel focuses not on Plaintiff's medical condition in fact but, rather, on Plaintiff's conduct. Here, Plaintiff's actions and documents demonstrate that Plaintiff wanted the SSA to believe that he had been disabled since September 17, 2003. Ultimately his benefits were calculated based on this onset date. Yet now he insists that he was able to work on that date. The Court finds that Plaintiff cannot be simultaneously unable to perform his job due to his disability (as represented to the SSA for purposes of collecting benefits) and at the same time able to perform the essential functions of his job (as represented to the Court for purposes of proving disability discrimina-

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tion). Plaintiff's argument that he was able to work in the beginning of the day, but he became totally disabled later in the day due to depression from his termination is unavailing. Given the implausibility of Plaintiff's explanation and the sheer lack of any evidence to support it, this Court holds that no reasonable juror could find this explanation sufficient to reconcile Plaintiff's inconsistent statements. Accordingly, Plaintiff is judicially estopped from bringing his disability claims under the ADA and NJLAD.^{FN11}

^{FN11}. In support of his position, Plaintiff relies upon Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999). However, the facts in that case are easily distinguishable from those in the present case. In Cleveland, the ADA plaintiff explained that although she was deemed "disabled" for purposes of her disability benefits claim, she could still perform her job with reasonable accommodation, which was necessary to prove her discrimination claim. The present case does not involve the issue of reasonable accommodation.

B. Age Discrimination

With regard to his ADEA claim, in order to set forth a prima facie case of discrimination, Plaintiff must show that he (1) is a member of the protected class, *i.e.*, at least 40 years of age, 29 U.S.C. § 631(a), (2) is qualified for the position, (3) suffered an adverse employment decision, and (4) in the case of a demotion or discharge, was replaced by a sufficiently younger person to create an inference of age discrimination. Simpson v. Kay Jewelers Division of Sterling, Inc., 142 F.3d 639, 644, n. 5 (3d Cir.1998); *see also* Monaco v. American General Assurance Co., 359 F.3d 296, 299 (3d Cir.2004). In the case of a reduction in force, "the plaintiff must show, as part of the fourth element, that the employer retained someone similarly situated to him who was sufficiently younger." Anderson v. Consolidated Rail Corp., 297 F.3d 242, 250 (3d Cir.2002).

There is no dispute here that Plaintiff satisfies the first and third prongs. Marino was over 40 at the time he was terminated and the decision to terminate his

employment constituted an adverse action.

The parties do dispute the second prong-whether Plaintiff was qualified. Defendant presses its argument that Plaintiff should also be judicially estopped from showing that he was qualified in the age discrimination context because of his prior statement of disability to the SSA. Plaintiff disagrees, arguing that the term "qualified" refers to something different, such as a level of experience and qualifications, which, he argues, he possessed.

The Court agrees with Defendant's argument. As the Third Circuit has explained,

[w]hile Cleveland only specifically addressed a conflict between SSDI and ADA claims, the analysis is not limited in its application to cases involving those particular statutory and administrative schemes... [A] prima facie showing under the ADEA that conflicts with earlier statements made to the SSA is subject to the same analysis, as the reasoning of the Court in Cleveland also applies in the context of the ADEA.

*9 Detz, 346 F.3d at 117. Accordingly, for the same reasons Plaintiff is judicially estopped from pursuing his ADA claim, Plaintiff is also judicially estopped from pursuing his ADEA claim.

Conclusion:

For the reasons discussed above, Plaintiff is judicially estopped from pursuing his discrimination claims under the ADA, NJLAD and ADEA. Defendant is entitled to summary judgment. An accompanying order shall issue this date.

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Only the Westlaw citation is currently available. NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
Hadis NAFAR, on behalf of herself and all others
similarly situated, Plaintiff,
v.
HOLLYWOOD TANNING SYSTEMS, INC., De-
fendant.
Civil Action No. 06-CV-3826 (DMC).

April 10, 2007.

Barry Benjamin Cepelewicz, Meiselman, Denlea,
Packman, Carton & Eberz, PC, White Plains, NY, for
Plaintiff.

Stephen M. Orlofsky, David A. Dorey, Kit Applegate,
Blank, Rome, LLP, Cherry Hill, NJ, for Defen-
dant.

OPINION

DENNIS M. CAVANAUGH, U.S. District Judge.

*1 This matter comes before the Court upon motion by Defendant Hollywood Tanning Systems, Inc. ("Defendant") for partial judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. No oral argument was heard pursuant to Fed.R.Civ.P. 78. After carefully considering the submissions of the parties and for the following reasons, Defendant's motion for partial judgment on the pleadings is **denied**.

I. BACKGROUND

Hadis Nafar ("Plaintiff") purchased monthly tanning memberships from Defendant in Middlesex County, New Jersey. Nafar began purchasing monthly memberships in April 2005, and continued through March 2006. Plaintiff then instituted this suit against Holly-

wood Tans alleging: (1) violation of the New Jersey Consumer Fraud Act, (2) fraud, (3) unjust enrichment, and (4) breach of warranty; and (5) requesting injunctive relief.

Nafar alleges that Hollywood Tans fraudulently omitted the fact that *any* exposure to ultraviolet rays (UV rays) increases the risk of cancer. Plaintiff emphasizes that "excessive exposure" to UV rays is not necessary for harm to occur and that *any* exposure can suffice. Plaintiff goes on to allege that Hollywood Tans made affirmative misrepresentations through its website. Among these alleged misrepresentations are claims that exposure to UV rays may help with acne, customers will "look terrific," and UV rays may help those suffering from psoriasis, body weight issues, stress, and seasonal affective disorder. Nafar contends that Hollywood Tans distorts these "benefits" and deceptively fails to warn consumers about the dangers of indoor tanning. Defendant's website states that its tanning system "block[s] out most of the UVB rays allowing your skin to maintain natural exfoliation [which] helps high pressure tanners to stay tan longer." While Plaintiff acknowledges that Hollywood Tans' machines may block out most UVB rays, she contends that Defendant fails to inform consumers that UVA rays, also emitted by its machines, are linked to skin cancer.

Plaintiff further alleges in her Complaint that both UVA and UVB exposure destroys cell DNA, a precursor to cancer. In addition to direct DNA damage, Plaintiff asserts that ultraviolet light produces activated oxygen molecules that also damage DNA, as well as creating localized immunosuppression that blocks the body's natural anti-cancer defenses. Plaintiff emphasizes that *prior to purchasing* her memberships, Defendant did not inform her about the cancer risks or other health risks attendant with UV tanning. Plaintiff also asserts that she did not receive warnings before her sessions, and she did not sign any consents or waivers acknowledging that she was informed about the health risks of indoor tanning. Nafar disclaims any remedy for personal injuries suffered, but proceeds on her fraud-based causes of action, which

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provide remedies in treble damages, injunctive relief, punitive damages, attorney's fees, and costs of suit.

*2 Hollywood Tans notes that its tanning machines are regulated by the FDA and are required by FDA regulations to carry a label providing:

- (1) recommended exposure positions;
- (2) directions for achieving the recommended exposure positions and a warning that the use of other positions may result in overexposure;
- (3) a recommended exposure schedule including duration and spacing of sequential exposures and maximum exposure times in minutes; and
- (4) a statement of the time it may take before the expected results appear.

21 C.F.R. § 1040.20(d)(1)(ii)-(v).

Each machine also carries the following warning, as required by FDA regulations:

DANGER-Ultraviolet radiation. Follow instructions. As with natural sunlight, overexposure can cause eye and skin injury and allergic reactions. Repeated exposure may cause premature aging of skin and skin cancer. WEAR PROTECTIVE EYEWEAR; FAILURE TO DO SO MAY RESULT IN SEVERE BURNS OR LONG-TERM INJURY TO EYES. Medications or cosmetics may increase your sensitivity to the ultraviolet radiation. Consult physician before using sunlamp if you have a history of skin problems or believe yourself especially sensitive to sunlight. If you do not tan in the sun, you are unlikely to tan from use of this product.

21 C.F.R § 1040.20(d)(1)(i).

It is undisputed that Defendant has posted these warnings on its tanning machines in compliance with the FDA regulations.

Hollywood Tans' Motion for Partial Judgment on the Pleadings seeks judgment as to each of Plaintiff's

claims that rely on a failure to warn theory, namely claims (1) violation of the New Jersey Consumer Fraud Act, (2) fraud, (3) unjust enrichment, and (5) Plaintiff's request for injunctive relief.

II. STANDARD OF REVIEW FOR 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS

Defendant files this motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. While it is generally true that a Rule 12(c) motion for judgment on the pleadings is treated similarly to a motion to dismiss under Rule 12(b)(6), there are significant differences between a Rule 12(c) motion for judgment on the pleadings and a Rule 12(b)(6) motion to dismiss for failure to state a claim.

First, a Rule 12(c) motion is brought after the close of the pleadings, while a Rule 12(b)(6) motion is brought before the close of the pleadings. Syncsort, Inc. v. Sequential Software, Inc., 50 F.Supp.2d 318, 324 (D.N.J.1999). Second, "a Rule 12(b)(6) motion to dismiss is directed solely towards the procedural defects or the statement of the Plaintiff's claim for relief and does not seek to determine the substantive merits of the controversy." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1369 (3d ed.2004).

Thus, whereas a Rule 12(b)(6) motion tests whether a plaintiff's pleading, viewed alone, states a claim, a Rule 12(c) motion moves for judgment on those claims, as pleaded. In this respect, the standard for decision the Court employs mirrors the summary judgment standard.

III. DISCUSSION

A. Whether Plaintiff's Consumer Fraud Claims are Subsumed by the NJPLA

*3 Hollywood Tans contends that this is a "product liability action" governed by the New Jersey Products Liability Act ("NJPLA"). N.J.S.A. § 2A:58C-1(b)(3). Defendant interprets Plaintiff's Complaint as alleging damage to her DNA. This DNA damage

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increases her risk of cancer, which requires that the Defendant properly warn consumers of the risks involved. Hollywood Tans asserts that Plaintiff cannot pursue a consumer fraud theory, attorneys' fees, or other theories on a failure to warn basis because the NJPLA is the sole remedy for products liability actions.

Defendant asserts that a "failure to warn" may constitute a "product defect," which is within the realm of products liability rather than consumer fraud. See Becker v. Baron Bros., 138 N.J. 145, 151-52 (1994). ("A failure to warn, or a failure to warn properly, can constitute a defect in a product sufficient to support an action in strict liability.").

New Jersey codified its products liability law in the NJPLA. N.J.S.A. § 2A:58C-1 *et seq.* The NJPLA defines a "product liability action" as "any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty." N.J.S.A. § 2A:58C-1(b)(3). Within the NJPLA's purview are claims based on harm caused by a failure "to contain adequate warnings or instructions...." N.J.S.A. § 2A:58C-2.

In order for the NJPLA to apply, Plaintiff must have suffered a "harm" as articulated in the statute. The harm contemplated by the NJPLA is limited to:

- (a) physical damage to property, other than to the product itself;
- (b) personal physical illness, injury, or death;
- (c) pain and suffering, mental anguish or emotional harm; and
- (d) loss of consortium or services or other loss deriving from any type of harm described in subparagraphs (a) through (c) of this paragraph.

N.J.S.A. § 2A:58C-1(b)(2).

Hollywood Tans argues that the DNA damage suffered by the Plaintiff, which could lead to cancer, constitutes "harm" under the NJPLA.

Defendant believes that Plaintiff is attempting to avoid the NJPLA by disclaiming recovery for personal injuries and couching her harm as "economic"-monetary harm suffered by the Plaintiff in the form of membership fees that she would not have paid but for Defendant's alleged fraudulent omissions. Despite this "economic" harm, Defendant emphasizes that the harm was "caused by a product," necessitating the NJPLA's exclusive application.

The NJPLA was enacted by the New Jersey Legislature to limit the expansion of products liability law, and is thus, "the sole method to prosecute a product liability action." Tirrell v. Navistar Int'l. Inc., 248 N.J.Super. 390, 398 (App.Div.1991). The Defendant cites Repola v. Morbark Industries, Inc., 934 F.2d 483 (3d Cir.1991), in which the Third Circuit dismissed a failure to warn claim based on negligence because it was subsumed by the NJPLA. Additionally, in Brown v. Phillip Morris, Inc., 228 F.Supp.2d 506 (D.N.J.2002), the court dismissed the plaintiff's intentional fraud claims because the fraud claims were also subsumed by the NJPLA.

*4 If the Consumer Fraud Act ("CFA") claims cannot go forward and are subsumed by the NJPLA, Defendant will no longer face consumer fraud-based treble damages and counsel fees. Additionally, under the NJPLA:

In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if. (2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended....

N.J.S.A. § 2A:58C-3(a)(2).

Also, "[i]f the warning or instruction given in connection with a drug or device or food or food additive

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has been approved or prescribed by the ... [FDA], a rebuttable presumption shall arise that the warning or instruction is adequate." N.J.S.A. § 2A:58C-4. Thus, if the NJPLA applies, Hollywood Tans will be able to take advantage of both statutory defenses.

Rather than claiming personal injury damages for "harm caused by a product," Nafar seeks to recover for economic harm that she suffered from purchasing Defendant's services without being warned of the dangers associated with indoor tanning. Additionally, Plaintiff asserts that Defendant only challenges Plaintiff's claims that are based on Hollywood Tan's failure to warn. Therefore, the Complaint has not been challenged as to claims based on affirmative misrepresentation, particularly Claim 4, breach of warranty.

Plaintiff argues that the NJPLA does not apply to this case because the economic harm Nafar suffered is not contemplated within the NJPLA's definition of "harm." In support of this proposition, Plaintiff cites to Repola, 934 F.2d at 492 (3d Cir.1991), where the Third Circuit explained that the NJPLA is the sole remedy for "claims falling within its purview." Therefore, the NJPLA's scope is limited by its own definitions of "product liability action" and "harm." *Id.* Although Hollywood Tans argues that Nafar suffered personal injury "harm" as contemplated by the NJPLA, Plaintiff asserts that she has not suffered any personal injury harm. Rather, she claims economic harm as a result of purchasing monthly tanning memberships that she would not have purchased but for Hollywood Tans' deceptive business practices.

In support of her claim that the NJPLA is only limited to the statute's definition of "harm," Nafar cites Knoster v. Ford Motor Co., 2006 U.S.App. LEXIS 22869 (3d Cir. Sept. 6, 2006). In *Knoster*, the plaintiff brought a consumer fraud claim after a car accident, but sought damages for the car itself. The defendant argued that the NJPLA subsumed the consumer fraud claim. However, the Third Circuit held that the damage claim for the car itself was not the type of harm contemplated by the NJPLA; therefore, the consumer fraud claim was allowed to proceed.

*5 Additionally, Plaintiff argues that the NJPLA applies to suits arising from "products," while this suit is based on Hollywood Tans' deception regarding its

"services." Plaintiff relies on Universal Underwriters Ins. Group v. Public Serv. Elec. & Gas Co., 103 F.Supp.2d 744, 748 (D.N.J.2000), for the proposition that "when an injury does not result from a defective product, but rather from a service, the NJPLA is inapplicable."

In refutation of Defendant's case analysis, Plaintiff points out that both Repola, 934 F.2d 483 and Brown, 228 F.Supp.2d 506, are inapposite because they deal with "harm" as it is defined in the NJPLA. Plaintiff also claims that Defendant's reliance on Estate of White v. R.J. Reynolds Tobacco Co., 109 F.Supp.2d 424, 431-32 (D.Md.2000) is misplaced. That court relied on the Restatement (Second) of Torts and the consumer expectations test in assessing a strict liability claim. Here, however, Nafar is not asserting a strict liability claim, so the consumer expectation test does not apply. If the court finds that the NJPLA applies in this case, Plaintiff seeks leave to file an amended complaint to assert claims under that statute.

Nafar alleges that Hollywood Tans misrepresented the benefits of indoor tanning and failed to disclose the harmful effects of its services. Plaintiff further alleges that she suffered a monetary loss because but for these misrepresentations and omissions, she would not have purchased Hollywood Tans' services. These allegations are enough to support a claim under the CFA.

Hollywood Tans argues that Nafar's claim is subsumed by the NJPLA. For Hollywood Tans to succeed on this defense the court would have to construe a deliberate omission of material fact as a "failure to warn." However, there are qualitative differences between a failure to warn in a products liability action and a fraudulent omission of material fact. Here, Nafar is not claiming harm for any physical injuries she may have suffered from the use of Defendant's tanning machines, as would be appropriate in a products liability action. Instead, she is claiming monetary harm because Defendant failed to inform her of the ill effects of indoor tanning, and had she been informed of those ill effects, she would not have purchased Defendant's services. If Hollywood Tans can construe economic harm resulting from the omission of a material fact as equivalent to a "failure to warn," this

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would render the Consumer Fraud Act inapplicable in nearly any situation where fraud is contingent on material omissions, as opposed to material misrepresentations.

B. Whether the Risks Associated with UV Exposure are of Such Common Knowledge that Plaintiff Cannot Prevail on a “Knowing Omission” Under the New Jersey Consumer Fraud Act

Defendant believes that Plaintiff's consumer fraud claim is based on a “knowing omission,” specifically that Hollywood Tans failed to warn consumers of the cancer risks associated with its tanning machines. The New Jersey CFA provides that:

*6 The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression or omission, of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice....

N.J.S.A. § 56:8-2.

However, Defendant contends that the CFA only prohibits conduct that would mislead the “average consumer.” See Dabush v. Mercedes-Benz USA, LLC, 378 N.J.Super. 105, 115 (App.Div.2005) (explaining that “[i]o constitute consumer fraud ... the business practice must be ‘misleading’ and stand outside the norm of reasonable business practice in that it will victimize the average consumer....”).

Hollywood Tans argues that it is a question of law whether its “omission” constitutes consumer fraud because it must be decided whether Hollywood Tans had a duty to disclose in the first place, and “[d]uty is a question of law.” See Judge v. Blackfin Yacht Corp., 357 N.J.Super. 418, 426 (App.Div.2003). In support of its argument, Defendant cites Strawn v. Camuso, 140 N.J. 43 (1995), where the New Jersey

Supreme Court held that a builder-developer had a duty to disclose to prospective buyers the homes' close proximity to an abandoned hazardous waste site. The Strawn court emphasized that the builder-developer was liable for physical conditions “known to it and unknown and not readily observable by the buyer....” *Id.* at 65. Therefore, Hollywood Tans asserts that “knowing omission” liability under the CFA arises only if the seller knows of some material fact that is unknown or not readily observable to the buyer. See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 623 N.Y.S.2d 529, 533 (N.Y.1995) (reasoning that the New York Consumer Fraud Act does not require businesses to “guarantee that each consumer has all relevant information,” but businesses may be liable “where the business alone possesses material information that is relevant to the consumer and fails to provide this information.”); Beaudreau v. Larry Hill Pontiac, 160 S.W.3d 874, 881 (Ten.Ct.App.2004) (dismissing the plaintiff's claim because “a reasonable customer should be aware that a for-profit retailer, in arranging financing for a consumer, would expect to receive some sort of remuneration for its efforts.”).

Defendant first argues that whether a duty exists is a question of law. See Petrillo v. Goldberg, 139 N.J. 472, 479 (1995) (determining that “the existence of a duty is a question of law for the court.”). Defendant contends that Plaintiff's interpretation of Oswego Laborer's Local, 623 N.Y.S.2d 529 (N.Y.1995), is improper. Plaintiff used that case to establish that the court could not rule on the parties' knowledge as a matter of law. Defendant emphasizes that the court does not have to determine the Plaintiff's subjective knowledge of the harms associated with indoor tanning. Rather, the CFA applies an objective test, and Hollywood Tans argues that the court can determine, based on the facts alleged by Plaintiff and by taking judicial notice of the articles cited by Defendant, whether the risk of cancer was of common knowledge to the average consumer.

*7 Defendant argues that Plaintiff's attempt to distinguish Beaudreau, 160 S.W.3d 874, is unavailing. In Beaudreau, the court ruled as a matter of law that there was no duty to disclose and no consumer fraud. Plaintiff claims there was an imputation of knowledge in that case which is not present in this case.

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The imputation was based on a Federal Reserve Ruling stating that there was no necessity to disclose the dealer reserve. Defendant asserts that Plaintiff must now concede that she has imputed knowledge of the FDA's 1985 regulation warning that tanning machines may cause cancer.

Defendant believes that Plaintiff misinterprets the knowledge requirement for CFA actions. In citing Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir.1990), a products liability case, Plaintiff noted that the issue whether consumers know of the dangers of cigarettes is a fact issue for the jury. However, Defendant explains that Cipollone was a products liability action and not a consumer fraud action. Defendant argues that the issue of "knowledge" in a products liability action goes to the causation requirement, a fact issue. However, in a consumer fraud action, "knowledge" goes to the question of duty, a legal determination made by the court. See Strawn, 140 N.J. 43.

Defendant explains that the risks associated with excessive exposure to UV light are commonly known, similar to the way in which the risks of excessive consumption of McDonalds' food is commonly known. Hollywood Tans notes that in Pelman v. McDonald's Corp., 237 F.Supp.2d 512 (S.D.N.Y.2003), the court dismissed the plaintiffs' "deceptive omission" consumer fraud claims because "one necessary element of any potentially viable claim must be that McDonalds' products involve a danger that is not within the common knowledge of consumers." Id. at 518. Defendant also cites a number of tobacco-related cases that support its contention. See, e.g., American Tobacco Co., Inc. v. Grinnell, 951 S.W.2d 420, 429 (Tex.1997) ("We conclude that the general health dangers attributable to cigarettes were commonly known as a matter of law when [plaintiff] began smoking.").

In sum, Defendant argues that the dangers of excessive UV-based tanning are common knowledge, and thus, there is no duty to disclose this information under the CFA. Since there is no duty to disclose, Defendant contends that there can be no "knowing omission" liability, and Plaintiff's CFA claim should be dismissed. Defendant concludes by addressing Plaintiff's claims that there is no such thing as a "safe

tan," emphasizing that there is currently a debate regarding the harms and benefits of indoor tanning, and the scientific evidence is inconclusive.

Plaintiff argues that the issue, whether the effects of "excessive" exposure is common knowledge, has no bearing on this case. First, Nafar emphasizes that *any* exposure to UV rays is harmful; exposure need not be "excessive." Second, Nafar points out that even Hollywood Tans is under the impression that the dangers of tanning are minimal and that there are an abundance of therapeutic benefits to sunless tanning. Plaintiff emphasizes that the ill effects of *any* exposure to UV rays is *not* common knowledge because even Hollywood Tans fails to recognize that *any* exposure is harmful. Because the effects of exposure to UV rays are not common knowledge, and because the average consumer would consider such information material to their decision to purchase such services, Defendant is required to provide these facts to consumers in order to avoid a fraud action.

*8 This Court cannot, at the pleading stage and before discovery, determine as a matter of law "what the average consumer knows or should know." Plaintiff notes that judgment on the pleadings is only proper where the material facts are not in dispute, and in this case, the average consumer's knowledge of the harmful effects of indoor tanning is a disputed issue.

A Rule 12(c) motion is governed by the same standard as a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, which includes a prohibition against considering evidence beyond the pleadings. See Mele v. Federal Reserve Bank of New York, 359 F.3d 251, 257 (3d Cir.2004).

In Cipollone, 893 F.2d 54, the Third Circuit held that whether the dangerous characteristics of cigarettes are known to the average consumer is an issue of fact for the jury. Nafar goes on to contend that the "common knowledge" test should not be read into the CFA. The purpose of the CFA is to prevent fraud or deception by acts of commission or omission. See Fenwick v. Kay American Jeep, Inc., 72 N.J. 372, 376-77 (1999). Plaintiff argues that reading the common knowledge test into the CFA would be in contravention of the statute, emphasizing that the CFA is remedial and should be liberally construed to

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protect consumers.

Under the CFA, the "omission, of any material fact with intent that others rely upon such concealment ..." is unlawful. N.J.S.A. § 56:8-2. Hollywood Tans argues that it is only required to disclose information if it has a "duty to disclose," and the recognition of a legal duty is a question of law. In doing so, Hollywood Tans conflates a "duty to disclose" with the issue of materiality.

For Plaintiff to succeed on her CFA claim, she has the burden of demonstrating that the ill effects of tanning are "material facts," facts that would be important to a consumer's decision whether or not to purchase Defendant's product. It is the materiality of those facts, the ill effects of tanning, which is at issue. The ill effects of tanning would not be material if the average consumer knows about these ill effects, and this information *would be material* if the average consumer does not know about the ill effects. Determining the materiality of a misrepresentation or omission is a question of fact, not a question of law.

Because both parties dispute the very existence of any ill effects related to tanning, this is an issue to be resolved at trial. At this pleading stage, all disputed issues of material fact are resolved in favor of the non-moving party.

IV. CONCLUSION

For the reasons stated, it is the finding of this Court that Defendant's motion for partial judgment on the pleadings is **denied**. An appropriate Order accompanies this Opinion.

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CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga
County.

Kostia PARJANOS, et al. Plaintiffs-Appellants

v.

BRUEGGER'S BAGEL BAKERY, et al. Defen-
dants-Appellees
No. 84664.

Jan. 13, 2005.

Background: Restaurant customer sued restaurant and its food supplier for injuries allegedly sustained when she bit into a "bone-like substance" in a sausage, egg, and cheese bagel sandwich. The Court of Common Pleas, Cuyahoga County, Case No. CV-503509, entered summary judgment in favor of restaurant and supplier. Customer appealed.

Holding: The Court of Appeals, Cooney, J., held that customer should reasonably have anticipated and guarded against the presence of a pig's bone in a sausage, egg, and cheese bagel sandwich.

Affirmed.

[1] Judgment 228 ↪ 185.1(3)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and
Execution of

228k185.1(3) k. Personal Knowledge or
Belief of Affiant. Most Cited Cases

Judgment 228 ↪ 185.1(6)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and
Execution of

228k185.1(6) k. Execution of Affidavit.
Most Cited Cases

Judgment 228 ↪ 185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Par-
ticular Cases

228k185.3(21) k. Torts. Most Cited
Cases

Affidavit attached to summary judgment motion filed by restaurant and its food supplier was admissible in action brought by customer for injuries allegedly sustained when she bit into a "bone-like substance" in a sausage, egg, and cheese bagel sandwich; affidavit was properly signed, sworn, and notarized, and statements regarding testing of substance that customer surrendered to restaurant were based upon affiant's personal knowledge and set forth facts sufficient to sustain burden of restaurant and supplier in going forward on motion. Rules Civ.Proc., Rule 56.

[2] Food 178 ↪ 25.11(3)

178 Food

178k25 Liability for Injuries

178k25.11 Spoilage, Contamination and For-
eign Objects

178k25.11(3) k. Meat, Fish and Poultry.

Most Cited Cases

Restaurant customer should reasonably have anticipated and guarded against the presence of a pig's bone in a sausage, egg, and cheese bagel sandwich, precluding customer's recovery against restaurant and its food supplier for injuries allegedly sustained when customer bit into bone; like "melted conglomeration" sandwich, a chicken gordita sandwich, pot pie, beef stew, or a cherry pie, a sausage, egg, and cheese bagel sandwich, by its very nature, obscured the ingre-

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dients therein.

Civil appeal from Common Pleas Court, Case No. CV-503509, Affirmed. Harold L. Levey, Cleveland, Ohio, for Plaintiffs-Appellants: (Kostia and Peter Parianos).

James E. Burns, Pamela N. Hultin, McCarthy, Lebit, Crystal & Liffman Co., Cleveland, Ohio, for Defendants-Appellees: (Bruegger's Bagel Bakery).

JOURNAL ENTRY and OPINION

COONEY, J.

*1 {¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Plaintiffs-appellants, Kostia and Peter Parianos (the "Parianos"), appeal the trial court's decision granting summary judgment in favor of defendants-appellees, Bruegger's Bagel Bakery ("Bruegger's") and Hormel Foods (collectively referred to as "appellees"). Finding no merit to the appeal, we affirm.

{¶ 3} In August 2002, Kostia Parianos purchased a sausage, egg, and cheese bagel sandwich from Bruegger's. While eating the sandwich, she bit into a "bone-like substance," which allegedly caused injury to her teeth and mouth.

{¶ 4} In the complaint, Kostia Parianos alleged that the appellees impliedly warranted that the sandwich was wholesome and fit for consumption and that they were negligent in the preparation of the sandwich and its contents. Peter Parianos also set forth a claim for loss of consortium. The trial court granted summary judgment for the appellees. The Parianos appeal, raising one assignment of error.

{¶ 5} Appellate review of summary judgment is de novo. Grafton v. Ohio Edison Co., 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; Zemcik v. La Pine Truck Sales & Equipment (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court set forth the appropriate test in Zivich v. Mentor Soccer Club, 82 Ohio St.3d 367, 369-370,

1998-Ohio-389, 696 N.E.2d 201, as follows:

"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. Horton v. Harwick Chem. Corp., 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Dresher v. Burt, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264."

{¶ 6} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); Mootispaw v. Eckstein, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. Murphy v. Reynoldsburg, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

[1] {¶ 7} The Parianos claim that summary judgment was improperly granted because the affidavit attached to the appellees' motion was inadmissible. They argue that the affidavit contained no averment that the object examined was the same as that provided by the Parianos which was found in the sandwich. We disagree.

*2 {¶ 8} A Civ.R. 56 affidavit is a "written declaration under oath, made without notice to the adverse party." R.C. 2319.02; Murin v. Jeep Eagle Corp (June 16, 2000), Lucas App. No. L-99-1346. Here, the affidavit of Bruce Fanta ("Fanta") was properly signed, sworn, and notarized. Fanta stated the following in his affidavit:

"In August 2002, I examined a piece of white material sent to Hormel Foods by the insurance company of Bruegger's Bagels in Ohio. I received the object

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from Hormel's Consumer Response Department. According to the information given to me, the material was found by a Bruegger's customer named Parianos who claimed to have found the material in a sausage patty."

{¶ 9} Fanta's affidavit, to be admissible, does not need to contain a specific averment that the object examined was the same as that discovered in the sandwich by the Parianoses. The affidavit is based upon his personal knowledge and it sets forth facts sufficient to sustain the appellees' burden under Civ.R. 56. Further, contrary to the Parianoses' assertion, a clear reading of the affidavit indicates that the substance examined by Fanta was the same material they surrendered to Bruegger's. Moreover, if the Parianoses believed that the object submitted for testing was not the object they surrendered to Bruegger's, the Parianoses bore the burden to refute Fanta's assertion. Civ.R. 56(E); *Mootispaw*, supra.

{¶ 10} The Parianoses also claim that the affidavit did not constitute sufficient evidence to establish that the material analyzed was a pig's bone, a natural substance found in a sausage patty.

{¶ 11} Fanta's affidavit stated that he examined and chemically tested the material. He stated that his visual observations of the material were consistent with that of bone and that the chemical tests confirmed the material was bone. We find that these statements sustain the appellees' burden under Civ.R. 56. Again, if the Parianoses believed that the bone was not natural to a sausage patty, the burden shifted to them to demonstrate that a genuine issue of material fact existed that the material was not a pig's bone. Civ.R. 56(E); *Mootispaw*, supra.

[2] {¶ 12} The Parianoses further allege that the trial court erred in granting summary judgment because a customer could not have reasonably guarded against the presence of a pig's bone in a "melted conglomeration" sandwich. They claim that a "conglomerate" sandwich is exempt from the well-accepted reasoning that a customer has the duty to protect herself from natural substances in food. However, the Parianoses fail to cite any authority in support of this argument.

{¶ 13} Moreover, this court has rejected this argu-

ment in Rivolo v. Homovich, 149 Ohio App.3d 701, 2002-Ohio-5852, 778 N.E.2d 661. In that case, this court found that a consumer should reasonably anticipate the natural occurrence of chicken bone fragments when the chicken in a gordita sandwich was "concealed in a manner similar to chicken that is contained in pot pie or a traditional sandwich." Id. at 703, 778 N.E.2d 661.

*3 {¶ 14} In reaching this conclusion, this court relied on the Ohio Supreme Court's decision of Allen v. Grafton (1960), 170 Ohio St. 249, 164 N.E.2d 167, where the court held that:

"[B]ones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones. * * * Certainly no liability would attach to a restaurant keeper for the serving of T-bone steak, or a beef stew, which contained a bone natural to a type of meat served, or if a fish dish should contain a fish bone, or if a cherry pie should contain a cherry stone * * *." Allen, supra at 253-254, 164 N.E.2d 167, quoting, Mix v. Ingersoll Candy Co. (1936), 6 Cal.2d 674, 59 P.2d 144 (It is a "matter of common knowledge [that] chicken pies occasionally contain chicken bones.")^{FN1}

^{FN1}. While we recognize that the *Mix* holding was modified by Mexicali Rose v. Superior Court (1992), 1 Cal.4th 617, 4 Cal.Rptr.2d 145, 822 P.2d 1292, the Ohio Supreme Court previously adopted such modification by implementing the reasonable anticipation analysis in *Allen*, supra. See Mexicali, supra at 625, 4 Cal.Rptr.2d 145, 822 P.2d 1292, discussing the holding of *Allen*, supra.

{¶ 15} In the instant case, Kostia Parianos bit into a sausage, egg, and cheese bagel sandwich. The sausage contained a bone which was natural to its type. Thus, she should reasonably have anticipated and guarded against the presence of such a bone in her sandwich. We find that there is no difference between a "melted conglomeration" sandwich, a chicken gordita sandwich, pot pie, beef stew, or a cherry pie, because these foods, by their very nature, obscure the

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ingredients therein. Therefore, the trial court did not err in granting the appellees' motion for summary judgment.

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{¶ 16} Accordingly, the sole assignment of error is overruled.^{FN2}

FN2. Having determined that Kostia Parianos has no cognizable claim against appellees, we find that Peter Parianos' claim for loss of consortium is also barred. See Bowen v. KilKare, Inc. (1992), 63 Ohio St.3d 84, 585 N.E.2d 384.

Judgment affirmed.

It is ordered that appellees recover of appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, P.J. and JAMES J. SWEENEY, J. concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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Parianos v. Bruegger's Bagel Bakery
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 FOR PUBLICATION

United States District Court,
 D. New Jersey.
 RLR INVESTMENTS, LLC, Plaintiff,
 v.
 TOWN OF KEARNY, Alberto G. Santos, Mayor,
 Council of the Town of Kearny, Planning Board of
 the Town of Kearny, Kearny-Harrison, LLC, Defen-
 dants.
 Civil Action No. 07-cv-3648 (DMC).

June 29, 2009.

Frank E. Ferruggia, Laura Leacy Kyler, Mc Carter
 and English, Newark, NJ, for Plaintiff.

Gregory J. Castano, Jr., Castant Quigley, West Cald-
 well, NJ, Richard L. Rudin, Weiner Lesniak, LLP,
 Parsippany, NJ, for Defendants.

OPINION

DENNIS M. CAVANAUGH, District Judge.

*1 This matter comes before the Court upon motion by Defendants the Town of Kearny ("the Town"), Mayor Alberto G. Santos ("Santos"), the Council of the Town of Kearny ("Town Council") and the Planning Board of the Town of Kearny ("Planning Board") (collectively "Kearny Defendants") to dismiss Plaintiff RLR Investments, LLC's ("Plaintiff") Complaint pursuant to FED. R. CIV. P. 12(b)(1) and (6); and upon motion by Defendant Kearny-Harrison, LLC ("Kearny-Harrison") ^{FN1} to dismiss Plaintiff's Complaint, pursuant to FED. R. CIV. P. 12(b)(1) and (6). After carefully considering the submissions of the parties, and based upon the following, it is the finding of this Court that Defendants' motions to dismiss are granted.

FN1. The Town, Santos, Town Council,

Planning Board and Kearny-Harrison will collectively be "Defendants."

I. BACKGROUND

In September 2006, Plaintiff brought suit against the same Defendants named in the instant action, alleging violations of the Public Use Clause of the United States Constitution and the New Jersey Constitution, a violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution, arbitrary and capricious conduct by Defendants and a violation of the New Jersey Eminent Domain Act. This Court dismissed Plaintiff's first Complaint. *See RLR Invs., LLC v. Town of Kearny*, No. 06-4257, 2007 U.S. Dist. LEXIS 44703 (D.N.J. June 18, 2007).

On August 3, 2007, Plaintiff filed a seven count Complaint with this Court. The Complaint was filed on the heels of the Town's second notice of intent letter seeking permission to execute pre-condemnation investigations and studies. In the August 3, 2007, Complaint, Plaintiff challenged the implementation and effect of New Jersey's eminent domain statutes. Specifically, Plaintiff brought the following claims: (1) a facial and as-applied constitutional challenge to N.J.S.A. 40A:12A-8h (Count I); (2) a facial and as-applied constitutional challenge to N.J.S.A. 20:3-16 (Count II); (3) a violation of the Public Use Clause of the United States Constitution and the New Jersey Constitution (Count III); (4) a challenge to Defendants' "authority to condemn" (Count IV); (5) a violation of the Blighted Areas Clause of the New Jersey Constitution (Count V); (6) arbitrary and capricious redevelopment actions (Count VI); and a violation of the New Jersey Eminent Domain Act (Count VII).

Plaintiff is the landowner of property located at 50 Harrison Avenue, Kearny, New Jersey and a real estate holding affiliate of R+L Carriers, Inc. ("R+L"). Plaintiff operates a "less than truckload" ("LTL") business.^{FN2} Plaintiff claims that the Kearny property at issue is central to its entire northeast LTL opera-

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tion because nearly all freight that originates in the Northeast must first pass through the Kearny terminal. Between January 11, 2000, and the filing of the first lawsuit in September 2006, Defendants adopted and effectuated multiple redevelopment resolutions and ordinances for the possible implementation of a development plan that would require the future acquisition of Plaintiff's property. On September 8, 2006, the same day Plaintiff filed its first lawsuit, the Town sent a notice of intent, pursuant to N.J.S.A. 20:3-16 and N.J.S.A. 40A:12A-8h, seeking Plaintiff's permission to conduct preliminary investigations of the property. Litigation delayed this preliminary entry and following the dismissal of the first lawsuit, the Town sent a second notice of intent letter on July 10, 2007. Similar to the first notice of intent, the second letter sought Plaintiff's permission to enter the property and conduct preliminary investigations, including wetland delineation, geotechnical investigations, environmental investigations, surveys, and civil engineering investigations. Defendants sought to commence this preliminary entry on August 6, 2007. On August 3, 2007, Plaintiff sent a letter denying permission. Plaintiff alleges that the preliminary entry, permitted under New Jersey's Eminent Domain Act and Local Redevelopment and Housing Law, is "invasive" and "substantially interfere[s]" with its "use and enjoyment of the property."

FN2. The LTL industry serves the "needs of businesses and individuals that do not require a full-truck load movement of their goods." LTL carriers pick up shipments from customers and brings these shipments to a centralized city. Prior to reaching the centralized city, LTL carriers sort, load and combine freight onto outbound trucks at regional "hub" terminals. For example, freight destined for Texas from Massachusetts, would first go to a "hub" (in this instance Kearny) to be combined with other freight destined for Texas from other areas within the region. Then, once the freight is at full capacity, trucks are sent to the centralized city for local delivery.

*2 By Opinion and Order dated June 25, 2008, this Court granted Defendants' motions to dismiss the Complaint. Six days before the June 25, 2008, Opin-

ion and Order, Plaintiff filed an Amended Complaint providing essentially one new factual contention. Specifically, that the preliminary entry of Plaintiff's property for environmental investigations had taken place. This entry took place pursuant to a January 3, 2008, Court Order of the Superior Court of New Jersey, Law Division. By Order dated August 12, 2008, this Court vacated its June 25, 2008, Opinion and Order to allow the Court to consider Plaintiff's Amended Complaint.

In its August 17, 2007, Amended Complaint Plaintiff brought the following claims: (1) a facial and as-applied constitutional challenge to N.J.S.A. 40A:12A-8h (Count I); (2) a facial and as-applied constitutional challenge to N.J.S.A. 20:3-16 (Count II); (3) a violation of the Public Use Clause of the United States Constitution and the New Jersey Constitution (Count III); (4) a challenge to Defendants' "authority to condemn" (Count IV); (5) a violation of the Blighted Areas Clause of the New Jersey Constitution (Count V); (6) a violation of the Due Process Clause of the United States Constitution (Count VI); (7) a violation of the Due Process Clause of the New Jersey Constitution (Count VII); (8) a federal and state claim for declaratory relief regarding pre-condemnation testing (Count VIII); (9) arbitrary and capricious redevelopment actions (Count IX); and (10) a violation of the New Jersey Eminent Domain Act (Count X).

II. STANDARD OF REVIEW

A. FED. R. CIV. P. 12(b)(6)

When deciding a motion to dismiss pursuant FED. R. CIV. P. 12(b)(6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. See Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir.1998). In evaluating a Rule 12(b)(6) motion, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents, if the plaintiff's claims are based upon those documents. Pension Benefit Guar. Corp. V. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir.1993).

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While under the liberal notice pleading standard a party is not required to plead facts sufficient to prove its case, there still must be an underlying claim for relief before the court. Lum v. Bank of America, 361 F.3d 217, 223 (3d Cir.2004). Moreover, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir.1997). A pleading that offers labels and conclusions or "a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

In Twombly, the Supreme Court established new language for interpreting the pleading standard when it held that a plaintiff was required to plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. The "[f]actual allegations [of the complaint] must be enough to raise a right to relief above the speculative level." *Id.* at 555. Nonetheless, the Supreme Court specified that there is no heightened standard of fact pleading or requirement to plead specifics. *Id.* at 570. The Supreme Court explains:

*3 To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." 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. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief."

Ashcroft v. Iqbal, --- U.S. ---, ---, 129 S.Ct. 1937, 1949, ---L.Ed.2d ---, --- (U.S.2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556-57, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

B. FED. R. CIV. P. 12(b)(1)

The standard of review for a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) depends on whether the motion is based on a facial or factual challenge to subject matter jurisdiction. See Gould Elecs. Inc. v. United States, 220 F.3d 169, 176 (3d Cir.2000). A facial challenge asserts that the court lacks jurisdiction over a plaintiff's claims on their face. If the defendant's attack is facial, a court must accept as true all allegations in the complaint and draw reasonable inferences in favor of the plaintiff. Mortensen v. Frist Fed. Savings and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977). Furthermore, a court "may dismiss the complaint only if it appears to a certainty that the plaintiff will not be able to assert a colorable claim of subject matter jurisdiction." Liu v. Gonzales, 2007 U.S. Dist. LEXIS 74611, at *7 (D.N.J. Oct. 5, 2007).

A factual challenge attacks the existence of a court's subject matter jurisdiction apart from any of the pleadings. See Mortenson v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977). When considering a factual challenge, "no presumpt[ion] of truthfulness attaches to a plaintiff's allegations." Martinez v. U.S. Post Office, 875 F.Supp. 1067, 1070 (D.N.J.1995) (citing Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir.1977)). "Accordingly, unlike a Rule 12(b)(6) motion, consideration of a Rule 12(b)(1) jurisdiction-type motion need not be limited; conflicting written and oral evidence may be considered and a court may 'decide for itself the factual issues which determine jurisdiction.'" *Id.* (citing Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.) Cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)). "When resolving a factual challenge, the court may consult materials outside the pleadings, and the burden of proving jurisdiction rests with the plaintiff." Med. Soc'y of N.J. v. Herr, 191 F.Supp.2d 574, 578 (D.N.J.2002) (citing Gould Elecs. Inc. v. U.S., 220 F.3d 169, 176, 178 (3d Cir.2000)). Nonetheless, "[w]here an attack on jurisdiction implicates the merits of a plaintiff's Federal cause of action, the district court's role in judging the facts may be more limited." Martinez, 875 F.Supp. at 1071 (citing Williamson, 645 F.2d at 413 n. 6). Regardless of whether the challenge is facial or factual, the plaintiff bears the burden of persuasion. Mortensen, 549 F.2d at 891.

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III. DISCUSSION

A. *Res Judicata*

*4 Defendants argue that *res judicata* bars Plaintiff's Complaint because the instant Complaint is virtually identical to the one dismissed by this Court on June 18, 2007. Central to the Court's role of resolving litigation in a conclusive manner and thereby closing the door to the possibility of inconsistent decisions, *res judicata* endeavors to conserve judicial resources, foster reliance on judicial action and avoid the expense and vexation that accompanies multiple lawsuits. See *EEOC v. United States Steel Corp.*, 921 F.2d 489, 492 (3d Cir.1990).^{FN3} Further, Defendants assert that the New Jersey Entire Controversy Doctrine bars this subsequent litigation. See *N.J.R. 4:30A*. The entire controversy doctrine seeks to cement the legal adjudication of related claims and defenses regarding an underlying controversy, in one court, at one time. See *Yenuto v. Witco Corp.*, 117 F.3d 754, 761 (3d Cir.1997). The party "sought to be barred must have had a fair and reasonable opportunity to have fully litigated that claim in the original action." See *DiTrollo v. Antiles*, 142 N.J. 253, 273, 662 A.2d 494 (1995) (citing *Cafferata v. Peyser*, 251 N.J.Super. 256, 261, 597 A.2d 1101 (App.Div.1991)). When applying *res judicata*, the preclusion laws of the issuing court determine whether state or federal preclusion laws apply to the subsequent litigation. *Paramount Aviation Corp. v. Augusta*, 178 F.3d 132, 135-36 (3d Cir.1999); see also *Watkins v. Resorts Int'l Hotel and Casino, Inc.*, 124 N.J. 398, 591 A.2d 592 (1991).

FN3. The doctrine of *res judicata* is often construed to apply to both claim and issue preclusion. Defendants assert both preclusion doctrines, however, claim preclusion is the concept that must be applied in the present action.

The entire controversy doctrine is stretched to its breaking point when no previous litigation has occurred within a New Jersey state court forum. *Fioriglio v. City of Atlantic City*, 963 F.Supp. 415, 422 (D.N.J.1997). Defendants seek to apply the entire controversy doctrine because it encompasses a broader reach than traditional *res judicata*. See *Id.* at

423 (noting that under the second step of an *Erie*^{FN4} analysis, the action is "outcome-determinative" because if New Jersey law is applied, the action would be barred under the entire controversy doctrine, whereas application of federal preclusion law would allow the action to go forward). Since the first action was decided by this Court, federal *res judicata* and not the New Jersey entire controversy doctrine applies. In order to assert a claim for federal preclusion, the following three elements must be met: (1) final adjudication on the merits; (2) same claim; and (3) same parties or privies. *Sutton v. Sutton*, 71 F.Supp.2d 383, 389 (D.N.J.1999), *aff'd* 216 F.3d 1077 (3d Cir.2000), *cert. denied*, 531 U.S. 928, 121 S.Ct. 306, 148 L.Ed.2d 246 (citing *EEOC v. United States Steel Corp.*, 921 F.2d 489, 493 (3d Cir.1990)).

FN4. See generally *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (U.S.1938).

In the first action, this Court dismissed Plaintiff's federal claims for a lack of subject matter jurisdiction. *Id.* at *16. Lack of subject matter jurisdiction is not an adjudication on the merits. *Sutton*, 71 F.Supp.2d at 383 (finding that three previous federal law suits dismissed for lack of subject matter jurisdiction did not trigger principles of *res judicata*); see *FED. R. CIV. P. 41(b)*. While this Court is apprehensive about allowing Plaintiff a second bite at the apple, because *res judicata* principles do not bar this action, jurisprudence requires fairness to overstep efficiency.

B. Constitutional Challenges

*5 The Fifth Amendment prohibits the taking of private property without just compensation. *U.S. Const. amend. V*. This property protection is applicable to the states via the Fourteenth Amendment. *Chicago B & O R.R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Although the power of condemnation "involves the exercise of one of the most awesome powers of government ... [such powers] must always be exercised in the public interest." *Harrison Redevelopment Agency v. DeRose*, 398 N.J.Super. 361, 402, 942 A.2d 59 (App.Div.2008) (citing *City of Atlantic City v. Cynwood Invs.*, 148 N.J. 55, 73, 689 A.2d 712 (1997)). Plaintiff asserts

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both as-applied and facial constitutional challenges to N.J.S.A.40A:12A-8(h) ^{FN5} and N.J.S.A.20:3-16 ^{FN6}. Plaintiffs argue that Defendants' preliminary entry onto the subject property amounts to a physical invasion and occupation of private property that substantially interfered with Defendants' rights as the property owner.

FN5. N.J.S.A. § 40A:12A-8h of the Local Redevelopment and Housing Law provides: "Upon adoption of a redevelopment plan ... the municipality or redevelopment entity designated by the governing body may proceed with the clearance, planning, development and redevelopment of the area designated in the plan. In order to carry out and effectuate the purposes of this act and the terms of the redevelopment plan, the municipality or designated redevelopment entity may: Enter upon any building or property in the redevelopment area in order to conduct investigations or make surveys, soundings or test soil borings necessary to carry out the purposes of the act."

FN6. N.J.S.A. § 20:3-16 of the Eminent Domain Act provides: "Prior to commencement of any action, a prospective condemnor and its employees and agents, during reasonable business hours, may enter upon any property which it has authority to condemn for the purpose of making studies, surveys, tests, soundings, borings and appraisals, provided notice of the intended entry is sent to the owner of the occupant of the property by certified mail at least 10 days prior thereto."

Nearly identical, both statutes authorize the prospective condemnor and/or redeveloper to gain preliminary entry onto the subject property to conduct investigations, surveys, tests, soundings, soil borings and appraisals. See N.J.S.A. 40A:12A-8(h) and N.J.S.A. 20:3-16. As *Harrison* indicated, there is a strong "legislative desire that the two statutes be applied to a particular redevelopment initiative in a coordinated and harmonized fashion." 398 N.J.Super. at 397, 942 A.2d 59. Under the principle of *in pari materia*, statutes addressing the same subject matter should gen-

erally be read as if they were one law. *Lafferty v. Gito St. Riel*, 495 F.3d 72, 81 (3d Cir.2007). As such, this Court will address the two statutes in accordance with one another.

As an initial matter, this Court must determine whether Plaintiffs' constitutional claims are justiciable under the ripeness doctrine. *RLR*, 2007 U.S. Dist LEXIS 44703, at *7. Ripeness is a justiciability doctrine that seeks to avoid deciding legal issues that are not distinctively concrete for decision. *United States ex rel. Ricketts v. Lightcap*, 567 F.2d 1226, 1232 (3d Cir.1977). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Heir v. Del. River Port Auth.*, 218 F.Supp.2d 627, 634 (D.N.J.2002) (quoting *Texas v. United States*, 523 U.S. 296, 299, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998)).

In reviewing whether an as-applied Fifth Amendment just compensation takings claim is ripe, a court must consider two factors: (1) that a final decision has been reached regarding the property ("finality prong"); and (2) that the plaintiff has exhausted state just compensation procedures ("exhaustion prong"). *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). The finality prong concerns whether a "definitive position" has been made that may inflict the property owner with deprivation, while the exhaustion prong requires an injured party to seek a state forum to "review [] an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.*

*6 The finality prong does not apply to a facial attack on an ordinance or statute. See *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159, 164 (3d Cir.2006). "Facial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an uphill battle, since it is difficult to demonstrate that mere enactment of a piece of legislation deprived [the owner] of economically viable use of [his] property." *County Concrete Corp.*, 442 F.3d at 164 (citing *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997)).

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In order to assert a claim under the Takings Clause of the Fifth Amendment ripe for federal adjudication, the procedure is the same “whether it is a facial or as-applied claim, ‘if a State provides an adequate procedure for seeking just compensation, the plaintiff must have exhausted this procedure.’” *Miles v. Twp. of Barnegat*, No. 05-1661, 2008 U.S. Dist. LEXIS 839, *15 (D.N.J. Jan. 7, 2008) (quoting *County Concrete Corp.*, 442 F.3d at 167-68). The Takings Clause is “designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.” *CBS Outdoor*, 2007 U.S. Dist. LEXIS 64155 at *28 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005)).

1. Facial Challenge

With respect to its facial challenge, Plaintiff argues that a state statute cannot authorize an entry onto private property for investigations, surveys, and testing to carry out the purpose of a development plan because this amounts to an unconstitutional taking.

Plaintiff's constitutional challenge to N.J.S.A. 40A:12A-8(h) and N.J.S.A. 20:3-16 is in part predicated upon an incorrect interpretation of several condemnation cases. These cases affirm that “government authorize[d] physical occupation of property” is a taking. *Yee v. City of Escondido*, Cal., 503 U.S. 519, 522, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). It is equally clear that “when [a] physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.” *Loretto v. Teleprompter*, 458 U.S. 419, 426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). These cases address intrusions that are permanent rather than authorized entries that are temporary, like the entry in question here.

Plaintiff turns to the regulatory takings cases *Lucas v. South Caroline Coastal Council* and *Palazzolo v. Rhode Island* to assert that it does not matter how minimal a government intrusion is because it is the character of the government intrusion and not the duration that is important. *Lucas*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Palazzolo*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). While *Lucas* and *Palazzolo* do

hold that minimal intrusions can constitute takings, these cases address regulations “that prohibit all economically beneficial use of land.” *Lucas*, 505 U.S. at 1029; *Palazzolo*, 533 U.S. at 617. In *Lucas* regulation required that a property owner allow a cable television company to put a small box on the subject property. *Lucas*, 505 U.S. at 1008. The portion of the subject property affected was small but the property owner was denied all economic use of that area. This is not relevant to the situation under consideration. *Lucas* and *Palazzolo* do not stand for the proposition that a temporary entry to perform investigations constitute a taking. Plaintiff cites an environmental case that is more on point. In the environmental case, it was held that monitoring wells installed by the EPA constituted a taking even though the wells were not permanent. *John R. Sand and Gravel Co. v. U.S.*, 57 Fed. Cl. 182, 189 (Fed.Cir.2003). Integral to the Federal Circuit's holding in this case was the Court's finding that there was a “total occupation.” *Id.* Although the occupation was not permanent it was for a substantial amount of time and the *Gravel Co.* Court recognized that there was a permanency to the occupation amounting to a taking.

*7 In further support of its position, Plaintiff turns to a series of cases from other jurisdictions. In *Missouri Highway & Transp. Com'n v. Eilers*, the Missouri Appellate Court found:

Although the soil survey is not an intrusion of an overwhelming magnitude, it is still an intrusion and interference with Eilers' rights as a private landowner. A soil survey conducted without Eilers' consent subverts his right to use and enjoy his property in fee simple absolute. This is not constitutionally permissible. Accordingly, the soil survey amounts to a “taking” and the Commission may not conduct the soil survey until it receives Eilers' consent or initiates judicial proceedings and pays the damages for a temporary easement before entering the land.

While it may be burdensome for the Commission to condemn a temporary easement for a soil survey and then later condemn the entire tract for the highway, the constitutional mandate that property not be taken or disturbed without prior compensation, and the landowner's right to freely use his

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land supersede any efficiency concerns. In addition, the Commission has in the past apparently obtained landowners' consent to conduct soil surveys.

729 S.W.2d 471, 474 (Mo.App.1987). Plaintiff also cites an Illinois case that found that subsurface investigations, like soil borings and geologic studies, do substantially interfere with a landowners' property rights. County of Kane v. Elmhurst Nat'l Bank, 111 Ill.App.3d 292, 67 Ill.Dec. 25, 443 N.E.2d 1149, 1152-54 (1982). While these cases support Plaintiff's position, they differ greatly from the seminal cases cited by Plaintiff at the outset of its argument. The prevailing position regarding physical takings is that a taking is a permanent physical occupation of land. Loretto, 458 U.S. at 246.

This notwithstanding, if the Court were to find that the entry did constitute a taking, the taking would not be illegal *pre se* because it is predicated on development plans that presumably follow New Jersey condemnation law. The real issue raised by Plaintiff is what compensation is warranted which is essentially an as applied claim. This points the Court to the fact that Plaintiff has not followed New Jersey procedures for having a taking recognized and compensated.

The question before this Court is not ripe for consideration. Plaintiff should have first brought the issue to a New Jersey Court. Indeed it has been established that "claims that are based not on lack of just compensation, but rather on an unlawful taking, and which have not been previously brought before the state court are [] premature." ISP Envtl. Servs. v. City of Linden, 2007 U.S. Dist. LEXIS 32614, *19 (D.N.J. May 3, 2007) (citing Taylor Investment LTD. v. Upper Darby Township, 983 F.2d 1285, 1292-95 (3d Cir.1993)); *See also Williamson, 473 U.S. at 186, 194* (holding that taking claims are not ripe for federal review until there has been a final administrative decision and a condemnation); San Remo Hotel v. City and County of San Francisco, Calif., 545 U.S. 323, 346-47, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005) ("a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

*8 Defendants sought an order to show cause in New Jersey Superior Court. The Superior Court Ordered Plaintiff to allow Defendants to enter the property. Plaintiff brought an emergent appeal to stay the Superior Court's Order. The New Jersey Appellate Division declined to address the merits of Plaintiff's case and dismissed the appeal as moot. Since the issue of whether an entry undertaken pursuant to N.J.S.A. 40A:12A-8(h) and N.J.S.A. 20:3-16 is a taking, and specifically whether Defendants' entry constitutes a taking has not been addressed by a New Jersey State Court, the issue is not ripe for determination by this Court. ISP Envtl. Servs., 2007 U.S. Dist. LEXIS 32614 at *19 (citing Taylor Investment LTD., 983 F.2d at 1292-95).

Moreover, Plaintiff has not demonstrated that it "file[d] a notice of constitutional question stating the question and identifying the paper that raises it" as required by Fed.R.Civ.P. 5.1 where "neither the state, nor any of its agencies, officers, or employees is a party" to an action challenging the constitutionality of a state statute. Citizens for a Better Lawnside, Inc. v. Bryant, 2006 U.S. Dist. LEXIS 93235, *23-24 (D.N.J. Dec. 22, 2006).

2. As-Applied Challenge

i. Takings Clause

With respect to Plaintiff's as-applied claim, the Fifth Amendment prohibits the taking of property "without just compensation" and not the mere "taking," Plaintiff must first exhaust state procedures by seeking compensation in order to effectuate a ripe takings claim pursuant to the Fifth Amendment. *See County Concrete Corp., 442 F.3d at 168* (citing Williamson, 473 U.S. at 194-95, n13). As long as a reasonable provision exists at the time of the taking to obtain just compensation, an aggrieved party must exhaust those procedures. Williamson, 473 U.S. at 194. Failure to satisfy the exhaustion doctrine automatically results in a failure to satisfy the finality prong of a takings claim. *See Miles v. Twp. of Barnegat, 2008 U.S. Dist. LEXIS 839, 15 (D.N.J. Jan. 7, 2008)*. Since Plaintiff has not been denied just compensation, Plaintiff's as-applied claim must fail on ripeness grounds.

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ii. Public Use Clause

Plaintiff seeks to circumvent state adjudicatory procedures by invoking the public use clause. As discussed above, failure to exhaust state remedies renders a takings claim premature. An exception to the exhaustion prong is the taking of property for private purposes. *Edlin Ltd. v. City of Jersey City*, 2008 U.S. Dist. LEXIS 41118, 18 (D.N.J. May 23, 2008).

Plaintiff specifically pleads in its Amended Complaint that the entering of its property to perform environmental testing constitutes a taking in and of itself. Plaintiff further pleads that this taking was for the "sole purpose of conferring a private benefit on a private developer." This allegation amounts to a bald assertion and is a misstatement of the law and facts.

A taking is constitutional if "the uses offered to justify it are palpably without reasonable foundation, such as if (1) the sole purpose of the taking is to transfer property to a private party, or (2) the asserted purpose of the taking is a mere pretext for an actual purpose to bestow a private benefit." *CBS Outdoor*, 2007 U.S. Dist. LEXIS 64155 at *43 (citations omitted).

*9 Assuming that Defendants' entry onto Plaintiff's property was a taking, Plaintiff's argument fails because the purpose of the entry was public in nature. Defendants entered Plaintiff's property to ensure that the property is viable for the public use for which it might be condemned. This is in furtherance of the redevelopment plan which Defendants proffer constitutes a public use. Plaintiff responds to Defendants' public use contention by asserting that a viable business is operated on the subject property and hence the property is not blighted. This however, does not in and of itself mean that the area cannot be deemed in need of redevelopment under N.J.S.A. 40A:12A-5. To the extent Plaintiff is challenging the validity of the blight designation, this is an issue involving New Jersey law that will affect the activities of New Jersey government. More to the point, as discussed above, matters involving the legality of a taking in New Jersey should first be addressed by the New Jersey Courts. *ISP Envtl. Servs.*, 2007 U.S. Dist. LEXIS 32614 at *19 (citing Taylor Investment LTD., 983

F.2d at 1292-95).

Additionally, Plaintiff's public use arguments question the validity of Defendants' redevelopment plan and the potential future condemnation of the subject property. As Plaintiff does not and cannot contend that there has been a general taking of its property beyond the preliminary entry, the ripeness discussion in this Opinion also applies to this aspect of the Complaint.

Since Plaintiff's constitutional challenges are not ripe, and Plaintiff has not provided the requisite notice to challenge the constitutionality of a state statute, Plaintiff's constitutional challenges are dismissed.

C. Authority to Condemn

Plaintiff asserts that Defendants do not have the authority to condemn the property at issue because Defendants have not satisfied all of the requirements of the Takings Clause requirements, including public use. *See N.J.S.A. 20:3-16*. For the ripeness reasons stated above, the Court does not and can not reach the merits of this issue. Accordingly, Plaintiff's claims challenging Defendants' authority to condemn are dismissed.

D. State Law Claims

The Court's authority over Plaintiff's state law claims was based on supplemental jurisdiction as provided for in 28 U.S.C. § 1367(c) (3). 28 U.S.C. § 1367(c)(3) provides:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Supplemental jurisdiction is predicated upon a fed-

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eral court first having original jurisdiction over related claims. *Id.* When a court loses original jurisdiction it is not automatic that the court waives supplemental jurisdiction. See *Figueroa v. Buccaneer Hotel*, 188 F.3d 172, 181 (3d Cir.1999). Indeed, the Third Circuit has expressed that it “prefer[s that a] district court []set forth its basis for dismissing state claims on a jurisdictional basis.” *Id.* (referring to *Sparks v. Hershey*, 661 F.2d 30, 33 (3d Cir.1981)). This, however, is a preference and not a requirement. *Id.*

*10 The Court dismisses Plaintiff's state claims for lack of jurisdiction because all of Plaintiff's federal claims have been dismissed. 28 U.S.C. § 1367(c)(3). Stated another way, the Court declines to exercise supplemental jurisdiction over Plaintiff's state claims because there remains no claims over which this Court has original jurisdiction. Declining supplemental jurisdiction after all federal claims are dismissed is appropriate where there is neither apparent unfairness nor any overriding judicial interest. See *Figueroa v. Buccaneer Hotel*, 188 F.3d 172, 181 (3d Cir.1999). The Court finds no such judicial interest or unfairness here. Therefore, Plaintiff's state claims are dismissed for lack of supplemental jurisdiction.

IV. CONCLUSION

For the reasons stated, this Court finds that Defendants' motions to dismiss are granted. An appropriate Order accompanies this Opinion.

D.N.J., 2009.
RLR Investments, LLC v. Town of Kearny
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C
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Third District, Union
County.

Robert J. SOLES, Plaintiff-Appellant,
v.
CHERYL & CO. GOURMET FOODS AND GIFTS,
Defendant-Appellee.
No. 14-99-36.

Nov. 23, 1999.

Jack P. Reynard, Jr., Reg. # 0014686, Springfield,
OH, for Appellant.

Timothy M. Fox, Reg. # 0038976, Jeffery J. Snider-
man, Reg. # 0065415, Columbus, OH, for Appellee.

OPINION

HADLEY.

*1 The plaintiff-appellant, Robert Soles ("appellant"), appeals the decision of the Union County Court of Common Pleas granting summary judgment in favor of the appellee, Cheryl & Co. Gourmet Foods and Gifts ("appellee"). For the following reasons, we affirm the judgment of the trial court.

The pertinent facts in this case are as follows. On or about January 14, 1997, the appellant was working at Honda of America located in Marysville, Union County, Ohio. While on a break, the appellant went to the lunchroom and purchased a pecan cookie manufactured by the appellee. When the appellant was halfway through the cookie, he bit down on something hard. The appellant spit the cookie out into a napkin and discovered that it contained a pecan shell about the size of a penny. As a result of biting the shell, the appellant suffered damage to his teeth.

On January 6, 1999, the appellant filed a complaint alleging that the appellee negligently baked the pecan shell into the cookie. The appellee filed a motion for summary judgment, which was granted by the trial court on August 9, 1999. It is from this judgment that the appellant now appeals.

The Rules of Appellate Procedure clearly set forth the requirements of an appellant's brief. In preparing the brief, the appellant's attorney failed to meet several of these requirements. Most notably, the appellant's brief fails to set forth the assignments of error he wishes to present for review. Appellate Rule 16, as well as common legal knowledge, specifically states that the appellant shall include in his brief a statement of the assignments of error presented for review. App.R. 16(A)(3). Without such, an appellate court would be unclear as to the issues the appellant wishes the court to review.

While not specifically set forth, this Court is able to ascertain from the argument the appellant makes in his brief the issues he wishes reviewed. It appears that the appellant is asserting two assignments of error.

Assignment of Error No. 1

The trial court erred in granting the appellee summary judgment because a genuine issue of material fact exists as to who has the duty to guard against natural substances in food products.

In considering an appeal from the granting of a summary judgment, we review the grant of the motion for summary judgment independently and do not give deference to the trial court's determination. Schuch v. Rogers (1996), 113 Ohio App.3d 718, 720, 681 N.E.2d 1388. Accordingly, we apply the same standard for summary judgment as did the trial court. Midwest Specialties, Inc. v. Firestone Tire & Rubber Co. (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411.

Summary judgment is proper when, looking at the

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evidence as a whole (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence, construed most strongly in favor of the nonmoving party, that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); Horton v. Harwick Chemical Corp. (1995), 73 Ohio St.3d 679, 686-87, 653 N.E.2d 1196. To make this showing the initial burden lies with the movant to inform the trial court of the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. Those portions of the record include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action. Civ.R. 56(C). Once the movant has satisfied this initial burden, the burden shifts to the nonmovant to set forth specific facts, in the manner prescribed by Civ.R. 56(C), indicating that a genuine issue of material fact exists for trial. Dresher v. Burt, 75 Ohio St.3d at 293, 662 N.E.2d 264.

*2 The appellant contends that whether or not a purchaser of food must guard against the presence of a pecan shell in a cookie is a question for the jury. The appellant relies on a Shaker Heights Municipal Court case to support this contention. Hecht v. Guinta Stop and Shop Market (1974), 40 Ohio Misc. 6, 317 N.E.2d 269. However, we find that case clearly distinguishable from the case *sub judice* and contrary to the well-established precedent set out by the Supreme Court of Ohio in Allen v. Grafton (1960), 170 Ohio St. 249, 164 N.E.2d 167.^{FN1}

^{FN1} The *Hecht* case involves peppercorns inserted and cooked into salami. The court based its decision, in part, on the fact that a peppercorn is not an item inherent in cooked salami. In contrast, a pecan shell is an item which is inherent to pecans.

In *Allen*, the Supreme Court held that a piece of oyster shell approximately three by two centimeters in size, which was present in a fried oyster, was insufficient to justify the legal conclusion that an entire

serving of six fried oysters was "adulterated" or that it was not "reasonably fit for" consumption. *Id.* at paragraph one of the syllabus. In support of its reasoning, the Supreme Court stated:

* * * bones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to anticipate and be on his guard against the presence of such bones. * * * Certainly no liability would attach to a restaurant keeper for the serving of T-bone steak, or a beef stew, which contained a bone natural to a type of meat served, or if a fish dish should contain a fish bone, or if a cherry pie should contain a cherry stone.

Patton v. Flying J, Inc. (June 6, 1997) Wood App. No. WD-96-056, unreported, citing Allen v. Grafton, 170 Ohio St. at 253-54, 164 N.E.2d 167.

Subsequent to *Allen*, Ohio courts of appeals have held that the presence of fish bones in a fish fillet does not give rise to liability on the part of the preparer of such food, and one who eats such a dish must reasonably anticipate and guard against the presence of bones therein. Mathews v. Maysville Seafoods, Inc. (1991), 76 Ohio App.3d 624, 627, 602 N.E.2d 764; Schoonover v. Red Lobster Inns of America, Inc. (Oct. 5, 1980), Hamilton App. No. C-790547, unreported. Courts have also held, as a matter of law, that one eating a cherry pie might reasonably anticipate and guard against eating a cherry pit. Krumm v. ITT Continental Baking Co. (Dec. 9, 1981), Fairfield App. No. 23-CA-81, unreported. The *Mathews* court reasoned, "courts cannot and must not ignore the common experience of life and allow rules to develop that would make sellers of food or other consumer goods insurers of the products they sell." Mathews v. Maysville Seafoods, Inc., 76 Ohio App.3d at 627, 602 N.E.2d 764, see, also, Patton v. Flying J, Inc., *supra*.

*3 Upon review of the record in this matter, this court finds that common sense dictates that the presence of a pecan shell in a pecan cookie is a natural occurrence that the appellant reasonably should have anticipated and guarded against. Construing the evidence before the court most strongly in favor of the appellant, reasonable minds can only conclude that

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the appellee is entitled to summary judgment as a matter of law.

Accordingly, the appellant's first assignment of error is overruled.

Assignment of Error No. 2

The trial court erred in granting the appellee summary judgment due to the Supreme Court of Ohio's recent declaration that House Bill 350 (Tort Reform) is unconstitutional.

The appellant asserts the Supreme Court of Ohio's recent declaration that House Bill 350 is unconstitutional warrants that the issues in this case be revisited. However, the appellant has failed to explain why or how that decision affects the issues in this case.

App.R. 16(A)(7) provides that an appellant's brief must include "an argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which the appellant relies." Under App.R. 12(A)(2) the court may "disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)."

While it is unclear whether the appellant meant for this to be an assignment of error, if he in fact did, he failed to provide any support for this contention. Therefore, the appellant's second assignment of error is overruled.

Having found no error prejudicial to the appellant, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

BRYANT, P.J., and WALTERS, J., concur.

Ohio App. 3 Dist., 1999.

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Only the Westlaw citation is currently available. NOT FOR PUBLICATION

United States District Court,
 D. New Jersey.
 VISUAL INTERACTIVE PHONE CONCEPTS,
 INC., Plaintiff,
 v.
 VIRGIN MOBILE USA, Defendant.
 Civil Action No. 05-2661 (MLC).

Sept. 8, 2008.

Jean-Marc Zimmerman, Zimmerman, Levi & Korsinsky LLP, Westfield, NJ, Mark L. Hankin, Hankin, Handwerker & Mazel, PC, New York, NY, for Plaintiff.

Cynthia V. Fitzgerald, Robert J. Del Tufo, William F. Clarke, Jr., Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY, for Defendant.

MEMORANDUM OPINION

COOPER, District Judge.

*1 Plaintiff, Visual Interactive Phone Concepts, Inc. ("VIPC"), alleges claims of infringement of U.S. Patent No. 5,606,361 (the "361 Patent") and U.S. Patent No. 5,724,092 (the "092 Patent") (collectively, the "patents-in-suit") against defendant, Virgin Mobile USA ("VMU"). (Dkt. entry no. 1, Compl.) VMU asserts counterclaims against VIPC for judgments declaring non-infringement and invalidity of the patents-in-suit. (Dkt. entry no. 3, Ans. & Countercl.) VMU now moves for summary judgment in its favor pursuant to Federal Rule of Civil Procedure ("Rule") 56(c). (Dkt. entry no. 83.) VIPC opposes the motion. (Dkt. entry no. 91.) For the reasons stated herein, the Court will grant the motion. ^{ENL}

^{ENL} The Court held oral argument on this motion on August 20, 2008. Because no

party has ordered a transcript of the oral argument, the Court will cite to that oral argument as "8-20-08 Oral Arg."

BACKGROUND

VIPC brought this action against VMU on May 20, 2005. (Dkt. entry no. 1.) On September 29, 2005, VMU served its first set of requests for production of documents to VIPC. (Dkt. entry no. 85, Decl. of Cynthia V. Fitzgerald ("Fitzgerald Decl."), Ex. A, First Set of Requests for Produc. of Docs.) VMU requested, *inter alia*, all documents relating to (1) "the ownership, assignment, or other transfer of ownership of the patents-in-suit", and (2) "any offers to license or licenses regarding any of the patents-in-suit". (*Id.*, Ex. A, First Set of Requests for Produc. of Docs., at 8.) VMU also served its first set of interrogatories to VIPC on September 29, 2005. (*Id.*, Ex. B, First Set of Interrogs.) VMU asked VIPC to, *inter alia*, "[i]dentify all license agreements, settlements, covenants not to sue, and any negotiations thereto, that relate to the patents-in-suit". (*Id.*, Ex. B, First Set of Interrogs., at 11.)

VIPC responded to the requests for production of documents and interrogatories by identifying, *inter alia*, a license agreement between VIPC and HandTrade.Com, Inc. ("HandTrade"), executed in 1999 (the "Non-Exclusive Agreement"). (*Id.*, Ex. C, Resp. to First Set of Interrogs., at 7-8.) VIPC also identified an action in New York state court involving VIPC and HandTrade. (*Id.*, Ex. C, Resp. to First Set of Interrogs., at 7.) This action was brought by VIPC against HandTrade on June 22, 2005, alleging breach of contract based on the Non-Exclusive Agreement ("First New York Action"). (*See* dkt. entry no. 92, 3-24-08 Certification of Mark L. Hankin ("3-24-08 Hankin Cert."), Ex. 16, First New York Action Compl.) Mark L. Hankin ("Hankin"), VIPC's counsel in this action, signed and submitted the First New York Action complaint. (*Id.*) VIPC has not amended or supplemented this response. (Dkt. entry no. 84, VMU Br., at 4.)

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VMU deposed Anthony J. Cinotti ("Cinotti"), a former officer of VIPC, on February 8, 2007. (*Id.*)^{FN2} In connection with this deposition, VMU received a copy of a document entitled "Amended And Restated License Agreement And Exclusive License Agreement Between HandTrade.Com, Inc. And Visual Interactive Phone Concepts, Inc.", dated August 10, 2000 (the "Exclusive Agreement"). (*Id.*; Fitzgerald Decl., Ex. D, Exclusive Agreement.) The Exclusive Agreement was executed by Cinotti, and, *inter alia*, granted HandTrade the (1) exclusive right to use the technology claimed in the patents-in-suit, and (2) right to sue for infringement of the patents-in-suit. (Fitzgerald Decl., Ex. D, Exclusive Agreement.)

FN2. Cinotti was the person who first revealed to VMU that there was an Exclusive Agreement pertaining to the patents-in-suit. (VMU Br., at 4-5.) This revelation was made when VMU subpoenaed and deposed Cinotti. (*Id.*) Cinotti is not a party in this action. Cinotti is a co-inventor of the patents-in-suit, and is formerly an officer, and currently a director, of VIPC. (Fitzgerald Decl., Ex. C, Resp. to First Set of Interrogs., at 5; VMU Br., at 33-34.) In April 2000, a dispute arose between Cinotti and John Davidsohn ("Davidsohn"), who is the other co-inventor of the patents-in-suit and is the current chief executive officer of VIPC. (Fitzgerald Decl., Ex. C, Resp. to First Set of Interrogs., at 5; VIPC Br., at 9.) That dispute concerned election of officers and control over VIPC, and was heavily litigated through the appeals level in New York state court. (VIPC Br., at 8-9; dkt. entry no. 95, VMU Reply Br., at 8.) During Davidsohn's deposition in this action, taken on October 10, 2006 ("10-10-06 Davidsohn Deposition Testimony"), Davidsohn testified that he did not "know where Cinotti" was, and that he had a "skip tracer looking for him". (10-10-06 Davidsohn Dep. Test., at 87.) He further testified that he had "a subpoena out against Cinotti". (*Id.* at 103.) However, VMU's counsel stated at oral argument that VMU was able to locate and depose Cinotti without difficulty. (8-20-08 Oral Arg.) Davidsohn's deposition testimony as to Cinotti's whereabouts is

relevant to the Court's determination of bad faith, discussed *infra*, because it was only by contacting and deposing Cinotti that VMU learned that the Exclusive Agreement existed. (VMU Br., at 4-5.)

*2 VMU then moved for summary judgment in its favor on April 9, 2007, arguing that, *inter alia*, the Exclusive Agreement divested VIPC of standing to bring this action. (Dkt. entry no. 48, VMU Br. in Support of 4-9-07 Mot. for Summ. J.)^{FN3} VIPC opposed the motion, arguing that, *inter alia*, the Exclusive Agreement was invalid as a matter of law. (Dkt. entry no. 58, 4-24-07 VIPC Opp. Br. to 4-9-07 Mot. For Summ. J.) VIPC's papers in opposition to this motion were submitted by Hankin. (See dkt. entry nos. 57-60.)

FN3. VMU first moved for summary judgment on February 23, 2007. (Dkt. entry no. 21, 2-23-07 VMU Mot. for Summ. J.) VIPC opposed that motion. (Dkt. entry no. 37, 3-26-07 VIPC Opp. Br. to 2-23-07 VIPC Mot. for Summ. J. ("3-26-07 VIPC Br.")). However, the Court denied that motion because of technical deficiencies on May 10, 2007. (Dkt. entry no. 64, 5-10-07 Order.)

While this motion was pending, VMU independently learned that VIPC had brought another action in New York state court against HandTrade on March 11, 2007 (the "Second New York Action"). (VMU Br., at 5-6; see Fitzgerald Decl., Ex. E, Second New York Action Compl.) VIPC did not inform VMU or the Court of the Second New York Action. (VMU Br., at 5.) In the Second New York Action, VIPC alleged that, *inter alia*, (1) it entered into the Exclusive Agreement with HandTrade, and (2) HandTrade breached the Exclusive Agreement by failing or refusing to pay the royalties and minimum license fees required under it. (Fitzgerald Decl., Ex. E, Second New York Action Compl.) VIPC thus requested, *inter alia*, a judgment (1) declaring a breach of the Exclusive Agreement by HandTrade, resulting in termination of the Exclusive Agreement, (2) in the sum of \$300,000, "plus the value of 3,250,000 of the common stock of" HandTrade due under the Exclusive Agreement, and accrued interest, (3) requiring an accounting of HandTrade's book and records to de-

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termine gross revenue received under the Exclusive Agreement, and (4) for royalties under the Exclusive Agreement in an amount of one percent of all gross revenues, and accrued interest. (*Id.*) Hankin signed and submitted this complaint. (*Id.*)

VMU informed the Court of the Second New York Action on June 1, 2007, attaching a copy of the Second New York Action complaint. (Dkt. entry no. 67, 6-1-07 VMU Letter to Court.) Hankin responded to this letter, stating that, *inter alia*, the “non-validity [of the Exclusive Agreement] had never been an issue”, and that “a decision was made by [VIPC] to obtain a judicial declaration in the State of New York terminating the said alleged [Exclusive] Agreement for all purposes”. (Dkt. entry no. 69, 6-4-07 Hankin Letter to Court.)

VIPC received a default judgment in the Second New York Action against HandTrade in an order dated August 17, 2007. (Fitzgerald Decl., Ex. F, Second New York Action 8-17-07 Order.) The court in the Second New York Action also ordered that a damages inquest would be conducted before the Honorable Lester Sacks, a New York Judicial Hearing Officer (the “JHO”). (*Id.*; VMU Br., at 6.) On August 31, 2007, this Court, *inter alia*, (1) denied VMU's first motion for summary judgment without prejudice, and (2) stayed this action for ninety days pending the outcome of the Second New York Action. (Dkt. entry no. 76, 8-31-07 Order.)

*3 Hankin then filed a “Notice For Inquest/Trial” in the Second New York Action on September 4, 2007. (Fitzgerald Decl., Ex. G, Second New York Action Notice For Inquest/Trial.) VIPC requested, *inter alia*, a judgment (1) “declaring a breach of the [Exclusive Agreement] by [HandTrade] resulting in the termination of [the Exclusive Agreement]”, (2) “in the sum of \$300,000.00 plus value of \$3,250.00 of the common stock of [HandTrade] due [and] owing under the [Exclusive Agreement] to [VIPC] from [HandTrade] plus accrued interest”, (3) “requiring an accounting of [HandTrade's] books and records for the period of August 10, 2000 through the present to determine gross revenue received under the [Exclusive Agreement]”, and (4) “for royalties under the [Exclusive Agreement] in an amount of one (1%) percent of all gross revenues, plus accrued interest”. (*Id.*)

The JHO entered a Decision and Order, dated October 9, 2007, stating that, *inter alia*, the Exclusive Agreement was not “renewed by proper authority” and thus “the alleged renewal was void ‘ab initio’ “ (“Second New York Action 10-9-07 Decision and Order”). (Fitzgerald Decl., Ex. H, Second New York Action 10-9-07 Decision and Order.) In reaching this decision, the JHO relied on the testimony of Davidsohn, noting that “[n]o proof ha[d] been presented to contradict” his testimony. (*Id.*) On November 14, 2007, the court in the Second New York Action ordered and adjudged that (1) the Exclusive Agreement was “void as a matter of law as of the date of execution for lack of authority”, and (2) because the Exclusive Agreement was “void ab initio, no damage award” was rendered (“Second New York Action Judgment”). (Fitzgerald Decl., Ex. I, Second New York Action Judgment.)

VIPC thereafter requested that the Court place this action “on the calendar”, stating that the Second New York Action Judgment showed that the Exclusive Agreement was invalid, and thus, VIPC had standing to bring this action. (Dkt. entry no. 78, 1-8-08 VIPC Letter to Court; dkt. entry no. 79, First 1-10-08 VIPC Letter to Court; dkt. entry no. 80, Second 1-10-08 VIPC Letter to Court.) The Magistrate Judge then granted VMU permission to move again for summary judgment in its favor. (Dkt. entry no. 82, 2-5-08 Letter Order.) VMU again moved for summary judgment in its favor on February 22, 2008. (Dkt. entry no. 83.) VIPC opposes the motion. (Dkt. entry no. 91.)

DISCUSSION

I. Summary Judgment Standard

Rule 56(c) provides that summary judgment is proper if the pleadings, the discovery and disclosure materials, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.* The summary judgment movant bears the initial burden of showing that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has met this prima facie burden, the non-

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movant must set out specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e)(2). A non-movant must present actual evidence that raises a genuine issue of material fact and may not rely on mere allegations. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

*4 The Court must view the evidence in the light most favorable to the non-movant when deciding a summary judgment motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). At the summary judgment stage, the Court's role is "not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. Under this standard, the "mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient [to defeat a Rule 56(c) motion]; there must be evidence on which the jury could reasonably find for the [non-movant]." Id. at 252. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48 (emphasis in original). A fact is material only if it might affect the action's outcome under governing law. Id. at 248. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249-50 (internal citations omitted).

II. Judicial Estoppel

A. Legal Standard

Judicial estoppel bars a litigant from asserting a position that is inconsistent with one that the litigant previously took before a court. Taylor v. Mooney Aircraft Corp., 265 Fed.Appx. 87, 92 (3d Cir.2008). It applies to assertions of both factual and legal positions, and may be applied based on the assertion of a party or a party's counsel. AFN, Inc. v. Schlott, Inc., 798 F.Supp. 219, 224 (D.N.J.1992). "Thus, a position taken or a representation made by counsel in a legal

brief or in argument to the court may provide a basis for estoppel." Id. However, "judicial estoppel is an extreme remedy, to be used only when the inconsistent positions are tantamount to a knowing misrepresentation to or even fraud on the court". Chao v. Roy's Constr., Inc., 517 F.3d 180, 186 n. 5 (3d Cir.2008) (quotation and citations omitted).

For the Court to apply judicial estoppel against a litigant, (1) the litigant must have taken two positions that are irreconcilably inconsistent, (2) the litigant must have changed the position in bad faith, or "with intent to play fast and loose with the court", and (3) no lesser sanction would adequately remedy the damage done by the litigant's misconduct. Taylor, 265 Fed.Appx. at 92 (quotations and citation omitted). The Court also may consider other factors in determining whether to apply judicial estoppel, such as whether the litigant (1) succeeded in convincing a tribunal to accept the position, and (2) would derive an unfair advantage in the absence of estoppel. Chao, 517 F.3d at 186 n. 5.^{FN4}

FN4. VIPC cites to Zenith Laboratories, Inc. v. Bristol Myers Squibb Co., No. 91-3423, 1991 WL 267892, at *11 (D.N.J. Dec.12, 1991), for the proposition that there is a "requirement that a party must 'successfully' assert a legal position in one proceeding to be barred from asserting an inconsistent position in a latter proceeding" for judicial estoppel to apply. (Dkt. entry no. 91, VIPC Br., at 16-17.) This is incorrect. As noted *supra*, whether a litigant has successfully asserted a legal position is merely a factor in the Court's judicial estoppel determination. See Chao, 517 F.3d at 186 n. 5; see also AFN, Inc., 798 F.Supp. at 225 (noting that the "integrity of the judicial process can be sorely compromised short of inconsistent results ... [i]ndeed, if what is at issue is the integrity of the court, whether a court is asked to rely or has in fact relied on a prior inconsistent position should be a distinction without a difference.")

B. Legal Standard Applied Here

*5 VMU contends that the Court should apply judi-

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cial estoppel against VIPC here, as (1) VIPC has advanced two irreconcilably inconsistent positions, (2) VIPC has acted in bad faith, and (3) no lesser sanction than summary judgment would right the wrongs VIPC has committed. (VMU Br., at 11-16.) This Court agrees, and will grant VMU's motion on the basis of judicial estoppel.

VIPC has advanced two irreconcilably inconsistent positions here. In this action, VIPC and Hankin have repeatedly asserted or argued that the Exclusive Agreement is invalid as a matter of law. (See, e.g., VIPC Br., at 8-15; dkt. entry no. 34, 3-26-07 Aff. of John Davidsohn ("3-26-07 Davidsohn Aff."), at ¶ 34; dkt. entry no. 35, 3-26-07 Decl. of Mark L. Hankin ("3-26-07 Hankin Decl."), at ¶ 15; 3-26-07 VIPC Br., at 1; dkt. entry no. 57, Aff. of John Davidsohn ("4-24-07 Davidsohn Aff."), at ¶ 49; dkt. entry no. 58, 4-24-07 Decl. of Mark L. Hankin ("4-24-07 Hankin Decl."), at ¶ 8.) However, while this action was ongoing, VIPC also brought the Second New York Action on March 11, 2007, asserting that, *inter alia*, (1) "on or about August 10, 2000, [VIPC and HandTrade] entered into a licensing agreement wherein [VIPC] granted a license to [HandTrade] for use of the [patents-in-suit]", (2) HandTrade "was required to pay" royalties and maintenance fees to VIPC under that agreement, (3) HandTrade's failure to pay the royalties and maintenance fees was "a complete breach of contract", and (4) VIPC was owed damages as a result of that breach. (Fitzgerald Decl., Ex. E, Second New York Action Compl.) Thus, in the Second New York Action, VIPC not only asserted that the Exclusive Agreement existed and was valid, but also sought damages for a breach of that agreement. (See *id.*) These two positions are irreconcilably inconsistent. See *AFN, Inc.*, 798 F.Supp. at 222-23, 227 (judicially estopping litigant from asserting that contract was illegal, as litigant asserted breach of and sought damages under contract in earlier court action).

VIPC contends that it has neither asserted nor argued that the Exclusive Agreement was valid. (VIPC Br., at 16-17.) It explains that upon learning of the existence of the Exclusive Agreement, it sought to terminate it in the Second New York Action, and merely "inadvertently" pled a breach of contract action. (*Id.*) It explains this inadvertence by stating that it utilized the same complaint filed in the First New York Ac-

tion. (*Id.* at 3.) It further states that the court in the Second New York Action "determined based on [Davidsohn's] testimony that the Exclusive Agreement was void ab initio for lack of authority ... [a]s such, the pleading defect was excused and the complaint amended to conform to the proof". (*Id.* at 16-17.)

This Court finds that VIPC did not merely "inadvertently" plead the Second New York Action as a breach of contract action. The complaints filed in the First New York Action and the Second New York Action seek different damages for breaches of different agreements. (See 3-24-08 Hankin Cert., Ex. 16, First New York Action Compl.; Fitzgerald Decl., Ex. E, Second New York Action Compl.) Further, as noted *supra*, the Notice For Inquest/Trial filed in the Second New York Action on September 4, 2007, again requested, on behalf of VIPC, a judgment (1) "declaring a breach of the [Exclusive Agreement] by [HandTrade] resulting in the termination of [the Exclusive Agreement]", (2) "in the sum of \$300,000.00 plus value of \$3,250.00 of the common stock of [HandTrade] due [and] owing under the [Exclusive Agreement] to [VIPC] from [HandTrade] plus accrued interest", (3) "requiring an accounting of [HandTrade's] books and records for the period of August 10, 2000 through the present to determine gross revenue received under the [Exclusive Agreement]", and (4) "for royalties under the [Exclusive Agreement] in an amount of one (1%) percent of all gross revenues, plus accrued interest". (Fitzgerald Decl., Ex. G, Second New York Action Notice For Inquest/Trial.) Moreover, in a letter to the Court dated August 30, 2007, Hankin represented that VIPC's decision to plead a breach of contract in the Second New York Action was deliberate, as VIPC "took the alternative position" to plead breach of contract so "that if the [Exclusive] Agreement was found valid ... its termination was required". (Dkt. entry no. 75, 8-30-07 Hankin Letter to Court.) Thus, it is apparent that VIPC did not "inadvertently" assert that the Exclusive Agreement was valid in the Second New York Action.

*6 This Court also finds that VIPC and Hankin acted in bad faith in asserting these two irreconcilably inconsistent positions. As noted *supra*, Hankin filed the Second New York Action Complaint on March 11,

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2007, where VIPC alleged that HandTrade breached the Exclusive Agreement. (See Fitzgerald Decl., Ex. E, Second New York Action Compl.) Only fifteen days later, on March 26, 2007, Hankin submitted papers to this Court repeatedly representing that the Exclusive Agreement was a "nullity" and "void". (See, e.g., 3-26-07 Davidsohn Aff., at ¶ 34; 3-26-07 Hankin Decl., at ¶ 15; 3-26-07 VIPC Br., at 1.)

VIPC admitted at oral argument, moreover, that it did not inform VMU or the Court of the Second New York Action. (8-20-08 Oral Arg.) Rather, it was only through VMU's independent investigation that VMU learned of the Second New York Action and subsequently informed the Court of it as well. (VMU Br., at 5; 6-1-07 VMU Letter to Court.) VIPC's failure to disclose the Second New York Action violated the continuing duty of disclosure. See Fed.R.Civ.P. 26(e)(1)(A). This failure is especially egregious considering that Hankin has acted as VIPC's counsel throughout this litigation, as well as in the First New York Action and Second New York Action.

Bad faith also is demonstrated by the deliberate withholding of the Exclusive Agreement from VMU and this Court, which also violates the continuing duty of disclosure. See Fed.R.Civ.P. 26(e)(1)(A). As noted *supra*, VMU only learned of the Exclusive Agreement when it deposed Cinotti on February 8, 2007. (VMU Br., at 4.) VIPC claims that it did not know the Exclusive Agreement existed before that deposition, stating that the fact that VIPC brought the First New York Action supports this assertion, as "[c]learly, had [VIPC] known that [the Exclusive Agreement] existed, there would be no need for the termination of the former Non-Exclusive Agreement". (VIPC Br., at 2-3.) Hankin also claimed at oral argument that neither he nor Davidsohn were aware of the existence of the Exclusive Agreement until Cinotti's deposition. (8-20-08 Oral Arg.)

This assertion is flatly contradicted by Hankin's earlier submissions, as well as other evidence in the record. Davidsohn's affidavit, submitted to the Court on March 26, 2007, states that, *inter alia*, (1) "on September 12, 2000, Cinotti obtained written consent(s) of certain shareholders ... to ratify the Exclusive Agreement with Handtrade dated August 10, 2000", and (2) "on October 2, 2000, Cinotti commenced an

action in District Court, Clark County Nevada ... for a Judicial Declaration that the ... ratification of the Exclusive Agreement held on September 12, 2000, was valid". (3-26-07 Davidsohn Aff., at ¶¶ 18-19 (emphasis in original).) The Court will hereinafter refer to that action as the "Nevada Action".^{FN5} At oral argument, Hankin stated that he did not know whether Davidsohn was ever served with the complaint in the Nevada Action, so as to make Davidsohn aware of the existence of the Exclusive Agreement around October 2, 2000, well before Cinotti was deposed on February 8, 2007. (8-20-08 Oral Arg.) However, VMU provided this Court with a copy of the docket in the Nevada Action. (8-21-08 VMU Letter to Court, Ex., Nevada Action Docket.) That docket provides that both VIPC and Davidsohn were parties to that action, and that Davidsohn answered the complaint on November 22, 2000. (*Id.*)^{FN6} Thus, Davidsohn was aware of the existence of the Exclusive Agreement over six years before Cinotti's deposition in this action occurred.^{FN7}

^{FN5}. The Court notes that VIPC did not disclose the Nevada Action in its response to VMU's requests for production of documents and interrogatories. (See Fitzgerald Decl., Ex. C, Resp. to First Set of Interrogs., at 6-7.) VIPC's failure to disclose the Nevada Action also violated the continuing duty of disclosure. See Fed. R.Civ.P. 26(e)(1)(A).

^{FN6}. The Court notes that this evidence also contradicts Davidsohn's testimony in the 10-10-06 Davidsohn Deposition Testimony, where he testified that he was aware of only one agreement between VIPC and HandTrade, the Non-Exclusive Agreement. (10-10-06 Davidsohn Dep. Test., at 60, 72, 84.) However, Davidsohn's testimony as to this issue is unclear at best. (See *id.* at 84 (stating that "Cinotti had given another-expanded on the [Non-Exclusive Agreement]. But he wasn't capable of expanding on the [Non-Exclusive Agreement] because he would need board approval; and that would be me, and I never approved anything. So the only license they had was the one license that I know of".))

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FN7. The Court notes that Davidsohn's testimony as to his knowledge of the whereabouts of documents pertaining to VIPC in general is somewhat dubious. For example, in the 10-10-06 Davidsohn Deposition Testimony, Davidsohn testified that sometime after 2001, "all sorts of corporate files" were "put in a storehouse", but that he didn't "know the name of" the place the files were stored because "they moved". (10-10-06 Davidsohn Dep. Test., at 160-61, 165.) Davidsohn further testified that these files were "destroyed", as they somehow became "water-damaged" and "moldy". (*Id.* at 161, 171-72.)

*7 The Court further notes that VIPC has misled this Court as to the threshold, dispositive issue of standing in this action by not disclosing the existence of the Exclusive Agreement. It is VIPC's burden to establish that it had standing to bring a suit alleging patent infringement when it brought this action. See *Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1309 (Fed.Cir.2003) (noting that "in order to assert standing for patent infringement, the plaintiff must demonstrate that it held enforceable title to the patent at the inception of the lawsuit") (emphasis in original); *Rite Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1551 (Fed.Cir.1995) (noting that "question of standing to sue" for patent infringement "is a jurisdictional one"). Further, in a patent infringement case, only "[a] patentee shall have remedy by civil action for infringement of his patent." 35 U.S.C. § 281; *Paradise Creations, Inc.*, 315 F.3d at 1308. Exclusive licensees holding all substantial rights to a patent meet this standard. *Id.* Thus, if the Exclusive Agreement is valid and enforceable, HandTrade may qualify as an exclusive licensee of the patents-in-suit so as to divest VIPC of standing to bring this action. See *id.*

Resolving this issue would require extensive litigation in an action that has been ongoing for over three years. The Court would have to trace the chain of title of the patents-in-suit as between VIPC and HandTrade, and determine whether the Exclusive Agreement is valid and enforceable. See, e.g., *Fitroil, N.A., Inc. v. Maupin*, No. 98-1212, 1998 WL 851131, at

*1-*3 (Fed.Cir. Dec.3, 1998) (analyzing evidence involving assignment of patent at issue, and determining that no party in the litigation had been shown to be owner of patent); *Gaia Techs., Inc. v. Reconversion Techs., Inc.*, 93 F.3d 774, 778-80 (Fed.Cir.1996) (noting that (1) "[i]n order to adjudicate" the standing issue, it had to "trace the chain of title" of the patents and trademarks at issue, and (2) "several pieces of evidence in the record" were "relevant to determining" ownership), amended on reh'g in part by, 104 F.3d 1296 (Fed.Cir.1996).^{FN8} Thus, VIPC has not only failed to meet its burden to establish standing; the deliberate and misleading conduct by VIPC and Hankin also has prevented this Court from resolving a threshold, dispositive issue in a timely and efficient manner.^{FN9}

FN8. Contrary to VIPC's assertions, the Second New York Action Judgment could not be used to collaterally estop VMU from litigating the issue of whether the Exclusive Agreement is valid and enforceable. (See VIPC Br., at 19-20.) New York law would apply to this issue, because this Court must give a state court judgment the same preclusive effect as would be given the judgment under the law of the state in which the judgment was rendered. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Walker v. Horn*, 385 F.3d 321, 337 (3d Cir.2004). Under New York law, because VMU was neither a party nor in privity with a party to the Second New York Action, the doctrine of collateral estoppel could not be applied against it. See *Howard v. Town of Bethel*, 481 F.Supp.2d 295, 301 (S.D.N.Y.2007) (applying New York law).

FN9. Whether a plaintiff has standing to bring this action is a question of law to be determined by the Court, not a question of fact for a jury. *Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 485 F.Supp.2d 519, 532 (D.Del.2007).

No lesser sanction would adequately remedy the damage done by the misconduct here. See *AFN, Inc.*, 798 F.Supp. at 227 (judicially estopping litigant from

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asserting that contract was illegal, and stating that “[i]n furtherance of the broader policy of protecting the integrity of the court and the judicial system, no further judicial aid will be given this particular enterprise of blowing hot and cold as the occasion demands”) (quotation and citation omitted).

The prejudice suffered by VMU is overwhelming here, moreover. VMU, at its own expense, has been forced to discover information concerning a dispositive issue in this action which VIPC had a duty to disclose to VMU and this Court. Indeed, at oral argument, VMU's counsel stated that VMU's legal fees in defending this action have reached at least \$1 million thus far. (8-20-08 Oral Arg.) These legal fees would undoubtedly increase if VMU were subjected to additional discovery to resolve the issue of VIPC's standing, an issue which, as discussed *supra*, was VIPC's burden to establish. The Court will not subject VMU to extended litigation to resolve this issue when VIPC and Hankin have misled the Court and VMU as to this issue since the inception of this action.^{FN10} Therefore, because (1) VIPC and Hankin have advanced two irreconcilably inconsistent positions, (2) VIPC and Hankin have acted in bad faith, and (3) no lesser sanction would remedy the damage done here, the Court concludes that this is the rare case where judicial estoppel should be applied so as to render judgment against VIPC. Thus, the Court will grant VMU's motion on that basis.^{FN11}

^{FN10}. The Court may decline to resolve the issue of standing here, as it “has leeway to choose among threshold grounds for denying audience to a case on the merits”. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, --- U.S. ---, ---, 127 S.Ct. 1184, 1191, 167 L.Ed.2d 15 (2007) (quotation and citations omitted); *Agcaoli v. Wiersielis*, 273 Fed.Appx. 138, 138-39 (3d Cir.2008) (noting same); *Gonzalez-Cifuentes v. I.N.S.*, 253 Fed.Appx. 173, 175-76, n. 2 (3d Cir.2007) (affirming decision of district court dismissing action on grounds of res judicata, and stating that it need not decide whether it lacked subject matter jurisdiction, as it did not reach merits of case). The Court is not reaching the merits of the parties' claims here; therefore, it need not address

the issue of standing. See *Sinochem Int'l Co. Ltd.*, 127 S.Ct. at 1191; *Gonzales-Cifuentes*, 253 Fed.Appx. at 175 n. 2.

^{FN11}. The Court notes that granting VMU's motion leaves VIPC in no worse position than when it brought this action, because the status of the ownership of the patents-in-suit remains unresolved, as it was when VIPC brought this action.

CONCLUSION

*8 For the reasons stated *supra*, the Court will grant the motion. The Court will issue an appropriate order and judgment.

D.N.J.,2008.
Visual Interactive Phone Concepts, Inc. v. Virgin Mobile USA
Not Reported in F.Supp.2d, 2008 WL 4192065 (D.N.J.)

END OF DOCUMENT

Exhibit C

EICHEN LEVINSON & CRUTCHLOW, LLP
40 Ethel Road
Edison, New Jersey 08817
(732) 777-0100
Attorneys for Plaintiff

DEBORAH FELLNER,

Plaintiff,

vs.

TRI-UNION SEAFOODS, L.L.C.,
d/b/a/ CHICKEN OF THE SEA,

Defendant.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

Civil Action 2:06-cv-00688-DMC-MF

AMENDED COMPLAINT

JURY DEMAND

Plaintiff, Deborah Fellner, by and through her counsel, Eichen Levinson & Crutchlow, LLP, hereby makes this claim against the Defendant as follows:

PARTIES

1. Plaintiff, Deborah Fellner, resides at 14 Bassett Avenue, Mine Hill Township, New Jersey, 07803.
2. Defendant Tri-Union Seafoods, d/b/a Chicken of the Sea, is a California corporation with its company headquarters located at 9330 Scranton Road, Ste 500, San Diego, California 92121.

COUNT I
VIOLATION OF THE NEW JERSEY PRODUCTS LIABILITY ACT

3. During the period 1993 through 2004, Plaintiff consumed approximately one can per day of Defendant's Chicken of the Sea albacore tuna products.

4. Defendant was aware that its tuna products contained methylmercury and/or other harmful compounds that could result in mercury poisoning.
5. Defendant canned and distributed its tuna products without any mercury warning, nor did it adequately disclosing the harmful effects of such compounds.
6. The Defendant, acting negligently as aforesaid, directly manufactured, processed, tested, canned, marketed and sold its tuna products to Plaintiff without adequate warning regarding the harmful mercury compounds contained in said tuna products.
7. Due to the negligence and statutory violations of the Defendant, Plaintiff Deborah Fellner contracted severe mercury poisoning and suffered extreme physical and emotional injuries.
8. Pursuant to N.J.S.A. 2A:58-C, *et seq.*, (New Jersey Products Liability Act) Plaintiff asserts all claims and causes of action against the Defendant, including but not limited to negligence, breach of implied warranty of merchantability, breach of implied warranty of fitness, strict liability, failure to warn and/or inadequate warning on theories of both negligence and strict liability, all claims and causes of action pertaining to the design, manufacture, sale and distribution of the defective tuna products which were not reasonably fit, suitable, or safe for their intended purposes as they were defectively designed, manufactured and/or failed to contain adequate warnings and/or instructions.

WHEREFORE, Plaintiff Deborah Fellner demands judgment against the Defendant for damages, costs of suit, interest, attorneys' fees, and other relief as this Court deems just and proper.

COUNT II
VIOLATION OF THE NEW JERSEY CONSUMER FRAUD ACT

9. Plaintiff hereby incorporates all the allegations of Count I.
10. The Defendant violated the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 *et seq.*, by knowingly misrepresenting, concealing, suppressing, omitting, and/or failing to disclose material information regarding the presence of methylmercury and/or other harmful compounds in its Tuna Products, with the intent that Plaintiff rely upon such concealment, suppression, omission, and failure to disclose in purchasing the Defendant's Tuna Products.
11. Defendant, acting as aforesaid, violated the CFA by failing to disclose to Plaintiff that its Tuna Products contained methylmercury and/or other harmful compounds that could result in mercury poisoning.
12. Defendant violated the CFA by the knowing use of false and misleading representations regarding the safety of its Tuna Products and the presence therein of harmful levels of methylmercury and other harmful compounds that could result in mercury poisoning.
13. Pursuant to the Defendant's misrepresentations and omissions, Plaintiff was falsely led to believe that Defendant's Tuna Products did not contain unsafe levels of methylmercury and other harmful compounds that could result in mercury poisoning.
14. Plaintiff suffered medical expenses and other ascertainable losses as a result of the Defendant's actions.

WHEREFORE, Plaintiff demands judgment against Defendant for compensatory damages, costs, treble damages, reasonable attorneys' fees, and any other relief as this Court deems just and proper.

COUNT III
PUNITIVE DAMAGES

15. Plaintiff hereby incorporates all the allegations of Count I and II.
16. Defendant knew that its tuna products contained methylmercury but continued to design, manufacture, market, and sell its tuna products so as to maximize sales and profits at the expense of the health and safety of the public, including plaintiff, in conscious and/or negligent disregard of the foreseeable harm of mercury poisoning.
17. Defendant intentionally concealed or misrepresented facts known to it regarding methylmercury in its tuna product.
18. Defendant failed to provide warnings to consumers about the risks of methylmercury in its tuna products.
19. Defendant's aforementioned conduct was committed with knowing, conscious, and deliberate disregard for the rights and safety of consumers such as plaintiff, thereby entitling plaintiff to punitive damages in an amount appropriate to punish defendants and deter them from similar conduct in the future. Defendants continues to promote its tuna products without warnings, and downplaying any risks.

WHEREFORE, Plaintiff demands judgment against the Defendant for statutory, treble, and/or punitive damages, attorneys' fees and costs of suit, and such other and further relief as the Court may deem proper.

CERTIFICATION PURSUANT TO RULE 11.2

I certify that the matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

JURY DEMAND

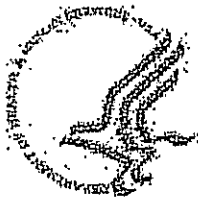
Plaintiff demands trial of all issues by jury.

EICHEN LEVINSON & CRUTCHLOW, LLP
Attorneys for Plaintiff

Dated: July 7, 2009

By: /s/ Barry R. Eichen
BARRY R. EICHEN, ESQ.

Exhibit D



U.S. Department of Health and Human Services
and
U.S. Environmental Protection Agency



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March 2004

EPA-823-R-04-005

What You Need to Know About Mercury in Fish and Shellfish

2004 EPA and FDA Advice For: Women Who Might Become Pregnant Women Who are Pregnant Nursing Mothers Young Children

Fish and shellfish are an important part of a healthy diet. Fish and shellfish contain high-quality protein and other essential nutrients, are low in saturated fat, and contain omega-3 fatty acids. A well-balanced diet that includes a variety of fish and shellfish can contribute to heart health and children's proper growth and development. So, women and young children in particular should include fish or shellfish in their diets due to the many nutritional benefits.

However, nearly all fish and shellfish contain traces of mercury. For most people, the risk from mercury by eating fish and shellfish is not a health concern. Yet, some fish and shellfish contain higher levels of mercury that may harm an unborn baby or young child's developing nervous system. The risks from mercury in fish and shellfish depend on the amount of fish and shellfish eaten and the levels of mercury in the fish and shellfish. Therefore, the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA) are advising women who may become pregnant, pregnant women, nursing mothers, and young children to avoid some types of fish and eat fish and shellfish that are lower in mercury.

By following these 3 recommendations for selecting and eating fish or shellfish, women and young children will receive the benefits of eating fish and shellfish and be confident that they have reduced their exposure to the harmful effects of mercury.

1. Do not eat Shark, Swordfish, King Mackerel, or Tilefish because they contain high levels of mercury.
2. Eat up to 12 ounces (2 average meals) a week of a variety of fish and shellfish that are lower in mercury.
 - o Five of the most commonly eaten fish that are low in mercury are shrimp, canned light tuna, salmon, pollock, and catfish.

- o Another commonly eaten fish, albacore ("white") tuna has more mercury than canned light tuna. So, when choosing your two meals of fish and shellfish, you may eat up to 6 ounces (one average meal) of albacore tuna per week.
3. Check local advisories about the safety of fish caught by family and friends in your local lakes, rivers, and coastal areas. If no advice is available, eat up to 6 ounces (one average meal) per week of fish you catch from local waters, but don't consume any other fish during that week.

Follow these same recommendations when feeding fish and shellfish to your young child, but serve smaller portions.

Frequently Asked Questions about Mercury in Fish and Shellfish:

1. "What is mercury and methylmercury?"
Mercury occurs naturally in the environment and can also be released into the air through industrial pollution. Mercury falls from the air and can accumulate in streams and oceans and is turned into methylmercury in the water. It is this type of mercury that can be harmful to your unborn baby and young child. Fish absorb the methylmercury as they feed in these waters and so it builds up in them. It builds up more in some types of fish and shellfish than others, depending on what the fish eat, which is why the levels vary.
2. "I'm a woman who could have children but I'm not pregnant - so why should I be concerned about methylmercury?"
If you regularly eat types of fish that are high in methylmercury, it can accumulate in your blood stream over time. Methylmercury is removed from the body naturally, but it may take over a year for the levels to drop significantly. Thus, it may be present in a woman even before she becomes pregnant. This is the reason why women who are trying to become pregnant should also avoid eating certain types of fish.
3. "Is there methylmercury in all fish and shellfish?"
Nearly all fish and shellfish contain traces of methylmercury. However, larger fish that have lived longer have the highest levels of methylmercury because they've had more time to accumulate it. These large fish (swordfish, shark, king mackerel and tilefish) pose the greatest risk. Other types of fish and shellfish may be eaten in the amounts recommended by FDA and EPA.
4. "I don't see the fish I eat in the advisory. What should I do?"
If you want more information about the levels in the various types of fish you eat, see the FDA food safety website www.cfsan.fda.gov/~frf/sea-mehg.html or the EPA website at www.epa.gov/ost/fish.
5. "What about fish sticks and fast food sandwiches?"
Fish sticks and "fast-food" sandwiches are commonly made from fish that are low in mercury.
6. "The advice about canned tuna is in the advisory, but what's the advice about tuna steaks?"
Because tuna steak generally contains higher levels of mercury than canned light tuna, when choosing your two meals of fish and shellfish, you may eat up to 6 ounces (one average meal) of tuna steak per week.
7. "What if I eat more than the recommended amount of fish and shellfish in a

week?"

One week's consumption of fish does not change the level of methylmercury in the body much at all. If you eat a lot of fish one week, you can cut back for the next week or two. Just make sure you average the recommended amount per week.

- B. "Where do I get information about the safety of fish caught recreationally by family or friends?"

Before you go fishing, check your Fishing Regulations Booklet for information about recreationally caught fish. You can also contact your local health department for information about local advisories. You need to check local advisories because some kinds of fish and shellfish caught in your local waters may have higher or much lower than average levels of mercury. This depends on the levels of mercury in the water in which the fish are caught. Those fish with much lower levels may be eaten more frequently and in larger amounts.

For further information about the risks of mercury in fish and shellfish call the U.S. Food and Drug Administration's food information line toll-free at 1-888-SAFEFOOD or visit FDA's Food Safety website www.cfsan.fda.gov/seafood1.html

For further information about the safety of locally caught fish and shellfish, visit the Environmental Protection Agency's Fish Advisory website www.epa.gov/ost/fish or contact your State or Local Health Department. A list of state or local health department contacts is available at www.epa.gov/ost/fish. Click on Federal, State, and Tribal Contacts. For information on EPA's actions to control mercury, visit EPA's mercury website at www.epa.gov/mercury.

This document is available on the web at <http://www.cfsan.fda.gov/~dms/admehg3.html>.

This document is also available in brochure format in both English and Spanish.

Seafood Information and Resources - Methylmercury

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FDA/Center for Food Safety & Applied Nutrition
Hypertext updated by [clm/dms](#) February 4, 2005

Exhibit E



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Backgrounder for the 2004 FDA/EPA Consumer Advisory: What You Need to Know About Mercury in Fish and Shellfish

Today's Action:

- FDA and EPA are issuing a joint consumer advisory about mercury in fish and shellfish. The advice is for: women who might become pregnant; women who are pregnant; nursing mothers; and young children. This is significant because it is the first time FDA and EPA have combined their advice into a single uniform advisory. Previously FDA issued an advisory on consumption of commercially caught fish, while EPA issued advice on recreationally caught fish.
- FDA and EPA revised their existing advisories as a result of recommendations FDA received from its Foods Advisory Committee (FAC) in July 2002. At that meeting the FAC offered a number of recommendations intended to improve the clarity and understandability of the then current FDA advisory. One of the suggestions was that FDA and EPA combine their two independent advisories.
- The criteria for the advisory was that it be based on sound science; is easy to understand and apply; and protects the public health.
- The purpose of the advisory is to inform women who may become pregnant, pregnant women, nursing mothers and the parents of young children on how to get the positive health benefits from eating fish and shellfish, while minimizing their mercury exposure.

Message to Consumers:

- Fish and shellfish are important parts of a healthy and balanced diet. They are good sources of high quality protein and other nutrients. However, depending on the amount and type of fish you consume it may be prudent to modify your diet if you are: planning to become pregnant; pregnant; nursing; or a young child. With a few simple adjustments, you can continue to enjoy these foods in a manner that is healthy and beneficial and reduce your unborn or young child's exposure to the harmful effects of mercury at the same time.

Key Parts of the Advisory:

- Fish and shellfish are an important part of a healthy diet. Fish and shellfish contain high quality protein and other essential nutrients, are low in saturated fat and contain omega-3 fatty acids. A well balanced diet that includes a variety of fish and shellfish can contribute to heart health and children's proper growth and development. Thus, women and young children in particular should include fish or shellfish in their diets due to the many nutritional benefits.
- By following these 3 recommendations for selecting and eating fish or shellfish, women and young children will receive the benefits of eating fish and shellfish and be confident that they have reduced their exposure to the harmful effects of mercury.

1. Do not eat Shark, Swordfish, King Mackerel, or Tilefish because they contain high levels of mercury.

2. Eat up to 12 ounces (2 average meals) a week of a variety of fish and shellfish that are lower in mercury.

1. Five of the most commonly eaten fish that are low in mercury are shrimp, canned light tuna, salmon, pollock, and catfish.
2. Another commonly eaten fish, albacore ("white") tuna has more mercury than canned light tuna. So, when choosing your two meals of fish and shellfish, you may eat up to 6 ounces (one average meal) of albacore tuna per week.

3. Check local advisories about the safety of fish caught by family and friends in your local lakes, rivers, and coastal areas. If no advice is available, eat up to 6 ounces (one average meal) per week of fish you catch from local waters, but don't consume any other fish during that week.

- Follow these same recommendations when feeding fish and shellfish to your young child, but serve smaller portions.

The Difference Between This Advisory and Previous Advisories:

1. The advisory emphasizes the positive benefits of eating fish.
2. The advisory provides examples of commonly eaten fish that are low in mercury.
3. The advisory for the first time specifically addresses canned light tuna and canned albacore ("white") tuna, as well as tuna steaks (in the questions and answers section).
4. The advisory recommends not to eat any other fish in the same week as locally caught fish are consumed (the advice on the amount of locally caught fish to eat is the same as in the 2001 EPA advisory).
5. The advisory contains a section that addresses frequently asked questions about mercury in fish.

What the Risk Is:

Research shows that most people's fish consumption does not cause a health concern. However, high levels of mercury in the bloodstream of unborn babies and young children may harm the developing nervous system. With this in mind, FDA and EPA designed an advisory that if followed should keep an individual's mercury consumption below levels that have been shown to cause harm. By following the advisory parents can be confident of reducing their unborn or young child's exposure to the harmful effects of mercury, while at the same time maintaining a healthy diet that includes the nutritional benefits of fish and shellfish.

General Methylmercury Information:

- The methylmercury described in the advisory is not the same type of mercury found in some thermometers or in dental amalgam.
- Mercury is a naturally occurring element in the environment and is also released into the air through industrial pollution. Mercury that falls from the air can accumulate in streams and oceans. Bacteria in the water cause chemical changes that transform mercury into methylmercury. Fish absorb the methylmercury as they feed in these waters. Methylmercury builds up more in some fish than others depending on what they eat how long they live, and how high up the food chain they are.
- Fish and shellfish are the main sources of mercury exposure to humans and that mercury is in the form of methylmercury. Other forms of mercury, such as that in dental amalgams are minor contributors to human mercury exposure.

General Dietary Advice:

- FDA recommends that consumers eat a balanced diet, choosing a variety of foods including fruits and vegetables, foods that are low in *trans* fat and saturated fat, as well as foods rich in high fiber grains and nutrients. Fish and shellfish can be an important

part of this diet.

What's Next:

- FDA and EPA want to ensure that women and young children continue to eat fish and shellfish because of the nutritional benefits and encourage them to follow the advisory so they can be confident in reducing their mercury exposure as well.
- FDA and EPA are planning a comprehensive educational campaign to reach: women who might become pregnant; pregnant women; nursing mothers; and young children. The agencies will work with state, local and tribal health departments to get information out into their communities. Physicians, other health professionals, and health care associations will be sent information to distribute through their offices. Extensive outreach through the media is also planned. Radio and television stations, health editors at newspapers, magazines, and other popular media will be contacted to encourage them to carry the public service message. The methylmercury advisory will also be an important part of a comprehensive food safety education program to be used by educators of pregnant women. FDA plans to launch the comprehensive education program later this year.
- EPA and FDA have begun discussions on how to coordinate other scientific assessments involving fish.

Other:

- FDA and EPA tested different versions of the revised advisory in 16 focus groups in 7 different locations throughout the United States. Based on responses we received we modified the advisory so that it is more easily understood.
 - In December 2003, after 8 focus groups had been conducted, a draft of the revised advisory was presented to the Foods Advisory Committee. Based on their feedback we conducted 8 additional focus groups and modified the advisory according to the feedback we received. The result is the 2004 FDA/EPA Consumer Advisory: "What You Need to Know About Mercury in Fish and Shellfish."
- Since July 2002 FDA has tested over 3400 cans of tuna as well as 227 fish samples, comprising 12 different species, for mercury. These results were added to our previous sampling results.
- FDA continues to sample fish and shellfish, testing for mercury.

For More Information:

For more information about the risks of mercury in fish and shellfish call the FDA's Food Information Hotline toll-free at 1-888-SAFEFOOD or visit FDA's Food Safety website at www.cfsan.fda.gov/seafood1.html. For more information about the safety of locally caught fish and shellfish, visit the Environmental Protection Agency's Fish Advisory website at www.epa.gov/osf/fish or contact your state or local health department. Contact information for state and local health departments is also found at this site.

###

FDA-EPA Advisory: What You Need to Know about Mercury in Fish and Shellfish (March 2004)

Mercury Levels in Commercial Fish and Shellfish (March 2004)

Mercury in Fish: FDA Monitoring Program (1990-2003)

FDA-EPA Press Release (March 19, 2004)

Fish is an Important Part of a Balanced Diet by Lester M. Crawford, D.V.M., Ph.D. (March 2004)

Mercury (Information from the Environmental Protection Agency)

Exhibit F



August 12, 2005

**Letter to Bill Lockyer, Attorney General of the State of
California,**
**RE: a suit filed on June 21, 2004 in San Francisco Superior
Court,**
***The People of the State of California v. Tri-Union Seafoods,
LLC, et al.,***
(Case No.: CGC-04-432394).

Bill Lockyer
Attorney General of the State of California
Office of the Attorney General
1300 "I" Street
P.O. Box 944255
Sacramento, California 94244-2550

Dear Mr. Lockyer:

On June 21, 2004, your office filed suit in San Francisco Superior Court, in *The People of the State of California v. Tri-Union Seafoods, LLC, et al.*, (Case No.: CGC -04-432394) seeking an injunction and civil penalties to remedy defendants' alleged failure to warn consumers that canned and packaged tuna products sold by defendants were "exposing consumers to chemicals known to the State of California to cause cancer and reproductive harm." The chemicals described in the complaint are mercury and mercury compounds.

Under the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 ("Proposition 65"), businesses must provide persons with a "clear and reasonable warning" before exposing them to such chemicals. According to the above-cited complaint, on July 1, 1987, methylmercury was added to the list of chemicals known to the State of California to cause reproductive toxicity and, on May 1, 1996, methylmercury compounds were added to the list of chemicals known to the State of California to cause cancer.

The warnings that would be required on the defendants' products if the lawsuit is successful are some derivation of the following: "WARNING: This product contains a chemical known to the State of California to cause cancer," and "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."^[1]

FDA believes that such warnings are preempted under federal law. They frustrate the carefully considered federal approach to advising consumers of both the benefits and possible risks of eating fish and shellfish; accordingly federal law preempts these Proposition 65 warnings concerning mercury and mercury compounds in tuna. Furthermore, FDA believes that compliance with both the Federal Food, Drug, and Cosmetic Act ("Act") and Proposition 65 is impossible and, as a result, the latter is preempted under federal law.

The Act provides broad authority to the FDA to regulate the labels of food products. However, rather than requiring warnings for every single ingredient or product with possible deleterious effects, FDA has deliberately implemented a more nuanced approach, relying primarily on disclosure of ingredient information and nutrition information, taking action in instances of adulterated and misbranded foods^[2] and, only under exceptional circumstances, requiring manufacturers to provide warnings on their labels.^[3] As part of this deliberate regulatory approach, FDA has required warnings only in those instances where there is clear evidence of a hazard, in order to avoid overexposing consumers to warnings, which could result in them ignoring all such statements, and hence creating a far greater public health problem.^[4]

FDA has been studying the issue of methylmercury in fish for several years. In so doing, it has compiled substantial data, and has developed significant expertise in analyzing the pertinent scientific issues, together with the consumer education aspects of this matter. As a result, the agency believes that it is uniquely qualified to determine how to handle the public health concerns related to methylmercury in fish. After many years of analysis on this issue, FDA has chosen to issue an advisory rather than to require a warning on fish and shellfish (collectively, "seafood") product labels for several reasons. First, consumer advisories are communicated to the target audience directly, rather than to all consumers. Second, FDA believes that the advisory approach is more effective than a product label statement in relaying the complex messages about mercury in seafood.^[5] Third, a label statement that reaches the public at large can also have unintended adverse public health consequences. FDA focus group results have suggested that people who are not in the target audience (i.e., women who are not nursing and not likely to become pregnant, and men) might eat less fish or refrain from eating fish altogether when they receive information about the mercury content of fish and possible harmful health effects to the targeted audience (i.e., pregnant women, women who might become pregnant, nursing mothers, and young children).

The agency issued its first methylmercury in fish advisory in the mid 1990s. As more information has come to light regarding the relative benefits and possible risks of eating seafood, FDA has revised the advisory to change its emphasis. For instance, in July 2002, the FDA Food Advisory Committee ("FAC") recommended that FDA clarify the language of the existing advisory, develop a quantitative exposure assessment, and increase monitoring for methylmercury. Recognizing the importance of a coordinated and consistent message on this issue, it also recommended that FDA and EPA combine their two independent advisories. The FAC recommendations were addressed by the two agencies as follows:

- FDA and EPA jointly held four stakeholder meetings between July 29 and July 31, 2003, regarding methylmercury in seafood. The meetings consisted of a series of formal presentations from FDA and EPA, followed by a general discussion in which participants provided comments on the progress toward a joint advisory.

- FDA conducted focus group testing in November 2003 to assess consumers' understanding of the existing advisory.
- The exposure assessment, which had been conducted by FDA, underwent a peer review in August 2003.
- Additional seafood monitoring data were collected during 2002 and 2003.

Revisions to the advisory were made in consideration of these activities in addition to the prior recommendations made by the FAC. This draft advisory ("2003 Draft Advisory") was then presented to the FAC for its review and released to the public on December 10, 2003.

On March 10, 2004, the FAC provided additional recommendations for the FDA and EPA to consider, including providing a list of seafood that have low levels of mercury, a list of common names of seafood, clarifying the portion size to make it easier to understand, making portion size consistent between variety and frequencies of consumption, and including a Web site in the advisory for those who might want further information. The FAC also recommended that FDA and EPA avoid the need to issue multiple advisories by designing the advisory in such a way that it is understood by more than just the original target audience. FDA and EPA considered these recommendations as they refined the 2003 Draft Advisory.

On March 19, 2004, FDA and EPA released the 2004 Advisory, "What You Need to Know About Mercury in Fish and Shellfish." The objective of the 2004 Advisory, as described in the Background document released simultaneously therewith, is to inform women who may become pregnant, pregnant women, nursing mothers, and parents of young children as to how to get the positive health benefits from eating fish and shellfish, while minimizing their mercury exposure.

The 2004 Advisory provides three principal recommendations for women and young children. These recommendations incorporate the relative mercury levels of "canned light tuna" and "albacore (white) tuna" in relation to each other as well as in relation to other seafood, together with advice as to how frequently these tuna products can be consumed by the targeted audience.

1. Do not eat Shark, Swordfish, King Mackerel, or Tilefish because they contain high levels of mercury.
2. Eat up to 12 ounces (two average meals) a week of a variety of fish and shellfish that are lower in mercury.
 - Five of the most commonly eaten fish that are low in mercury are shrimp, canned light tuna, salmon, pollock, and catfish.
 - Another commonly eaten fish, albacore ("white") tuna has more mercury than canned light tuna. So, when choosing your two meals of fish and shellfish, you may eat up to six ounces (one average meal) of albacore tuna per week.
3. Check local advisories about the safety of fish caught by family and friends in your local lakes, rivers and coastal areas. If no advice is available, eat up to six ounces (one average meal) per week of fish you catch from local waters, but don't consume any other fish during that week. Follow these same recommendations when feeding fish and shellfish to your young child, but serve smaller portions. [Emphasis added]

As subsequent steps, FDA and EPA are engaged in a comprehensive educational campaign to reach the targeted audience. The agencies are working with state, local, and tribal health departments to get information out into their communities. Physicians, other health professionals, and health care associations are being sent information to distribute through their offices. Extensive outreach through the media is also planned. Radio and television stations, health editors at newspapers, magazines, and other popular media will be contacted to encourage them to carry public service messages. The 2004 Advisory will also be an important part of a comprehensive food safety education program to be used by educators of pregnant women.

In addition to issuing these advisories, FDA has used its expertise in this area to advance the public health other ways. For example, FDA employed its expertise on mercury in food and food labeling in resolving the Omega-3 fatty acid health claim petitions: On September 8, 2004, FDA issued its decision to allow qualified health claims involving Omega-3 fatty acids and a reduced risk of coronary heart disease.^[6] Omega-3 fatty acids are abundant in a variety of fish. FDA stated in these letters that it would consider exercising enforcement discretion for the following qualified health claim:

"Supportive but not conclusive research shows that consumption of EPA and DHA omega-3 fatty acids may reduce the risk of coronary heart disease. One serving of [Name of the food] provides [] gram of EPA and DHA omega-3 fatty acids. [See nutrition information for total fat, saturated fat, and cholesterol content.]"

FDA also considered, and rejected, the suggestion by petitioner Martek that the presence of mercury in seafood needed to be addressed in the health claim.^[7] With regard to the petitioner's argument that when the health claim appeared on a fish product, such as tuna, it should be accompanied by an advisory statement suggesting a limited weekly intake for a vulnerable population of pregnant women, women of childbearing age, nursing mothers, and young children, our response was as follows:

"FDA disagrees with the petitioners' contention that the omega-3 fatty acid qualified health claim should be accompanied by a product label statement about mercury content of fish and possible harmful health effects to the vulnerable population of pregnant women, women who might become pregnant, nursing mothers, and young children. For some time, FDA has been addressing the issue of reducing the exposure to the harmful effects of mercury by communicating with this target population (pregnant women, women who might become pregnant, nursing mothers, and parents of young children) through the use of consumer advisories. The latest consumer advisory was issued in March 2004 jointly by FDA and the Environmental Protection Agency. This advisory includes information about mercury and makes recommendations about the kinds and amount of fish to eat and to avoid.

Agencies are granted broad discretion in determining the means by which to pursue policy goals . . . FDA has decided that it is preferable not to use a label statement about mercury and possible harmful effects to pregnant women, women who might become pregnant, nursing mothers and young children as a condition for the agency's enforcement discretion for the omega-3 fatty acid qualified health claims." [Footnotes omitted]

For all of the public health reasons stated above, FDA believes that California should not interfere with FDA's carefully considered approach of advising consumers of both the benefits and possible risks of eating seafood.

Furthermore, the agency believes California cannot legally require the Proposition 65 warnings on tuna products because they are preempted under federal law, for two principal reasons. First, FDA has been given broad authority to regulate the labels of food products, and has deliberately implemented its regulatory authority with a nuanced approach, relying primarily on disclosure of ingredient information and nutrition information and, only under exceptional circumstances, requiring manufacturers to provide warnings on their labels. After years of analysis of the methylmercury in tuna issue, the agency remains convinced that the issuance of an advisory remains the preferred route for advising the public. The Proposition 65 warnings frustrate this carefully considered agency approach, causing federal law to preempt California's warnings.

Second, the Proposition 65 warnings purport to convey factual information, namely that methylmercury is known to cause cancer and reproductive harm. However, it is done without any scientific basis as to the possible harm caused by the particular foods in question, or as to the amounts of such foods that would be required to cause this harm. Stated differently, these warnings omit facts which are necessary to place the information in its proper context. As a result, FDA believes that the Proposition 65 warnings are misleading under section 403 of the Act, causing tuna products with such warnings to be misbranded under federal law. Tuna manufacturers would not be able to comply both with Proposition 65 and the Act and, hence, the Proposition 65 warnings are conflict preempted under federal law.

For all of the above-stated reasons, the agency believes that Proposition 65 is preempted by federal law with respect to the proposed warnings concerning mercury and mercury compounds in tuna.

Sincerely,

Lester M. Crawford, D.V.M., Ph.D.
Commissioner of Food and Drugs

cc: Robert E. Brackett, Ph.D, Director CFSAN
Joan E. Denton, Director, Office of Environmental Health Hazard Assessment, Proposition 65 Implementation

[1] Proposition 65 does not specify the form or wording of the warning. Section 12601 of the California Regulations (22 CCR 12601) addresses Clear and Reasonable Warnings, and provides generally that "[t]he message must clearly communicate that the chemical in question is known to the state to cause cancer, or birth defects or other reproductive harm." Section 12601(a). The regulations provide a "safe harbor" warning for carcinogens and reproductive toxicants. The safe harbor warning for reproductive toxicants states, "WARNING: This product contains a chemical known to the State of California to

cause birth defects or other reproductive harm." Section 12601(b)(4)(B). While this provision states that persons are not precluded from providing other warnings that satisfy the requirements of the regulation (Section 12601(a)), it does not provide further clarification as to acceptable warnings.

[2] FDA has adulteration and misbranding authority by virtue of sections 402 and 403 of the Act.

[3] For example, 21 C.F.R. 172.804(e)(2) requires that any food containing the sweetener aspartame must bear the following statement: "Phenylketonurics: contains phenylalanine"; 21 C.F.R. 101.17(g) requires juices that have not been specifically processed to prevent, reduce or eliminate the presence of pathogens to bear the following statement: "WARNING: This product has not been pasteurized and, therefore, may contain harmful bacteria that can cause serious illness in children, the elderly, and persons with weakened immune systems"; and 21 C.F.R. 101.17(d) requires food products that derive more than 50 percent of its total caloric value from either whole protein, protein hydrolysates, amino acid mixtures, or a combination of these, and that is represented for use in weight reduction to bear the following statement: "WARNING: Very low calorie protein diets (below 400 Calories per day) may cause serious illness or death. Do Not Use for Weight Reduction in Such Diets Without Medical Supervision. Not for use by infants, children, or pregnant or nursing women."

[4] "When confronted with a problem that threatens the general public, FDA has promulgated regulations requiring placement of warning statements on the food label. For example, in 21 C.F.R. 101.17(d), the agency requires a warning on protein products promoted for weight reduction. However, FDA is unwilling to require a warning statement in the absence of clear evidence of a hazard....[as the agency] is concerned that it would overexpose consumers to warnings. As a result, consumers may ignore, and become inattentive to, all such statements." 56 F.R. 28592, 28615; Preamble to the Proposed Rule on Food Labeling; Declaration of Ingredients (1991).

[5] For instance, the 2004 Advisory, as discussed below, provides information on the relative amounts of mercury in different types of seafood, including "canned light tuna", and "albacore (white) tuna", the number of ounces that the targeted population can eat per week of each of the different types of seafood, together with the types of seafood that the targeted population should altogether avoid. This level of detail would be difficult to provide on a product label. Furthermore, this should be contrasted with the substance of the Proposition 65 warnings referenced at the beginning of this letter.

[6] Health Claim Petitions: Omega-3 Fatty Acids and Reduced Risk of Coronary Heart Disease (Docket No. 2003Q-0401) (Letter responding to Wellness petition can be found at <http://www.cfsan.fda.gov/~dms/ds-ltr38.html>) (Letter responding to Martek petition can be found at <http://www.cfsan.fda.gov/~dms/ds-ltr37.html>).

[7] Specifically, the Martek petition argued four principal points in this regard: (1) that when the health claim appears on fish (such as tuna), it should be accompanied by an advisory statement suggesting a limited weekly intake for a vulnerable population of pregnant women, women of childbearing age, nursing mothers, and young children; (2) that certain fish (including shark, swordfish, king mackerel, and tile fish), and other fish that are similarly high in methylmercury, should be ineligible to bear the proposed health claim; (3) that sources of omega-3 fatty acids derived from fish (such as fish oils) should be ineligible for the health claim unless the oil has been tested and found to contain less than 0.025 ppm of mercury; and, (4) that the presence of mercury may offset the cardio-protective effects of omega-3 fatty acids, and therefore, that the claim would be misleading if it appeared on fish that contained elevated levels of mercury. FDA rejected all of these points after extensive review of the applicable science and considerable deliberation.

Exhibit G

Food

Fish and Fisheries Products Hazards & Controls Guidance: 3rd ed., Appendix 5 - FDA & EPA Safety Levels in Regulations and Guidance

APPENDIX 5

FDA & EPA Safety Levels in Regulations and Guidance

(Return to [table of contents](#).)

This appendix contains a listing of FDA and EPA levels relating to safety attributes of fish and fishery products published in regulations and guidance. In many cases, these levels represent the point at or above which the agency will take legal action to remove products from the market. Consequently, the levels contained in this table may not always be suitable for critical limits.

Table A-5

FDA & EPA Safety Levels in Regulations and Guidance

Product	Level	Reference
Ready to eat fishery products (minimal cooking by consumer)	Enterotoxigenic <i>Escherichia coli</i> (ETEC) - 1×10^3 ETEC/g, LT or ST positive.	Compliance Program 7303.842
Ready to eat fishery products (minimal cooking by consumer)	<i>Listeria monocytogenes</i> - presence of organism.	Compliance Program 7303.842
All fish	<i>Salmonella</i> species- presence of organism.	Sec 555.300 Compliance Policy Guide
All fish	1. <i>Staphylococcus aureus</i> - positive for staphylococcal enterotoxin, or	Compliance Program 7303.842

	2. <i>Staphylococcus aureus</i> level is equal to or greater than 10 ⁴ /g (MPN).	
Ready to eat fishery products (minimal cooking by consumer)	<i>Vibrio cholerae</i> - presence of toxigenic 01 or non-01.	Compliance Program 7303.842
Ready to eat fishery products (minimal cooking by consumer)	<i>Vibrio parahaemolyticus</i> - levels equal to or greater than 1 x 10 ⁴ /g (Kanagawa positive or negative).	Compliance Program 7303.842
Ready to eat fishery products (minimal cooking by consumer)	<i>Vibrio vulnificus</i> - presence of pathogenic organism.	Compliance Program 7303.842
All fish	<i>Clostridium botulinum</i> - 1. Presence of viable spores or vegetative cells in products that will support their growth; or, 2. Presence of toxin.	Compliance Program 7303.842
Clams and oysters, fresh or frozen - Imports	Microbiological - 1. <i>E. coli</i> - MPN of 230/100 grams (average of subs or 3 or more of 5 subs); 2. APC - 500,000/gram (average of subs or 3 or more of 5 subs).	Sec 560.600 Compliance Policy Guide
Clams, oysters, and mussels, fresh or frozen - domestic	Microbiological - 1. <i>E. coli</i> or fecal coliform - 1 or more of 5 subs exceeding MPN of 330/100 grams or 2 or more exceeding 230/100 grams; 2. APC - 1 or more of 5 subs exceeding 1,500,000/gram or 2 or more exceeding 500,000/gram.	Compliance Program 7303.842
Salt-cured, air-dried unviscerated fish	Not permitted in commerce (Note: small fish exemption).	Sec 540.650 Compliance Policy Guide
Tuna, mahi mahi, and related fish	Histamine - 500 ppm based on toxicity. 50 ppm defect action level, because histamine is generally not uniformly distributed in a decomposed fish. Therefore,	Sec 540.525 Compliance Policy Guide

	50 ppm is found in one section, there is the possibility that other units may exceed 500 ppm.	
All fish	Polychlorinated Biphenyls (PCBs) - 2.0 ppm (edible portion)*.	21 CFR 109.30
Fin fish and shellfish	Aldrin and dieldrin - 0.3 ppm (edible portion).	Sec 575.100 Compliance Policy Guide
Frog legs	Benzene Hexachloride - 0.3 ppm (edible portion).	Sec 575.100 Compliance Policy Guide
All fish	Chlordane - 0.3 ppm (edible portion).	Sec 575.100 Compliance Policy Guide
All fish	Chlordecone - 0.4 ppm crabmeat and 0.3 ppm in other fish (edible portion).	Sec 575.100 Compliance Policy Guide
All fish	DDT, TDE and DDE - 5.0 ppm (edible portion).	Sec 575.100 Compliance Policy Guide
All fish	Heptachlor and heptachlor epoxide - 0.3 ppm (edible portion).	Sec 575.100 Compliance Policy Guide
All fish	Mirex - 0.1 ppm (edible portion).	Sec 575.100 Compliance Policy Guide
All fish	Diquat - 0.1 ppm*.	40 CFR 180.226
Fin fish and crayfish	Fluridone - 0.5 ppm*.	40 CFR 180.420
Fin fish	Glyphosate - 0.25 ppm*.	40 CFR 180.364
Shellfish	Glyphosate - 3.0 ppm*.	40 CFR 180.364
Fin fish	Simazine - 12 ppm*.	40 CFR 180.213a
All fish	2,4-D - 1.0 ppm*.	40 CFR 180.142
Salmonids, catfish and lobster	Oxytetracycline - 2.0 ppm.	21 CFR 556.500
All fish	Sulfamerazine - no residue permitted.	21 CFR 556.660
Salmonids and catfish	Sulfadimethoxine/ormetoprim combination - 0.1 ppm.	21 CFR 556.640
All fish	Unsanctioned drugs *** - no residue permitted	Sec 615.200 Compliance Policy Guide
Crustacea	Toxic elements: 76 ppm arsenic; 3 ppm cadmium; 12 ppm chromium; 1.5 ppm lead; 70 ppm nickel.	FDA Guidance Documents

Clams, oysters, and mussels	Toxic elements: 86 ppm arsenic; 4 ppm cadmium; 13 ppm chromium; 1.7 ppm lead; 80 ppm nickel.	FDA Guidance Documents
All fish	Methyl mercury - 1.0 ppm ***	Sec 540.600 Compliance Policy Guide
All fish	Paralytic shellfish poison - 0.8 ppm (80µg/100g) saxitoxin equivalent.	Sec 540.250 Compliance Policy Guide, and Compliance Program 7303.842
Clams, mussels and oysters, fresh, frozen or canned	Neurotoxic shellfish poison - 0.8 ppm (20 mouse units/100 gram) brevetoxin-2 equivalent.	National Shellfish Sanitation Program Manual of Operations
All fish	Amnesic shellfish poison - 20 ppm domoic acid, except in the viscera of dungeness crab, where 30 ppm is permitted.	Compliance Program 7303.842
All fish	Hard or sharp foreign object - generally 0.3 (7mm) to 1.0 (25mm) in length	Sec 555.425 Compliance Policy Guide

* These values are tolerances.

** Sanctioned drugs are approved drugs and drugs used under an INAD. See Chapter 11 for additional information.

*** See Chapter 10 for additional information.

Note: the term "fish" refers to fresh or saltwater fin fish, crustaceans, other forms of aquatic animal life other than birds or mammals, and all mollusks, as defined in 21 CFR 123.3(d).

See also:

[FDA Seafood List](#)

Foodborne Pathogenic Microorganisms and Natural Toxins Handbook (Bad Bug Book)

Seafood Information and Resources