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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Law Division.
Marilyn **ARONS**, Joseph Caruso, and Phillip Arrigo, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
RITE AID CORPORATION, Med-Pro Inc., Albers Medical Distributors Inc., Americare Pharmacy, and H.D. Smith Wholesale Drug Company, John Does 1-100 and XYZ Corps 1-100, Defendants,
No. BER-L-4641-03.

March 23, 2005.

Patrick L. Rocco , and Jennifer A. Sullivan , (Shalov Stone & Bonner LLP , attorneys) and Lee S. Shalov, argued the cause for plaintiffs.
Thomas A. Schmutz , Michael F. Healy , Melissa Furrer Miller , and Meredith B. Trzcinski , (Morgan, Lewis & Bockius LLP, attorneys) argued the cause for defendant Rite Aid Corporation.
Martin Healy , (Sedgwick, Deter, Moran & Arnold , attorneys) and Cathy J. Dean , and Daniel R. Zmijewski , (Polsinelli Shalton Welte Suelthaus, A Professional Corporation, attorneys) argued the cause for defendant Albers Medical Distributors Inc.
Frank Lo Bosco , and Arthur G. Lash , (Taylor Colicchio & Silverman, LLP, attorneys) argued the cause for defendant Americare Pharmacy.
Michael R. McDonald , (Gibbons, Del Deo Dolan , Griffinger & Vecchione , attorneys) and Francis P. Morrissey , (Schiff Hardin, LLP, attorneys) argued the cause for defendant H.D. Smith Wholesale Drug Company.
HARRIS, J.

I. INTRODUCTION

***1** The pharmaceutical product Lipitor® (atorvastatin calcium)(Lipitor) is exclusively manufactured by Pfizer Ireland Pharmaceuticals and distributed in the United States by Pfizer, Inc. (Pfizer) and its affiliates. Lipitor is a prescription drug used along with diet to lower cholesterol. Lipitor is the most prescribed drug in one of the most widely prescribed classes of cholesterol-lowering medications, called statins.

This is a putative class action seeking compensation for economic loss claimed by three New Jersey residents who assert that the Lipitor they purchased from three retail pharmacies was not authentic. They allege that the tablets sold to them in March, April, and May 2003, were represented to be Lipitor, but were not. Based upon this alleged affirmative misrepresentation, FN1 plaintiffs seek remedies for breach of express warranty under New Jersey's version of the Uniform Commercial Code (N.J.S.A.12A:2-313) (UCC) and for consumer fraud under the New Jersey Consumer Fraud Act (N.J.S.A.56:8-2)(NJCFA). Underpinning plaintiffs' assertions is the conduct of the defendants in participating in a voluntary recall of all pharmacological products sold as Lipitor in April and May 2003.

> FN1. Although each plaintiff purchased tablets separately, at different retail pharmacies, and at different times, they allege that they were all victimized by the same affirmative misrepresentation.

Plaintiffs have moved for a declaration that the dispute shall proceed as a class action under R. 4:32 and for permission to amend the complaint to add new parties pursuant to R. 4:9. Defendants have moved for summary judgment to dismiss all claims pursuant to R. 4:46.

Plaintiffs initially proposed that they serve as the representatives for two classes defined by the following:

> All persons throughout the United States who purchased (or paid for) counterfeit Lipitor, including those bottles of Lipitor recalled by Defendants from March 1, 2003 to the present.
> (Nationwide Class)
> and
> All persons in New Jersey who purchased (or paid for) counterfeit Lipitor, including those bottles of Lipitor recalled by Defendants, from March 1, 2003 to the present.
> (New Jersey Class)

Although the plaintiffs' briefs are unclear, at oral argument they clarified their position that the Nationwide Class would proceed on the theory of a violation of the UCC only, and the New Jersey Class would proceed on the theory of a violation of the NJCFA. Plaintiffs conceded at oral argument that their proposed class definitions required modification in order to avoid, among other things, being fail-safe class FN2 definitions. Notwithstanding this concession, plaintiffs have not offered any specific suggestions to better refine and tailor the class definitions. Instead they have left the fine-tuning to the court. FN3

> FN2. A fail-safe class is a class that would be bound only by a judgment favorable to plaintiffs but not by an adverse judgment. The order defining the class should avoid subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against). *Manual for Complex Litigation,Fourth* § 21.222 at 270 (2004)(footnote omitted).

> FN3. Although ultimate discretion and authority to define a litigation class resides in the court, the plaintiffs' decision not to proffer modified class definitions runs the risk that the court might inadvertently contravene a tactic or strategy of the very party to whom the court believes it is providing some measure of relief. Said another way, if the court tries the case, it may very well lose it for the party.

I deny plaintiffs' motion to certify a class; I grant in part and deny in part defendants' motions for summary judgment. I grant in part and deny in part plaintiffs' motion to amend the complaint.

II. BACKGROUND

The Defendants

Albers Medical Distributors, Inc.

Albers Medical Distributors, Inc. (Albers) is a national distributor of prescription and over-the-counter pharmaceutical products, as well as medical supplies for clinics, hospitals, physicians' practices, and independent pharmacies. Its principal place of business is in Kansas City, Missouri.

***2** In the latter months of 2002, Albers began acquiring hundreds of bottles containing 5000 tablets each that were represented to be 10 mg Lipitor. Albers also acquired smaller quantities of bottles containing tablets represented to be 20 mg Lipitor. Although Albers obtained written pedigree information pursuant to the Prescription Drug Marketing Act (21 U.S.C. 331(t) , 333(b) , 353(c)-(e)) it appears that the pedigree may not have been completely trustworthy. FN4 Nevertheless, several individuals with experience in the wholesale drug industry reviewed the pedigree data during the time the tablets were navigating their way through the supply chain and into the hands of consumers. The pedigree data showed, for example, that 774,180 of the 10 mg tablets had been bought and sold by six different entities in Puerto Rico, Tennessee, Maryland, Missouri, and Illinois within a nine-day period in early 2003:

> FN4. On January 21, 2005, a Miami man pleaded guilty to conspiring to sell more than $12.8 million worth of counterfeit and illegally imported Lipitor to a Kansas City company. Julio Cruz admitted in U.S. District Court in Kansas City that he had participated in a conspiracy to sell the counterfeit and imported

cholesterol-reducing pills from February 2002 to April 2003. See *South Florida Business Journal*, January 24, 2005. http://southflorida.bizjournals.com/southflorida/stories/2005/01/24/daily8.html (last visited on February 7, 2005).

January 20, 2003: JM Blanco sold to Drogueria Javiness
January 22, 2003: Drogueria Javiness sold to Pharma Medical LLC
January 24, 2003: Pharma Medical LLC sold to G & K Pharm, LLC
January 27, 2003: G & K Pharm, LLC sold to Albers Medical
January 29, 2003: Albers Medical sold to H.D. Smith/Wooddale

Once Albers bought the bottles of tablets, it contracted with the now-bankrupt Med-Pro, Inc. (Med-Pro), FN5 a pharmaceutical repackaging specialist located in Lexington, Nebraska, to repackage the tablets from 5000 tablet bottles into 90 tablet packages. On January 29, 2003, Med-Pro obtained quantitative assays from a testing laboratory, Chemir Analytical Services located in Maryland Heights, Maryland, of samples labeled "Lipitor 10 mg" and "Lipitor 20 mg, 90 tablets." The test results indicated that both samples contained atorvastatin calcium.

FN5. On September 12, 2003, Judge Peter E. Doyne, P.J.S.C. dismissed all claims in the instant action against Med-Pro without prejudice as a result of a bankruptcy proceeding involving Med-Pro.

H.D. Smith Wholesale Drug Company

Commencing in November 2002, Albers began to sell a substantial quantity of 90 tablet packages represented to be 10 mg Lipitor and 20 mg Lipitor to H.D. Smith Wholesale Drug Company (H.D.Smith). H.D. Smith maintains its principal corporate offices in Springfield, Illinois, but offers a complete line of pharmaceuticals, over-the-counter items, and home health care products nationally. At the time of the sale, H.D. Smith was an authorized distributor for Pfizer.

Rite Aid Corporation

After H.D. Smith took ownership and control of the tablets claimed to be Lipitor, it sold substantial quantities of the tablets to Rite Aid Corporation (Rite Aid) in March and April 2003. Much smaller quantities of the tablets were sold by H.D. Smith to Americare Pharmacy (Americare) in February 2003.

Rite Aid is a Delaware corporation with its principal offices located in Camp Hill, Pennsylvania. It claims to be one of the nation's leading drugstore chains with annual revenues of more than $16.7 billion. As of February 26, 2005, Rite Aid operated 3,356 stores FN6 through a complex web of subsidiaries and affiliates in 28 states across the country and the District of Columbia.

FN6. See http://www.riteaid.com/company_info/press/press_show.php/item_nbr/681/cat/national (last visited March 20, 2005).

***3** Rite Aid claims that it was not the entity that purchased the tablets sold by H.D. Smith. Rather, it contends that its subsidiary, Rite Aid Hdqtrs Corp. (Rite Aid Hdqtrs), actually acquired the tablets and distributed them to several retail pharmacies operating under the Rite Aid brand owned by related subsidiaries, including Rite Aid of New Jersey, Inc. (Rite Aid New Jersey). The total number of tablets that either Rite Aid Hdqtrs or Rite

Aid purchased from H.D. Smith was approximately 3,400,000. Between April 3, 2003 and June 1, 2003, Rite Aid pharmacies nationwide dispensed approximately 16,600,000 tablets that were represented to be Lipitor. Obviously, H .D. Smith was not Rite Aid's sole source of products claimed to be Lipitor in 2003. In New Jersey, Rite Aid pharmacies dispensed approximately 850,000 tablets that were represented to be Lipitor.

Americare Pharmacy

Americare appears to be a trade name for a retail pharmacy operated in Fort Lee, New Jersey. On February 27, 2003, H.D. Smith sold Americare two bottles containing 90 tablets each that were represented to contain Lipitor.

The Plaintiffs

Marilyn Arons

Marilyn Arons (Arons) resides in Fort Lee, New Jersey. On or about March 1, 2003, she presented her physician's prescription for 10 mg Lipitor to Americare's pharmacist and requested that the prescription be filled. In return, she received a bottle filled with 90 tablets that were represented to be 10 mg Lipitor. Americare charged her $190.29 for the tablets. Arons consumed 72 of the tablets before immediately stopping after she read an article in *The Record* that reported on the subject of counterfeit Lipitor. Arons does not claim that she suffered any personal injuries or other adverse health-related consequences as a result of ingesting the 72 tablets. Arons refused the offer of Americare to replace-at no cost to Arons-the remaining 18 tablets in her custody after she stopped taking the tablets from the bottle that she had purchased on March 1, 2003.

Joseph Caruso

Joseph Caruso (Caruso) purchased 90 tablets that were represented to be 10 mg Lipitor from a Rite Aid pharmacy in Bloomfield, New Jersey, on April 15, 2003. Caruso was charged $10.00 for the tablets. Caruso did not return his unused tablets to the Rite Aid pharmacy for a free replacement although this offer was extended to him. Caruso does not claim that he suffered any personal injury or other untoward side effects from ingesting the tablets sold to him by the Rite Aid pharmacy on April 15, 2003.

Phillip Arrigo

Phillip Arrigo (Arrigo) acquired a 30-tablet bottle that was represented to contain Lipitor tablets from a Rite Aid pharmacy in Bayonne, New Jersey, on May 9, 2003. Over the next few days he consumed an unknown number of tablets before he stopped. He returned all but one tablet to the Rite Aid pharmacy and received free replacement tablets that were represented to be Lipitor. Arrigo did not seek medical attention as a result of his ingestion of the tablets that he bought on May 9, 2003. He does not claim that his health was impaired by consuming the tablets he acquired on May 9, 2003. To the contrary, it appears that by August 2003, Arrigo's cholesterol count had improved from an earlier time.

The Voluntary Recall

***4** As early as April 2003, agents of the United States Food and Drug Administration (FDA) were investigating the purchasing, repacking, sale, and distribution of counterfeit prescription pharmaceuticals, including Lipitor. On May 1, 2003, Special Agents Stephen M. Holt and Larry W. Sperl of the FDA wrote to Virgil Montgomery, Esq., an attorney for H.D. Smith, requesting information about, and segregation of, certain lot numbers of tablets believed to be counterfeit Lipitor that H.D. Smith purchased from Albers (and that were repackaged by Med-Pro) in or around December 2002.

On May 22, 2003, the FDA requested that Albers initiate a voluntary recall of certain lots of tablets believed to be counterfeit Lipitor. The next day, Albers transmitted to its customers, including H.D.

Smith, an *Urgent Drug Recall* urging the cessation of distribution of tablets identified within lot numbers # 04132V expiration 01/04 (10 mg), # 20722V expiration 09/04 (10 mg), and # 16942V expiration 09/04 (10 mg).

After receiving Albers' *Urgent Drug Recall,* H.D. Smith, on May 23, 2003, issued its own letter to its customers-including Rite Aid and Americare-requesting that they return all tablets that emanated from the lot numbers identified by Albers.

The FDA, for its part, issued an *FDA Talk Paper* entitled "FDA Alerts Consumers and Health Professionals to Recall of Counterfeit Lipitor." The FDA advisory alerted the public to the FDA's ongoing concerns and set forth specific directions to healthcare providers and patients to check their product packaging for the identification of tablets within the affected lot numbers.

On May 31, 2003, Rite Aid issued a letter to its patients and customers who purchased tablets represented to be Lipitor between April 1, 2003 and May 23, 2003. The letter advised those patients and customers of the risk of counterfeit Lipitor. It urged them not to take any remaining tablets and to return them to their Rite Aid pharmacy for replacement.

A second *FDA Talk Paper,* entitled "FDA's Continuing Investigation Implicates Additional Lots of Counterfeit Lipitor" was issued on June 3, 2003. This *FDA Talk Paper* announced that further investigation had revealed that three additional lots might be counterfeit: # 20842V expiration 09/04 (10 mg), # 16092V expiration 07/04 (10 mg), and # D270481 expiration not available (20mg).

On June 5, 2003, H.D. Smith notified its customers that the FDA had advised that all strengths and all lot numbers of tablets repacked by Med-Pro might be counterfeit. H.D. Smith requested that retailers return all opened and unopened products connected with the Med-Pro repackaging effort.

On June 6, 2003, Rite Aid advised its patients and customers of the expanded recall, particularly calling attention to 20 mg tablets claiming to be Lipitor that were purchased by patients and customers between April 3, 2003 and June 1, 2003. Rite Aid invited patients and customers to return all tablets that were sold as Lipitor regardless of whether they could be identified with or linked to the Med-Pro repackaging effort.

III. MOTION TO AMEND COMPLAINT TO ADD PARTIES

***5** Plaintiffs seek permission under R. 4:9-1 to amend their Complaint to add three subsidiaries of Rite Aid in place of previously named fictitious defendants. The new parties are identified by plaintiff as Rite Aid Hdqtrs Corp. (Rite Aid Hdqtrs), Rite Aid of Maryland, Inc. (Rite Aid Maryland), and Rite Aid of New Jersey, Inc. (Rite Aid New Jersey). Plaintiff claims that although these parties will be new to the case, their involvement in the background factual matrix has been open and well known, and Rite Aid has effectively protected their rights during the discovery process. Thus, according to plaintiffs, there can be no prejudice to the existing parties and the amendment will not unduly delay the progress of the litigation.

Plaintiffs indicate that they were unaware of the fine distinctions that Rite Aid was seeking to make between it and its subsidiaries until August 2004. In September 2004, plaintiffs conducted discovery depositions in which Rite Aid's corporate structure and business plan were explored. According to this discovery, plaintiffs now assert that Rite Aid Hdqtrs was involved in the purchase and distribution of the pharmacological products claimed to be Lipitor. Rite Aid Maryland is another Rite Aid subsidiary that operates a distribution center on behalf of Rite Aid's retail pharmacies in the Eastern United States. Discovery suggests that it may have received from H.D. Smith products claimed to be Lipitor and then distributed such products to several retail pharmacies in New Jersey and elsewhere. Rite Aid New Jersey is a Rite Aid subsidiary that operates virtually all of the Rite Aid-branded retail pharmacies in New Jersey. It was from two of these retail pharmacies that the products represented to be Lipitor were purchased by Caruso and Arrigo.

Rule 4:9-1 sets forth the general rule that while leave of court is required to amend a pleading, motions for leave to amend are to be "freely given in the interest of justice." New Jersey courts have adopted an indulgent and liberal approach to the amendment of pleadings. *See* Pressler, *Current N.J. Court Rules,* comment on R. 4:9-1 (explaining that "[t]he motion for leave to amend is required by the rule to be liberally granted and without consideration of the ultimate merits of the amendment"). Of course, there remains "a necessary area of judicial discretion in denying such motions where the interests of justice require." *Young v. Schering Corp.*, 275 N.J.Super. 221, 232 (App.Div.1994) (quoting *Wm. Blanchard Co. v. Beach Concrete Co., Inc.*, 150 N.J.Super. 277, 299 (App.Div.), *certif. denied*, 75 N.J. 528 (1977)), *aff'd*, 141 N.J. 16 (1995). However, as "the achievement of substantial justice is the fundamental consideration," denial of such a motion in the "interests of justice" is appropriate only when there would be undue prejudice to another party. *Jersey City v. Hague*, 18 N.J. 584, 602 (1955); *see also Brower v. Gonnella*, 222 N.J.Super. 75, 81 (App.Div.1987).

***6** The decision whether to grant such a motion rests within the court's sound discretion. *Kernan v. One Washington Park Urban Renewal Assocs.*, 154 N.J. 437, 456-57 (1998); *Fisher v. Yates*, 270 N.J.Super. 458, 467 (App.Div.1994). Significantly, courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. *Interchange State Bank v. Rinaldi*, 303 N.J.Super. 239, 257 (App.Div.1997). This is because there is no point in permitting an amended pleading when a subsequent motion to dismiss must be granted. *Id.*

Defendant Rite Aid resists plaintiffs' application contending that the request to amend the pleadings comes too late, will prejudice the defendants, and is an act of futility. I conclude that other than its lip service claiming prejudice, Rite Aid has not demonstrated any sound reason to deny the application, except in part as to Rite Aid New Jersey. As for Rite Aid New Jersey, I conclude that claims against it for remedies under the NJCFA are not available, and to allow the amendment for that theory of liability would be futile. I will explain in detail elsewhere in this opinion why Rite Aid New Jersey, as a proxy for a licensed professional pharmacist, is not vulnerable for the imposition of remedies under the NJCFA. Thus, plaintiffs may amend their complaint to add the three parties, but they may not assert NJCFA violations against Rite Aid New Jersey.

IV. SUMMARY JUDGMENT

A movant will be granted summary judgment if the court finds, after reviewing the full motion record in the light most favorable to the adverse party, *Strawn v. Canuso*, 140 N.J. 43, 48 (1995), that there is no genuine issue of material fact. *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520, 536 (1995). In *Brill* the Supreme Court made clear that

> a determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540 (internal quotations and citation omitted).]

The *Brill* summary judgment standard is codified in our Court Rules:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

***7** I do not assess the credibility of plaintiffs'

assertions as that is reserved for the trier of fact. However, as *Brill* emphasized, it is within my province " 'to determine whether there is a genuine issue for trial." ' *Id.* at 540 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986)). That the motion judge makes no determinations as to credibility "does not require a court to turn a blind eye to the weight of the evidence; the 'opponent must do more than simply show that there is some metaphysical doubt as to the material facts." ' *Big Apple BMW, Inc. v. BMW of N.Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir.1992) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986)), *cert. denied,* 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). At the summary judgment stage, a judge does not weigh the evidence for the truth of the matter, but simply determines "whether there is a genuine issue for trial." *Schnall v. Amboy Nat. Bank,* 279 F.3d 205, 209 (3d Cir.2002) (citing *Anderson,* 477 U.S. at 249). An issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in the complaint; instead, it must 'go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, and designate specific facts showing that there is a genuine issue for trial." ' *Schiazza v. Zoning Hearing Bd.,* 168 F.Supp.2d 361, 365 (M.D.Pa.2001) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Summary judgment should be granted when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, supra,* 477 U.S. at 322-323.

Rite Aid argues that it is not a proper party in this action because it is merely a holding company that has no connection to the conduct complained of, either directly or vicariously, other than to share the name of the pharmacies from which Arrigo and Caruso purchased what they thought was Lipitor. Rite Aid is correct in its assertion that it may not be held liable merely because its subsidiaries or affiliates may have contributed to the problem. Mere stock ownership by one corporation in another corporation is insufficient to render the former liable for the torts of the latter, *Ross v. Pennsylvania R.R. Co.,* 106 N.J.L. 536 (E. & A.1930). However, plaintiffs have shown that the discovery to date suggests that Rite Aid was itself actually involved in the chain of distribution, notwithstanding its protestations of mistake, misunderstanding, or error by some of its representatives. I cannot parse the credibility of Rite Aid's witnesses, and I am duty bound to give plaintiffs the benefits of all reasonable inferences derived from the evidence adduced through discovery. Thus, where that discovery reveals that Rite Aid was a participant, Rite Aid remains in the case until and unless the jury concludes that its involvement was nil.

***8** Rite Aid further argues that plaintiffs lack standing to pursue claims against Rite Aid because of Rite Aid's purported lack of involvement. Among the cluster of doctrines that ensure adherence to the requirement that New Jersey courts not render advisory opinions, the doctrine that requires a litigant to have standing to invoke the power of a court is one of the most important. The party invoking the court's jurisdiction has the burden to establish his standing to sue. To do so, a litigant must satisfy three elements that constitute the minimum to possess standing. First, a party must present a sufficient stake in the outcome of the litigation; second, a real adverseness with respect to the subject matter must exist; and third, there must be a substantial likelihood that the party will suffer harm in the event of an unfavorable decision. *N.J. State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n,* 82 N.J. 57, 67-69 (1980).

Unlike its federal counterpart, our Constitution contains no express language confining the exercise of judicial power to deciding actual cases and controversies. *Compare U.S. Const.* art. III, § 2 with *N.J. Const.* art. VI, § 1. Our courts, nevertheless, have long held that we will not render

advisory opinions or function in the abstract. *See Crescent Park Tenants Ass'n v. Realty Eq. Corp. of N.Y.,* 58 N.J. 98, 107 (1971). Nor will we entertain proceedings initiated by litigants who are mere intermeddlers, interlopers, or strangers to the dispute. *Id.* at 107 (citations omitted); see also *Bergen County v. Port of N.Y. Authority,* 32 N.J. 303, 307 (1960) ; *N.J. Tpke. Auth. v. Parsons,* 3 N.J. 235, 240 (1949). Ordinarily, a litigant may not claim standing to assert the rights of third parties. *Jackson v. Dept. of Corr.,* 335 N.J.Super. 227, 231 (App.Div.2000), *certif. denied,* 167 N.J. 630 (2001) ; *Jersey Shore Med. Center-Fitkin Hosp. v. Estate of Baum,* 84 N.J. 137, 144 (1980). This principle has particular efficacy where one seeks to vindicate the constitutional rights of strangers to the dispute. See *In re D'Aconti,* 316 N.J. Super 1, 13 (App.Div.1998) ; *State Dept. Envtl. Prot. & Energy v. Dopp,* 268 N.J. Super 165, 174 (App.Div.1993) ; *In re Ass'n of Trial Lawyers of Am.,* 228 N.J. Super 180, 185 (App.Div.), *certif. denied,* 113 N.J. 660 (1988). The related doctrines of standing, justiciability, ripeness, and mootness are incidents of the primary conception that judicial power is to be exercised to provide remedies for proven wrongs only at the instance of one who is himself harmed, or immediately threatened with harm, by the challenged conduct. *Poe v. Ullman,* 367 U.S. 497, 504, 81 S.Ct. 1752, 1756, 6 L.Ed.2d 989, 996 (1961).

Standing cannot be waived. *New Jersey Citizen Action v. Riviera Motel Corp.,* 296 N.J. Super 402, 412 (App.Div.1997). A magnanimous and lenient approach to standing to seek remedies applies in this state. *See Crescent Park Tenants Ass'n, supra,* 58 N.J. at 107-08 (1971) ; *Dome Realty, Inc. v. City of Paterson,* 150 N.J. Super 448, 452 (App.Div.1977). "[The] courts have considered the threshold for standing to be fairly low. In other words, so long as the litigant evidences a sufficient stake with real adverseness, standing will be found." *Reaves v. Egg Harbor Tp.,* 277 N.J. Super 360, 366 (Ch. Div.1994) (citations omitted). More specifically, there must be a substantial likelihood that the plaintiff will experience some harm in the event of an unfavorable decision. *Loigman v. Township Committee of the Twp. of Middletown,* 297 N.J.Super. 287, 295 (App.Div.1997).

***9** Due to the status of discovery that suggests Rite Aid's involvement in the distribution chain, it cannot confidently be said that plaintiffs lack standing to pursue remedies. Notwithstanding the precarious nature of plaintiffs' proofs on the question of Rite Aid's involvement, they have demonstrated sufficient harm-if what they say happened is true-to invest them with standing to pursue remedies.

Defendants argue that they are entitled to summary judgment because plaintiffs cannot satisfy all of the necessary elements required to prove a breach of express warranty. The missing elements are claimed to involve proof that the tablets purchased by plaintiffs were counterfeit and that plaintiffs suffered damages as a result thereof.

Plaintiffs' express warranty claims are governed by New Jersey's version of the Uniform Commercial Code-Sales, *see* N.J.S.A. 12A:2-101 *et. seq.* (UCC). It 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 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.
>
> N.J.S.A. 12A:2-313(1).

The UCC makes it clear that an express warranty is created when a promise is made by a seller to a buyer which relates to a good and becomes part of the basis of the bargain. The seller promises that the good sold will conform to some standard that may be established by a model, a level of quality, an assurance, a description or a list of specifications. The UCC does not require the use of formal words of promise or that the seller have a specific intention to warrant the good but rather that the substance of the sales agreement contains a promise of conformity as described above. *See* N.J.S.A. 12A:2-313(2). The policy behind a warranty should

also be taken into consideration when determining whether a warranty exists. Generally, the seller knows more about the good and is better able to absorb any loss resulting from a dangerous condition relating to the good than the buyer. *See Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434 (1965) ("Warranties of fitness are regarded by law as an incident of transaction because one party to the relationship is in a better position than the other to know and control the condition of the chattel transferred and to distribute the losses that may occur because of a dangerous condition the chattel possess."). It must be emphasized, however, that not all promises of conformity to some standard are warranties; to be a warranty, the promise must also be part of the basis of the bargain for the purchase of the good.

***10** In this case, plaintiffs claim that the pharmacies that purchased the tablets from the defendants' chain of distribution represented that plaintiffs were receiving authentic Lipitor. Plaintiffs further allege that they did not receive authentic Lipitor and that the defendants can no longer warrant that the tablets, in fact, are authentic Lipitor. Moreover, plaintiffs argue that by paying for non-authentic Lipitor, they have been economically injured-albeit in incrementally small amounts-as a result of the sham transactions. FN7 Plaintiffs base these allegations upon two sources in the factual record: (1) the defendants' participation in a voluntary recall and (2) their expert's opinion that the samples he tested are not authentic Lipitor.

> FN7. Plaintiffs have eschewed any claim that their ingestion of the tablets caused personal injuries.

I am satisfied that plaintiffs may not rely upon the happening of the voluntary recall as a basis to argue that the goods acquired from the retail pharmacies, in fact, were not authentic. Although the voluntary recall is not entirely irrelevant to a complete understanding of what occurred in this case, it can not permit a reasonable trier of the facts to conclude-through inference or otherwise-that these activities demonstrate a breach of warranty. There are simply too many other reasonable motivations and explanations for conducting a voluntary recall besides removing potentially counterfeit products from the market to allow a trier of fact to conclude that, indeed, the plaintiffs' tablets were tainted. For example, a voluntary recall could occur if there were suspicions of tampering with a product by a third party; it could be precipitated if there were problems with outside contamination; or it could be conducted because of the inclusion in the packaging of misprinted or outdated information. None of these hypothetical situations lead ineluctably to the conclusion that there must be a failure of the benefit of the bargain and a breach of express warranty. Plaintiffs must demonstrate substantially more than the occurrence of a mere voluntary recall in order to create a reasonable inference that the goods were not as they were represented to be. This is especially true where, in this case, the evidence supports the reasonable inference that the vast majority of the tablets sold and resold by the defendants were probably authentic and that the tablets that were recalled were similarly authentic for the most part. Thus, it is entirely unclear whether plaintiffs may have been among the unlucky ones who acquired tablets that are actually bogus. To extrapolate from the voluntary recall episode that plaintiffs likely were so unlucky creates impermissible speculation and conjecture.

That having been said, plaintiffs have produced as part of the record on these motions, an uncertified FN8 nineteen page "Summary Report draft" dated December 19, 2004, that opines

> FN8. Because the report was not incorporated into deposition testimony and did not constitute either a certification or affidavit, it is not "competent evidential materials" for the purpose of opposing defendants' motions for summary judgment. *Brill v. Guardian Life Ins. Co. of Am.*, *supra*, 142 N.J. at 540; R. 4:46-2(c). It is of no moment that the report *could* have been made the subject of a certification. It was not; now, given the jettisoning of the expert by plaintiffs, it is not likely ever to be.

"... these Suspect SAMPLE Tablets are not authentic Lipitor Tablets manufactured by Pfizer or by using Pfizer-defined manufacturing protocols."
***11** (capitalization in the original).
Plaintiffs' expert, Gerald J. DeMenna, represented himself as the holder of advanced degrees in analytical chemistry, as well as having extensive hands-on experience in performing chemical analyses for more than twenty years. Apparently, not everything that DeMenna represented himself to be is accurate. FN9 Under a blistering attack by defendants upon their expert's credentials, plaintiffs have moved separately-after oral argument on the instant dispositive motions-for permission to substitute a different expert opinion for that of DeMenna's and to retest some of the tablets that remain in plaintiffs' possession. By separate order I have granted that motion with conditions. However, that leaves the instant motions for summary judgment without competent record evidence that would support either a direct or a circumstantial conclusion that the plaintiffs received something other than authentic Lipitor. In this light, plaintiffs have done nothing more than create a mere metaphysical doubt that is insufficient to withstand summary judgment. *Big Apple BMW, Inc. v. BMW of N.Am., Inc., supra,* 974 F.2d at 1363. At this posture of the case, all that can be said is that plaintiffs purchased pharmacological tablets in 2003 that were represented to be Lipitor, those tablets were the subject of a voluntary recall in 2003, and plaintiffs still do not know whether they actually received that for which they bargained. This is wholly insufficient to support a claim for breach of express warranty under New Jersey law.

> FN9. Plaintiffs' attorney stated in a certification filed in support of plaintiffs' separate request to change experts, "... it is now apparent that DeMenna mislead both me and my firm regarding various aspects of his credentials. Had we known the truth about his qualifications, we would not have retained him. Moreover, his lack of candor will likely result in prejudice to plaintiffs and the proposed class."

Notwithstanding the deafening silence of plaintiffs' proofs on the question of breach of warranty, I am mindful of plaintiffs' predicament. They apparently secured an expert in good faith who turned out to be something other than they expected. They have asked for additional time to obtain another expert opinion to bolster their belief that the products they bought were not authentic Lipitor. Thus, even though plaintiffs currently cannot resist defendants' motions for summary judgment on the express warranty claims, I believe that it would be an abuse of discretion now to end those claims permanently. In other words, I elect to deny defendants' motions *without prejudice* because a final disposition-under the cloud of plaintiffs' current dubious expert report-would be premature. Plaintiffs may or may not be able to resuscitate their express warranty claims in the future if they indeed obtain another analysis of the pharmacological products in their possession. All parties must be patient and await the outcome of the unfolding discovery process on that issue. If plaintiffs do not produce an expert opinion, the disposition of defendants' motions will be transformed from denials without prejudice into grants. If plaintiffs *do* produce an expert opinion of evidentiary significance, defendants shall be permitted nevertheless to argue that such opinion does not create a material factual dispute. I leave all of that wrangling to the future.

***12** Americare makes a particularized argument that it is immune from claims under the UCC for breach of express warranty because it provided a service, rather than a sale of goods. As a retail pharmacy, it asserts that in dispensing prescription drugs like Lipitor (even if it turns out not to be authentic) the pharmacy is primarily a service provider. Since its sales of prescription drugs were governed by N.J.S.A. 45:14-1 to -36.4 at the time, and now by the New Jersey Pharmacy Practice Act, FN10 N.J.S.A. 45:14-40 to -80, Americare considers it a health care professional engaged in the practice of pharmacy. Thus, it argues that it merely provided a health care service and not a sale of a good to plaintiff Arons.

> FN10. The New Jersey Pharmacy Act became effective on or about July 14, 2004. L.2003, c. 280, § 43.

Americare cites a California strict liability drug defect case, *Murphy v. E.R. Squibb and Sons, Inc.*, 40 Cal.3d 672, 710 P.2d 247 (1985), for the proposition that there the dominant role of a pharmacist in supplying a prescription drug should be characterized as a service, even though the pharmacist is generally engaged in a hybrid enterprise, combining the performance of services and the sale of prescription drugs. *Murphy* has no persuasive authority in a case such as the instant matter where there is no claim of a defective product. Rather, plaintiffs claim that the product was not what it was represented to be. Additionally, the instant matter does not raise issues of strict liability. Americare further cites *Supermarkets Gen. Corp. v. Sills,* 93 N.J.Super. 326 (Ch. Div.1966) where the court upheld the validity of N.J.S.A. 45:14-12, as support for the idea that remedies under the UCC for breach of an express warranty are unavailable in circumstances where prescription drugs are being dispensed. *Supermarkets Gen. Corp.* is wholly inapposite to the present inquiry and I find it unilluminating on the instant inquiry.

Article 2 of the UCC applies to "transactions in goods." N.J.S.A. 12A:2-102. The term "goods" is defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid [.]" N.J.S.A. 12A:2-105(1). A "sale" involves "the passing of title from the seller to the buyer for a price." N.J.S.A. 12A:2-106(1). Notwithstanding these narrowly defined terms, whether N.J.S.A 12A:2-313 applies depends on how the contract between the parties may be accurately characterized: as one involving a transaction of goods (N.J.S.A.12A:2-102) plus incidental services, or as one for services plus the incidental sale of goods. *See Meyers v. Henderson Constr. Company,* 147 N.J.Super. 77, 79 (Law Div.1977). The legal analysis most frequently employed when courts are faced with such mixed contracts is that Article 2 of the UCC is applicable "if the sales aspect predominates and is inapplicable if the service aspect predominates." Sonja A. Soehnel, Annotation, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services,* 5 A.L .R. 4th 501, 505 (1981), and see cases annotated therein. I am convinced that at the present time, there are genuine issues of material fact in dispute so as to make it impossible to determine as a matter of law whether Americare's distribution of tablets labeled Lipitor was predominately a service. Those disputes revolve around the nature of the activities actually performed by Americare's pharmacist in dispensing the tablets, the actual status-either counterfeit or authentic-of the tablets, and the nature of the interaction between Arons and Americare's pharmacist. Americare's motion on this ground is denied.

***13** Rite Aid seeks summary judgment on the NJCFA claim based upon its view that pharmacists engaged in the practice of pharmacy are learned professionals entitled to the protection of *Macedo v. Dello Russo,* 178 N.J. 340 (2004) (holding that the advertising activities of "learned professionals" such as physicians are not subject to the CFA). Rite Aid has accurately explicated the current state of the law, but that does not assist Rite Aid. This is because Rite Aid neither is a member of a learned profession nor did it employ a member of a learned profession involved in this action. Rite Aid does have an interest in a subsidiary corporation, Rite Aid New Jersey, which *is* entitled to *Macedo* immunity. Rite Aid is a party in this action because of its alleged participation in the chain of distribution *before* the tablets were sold to plaintiffs. It is not a party because of a claim of alter ego status. Rite Aid New Jersey, on the other hand, as the employer of the pharmacist who actually dispensed the tablets is entitled to the same protection from remedies under the NJCFA as were Dr. Dello Russo's corporate entities in *Macedo.* For this reason, plaintiffs may not amend their complaint to add Rite Aid New Jersey; it would be an exercise in futility. *Interchange State Bank v. Rinaldi,* 303 N.J.Super. 239, 256-257 (App.Div.1997) (courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law).

On the other hand, Americare's situation is unlike that of Rite Aid. Americare employed a pharmacist who was practicing pharmacy and it is therefore entitled to the learned profession immunity under the NJCFA. Thus, Arons' claims that are based

upon the NJCFA are dismissed pursuant to the logical imperative of *Macedo.*

The defendants have further moved to dismiss plaintiffs' NJCFA claims on the basis that no rational fact finder could conclude that they had engaged in any conduct prohibited by the NJCFA. Plaintiffs argue that defendants' conduct of purveying non-authentic Lipitor under the affirmative misrepresentation that it was authentic renders them guilty of unconscionable commercial practices even if they too were duped.

This state's public policy affords broad protection to consumers against deceptive commercial practices. *See Blatterfein v. Larken Assocs.,* 323 N.J.Super. 167, 179 (App.Div.1999) ("The Consumer Fraud Act is written broadly, in order to protect the public. Its purpose is to eliminate 'sharp practices and dealings in the marketing of merchandise and real estate.' As remedial legislation, it is to be liberally construed in favor of consumers." (citations omitted)); *see also,* e.g., *Lemelledo v. Beneficial Management Corp. of America,* 150 N.J. 255, 265 (1997) (noting that "merchandise" is broadly defined under the NJCFA to include the sale of credit); *Marascio v. Campanella,* 298 N.J.Super. 491, 498 (App.Div.1997) (holding that a " commercially owned, unoccupied, part residential, part commercial property qualifies as a residential, non-commercial property for purposes of the Act and its regulations"); *Miller v. American Family Publishers,* 284 N.J.Super. 67, 83-84 (Ch. Div.1995) (noting that magazine subscription/sweepstakes scheme fell within ambit of Act's proscribed "unconscionable commercial practices" even though the program explicitly stated that no purchase was required to enter or win).

***14** In 1971, more than a decade after the NJCFA was passed, it was amended to permit individual consumers to bring private actions to recover refunds, N.J.S.A. 56:8-2.11 to -2.12 , and treble damages for violations, N.J.S.A. 56:8-19. *Lemelledo v. Beneficial Mgmt. Corp. of Am.,* 150 N.J. 255, 264 (1997). *See* also *Riley v. New Rapids Carpet Ctr.,* 61 N.J. 218, 226 (1972) (stating that " private class action must be accepted if the objectives [of the Act] are to be realized"). In Governor Thomas Cahill's press release regarding the 1971 amendment, he noted that the amendment " provide[s] easier access to the courts for the consumer, ... increase[s] the attractiveness of consumer actions to attorneys[,] and ... reduce[s] the burdens on the Division of Consumer Affairs." Governor's Press Release for Assembly Bill, No. 2402, at 2 (Apr. 19, 1971). *See also Skeer v. EMK Motors, Inc.,* 187 N.J.Super. 465, 471-73 (App.Div.1982) (examining legislative history of Act).

The addition of a private cause of action, by a person who suffers a loss due to a violation of the Act, promoted several purposes. It created an efficient mechanism to: (1) compensate the victim for his or her actual loss, (2) punish the wrongdoer through the award of treble damages, and (3) attract competent counsel to counteract the "community scourge" of fraud by providing an incentive for an attorney to take a case involving a minor loss to the individual. *Lettenmainer v. Lube Connection, Inc.,* 162 N.J. 134, 139 (1999) (citations omitted); *Scibek v. Longette,* 339 N.J.Super. 72, 77-78 (App.Div.2001) (examining purposes of the legislation).

The NJCFA has been hailed as "one of the strongest consumer protection laws in the nation[.]" Governor's Press Release for Assembly Bill No. 2402, at 1 (June 29, 1971). "The history of the Act is one of constant expansion of consumer protection. " *Gennari v. Weichert Co. Realtors,* 148 N.J. at 604. The NJCFA is remedial in nature and, for that reason, "[c]ourts have emphasized that like most remedial legislation, the Act should be construed liberally in favor of consumers." *Cox v. Sears Roebuck & Co.,* 138 N.J. 2, 15 (1994). When assessing individual claims, courts must remain " mindful that the Act's provision authorizing consumers to bring their own private action is integral to fulfilling the [statute's] legislative purposes[.]" *Id.* at 16. "It is well to remember that the Consumer Fraud Act is aimed at more than the stereotypic con man. 'The statutory and regulatory scheme is also designed to promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services." ' *Leon v. Rite Aid Corp.,*

340 N.J.Super. 462, 471 (App.Div.2001) (citing *Division of Consumer Affairs v. G.E. Co.,* 244 N.J.Super. 349, 353 (App.Div.1990)).

Defendants urge the notion that plaintiffs' core grievance is nothing more than a garden-variety breach of warranty or breach of contract claim. There is no evidence, for example, that any defendants knowingly and intentionally tried to fob off non-authentic Lipitor on plaintiffs. They clearly affirmatively represented that what they were selling was authentic Lipitor, but the most that may be said about their actions is that the defendants, or some of them, failed to exercise reasonable care and oversight in their purchasing practices to protect adequately the consuming public from the distribution of non-authentic Lipitor. Although this conduct may be grounds for appropriate contract-based remedies if proven, defendants say that the tort-like remedies under the NJCFA are inappropriate and excessive. They cite *Cox v. Sears Roebuck & Co.,* 138 N.J. 2 (1994) for the proposition that ordinary remedial damages may be appropriate for an action on a contract, but that the NJCFA remedies should be deployed in such a situation only if there are substantial aggravating circumstances present in addition to the breach. *See also DiNicola v. Watchung Furniture,* 232 N.J.Super. 69, 72 (App.Div.1989) (NJCFA does not expose defendant to treble damages for breach of warranty or breach of contract unless substantial aggravating factors exist); *D'Ercole Sales, Inc. Fruehauf Corp.,* 206 N.J.Super. 11, 25-31 (App.Div.1985) (in absence of substantial aggravating circumstances, a breach of contract or warranty does not implicate treble damages under the NJCFA); *Suber v. Chrysler Corp.,* 104 F.3d 578, 588 (3d Cir.1997)(NJCFA requires that substantial aggravating circumstances be shown when the basis for the NJCFA claim is breach of warranty).

***15** Plaintiffs claim that they do not need to demonstrate substantial aggravating circumstances because their NJCFA claim is an additional claim, separate from their breach of warranty claim. This sounds promisingly persuasive until one examines the factual underpinnings of plaintiffs' claims. Upon due consideration, the facts that support plaintiffs' theories are exposed as identical. The representation that is claimed to be the basis of creating the bargain between the buyers and sellers is exactly the same representation upon which the NJCFA theory is based. The friction point between the parties lies in the offer to sell authentic Lipitor, nothing more and nothing less. Wordsmithing does not convert the same factual background into two different events worthy of sequential remedies under New Jersey law, unless those circumstances create a genuine factual dispute on whether substantial aggravating circumstances exist. I conclude that under the facts adduced to date, no rational trier of the facts could conclude that any of the defendants behaved in ways that may be characterized as creating substantial aggravating circumstances.

In *Suber v. Chrysler Corp., supra,* 104 F.3d at 587, the Third Circuit determined that there were factual disputes in the record that suggested the existence of substantial aggravating circumstances to enable plaintiff to pursue his NJCFA claim. Those circumstances included allegations that Chrysler representatives had lied about problems associated with Suber's van. In *United Roasters, Inc. v. Colgate-Palmolive Co.,* 649 F.2d 985, 992 (4th Cir.) , cert. denied, 454 U.S. 1054, 102 S.Ct. 599, 70 L.Ed.2d 590 (1981)), a opinion cited with approval by *D'Ercole Sales, Inc. v. Fruehauf Corp., supra,* 206 N.J.Super. at 31, the Fourth Circuit considered substantial aggravating circumstances akin to conduct that is actually deceptive or approaches deception. "In each instance, the deception or unfairness was present at the time of contract formation." *United Roasters, Inc. v. Colgate-Palmolive Co., supra,* 649 F.2d at 992.

In the present case, there is nothing of record to suggest that the defendants' behavior warrants the powerful remedies of the NJCFA. At its core, the instant dispute revolves around the sale of goods and whether those goods conform to the representations made by defendants. That those goods happen to have been ordered by physicians and dispensed by pharmacists does not change the calculus. The NJCFA was not intended by the New Jersey Legislature to be a backstop to the FDA's overarching superintendence of drug safety in this state or anywhere else. Even under the lens of the

certification of Steven Burns that was submitted by plaintiffs recounting supposed industry practices, I cannot conclude that this case presents anything approaching the need for NJCFA intervention. Burns' certification is riddled with unsubstantiated lay and expert opinion, it relies upon hearsay without proffering that such reliance is common to similarly-situated experts, and it fails to explain the "whys and wherefores" of its opinion. The ultimate net opinion that "[i]f I [Burns] had received such lab reports [from Chemir Analytical Services] in connection with a secondary market purchase, I automatically would have questioned both the origin and authenticity of the product, and would not have purchased it" is wholly insufficient to create a material factual dispute regarding the existence of substantial aggravating circumstances. At best, it simply fortifies plaintiffs' position that defendants, or some of them breached a contract or warranty.

***16** In the absence of substantial aggravating circumstances, plaintiffs may not pursue their NJCFA claims. Defendants' motions for summary judgment dismissing such NJCFA claims are granted. Frankly, given the defendants' participation in a voluntary recall and their immediate cooperaton with the FDA, the persuasive evidence militates directly *against* the notion that the defendants acted deceptively or unconscionably, even if-assuming for purposes of this motion-they may have made an misrepresentation regarding the contents of the tablets they were selling. In the highly regulated area of pharmacological products, plaintiffs must demonstrate something dramatically more malevolent on the part of the defendants in order to trigger remedies under the NJCFA. In this regard, plaintiffs have failed.

V. CLASS ACTION MAINTAINABILITY MOTION

Plaintiffs seek to certify a nationwide class on behalf of

> All persons throughout the United States who purchased (or paid for) counterfeit Lipitor, including those bottles of Lipitor recalled by Defendants from March 1, 2003 to the present.

At this posture of the application, I am required to indulge "every favorable view" of plaintiff's complaint and the record. *Riley v. New Rapids Carpet Ctr.*, 61 N.J. 218, 223 (1972) (merits of action are not involved in determination of the mode in which the action shall proceed unless the allegations are patently frivolous); *Delgozzo v. Kenny,* 266 N.J.Super. 169, 181 (App.Div.1993)('[t]he court is bound to take the substantive allegations of the complaint as true'')(quoting *Blackie v. Barrack,* 524 F.2d 891, 901 n. 17 (9th Cir.1975), *cert. denied,* 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976)). In addition to the pleadings, the discovery taken in the matter is relevant. The evaluation of the legal and factual issues underlying a class certification motion, however, should be less penetrating as compared to a motion for summary judgment or at trial. *See In re Cadillac,* 93 N.J. 412, 426 (1983).

While not bound by the interpretations given the federal class-action rule, New Jersey courts, when construing its class action rule, "... have consistently looked to the interpretations given the federal counterpart for guidance" *Delgozzo v. Kenny, supra,* 266 N.J. Super at 188. Thus, in order to determine whether the requirements for class action certification have been met, inquiry beyond the pleadings must be made because "a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. American Tobacco Co.,* 84 F.3d 734, 744 (5th Cir.1996); *accord, Carroll v. Cellco Partnership,* 313 N.J.Super. 488, 495 (App.Div.1998).

Within this jurisprudential framework, I embark upon an analysis of each of the issues required to be considered under R. 4:32. A trial court should not certify a class until it has been determined, through rigorous analysis, that all the prerequisites of the rule governing class actions have been satisfied. As a first hurdle, a class is appropriate for certification only if it meets the four prerequisites of a class action set out in R. 4:32-1(a). Under this rule, one or more members of a class may sue or be sued as representative parties on behalf of all, only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact

common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

***17** Once this threshold is surmounted, the additional requirements of R. 4:32-1(b)(3) must be met. This second hurdle requires that "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." R. 4:32-1(b)(3).

New Jersey courts have determined that principled discretion must be applied in the treatment of the class certification rule. The reason is that class actions save time and money for the parties and the public and promote consistent decisions for people with similar claims. *Carroll v. Cellco Partnership,* 313 N.J.Super. 488, 498 (App.Div.1998) (citing *In re Cadillac, supra,* 93 N.J. at 430). Class actions also allow consumers to redress a common grievance under circumstances that would make individual actions uneconomical to pursue. *Varacallo, supra,* 332 N.J.Super. at 45.

Numerosity

To begin, R. 4:32-1(a)(1) requires that the class be " so numerous that joinder of all members is impracticable." This requirement does not demand that joinder be impossible, but rather that joinder would be extremely difficult or inconvenient. *See Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.,* 149 F.R.D. 65, 73 (D.N.J.1993) (impracticability does not mean impossibility, but rather that the difficulty or inconvenience of joining all members calls for class certification). Whether joinder of all of the class members would be impracticable depends on the circumstances surrounding the case and not merely on the number of class members. *See General Tel. Co. of the Northwest v. E.E.O.C.,* 446 U.S. 318, 329, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980) (numerosity requires examination of specific facts of each case and imposes no absolute numerical limitations). *See also Liberty Lincoln Mercury,* 149 F.R.D. at 73 (number is not, by itself, determinative); *Ardrey v. Federal Kemper Ins. Co.,* 142 F .R.D. 105, 109 (E.D.Pa.1992). While no minimum number of class members is required, " generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong ... has been met." *Stewart v. Abraham,* 275 F.3d 220, 226-27 (3d Cir.2001). A class of 81 property owners seeking money damages is sufficiently large to meet the numerosity requirement. *Saldana v. City of Camden,* 252 N.J.Super. 188, 193 (App.Div.1991). In order to satisfy the numerosity requirement "[p]recise enumeration of the members of a class is not necessary." *Zinberg v. Washington Bancorp, Inc.,* 138 F.R.D. 397, 405 (D.N.J.1990) ; see also *In re Cadillac,* supra, 93 N.J. at 425.

Plaintiffs' evidence strongly suggests that the number of persons who may have been allegedly victimized by defendants' breaches of warranty is in the thousands. Although there remains a substantial problem of identifying members of the class insofar as plaintiffs' failsafe definition is concerned, the raw number of affected purchasers who arguably might be similarly situated with plaintiffs is more than enough to satisfy the numerosity requirement of R. 4:32-1(a)(1).

Commonality

***18** Rule 4:32-1(a)(2) requires that there be questions of law or fact common to the class, " although not all questions of law or fact raised need be in common." *Weiss v. York Hospital,* 745 F.2d 786, 808-809 (3d Cir.1984), *cert. denied,* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (citing 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1763, at 603 (1972)). Where class members' factual circumstances are materially identical and the "questions of law raised by the plaintiff are applicable to each [class] member," the commonality requirement is satisfied. *Weiss v. York Hospital, supra,* 745 F.2d at 809 (citations omitted). Further, the commonality requirement is met " [w]hen the party opposing the class has engaged in a course of conduct that affects a group of persons

and gives rise to a cause of action," resulting in all of the members sharing at least one of the elements of that cause of action. *Newberg Class Actions,* § 3.10 (3d ed.1992). Common questions arise "from a 'common nucleus of operative facts' regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *In re Asbestos School Litig.,* 104 F.R.D. 422, 429 (E.D.Pa.1984), *aff'd in part, vacated in part sub nom.; In re School Asbestos Litig.,* 789 F.2d 996 (3d Cir.1986), cert. denied, 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117, 35 Ed. Law Rep. 30. "A common nucleus of operative fact[s] is typically found [when] defendants have engaged in standardized conduct toward members of the proposed class." *In re Life USA Holdings Inc. Ins. Litig.,* 190 F.R.D. 359, 366 (E.D.Pa.2000) , accord, *Kugler, supra,* 58 N.J. at 540. It should be kept in mind, however, that "commonality becomes obscured when the probable unique issues of liability, causation and damages in each case are considered, requiring individualized treatment at trial." *Saldana v. City of Camden, supra,* 252 N.J.Super. at 197.

This case presents the potential spectacle of the sale of counterfeit Lipitor by retail pharmacies. As I have developed elsewhere in this opinion, that factual circumstance has not yet been established, and it is absolutely required even if plaintiffs are to proceed individually. It is not enough simply to carp about defendants' current inability to warrant the contents of the tablets they sold. Rather, plaintiffs-as evidenced by plaintiffs' choice of class definition-must be able to establish that they and absent class members, in fact, paid for counterfeit Lipitor or received something other than that which was represented by defendants. Even assuming that the plaintiffs, in fact, were sold counterfeit Lipitor, absent potential class members, however, cannot be confidently said to have been treated in the same way. First, it is impossible to know with any certainty exactly what each purchaser took home in the tablets acquired from the pharmacies. The individual contents of the bottles sold at retail remain unknown. Many purchasers consumed their tablets. Some returned the leftovers to Rite Aid and Americare. Some retained their tablets. Just because the universe of tablets sold in the Spring of 2003 was the subject of the voluntary recall does not circumstantially demonstrate a breach of warranty. It is not inexorably true or even probable (based upon the instant record) that damages accrued to class members solely as a result of the same type of breach of warranty suffered by plaintiffs. Some of the tablets may indeed have been authentic and others not. This may have been true even within the same bottle dispensed by a pharmacist. The question of what each purchaser actually acquired demands individualized investigations and assessments for potential absent class members' claims, thereby militating against a finding of commonality. There is simply no general defect against which to measure defendants' conduct. Each sale was unique and the contents of the bottle sold to an absent class member will be unknown unless each class member can prove its contents. This is the antithesis of commonality.

Typicality

***19** Rule 4:32-1(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." "When the same unlawful conduct was directed at or affected both the named plaintiffs and the members of the putative class, the typicality requirement is usually met, irrespective of varying fact patterns that may underlie individual claims." *Cannon v. Cherry Hill Toyota, Inc.,* 184 F.R.D. at 544 (D.N.J.1999). In order to meet the typicality requirement, the plaintiff must show that his "injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff ." *In re Am. Med. Sys. Inc.,* 75 F.3d 1069, 1082 (6th Cir.1996) (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions,* § 3:76 (4th ed.2002). The court must ask whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented. *Baby Neal v. Casey,* 43 F.3d 48, 57 (3d Cir.1994).

By ensuring that the class representative's claims are similar to those of the class, the typicality requirement, like commonality, promotes efficient

case management and fair representation. Yet, despite this similarity, the commonality and typicality requirements serve distinct functions. The commonality requirement tests the sufficiency of the class claim. *See Hassine v. Jeffes,* 846 F .2d 169, 177 n. 4 (3d Cir.1988). The typicality requirement focuses on the relation between the representative parties and the class as a whole. *Id.* The New Jersey Supreme Court has stated that " [t]he claims of the representatives 'must have the essential characteristics common to the claims of the class." ' *In re Cadillac,* 93 N.J. at 425 (quoting 3B Moore's Federal Practice ¶ 23.06-2 (1982)).

A central issue in the instant case, claimed to be shared by plaintiffs and the members of the proposed classes alike, is whether defendants' conduct amounted to a breach of warranty under the UCC. Plaintiffs have demonstrated that their circumstances-at least in terms of behavior up to the point of sale-mirror the myriad state of affairs of potential absent class members. Subject to the problems of identifying exactly what was sold to individual patients and customers discussed in my analysis of commonality, typicality has been barely shown to exist on this record.

Adequacy of Representation

The proposed class satisfies the standards of R. 4:32-1(a)(4). Plaintiffs and their attorneys are qualified and experienced to conduct this litigation. Although I do not believe that plaintiffs have demonstrated sufficient commonality to allow this action to proceed as a class action (and typicality is precarious as well), they have no interests antagonistic to those of the potential class and no conflicts are apparent on the record.

Predominance of Common Issues

***20** The issue of predominance under R. 4:32-1(b)(3) focuses on "whether the potential class, including absent class members, seeks 'to remedy a common legal grievance." *In re Cadillac,* 93 N.J. at 431; *see also Delgozzo,* 266 N.J.Super. at 189. In order to meet the predominance requirement of R. 4:32-1(b)(3) a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof. In other words, just because the legal issues involved may be common between class members does not mean that the proof required to establish these same issues is sufficiently similar to warrant class representation and treatment.

Therefore, the predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Moore v. Paine Webber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002). The predominance requirement is far more demanding than the commonality requirement. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623-24, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Because R. 4:32-1(b)(3) requires that common issues predominate, class certification may be denied where common issues of law are not present or where resolving the claims for relief would require individualized inquiries. *See, e.g., Lewis Tree Serv., Inc. v. Lucent Techs. Inc.,* 211 F.R.D. 228, 235 (S.D.N .Y.2002) ("At a basic level, a nationwide class action in which plaintiffs raise claims of fraud would require the application of the law of at least fifty jurisdictions and would make class certification inappropriate."); *In re Methyl Tertiary Butyl Ether ("MTBE"),* 209 F.R.D. 323, 350 (S.D.N.Y.2002) (finding no predominance given plaintiffs' allegation that MTBE contamination occurred "over many years across four states indirectly caused by twenty defendants in conjunction with innumerable third parties who released the contaminant into the environment"). " The critical consideration is whether there is a ' common nucleus of operative facts." ' *Carroll v. Cellco Partnership, supra,* 313 N.J.Super. at 499.

In this case, predominance is absent. Plaintiffs unwittingly recognized this when they offered a class definition that required findings of counterfeit Lipitor as the price of admission to the class. Even if a more benign definition were proposed, thereby allowing identification of class members without regard to an ultimate determination in the case, the fundamental dispute revolves around what each

member of the class acquired. This is not provable just by showing that the plaintiffs' acquired a batch of counterfeit or even non-authentic Lipitor. It is not provable just by showing that defendants withdrew their products from the market under the guise of the voluntary recall. It is only provable by separate, individual inquiries that test the contents of absent class members' tablets, to the extent that is even possible at this time. The evidence does not demonstrate a systemic flaw in the goods that were sold and distributed by defendants. Rather, the most that may be said is that some of the goods sold have the earmarks of something other than authentic Lipitor. This cannot serve as the basis upon which a class action-one that will bind defendants as well as all absent class members-may proceed. Predominance is missing.

Superiority

***21** Rule 4:32-1(b)(3) requires that a class action be a superior method for the adjudication of a controversy. Implicit in this requirement is an identification of the relevant factual and legal issues underlying the request for class certification. *In re Cadillac, supra*, 93 N.J. at 426. The mere identification of those issues, however, is less penetrating than their subsequent evaluation on a motion for summary judgment or at trial. *Id.* Certification of a class action should not be denied because of the merits underlying the theory on which the action is predicated. *Olive v. Graceland Sales Corp.*, 61 N.J. 182, 189 (1974). "Nonetheless, even the identification of the issues to determine the suitability of an action for certification requires some preliminary analysis." *In re Cadillac, supra*, 93 N.J. at 426 (citing Miller, *An Overview of Federal Class Actions: Past, Present and Future* 51 (1977)). Thus, the court must engage in a cursory analysis of plaintiffs' claims to determine whether class certification represents a superior form of dispute resolution for the breach of express warrant claim.

Here, this analysis must be cognizant that the main factor affecting superiority involves the application of state law to plaintiffs' claims. Even if common questions of law were to exist, the application of multiple state laws may render the case unmanageable as a class action. Indeed, a number of courts in recent years have held that nationwide state law class actions are unmanageable and cannot be certified. *See, e.g., Andrews v. American Telephone & Telegraph Co.,* 95 F.3d 1014, 1024-25 (11th Cir.1996) ; *Castano v. American Tobacco Co.,* 84 F.3d 734, 741-44 (5th Cir.1996) ; *In re Rhone-Poulenc Rorer Inc.,* 51 F.3d 1293, 1302 (7th Cir.1995).

New Jersey trial judges, however, under appropriate circumstances, do have the authority to certify a national class action under *Phillips Petroleum v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed 2d 628 (1985). In that case, the Supreme Court held that the forum state may exercise jurisdiction over absent class members if they are given notice and an opportunity to opt-out, i.e., minimal procedural due process protection. *Id.* at 811-12.

Where there is a conflict of law between New Jersey and the law of a potential absent class member's residence or place of the product's acquisition, however, there is a risk that continuing to apply the law of this state could be unconstitutional. The Supreme Court addressed this issue in *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981). In *Allstate,* the Court stated that the Constitution's Due Process and Full Faith and Credit Clauses provided modest restrictions on the application of the forum state's law in class action cases. These restrictions require " that for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.,* 312-313.

***22** The locus of the transaction-from where the epiphany of a contract springs or where the breach of warranty is felt-is the jurisdiction that has the greatest governmental interest in having its breach of contract/warranty laws applied. See N.J.S.A. 12A:1-105 ("this act applies to transactions bearing an appropriate relation to this State.") Therefore, many different state laws shall apply in this case if they are unlike New Jersey's because the court shall

necessarily apply the law of each of the jurisdictions from which potential absent class members acquired their tablets of putative Lipitor. This conclusion, of course, creates problems for class certification itself, as discussed below. *See Georgine v. Amchem Prods., Inc.,* 83 F.3d 610 (3d Cir.1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (individualized choice of law analysis for each plaintiff's claims in a nationwide class action led to proliferation of disparate factual and legal issues and a lack of predominant common issues).

Plaintiffs have not presented a workable trial plan and has not convinced me of the similarities among the 50 states' breach of warranty law. This, at first blush, might seem ridiculous since plaintiffs seek remedies under a uniform law, the UCC. However, the UCC is not uniform. J. White & R. Summers, *Uniform Commercial Code* 7 (2d ed.1980) ; *Compag Computer v. Lapray,* 135 S.W.3d 657, 666 (Tex.2004) ; *Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1016 (D.C.Cir.1986), *cert. den.* 482 N.U. 915, 107 S.Ct. 3188, 96 L.Ed.2d 677 (1987). There are significant differences among many of the states that would materially affect the outcome.

In a motion for class certification, plaintiffs bear the burden of providing an "extensive analysis" of state law variations to determine whether there are " insuperable obstacles" to class certification. *Walsh v. Ford Motor Co., supra,* 807 F.2d at 1017 (D.C.Cir.1986) (citing *In re School Asbestos Litig.,* 789 F.2d at 1010). "If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action." *In re American Medical Systems, Inc.,* 75 F.3d 1069, 1085 (6th Cir.1996) (reversing certification of nationwide class in products liability case).

Plaintiffs recognize that notwithstanding the rubric Uniform Commercial Code, the law that has emerged thereunder is not pristinely uniform. Indeed, it is sometimes tangled and contradictory between jurisdictions, and in some instances clear expressions of the law notwithstanding the statutory language have not emerged. For example, in New Jersey, privity is not required for plaintiffs to prevail against remote sellers in the chain of distribution. *Alloway v. General Marine Industries, L.P.,* 149 N.J. 620 (1997) ; *Spring Motors Distribs. v. Ford Motor Co.,* 98 N .J. 555 (1985) ; *DiIorio v. Structural Stone & Brick Co., Inc.,* 368 N.J.Super. 134 (App.Div.2004). This appears to be the majority view.

***23** However, it is not the law in several other jurisdictions, including New York, where privity is an essential element of a cause of action for express warranty (*Martin v. Dierck Equip. Co.,* 403 N.Y.S.2d 185 (1978) ; *Manufacturers & Traders Trust Co. v. Stone Conveyor,* 458 N.Y.S.2d 116 (App.Div.1982)). Variations on the privity requirement in express warranty cases are also found in Alabama (*Barre v. Gulf Shores Turf Supply,* 547 So.2d 503 (1989) , Arizona (*Flory v. Silvercrest Industries, Inc.,* 633 P.2d 383 (1981) , Florida (*T.W.M. v. American Medical Systems, Inc.,* 886 F.Supp. 842 (N.D.Fla.1995) , Kentucky (*Williams v. Fulmer,* 695 S.W.2d 441 (1985) , Maryland (*Copiers Typewriters Calculators, Inc. v. Toshiba Corp.,* 576 F.Supp. 312 (D.Md.1983) , and Tennessee (*Masters by Masters v. Rishton,* 836 S.W.2d 702 (Ct App.1992).

Another aspect of express warranty law that demonstrates marked differences among the several states is whether reliance upon a seller's representation must be demonstrated. Plaintiffs argue that even if there are differences among the states regarding the necessity of proving reliance, it is a *non sequitor* because, in the words of plaintiff's brief, "common sense" shows that a purchaser of prescription drugs necessarily relies upon the representation that the pharmacological product is authentic. If plaintiffs' "common sense" rule of law were to prevail, it would automatically swallow and eliminate a mandatory element of proof that many states continue to require. In addition, it is not obvious that consumers of prescription drugs pay careful attention to what their pharmacists say in every case or that they read the label or package inserts for the prescriptive products they purchase. Thus, although it may not be a difficult burden for a plaintiff in a case like this to demonstrate reliance,

it is not a certainty.

Under New Jersey express warranty law it appears that particular reliance need not be shown and the warranty issue will be a factual one. *Gladden v. Cadillac Motor Car Div.,* 83 N.J. 320, 325 (1980). This appears to be the majority view. Many other states, however, expressly require a plaintiff to demonstrate reliance as a necessary element of the cause of action. For example, in Illinois, the buyer must show reliance on the seller's representations in order for an express warranty to exist. *Hrosik v. J. Keim Builders,* 345 N.E.2d 514 (Ill.App.1976). This is also the law in Arizona (*Flory v. Silvercrest Industries, Inc., supra*), Kentucky (*Salisbury v. Purdue Pharma,* 166 F.Supp.2d 526 (E.D.Ky.2001) , Maine (*Maine Farmers Exch. V. McGillicuddy,* 697 A.2d 1266 (Me.1997) , and Maryland (*Lowe v. Sporicidin Int'l,* 47 F.3d 124 (4th Cir.1995).

I conclude that given the disparate treatment of express warranties by the several states, it cannot confidently be said that a manageable jury trial is feasible. The creation of subclasses does not appear to be a viable alternative. In short, plaintiff has failed to convince me that treatment of its express warranty claim under the auspices of a class action is a superior way to resolve the dispute. Plaintiffs, of course, shall be permitted to pursue their individual claims to the extent that they are able to produce evidence of non-authentic Lipitor based upon the forthcoming opinion of their substitute expert(s).

VI. CONCLUSION

***24** Plaintiffs' motion to amend their complaint is granted in part. The defendants' motions for summary judgment on the express warranty issue are denied without prejudice. The defendants' motions for summary judgment on the NJCFA claim are granted. Plaintiffs' motion for class certification is denied. Rite Aid's counsel shall prepare the appropriate form of interlocutory order to memorialize all aspects of this decision and shall submit it to the court and opposing counsel as soon as practicable pursuant to R. 4:42 -1(c).

N.J.Super.L.,2005.
Arons v. Rite Aid Corp.
Not Reported in A.2d, 2005 WL 975462

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