SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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IVAN DIMICH, individually and on behalf of others similarly situated,

Plaintiff,

-against- Index No. 113528/03

MED-PRO INC., ALBERS MEDICAL DISTRIBUTORS INC., H.D. SMITH WHOLESALE DRUG COMPANY, and RITE AID CORPORATION,

Defendants.

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RICHARD B. LOWE, III, J.:

Motion sequence numbers 012-017 are consolidated for decision.

This action involves the sale, over an approximately three- month period, and later recall by defendant Rite Aid Corporation (Rite Aid) of several million Lipitor pills, approximately 19% of which may have been counterfeit. The facts are discussed in detail in this court's decision dated April 14, 2005, and will not be reiterated here, except as necessary.

MOTION SEQUENCE NUMBER 012

In motion sequence number 012, plaintiff Ivan Dimich moves for leave to reargue and renew the decision of this court dated April 14, 2005, which denied Dimich's motion for certification of a nationwide class and statewide sub-class, and also denied his motion to reinstate his cause of action for fraud.

The rules regarding motions for leave to reargue and renew are plainly set forth in the CPLR. Each motion has a different basis in law, and each must be specifically identified. A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of

fact not offered on the prior motion." CPLR 2221 (d) (2). A motion to reargue does not properly serve as a "vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979). A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR 2221 (e) (2) & (3). Those new or additional facts should have been unknown to the party seeking renewal at the time of the original motion. *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992).

In support of his motion, plaintiff initially merely submits the affirmation of his attorney, Robert L. Herbst, which does not distinguish between the specific bases for reargument or renewal, and did little more than repeat the arguments made on the initial motion. Moreover, the affirmation mischaracterized this court's decision regarding class certification. In that decision, the court concluded that Dimich failed to satisfy the requirement of typicality. In his complaint, Dimich alleged that he had purchased a 60-tablet bottle of 20-mg Lipitor from a Rite Aid pharmacy that was prescribed for him, and that he consumed most of the pills and returned only a few pills which he had not consumed. The following facts emerged, however, in discovery: the Lipitor prescription in question was written for his wife, not for him; his wife, a physician, at times obtained samples of Lipitor and both Dimich and his wife often shared the pills purchased with a prescription; Dimich took varying amounts of Lipitor; and there was conflicting evidence concerning how much money Dimich paid for the Lipitor. Finally, evidence existed which contradicted Dimich's claim that he had only returned a small number of the 60 pills, and which

suggested that, in fact, all of the pills that he purchased were returned to Rite Aid. In his motion to renew and reargue, however, Dimich incorrectly asserts that the court's decision was based "primarily" on the court's assumption that there was a serious question as to whether Dimich had returned all 60 pills he had purchased. It is clear, however, that the court's concern with Dimich's lack of typicality was based on numerous factors, and not merely on the number of pills that Dimich purportedly returned.

The Herbst affirmation also lists, without discussion, several legal and factual issues which, he contends, warrant reconsideration, including whether it was inappropriate for the court to have purportedly resolved factual questions at the class certification stage of the case, and whether the breach of warranty and General Business Law causes of action run to Dimich rather than his wife. As Dimich earlier recognizes, the court did not actually resolve the issue of how many pills Dimich returned, but rather, merely recognized that there was a conflict of fact regarding the issue.

In his affirmation in support of the motion to renew and reargue, Herbst requested that the actual motion be held in abeyance until the court ruled on a then-pending issue of whether plaintiff could contact putative class members. Herbst's request for a stay of the motion was never granted by this court. It is only in the September 7, 2005 affirmation of Clare R. Norins, served and filed as a reply to defendants' opposition papers, that plaintiff made any effort to separate the reargument and renewal aspects of his motion, to identify the facts or law allegedly overlooked or misapplied by the court, or to make any substantive legal arguments. This approach, resulting in basic factual and legal arguments being made in reply papers, was presumably a decision based upon litigation strategy, and deprived the defendants of the

opportunity to respond to plaintiff's basic arguments, and deprived the court of the benefit of a full consideration of the issues. The result is, unfortunately, reminiscent of plaintiff's prior submission of his amended complaint with reply papers on his original motion.

With respect to plaintiff's motion to renew, the only possible "new facts" addressed by Norins (facts which were not previously known to plaintiff) relate to the affidavit of Margaret Williams, dated July 27, 2005. Williams states that she purchased Lipitor pills from Rite Aid, does not remember having received a recall notice, does not remember returning pills to Rite Aid, and had those events occurred, she would have remembered them. Nonetheless, Williams is apparently included in Rite Aid's database as having returned pills. The Williams affidavit is presumably intended to raise questions as to the reliability of Rite Aid's data base.

Since this court's ruling regarding Dimich's lack of typicality was *not* based solely on the screenshot of Rite Aid's database which identified Dimich as having returned, and received replacement for, 60 pills, the Williams affidavit does not provide sufficient justification for granting a motion to renew. The Norins affirmation also refers to deposition testimony of Marie Karin Clinton, an employee of Rite Aid, concerning handwriting on the pill bottle which is labeled as belonging to Alexandra Dimich. This evidence is presumably also offered to undermine the validity of Rite Aid's database. The Clinton deposition was taken on March 16, 2005, approximately two months before plaintiff made his motion to reargue and renew. No justification is provided by plaintiff for not mentioning the Clinton testimony with his motion in chief, rather than with his reply papers.

In his reply papers, plaintiff also presents lengthy legal discussions that should have been made in his motion in chief. He argues, inter alia, that the court erred in its application of the law

governing privity and express breach of warranty (in the Herbst affirmation, the issue is mentioned in the form of a question, but no argument is presented). It is well settled that the function of reply papers is to address arguments made in opposition to the movant's original position and not to merely show in a more detailed way that the statements contained in the moving papers were valid. *Matter of Spofford Ave.*, 76 App Div 90 (1st Dept 1902). Nor should new arguments be introduced in reply papers, and the court should not consider such arguments, or previously available facts, pressented in reply papers. *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 1993). Particularly in light of plaintiff's previous submission of new material with reply papers, the court will not consider the new arguments and facts which could have been submitted with the motion in chief. In any case, the court notes that the very discussion of privity in the prior decision arose because, though Dimich may have purchased the pills in question, they were prescribed for his wife, not for him, again raising a substantial question of the typicality of his claims and his appropriateness as a class representative.

Plaintiff has not provided sufficient justification to grant either reargument or renewal of his motion for class certification, and it is denied.

Plaintiff also moves to renew or reargue his motion to reinstate the common-law fraud claim against defendant Albers Medical Distributors Inc. (Albers). The court previously denied plaintiff's motion to reinstate, as against Albers, because, as a result of his having served his proposed amended complaint with his reply papers, Albers did not have the opportunity to respond to plaintiff's new allegations. Plaintiff initially argues that Albers would have an

opportunity to respond to the allegations when it answered plaintiff's[1] third amended complaint. In addition, however, on September 15, 2005, plaintiff submitted a copy of a federal indictment issued on August 31, 2005, against Albers, defendant H.D. Smith Wholesale Drug Company (H.D. Smith) and others in connection with the importation and sale of counterfeit Lipitor. As a result of that indictment, plaintiff now seeks renewal of his motion to reinstate the common-law fraud claim against both Albers and H.D. Smith.

Given the timing of the federal indictment, plaintiff could not have submitted it as a basis for this motion with his original papers. Those defendants must, however, be given an opportunity to respond to the possible significance of that document in connection with plaintiff's now-dismissed fraud claims. This aspect of plaintiff's motion will therefore be held in abeyance pending a response by Albers and H.D. Smith.

MOTION SEQUENCE NUMBER 013

In motion sequence number 013, plaintiff moves to vacate the note of issue he filed on April 11, 2005. Although defendants disagree on the reason that the note of issue should be vacated, they do not appear to disagree that this case is not ready for trial. The motion to vacate the note of issue is granted.

MOTION SEQUENCE NUMBER 014

In motion sequence number 014, plaintiff moves for leave to file a fourth amended complaint, substituting Margaret Williams as a new proposed class representative, for David

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[1] Although the third amended complaint named David Fishof as a plaintiff in addition to Ivan Dimich, because he subsequently withdrew as a plaintiff, and Margaret Williams is not a plaintiff unless and until the court grants the outstanding motion to file a fourth amended complaint (Motion Sequence # 014), the court refers to plaintiff in the singular throughout this decision.

Fishof, who briefly sought to be a plaintiff, on his own behalf and on behalf of the class, but then withdrew from this action in both capacities.

In considering this motion, it is necessary to look at the rather convoluted history of this case. The first complaint was filed on behalf of Ivan Dimich, individually and on behalf of all others similarly situated on July 24, 2003. In that complaint, the class was defined as

> [a]ll persons throughout the United States who purchased (or paid for) counterfeit Lipitor, including but not limited to those bottles of Lipitor recalled by defendants, from the first date at which the counterfeit Lipitor was placed in the stream of commerce to the present.

Complaint, ¶ 19. A sub-class of persons purchasing counterfeit Lipitor in New York was also asserted.

In a decision dated June 14, 2004, this court dismissed plaintiff's claim for fraud as completely conclusory, without prejudice to plaintiff seeking reinstatement if evidence were uncovered to provide a sufficient basis to sustain the cause of action.

Plaintiff then moved for class certification and to reinstate his fraud cause of action. Plaintiff did not submit his proposed amended complaint containing his new fraud allegations with his motion in chief; rather, he submitted it with his reply papers.

In a decision dated April 14, 2005, this court denied both plaintiff's motion for class certification and his motion to reinstate the fraud cause of action. The class certification motion was denied on the basis that Dimich did not satisfy the requirement of typicality to be a proper representative of the class, and did not reach the other prerequisites for class certification set forth in CPLR 901.

On or about March 24, 2005, prior to this court's decision on the class certification

motion, plaintiff filed his second amended complaint seeking to add David Fishof as a second class action plaintiff. The class continued to be defined as it was in the first amended complaint.

On March 23, 2005, in the case of *Arons v Rite Aid Corp.* (2005 WL 975462 [NJ Super L, March 23, 2005]), the Superior Court of New Jersey denied a motion for class certification in a case with allegations similar to those in this case. On May 3, 2005, in the case of *Crepeau v Rite Aid, Inc.* (2005 WL 1041395 [Pa Com Pl, May 3, 2005]), the Pennsylvania Court of Common Pleas also denied a class certification motion in a similar case. In both cases, the class was defined as persons who purchased counterfeit Lipitor. Both courts found that a class action was not a fair, efficient, or manageable method for adjudicating the claims in the case.

On or about May 20, 2005, plaintiff filed a third amended class action complaint in which he redefined the class as "[a]ll persons throughout the United States who, from on or about April 3, 2003 to on or about June 1, 2003, purchased or paid for tainted 'Lipitor' which was placed into the stream of commerce by defendants, including but not limited to those purchases subsequently recalled by defendants." Third Amended Class Action Complaint For Equitable Relief And Damage, ¶ 49. The sub-class was similarly defined as all persons who purchased such "tainted 'Lipitor'" in the State of New York. *Id.*, ¶ 50.

Tainted Lipitor is defined as:

> the contents of all pill bottles labeled as genuine Lipitor and sold to purchasers as such, but which came from an inventory tainted by counterfeit "Lipitor" - counterfeit "Lipitor" commingled with genuine Lipitor and visually indistinguishable from one another - and therefore, at the time and point of sale, the bottles' contents could not be guaranteed to contain only genuine Lipitor pills manufactured by Pfizer, Inc., as warranted on the label.

Id., ¶ 3.

On June 15, 2005, prior to his deposition, David Fishof withdrew from the litigation as plaintiff.

On June 27, 2005, as part of an effort to locate another class representative to replace Fishof, Myron Beldock, whose law firm represents the plaintiff, contacted Margaret Williams, a former employee and former client of the Beldock law firm. The Rite Aid records indicate that a Margaret Williams returned 31 Lipitor pills on June 10, 2003. Ms. Williams apparently confirmed that she was taking Lipitor during the period in question and had filled her prescriptions at a Rite Aid pharmacy. Following that conversation, Ms. Williams signed an affidavit stating that she purchased Lipitor from Rite Aid between April 3 and June 1, 2003,[2] but that she did not recall receiving any recall notice, did not recall ever returning any Lipitor, and that she would have recalled those events if she had received such a notice and returned pills.

On July 8, 2005, plaintiff moved for leave to file a fourth amended complaint seeking to add Ms. Williams as a class action plaintiff. The proposed amended complaint was unverified and supported only by an affirmation of Clare Norins, who had no personal knowledge of the facts asserted by Ms. Williams. Only after defendants filed their opposition papers did plaintiff submit a verification by Ms. Williams with their reply papers.

Although motions to amend a complaint are to be liberally granted in the absence of prejudice or surprise, the court should examine the sufficiency of the proposed amended pleadings and such motions should be denied where the proposed pleadings are legally insufficient. *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 (1st Dept 2003). Such motions

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[2] Ms. Williams states in her affidavit that she was taking Lipitor during the period of April 3, 2003 and June 1, 3002; however the court concludes that the latter date contains a typographical error.

are, of course, committed to the discretion of the court. *Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 (1983). Here, the purpose of the proposed fourth amended complaint is to add a new class representative. Therefore, in determining whether to grant the motion, the court will examine whether this case is amenable to class action treatment.

> In order to qualify for class action treatment, the following factors must be met:
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> (1) the class is so numerous that joinder of all members is impracticable; (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy (CPLR 901 [a] [1]-[5]).

Ackerman v Price Waterhouse, 252 AD2d 179, 191 (1st Dept 1998).[3]

Although all of these factors were addressed by the parties in connection with Dimich's class certification motion, when this court rejected plaintiff's motion, it did so merely on the basis of typicality, finding that there were too many factors which prevented Dimich's claims from being typical of the other purported class members. As plaintiff has recognized, this court never reached the other prerequisites for a class action, and will do so now.

Despite plaintiff's obvious efforts to avoid the impact of the decisions in *Arons* and *Crepeau* by redefining his class and sub-class, the analyses of the New Jersey and Pennsylvania courts are both relevant and helpful to this court, as is the even more recent analysis of the United States District Court for the Western District of Missouri rejecting a motion for class certification in another case relating to the same batches of counterfeit Lipitor. *Dumas v Albers Med., Inc.*,

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[3] The prerequisites for a class action are similar under the laws of New Jersey and Pennsylvania. See NJ Rules of Court, Rule 4:32-1; PA Rules of Civil Procedure Rule 1702.

2005 WL 2172030 (WD Mo, September 7, 2005).

NUMEROSITY

Plaintiff alleges that there are approximately 57,921 New York and 350,000 nationwide purchasers of Lipitor who fall within the class which he has defined. There is no mechanical test to determine the minimum number of persons necessary to justify class treatment (*Friar v Vanguard Holding Corp.*, 78 AD2d 83, 96 [2d Dept 1980]), but certainly the numbers alleged by plaintiff would satisfy notions of numerosity.

PREDOMINANCE OF COMMON QUESTIONS OF LAW OR FACT

Plaintiff asserts five causes of action in his fourth amended complaint: negligent misrepresentation, breach of express warranty, unjust enrichment, violation of General Business Law § 349 (for the New York sub-class), and common-law fraud.

In *Arons*, as in plaintiff's original complaint, the class was defined as persons who purchased or paid for "counterfeit Lipitor." Despite the liberal standard to be applied to class certification motions under New Jersey law, the court concluded that a class action was inappropriate for several reasons. First, the court was troubled by the impossibility of knowing with any certainty whether the pills that individual purchasers took home were in fact counterfeit, or whether they were genuine Lipitor. As the court pointed out, many purchasers consumed their pills, some returned their pills, and others retained them, but may not have taken them. The court in *Arons* also concluded that the plaintiffs must carry the burden to establish that they and absent class members paid for and received counterfeit pills, and that individualized factual hearings would be necessary to determine whether putative class members were damaged. This,

according to the court, is the antithesis of commonality. *Arons,* 2005 WL 975462 at * 18[4].

The Pennsylvania court, faced with similar allegations, also had problems with the question of commonality since only 20% of the entire batch of Lipitor was counterfeit. *Crepeau v Rite Aid, Inc.*, 2005 WL 1041395, *supra.* The court concluded that there were no common issues between the 20% of the class members who received counterfeit Lipitor and the 80% who received genuine product. According to the court, it would be unjust to give a refund to purchasers who received all genuine pills because they would receive a "windfall," being compensated for injuries they did not sustain. Thus, a class including all persons who purchased Lipitor during the period in question would be over inclusive. *Id.* at *6. Similarly, if all purchasers were to share in the recovery, just as some persons would be overcompensated, others would be under-compensated. The court considered plaintiffs' unjust enrichment cause of action and concluded that if plaintiffs were awarded all of the profits made by Rite Aid from the sale of Lipitor during the period in question, some purchasers would be overcompensated, because they in fact purchased genuine Lipitor, and others, who may have purchased counterfeit Lipitor, would be under-compensated. In short, the class definition was both over-inclusive and under-inclusive, and individual determinations would be necessary. *Id.* The court noted that, given the definition of the class, and the fact that plaintiffs did not and could not know who purchased counterfeit Lipitor, the burden of proof would be shifted to the defendants to show which of the class had received genuine Lipitor, and such a shift in the burden of proof would be basically

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[4] The court in *Dumas* also concluded that what each purchaser bought required an individualized investigation, because each sale was unique and the contents of the bottle sold to each class member would be unknown unless each class member could prove the contents of the bottle purchased. Therefore, according to the court, the allegations constituted the "antithesis of commonality." 2005 WL 2172030 at *4.

unfair. *Id.* at *9. The Pennsylvania court, therefore, concluded that a class action would not provide a fair and efficient method of adjudication.

The allegations of plaintiff's purported new class representative, Ms. Williams, present a good example of the concerns expressed by the New Jersey and Pennsylvania courts about the need for individualized factual hearings. For although Ms. Williams contends that she does not remember ever having received a recall notice for her pills or having returned them, Rite Aid's records apparently indicate that she in fact returned 30 pills. Thus, even for this proposed plaintiff, a factual hearing would have to be conducted to determine the threshold questions of whether she received a recall notice and returned any pills, before even reaching the question of whether the pills she received were counterfeit or genuine.

In New York, as in New Jersey and Pennsylvania, although common issues may exist, where, in the end, there must be an individualized determination of the injury, individual issues predominate and class determination may be inappropriate. *See e.g. Gordon v Ford Motor Co.*, 260 AD2d 164 (1st Dept 1999)(to establish a breach of warranty of merchantability and a breach of express warranty with respect to automobiles which were allegedly defectively designed, individual plaintiffs must prove that their vehicles were not fit for their ordinary purpose and class certification properly denied); *Hazelhurst v Brita Products Co.*, 295 AD2d 240 (1st Dept 2002)(for cause of action under General Business Law § 349, individual determinations are required to determine if water filters have actually failed to perform as advertised and particular class member was injured; therefore, certification of a class was improper). Thus, even where common issues exist, the individual issues may "overwhelm" the common issues and "undermine class cohesion," rendering class action treatment inappropriate. *Geiger v American*

Tobacco Co., 181 Misc 2d 875, 883 (Sup Ct, Queens County 1999), *affd* 277 AD2d 420 (2d Dept 2000).

In addition to the problems resulting from the need for individual determinations of injury, in *Arons*, the New Jersey court noted the problems resulting from differences among the laws of the 50 states governing breach of warranty, pointing, for example, to the issue of whether privity is an essential element of the claim. *Arons*, 2005 WL 975462, at *22-23 (citing differences among the states of New York, Alabama, Florida, Kentucky, Maryland and Tennessee). Those same problems would also exist in the New York courts. Additional problems exist with respect to plaintiff's claims for the purported sub-class under General Business Law § 349, for plaintiff asserts a claim for treble, as well compensatory damages, and such damages constitute punitive damages and may not be asserted on behalf of a class. *See Cox v Microsoft Corp.*, 8 AD3d 39 (1st Dept 2004); *see also Asher v Abbott Labs.*, 290 AD2d 208 (1st Dept 2002); CPLR 901 (b).

Obviously the purported class, as initially defined by plaintiff, suffers from the same problems as those in *Arons, Crepeau,* and *Dumas.* Presumably in an effort to avoid those difficulties, plaintiff redefined the class from persons who bought "counterfeit" Lipitor, to persons who bought "tainted" Lipitor. Plaintiff defined "tainted" Lipitor as any Lipitor which came from the inventory which included "counterfeit" Lipitor, and therefore the bottles could not be guaranteed as containing genuine Lipitor. According to plaintiff's current class definition, a person who purchased genuine Lipitor during the period that counterfeit Lipitor was sold, would also be included as having purchased "tainted" Lipitor and would be a class member. Although this attempt at re-definition may superficially appear to eliminate the problems inherent in the

original class definition, it does not alter an underlying problem inherent in the New Jersey, Pennsylvania and Missouri cases - at least 80% of the putative class members received genuine medication. As the New Jersey and Pennsylvania courts recognized, if the purchasers returned their genuine pills for other genuine pills, at most, they were slightly inconvenienced. And if purchasers who received genuine pills took them, rather than returning them, they were in no way harmed, because the medication that they took was genuine. That is why awarding damages to those persons would provide a windfall, compensating them for damages that they did not sustain. *Crepeau,* 2005 WL 1041395, at *6. Re-defining the class to effectively claim that every pill purchased by consumers during the period in question was worthless and that every purchaser was harmed, regardless of whether the pills they received were genuine, does not create an actual injury where none exists for possibly 80% of the total number of purchasers who purchased genuine Lipitor. That is a far different situation from that in *United States v Milstein* (401 F3d 53 [2d Cir 2005]) and *United States v Bhutani* (266 F3d 661 [7th Cir 2001]) cited by plaintiff, where all of the pills that were purchased were deemed worthless to the consumer because they were all adulterated or mislabled.

Thus, despite plaintiff's effort to redefine the class, the problem remains that to determine whether any class member actually suffered any damage, much less the extent of the damage, would require individual hearings; and therefore, the requirement that common issues predominate is not met.

FAIR AND ADEQUATE REPRESENTATION

Finally, with respect to the requirement that the representative party will fairly and adequately represent the interests of the class, the court in *Ackerman v Price Waterhouse* (252

AD2d at 202) looked, in part, at the fact that counsel "has amply demonstrated its experience and skill in class action litigation and will adequately represent the interest of all class members." Although this court does not question the experience and skill of counsel for plaintiff, it does note its concern about what appears to be counsel's repeated tactic of providing substantive papers on reply. Such inappropriate practice techniques do not ultimately benefit the plaintiff or the members of the purported class which he seeks to represent.

For all of the foregoing reasons, class certification is inappropriate.

CAUSE OF ACTION FOR FRAUD

In addition to the problems stemming from the class action allegations, plaintiff's proposed fourth amended complaint re-alleges the fraud causes of action which have already been dismissed as inadequate. With respect to Rite Aid, plaintiff improperly continues to rely on evidence which this court rejected in its April 14, 2005 decision.

With respect to H.D. Smith and Albers, at the time that plaintiff's motion was filed, he had no new information on which to base his previously dismissed causes of action, nonetheless those allegations were included in the proposed complaint. On August 31, 2005, a federal indictment was issued against Albers, H.D. Smith and others, charging them with, among other things, conspiracy to purchase, sell, counterfeit, and misbrand Lipitor. *United States v Albers, et al.*, D Ct, WD Mo, August 31, 2005. Whether that indictment will provide sufficient evidence to support a cause of action for fraud against those two companies is yet to be determined. But even assuming that a valid cause of action for fraud may be asserted against those two companies, for the reasons set forth above, it cannot be asserted by way of a class action complaint.

Having concluded that this is not a proper case for class action treatment, plaintiff's motion for leave to file a fourth amended class action complaint is denied.

MOTION SEQUENCE NUMBERS 015, 016 and 017

In Motion Sequence Numbers 015, 016 and 017, defendants H.D. Smith, Albers, and Rite Aid, respectively, each move for costs and attorneys' fees, pursuant to 22 NYCRR 130-1.1, based upon plaintiff's

1) failure to comply with discovery orders relating to plaintiff Fishof;

2) use of Fishof as a "placeholder"; and

3) advancing meritless arguments in support of plaintiff Dimich's motion to renew and reargue.

In addition, Rite Aid contends that plaintiff's failure to remove the fraud claim against Rite Aid from plaintiff's pleadings justifies sanctions.

ACTIONS IN CONNECTION WITH PLAINTIFF FISHOF

Defendants contend that plaintiff engaged in willful discovery violations in connection with the failure to respond to discovery requests directed to David Fishof. Defendants chronicle their efforts to obtain compliance with interrogatories and document requests and to obtain a deposition of Fishof over the period from March 24, 2005, when he was added as a plaintiff via the second amended complaint, and June 16, 2005, when he withdrew as plaintiff. Defendants note that despite those efforts, Fishof responded to only nine of Rite Aid's 21 document requests, and only selectively responded to the 71 interrogatories of H.D. Smith, not even addressing 51 of them, and failed to provide any substantive information in those answers he gave, and provided no response to 50 of H.D. Smith's 60 document requests; and no response to 58 of Albers' 71

interrogatories, objecting to 13, and gave no response to Albers' 55 document requests.

Plaintiff contends that the discovery requests were unduly burdensome in number and scope and that many were no longer relevant because of the redefinition of the class. That does not, however, justify plaintiff's complete failure to address many of the requests. Plaintiff does belatedly concede that Fishof should have at least responded to the questions regarding where and when he purchased Lipitor during the period in question, whether he returned any Lipitor, and whether he received a recall notice from Rite Aid. Although plaintiff characterizes the failure to respond to those questions as "unintentional" and an "inadvertent omission" (*see* Plaintiff's Memorandum Of Law In Further Support Of Plaintiffs' Motion For Leave To Amend And In Opposition To Defendants' Motions for Costs and Sanctions, at 23), plaintiff's purported justification is unconvincing.

Defendants also point to plaintiff's efforts to obtain a stay of discovery from the special master within days of this court's denial of such a request, and plaintiff's failure to inform the special master of this court's action.

Further, defendants suggest that Fishof was merely functioning as a "placeholder" while counsel for plaintiff searched for an appropriate class action representative. Without questioning Fishof directly, however, defendants' assertions, constitute mere speculation.

Although Fishof's failure to provide meaningful compliance with discovery is certainly troubling, and approaches sanctionable conduct, it only delayed this litigation by a matter of a few months. This court does not condone such dilatory conduct, however, the conduct does not reach such a level that the court is compelled, in its discretion, to impose sanctions on this basis.

MOTION TO RENEW AND REARGUE

Defendants contend that plaintiff's motion to renew and reargue is completely meritless and thus sanctionable. Certainly the papers submitted initially in support of plaintiff's motion provided an insufficient basis for such a motion. Only on reply did plaintiff even attempt to comply with the requirements of CPLR 2221 in connection with such a motion. Because plaintiff improperly offered substantive factual and legal arguments on reply, the court refused to consider the arguments made in those papers. *See Azzopardi v American Blower Corp.*, 192 AD2d 453, *supra.* Having penalized plaintiff in that fashion, the court will not also impose sanctions pursuant to Rule 130.1-1.

FRAUD CLAIM AGAINST RITE AID

This court dismissed plaintiff's cause of action for fraud against Rite Aid in its decision of June 14, 2004 as completely conclusory. The court denied plaintiff's motion to reinstate the cause of action against Rite Aid in an April 14, 2005 opinion, on the bases that Rite Aid had no obligation to obtain the pedigree of the Lipitor (*see* 21 USC § 353 [e] [1] [A]), that plaintiff had failed to provide any evidence of industry practice requiring Rite Aid to obtain such information, and that plaintiff mis-characterized the deposition testimony on which plaintiff based his claim that Rite Aid specifically asked H.D. Smith for a false representation concerning the pedigree of the Lipitor. The court concluded, therefore, that plaintiff failed to provide a sufficient basis for restoring the fraud claim against Rite Aid. Although this court declined to grant Rite Aid's motion for sanctions in its April 14, 2005 decision, it specifically stated: "[p]laintiff's counsel is put on notice, however that this misrepresentation caused great concern for the Court and any such further conduct will not go unsanctioned."

Plaintiff did not move for renewal or reargument with respect to the fraud cause of action

against Rite Aid. Nonetheless, in his third and proposed fourth amended complaints, plaintiff has continued to assert the fraud cause of action against Rite Aid. Nor has plaintiff come forward with any new evidence on which to base a claim of fraud against Rite Aid (the court notes that the federal indictment offered by plaintiff as a basis for reinstating a fraud claim against H.D. Smith and Albers does not contain allegations with respect to Rite Aid). In light of the above, the court finds that plaintiff's failure to remove Rite Aid from the cause of action for fraud constitutes frivolous conduct, pursuant to 22 NYCRR 130-1.1, in that it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" and, thus, warrants the imposition of sanctions.

Rite Aid addressed the issue of plaintiff's failure to remove the fraud allegations against it in papers, the majority of which were devoted to other issues, and it would appear that the work involved, and, therefore, the reasonable expenses incurred, in addressing the fraud allegations was relatively minimal. Sanctions will, however, be imposed against the law firm of Beldock Levine & Hoffman LLP in the amount of $1,000, to be deposited with the Lawyers' Fund for Client Protection.

Accordingly, it is hereby

ORDERED that, in Motion Sequence Number 012, plaintiff's motion to reargue and renew is denied with respect to plaintiff's motion for class certification, and is held in abeyance with respect to plaintiff's motion to reinstate his cause of action for fraud, as discussed above; and it is further

ORDERED that, in Motion Sequence Number 013, plaintiff's motion to vacate his note of issue is granted; and it is further

ORDERED that, in Motion Sequence Number 014, plaintiff's motion for leave to file a fourth amended complaint is denied; and it is further

ORDERED that, in Motion Sequence Number 015, defendant H.D. Smith's motion for costs and sanctions is hereby denied; and it is further

ORDERED that, in Motion Sequence Number 016, defendant Albers Medical Distributors, Inc.'s motion for costs and sanctions is hereby denied; and it is further

ORDERED that, in Motion Sequence Number 017, defendant Rite Aid's motion for costs and sanctions is granted to the extent that plaintiff's counsel, the law firm of Beldock Levine and Hoffman LLP, shall pay the sum of $1,000 to the Lawyers' Fund for Client Protection, 55 Elk Street, 3d floor, Albany, NY 12210, and the motion is otherwise denied; and it is further

ORDERED that written proof of such payment be provided to the Clerk of Part 56 and opposing counsel within 30 days after service of a copy of this order with notice of entry.

Dated: November 18, 2005

ENTER:

J.S.C.