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

LEE KENWORTHY as the Administer for the)
ESTATE OF SHAYLING KENWORTHY AND)
LEE KENWORTHY, Individually,)
)
Plaintiff,)

CIVIL ACTION NO.

v.)

2:18-cv-12822-MCA-CLW

)
LYNDHURST POLICE DEPARTMENT,)
OFFICER PHILIP REINA, in his individual)
capacity, LYNDHURST CHIEF OF POLICE)
JAMES O'CONNOR, in his individual capacity,)
SERGEANT RICHARD PIZZUTI, in his)
individual capacity, LYNDHURST TOWNSHIP)
AMBULANCE SQUAD, TOWNSHIP OF)
LYNDHURST, ROBERT MARTIN, ANN)
MARTIN, RICHARD ANDERSON, LAUREN)
ANDERSON, HOUSING AUTHORITY OF)
BERGEN COUNTY, and ADAPT PHARMA,)
INC.,)
)
Defendants.)

**BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION PURSUANT TO
FED. R. CIV. P. 12(B)(1) AND FOR FAILURE TO STATE A CLAIM
PURSUANT TO FED. R. CIV. P. 12(B)(6) BY DEFENDANT ADAPT
PHARMA, INC.**

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PRELIMINARY STATEMENT

Plaintiff's Complaint asserts no viable claims against defendant Adapt Pharma, Inc. ("Adapt"). Adapt manufactures NARCAN®, a nasal spray form of naloxone.¹

Plaintiff alleges that his wife, Shayling Kenworthy, suffered fatal injuries after members of the defendant Lyndhurst Police Department administered naloxone to her while she was suffering an asthma attack. Plaintiff alleges his wife's asthma attack was caused by unhealthy conditions in the residence he rented from Robert Martin, Ann Martin, Richard Anderson, and Lauren Anderson. Plaintiff asserts negligence claims against his landlords, the Township of Lyndhurst, the Lyndhurst Township Ambulance Squad, the Lyndhurst Police Department, individual members of the Lyndhurst Police Department, and the Housing Authority of Bergen County. He also asserts a claim against the individual members of the Lyndhurst Police Department pursuant to the New Jersey Civil Rights Act, *N.J.S.A. 10:6-2*, for violations of his wife's rights under the New Jersey Constitution. Plaintiff's sole claim against Adapt is that the company was negligent in training officers or medical personnel to administer naloxone.

¹ Naloxone is a medication designed to rapidly reverse an opioid overdose. The Complaint mistakenly refers to naloxone as naloxene.

Plaintiff's Complaint should be dismissed with prejudice as to Adapt on two grounds. First, Plaintiff has failed to allege a proper basis for subject matter jurisdiction in the United States District Court for the District of New Jersey. While Plaintiff asserts the basis for jurisdiction is that the United States Government is a defendant in the action, he has not, in fact, named the United States Government as a defendant nor does he assert any claims against the United States Government. Therefore, Plaintiff's stated grounds for this Court's jurisdiction are improper. Plaintiff has also failed to allege facts that would support federal question jurisdiction or diversity jurisdiction.

Second, Plaintiff has failed to state a cognizable claim against Adapt. The Complaint asserts product liability claims against Adapt, which sound in negligence. New Jersey's Product Liability Act ("PLA") limits Plaintiff to four potential causes of action against a product manufacturer: design defect, manufacturing defect, failure to warn, and express warranty. Plaintiff's Complaint makes no such claims. Plaintiff's claim for negligence must be dismissed because it is subsumed by the PLA, the exclusive remedy available to Plaintiff.

For these reasons, Adapt respectfully requests that the Complaint be dismissed in its entirety as to this defendant with prejudice.

STATEMENT OF FACTS

Plaintiff Lee Kenworthy filed this Complaint on or about August 16, 2018, asserting claims individually, and as Administrator for the Estate of Shayling Kenworthy (“Decedent”). Plaintiff alleges that on August 17, 2016, members of the defendant Lyndhurst Police Department were summoned to 287 Castle Terrace, Lyndhurst, New Jersey, where Plaintiff and Decedent resided. See December 10, 2018 Certification of Beth S. Rose (“Rose Cert.”), Ex. A, *Complaint* at Statement of Claim, ¶¶ 1, 6, 7.² Plaintiff alleges Decedent suffered an asthma attack while she and Plaintiff were moving out of the residence. *Id.* ¶ 6. Plaintiff further alleges the responding officers and members of the Lyndhurst Ambulance Squad offered no assistance to Decedent while she suffered from the asthma attack. *Id.* ¶¶ 9-10. In somewhat contradictory fashion, Plaintiff also alleges the responding officers negligently administered naloxone to Decedent, which aggravated her respiratory issues. *Id.* at Third Count, ¶ 6. Plaintiff alleges the officers were “improperly trained on the uses, side effects, and when to implement” naloxone. *Id.* ¶ 7. Decedent was pronounced dead at Meadowlands Medical Center. *Id.* at Statement of Claim, ¶ 10. Plaintiff alleges Adapt failed to properly train officers or medical personnel how to administer naloxone or properly inform them of the

² Exhibits cited in this brief are attached to the Rose Cert. submitted herewith.

product's effects on people with asthma and respiratory issues. *Id.* at Fifth Count, ¶ 1.

Plaintiff named the following individuals/entities as defendants: Robert Martin, Ann Martin, Richard Anderson, and Lauren Anderson (“Landlord Defendants”); the Township of Lyndhurst (“Lyndhurst”), Lyndhurst Township Ambulance Squad (“Ambulance Squad”), Lyndhurst Police Department (“Police Department”), and Lyndhurst Police Chief James O’Connor, Sergeant Richard Pizzuti, Officer Philip Reina, and Officer Haggerty³ in their individual capacities (“Individual Police Defendants”);⁴ the Housing Authority of Bergen County (“HABC”); and Adapt. Plaintiff’s Complaint asserts (1) a negligence claim against Landlord Defendants (First Count); (2) a negligence claim against Lyndhurst Defendants and HABC (Second Count); (3) a claim for violation of Decedent’s rights under the New Jersey Constitution against Individual Police Defendants (Third Count); (4) a negligence claim against HABC (Fourth Count); and (5) a negligence claim against Adapt (Fifth Count).

Less than one year before the filing of this Complaint and on October 19, 2017, Plaintiff, through counsel, filed a substantially similar complaint in New Jersey Superior Court (“State Court Complaint”) asserting negligence claims

³ The Complaint refers to Officer Haggerty only by his surname.

⁴ Lyndhurst, the Ambulance Squad, Police Department, and Individual Police Defendants are collectively referred to as “Lyndhurst Defendants.”

against the Landlord Defendants and the Lyndhurst Defendants; and a claim for violation of Decedent's rights under the New Jersey Constitution against Individual Police Defendants. Rose Cert., Ex. B, *State Court Complaint*. Plaintiff did not name HABC or Adapt as defendants in the State Court action. *Id.* See Rose Cert., Ex. A, *Complaint*, Ex. B, *State Court Complaint*.

LEGAL ARGUMENT

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO FED. R. CIV. P. 12(b)(1)

A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) can be either factual, based on evidence outside the complaint, or facial, based on the insufficiency of the complaint. On a factual motion, the court may examine evidence and resolve issues of fact going to the existence of jurisdiction, and the burden of proof lies with the plaintiff. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 n.9 (3d Cir. 2011); *CNA v. United States*, 535 F.3d 132, 140 (3d Cir. 2008); *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007); *Turicentro S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 300 n.4 (3d Cir. 2002); *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial attack, such as the present motion, "challenges the subject matter jurisdiction without disputing the facts

alleged in the complaint, and it requires the court to ‘consider the allegations of the complaint as true.’” *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d Cir. 2016) (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 n.3 (3d Cir. 2006)); see *NJSR Surgical Ctr., LLC v. Horizon Blue Cross Blue Shield of N.J., Inc.*, 979 F. Supp. 2d 513, 517 (D.N.J. 2013) (citations omitted) (finding that a pre-answer motion made pursuant to Rule 12(b)(1) is a facial challenge).

A. Plaintiff Has Failed To Provide Sufficient Grounds For The Court’s Subject Matter Jurisdiction Because the United States Is Not A Party

“[T]he burden of proving the existence of subject matter jurisdiction lies with the plaintiff.” *CSR Ltd. V. Cigna Corp.*, 405 F. Supp. 2d 526, 534-35 (D.N.J. 2005) (quoting *Carpet Group Int’l v. Oriental Rug Importers Ass’n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000)). Plaintiff states the Court has jurisdiction because the United States Government is a Defendant. Rose Cert., Ex. A, *Complaint*. Pursuant to 28 U.S.C. § 1346(b)(1), district courts have exclusive jurisdiction over civil actions in which a plaintiff asserts claims against the United States Government. *CNA*, 535 F.3d at 140. However, Plaintiff has not named the United States Government as a defendant, nor has he asserted any claims against the Government. Therefore, Plaintiff’s stated basis for subject matter jurisdiction is improper and the Complaint should be dismissed.

B. Plaintiff Has Failed To Provide Sufficient Grounds For Any Other Basis For The Court To Exercise Subject Matter Jurisdiction

None of the allegations in the Complaint supports any other basis for federal subject matter jurisdiction. “Generally, there are three bases for federal subject matter jurisdiction: (1) jurisdiction under a specific statutory grant, (2) federal question jurisdiction pursuant to 28 U.S.C. § 1331 and (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332(a).” *TM Mktg. v. Art & Antiques Assocs., L.P.*, 803 F. Supp. 994, 997 (D.N.J. 1992) (citation omitted).

Here, Plaintiff has not asserted a claim pursuant to any statutory right nor cited any federal statute, so the first basis does not apply.

a. The Complaint Provides No Basis For Federal Question Jurisdiction

As to federal question jurisdiction, such jurisdiction arises when “a federal right or immunity . . . is ‘an element, and an essential one, of the plaintiff’s cause of action.’” *Id.* at 998 (quoting *Gully v. First Nat’l Bank*, 299 U.S. 109, 112 (1936)). Here, Plaintiff has asserted common law negligence claims against Landlord Defendants (First Count), Lyndhurst Defendants and HABC (Second Count and Fourth Count), and Adapt (Fifth Count). He also asserts a New Jersey Civil Rights Act claim against Individual Police Defendants (Third Count). None of these claims implicates a federal question. Thus, federal question jurisdiction does not apply.

b. The Complaint Provides No Basis For Diversity Jurisdiction

Finally, as to diversity jurisdiction, pursuant to 28 U.S.C. § 1332(a), the federal courts have original jurisdiction over cases in which the amount in controversy is greater than \$75,000, and in which complete diversity exists. *Zambelli Fireworks Mfg. Co v. Wood*, 592 F.3d 412, 419 (3d Cir. 2010). “Complete diversity requires that, in cases with multiple plaintiffs or multiple defendants, no plaintiff be a citizen of the same state as any defendant.” *Id.* (citing *Exxon Mobil Corp. v. Allapattah Svcs. Inc.*, 545 U.S. 546, 553 (2005)). A natural person is deemed a citizen of his or her state of domicile, while a corporation is a citizen of both the state where it has its principal place of business and its state of incorporation. *Id.* Here, the prerequisites for complete diversity are not met. Plaintiff indicated he resides at 72 Constitution Boulevard in Whiting, New Jersey. Rose Cert., Ex. A, *Complaint*. The Police Department, the Ambulance Squad, Landlord Defendants, and HABC are also citizens of New Jersey for the purposes of diversity jurisdiction. *Id.* at Parties and Facts Common to All Counts, ¶¶ 2, 7, 9, and 10. Plaintiff has not alleged damages in excess of \$75,000. Therefore, diversity jurisdiction is not proper.

c. **Adapt Respectfully Adopts And Incorporates By Reference Co-Defendants' Arguments Concerning Subject Matter Jurisdiction**

The following defendants have also filed motions to dismiss, based in part, on a lack of subject matter jurisdiction: Lyndhurst Defendants (November 13, 2018); Robert and Ann Martin (November 16, 2018); and HABC (December 4, 2018). Adapt respectfully adopts and incorporates by reference the arguments concerning subject matter jurisdiction made by these defendants in their respective motions to dismiss. As Plaintiff has not established this Court's subject matter jurisdiction, the Complaint should be dismissed.

II. **PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM PURSUANT TO FED. R. CIV. P. 12(b)(6)**

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the court must accept the complaint's well pleaded allegations of fact as true but disregard "rote recitals of the elements of a cause of action, legal conclusions, and mere conclusory statements." *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2011); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft*,

556 U.S. at 578 (*citing Twombly*, 550 U.S. at 570); *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011).

A. Plaintiff's Claim Of Negligence (Count Five) Should Be Dismissed Because Negligence Is Not A Recognized Claim Under The PLA.

Plaintiff's Complaint should be dismissed as to Adapt for failure to state a claim upon which relief can be granted. Since this case involves claims that Decedent suffered personal injuries as a result of a product (or products), Plaintiff may only assert claims that are authorized by the PLA: design defect, manufacturing defect, failure to warn and breach of express warranty. *See N.J.S.A. 2A:58C-1(b)(3)* (allowing express warranty claims); *N.J.S.A. 2A:58C-2* (identifying design defect, manufacturing defect and failure to warn as the only other claims available under the PLA). The New Jersey Supreme Court has repeatedly held that the PLA provides the sole and exclusive remedy for individuals who claim they were physically injured by a product. *In re Lead Paint Litigation* ("*In re Lead Paint*"), 191 N.J. 405, 436-37 (2007). All other potential theories of recovery, including those for negligence and breach of implied warranties, are subsumed by the PLA and cannot be asserted in a traditional product liability action such as this one.

In *In re Lead Paint*, the New Jersey Supreme Court addressed whether plaintiffs could assert a nuisance cause of action against lead paint manufacturers that allegedly caused plaintiff's personal injuries. The Court analyzed the

language of the PLA, and its legislative history, and held that “[t]he language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products.” *In re Lead Paint*, 191 N.J. at 436-37. Because lead paint was a product covered by the PLA, and because the personal injuries at issue in the case were squarely within the scope of the PLA, the Court held that the PLA precluded plaintiffs from asserting common law claims. *Id.*

The District of New Jersey has applied the holding of *In re Lead Paint* in the context of a common law negligence claim related to a pharmaceutical product. *Clements v. Sanofi-Aventis, U.S., Inc.*, 111 F. Supp. 3d 586, 596 (D.N.J. 2015). In *Clements*, the plaintiff asserted state common law claims for negligence, strict liability, and breach of warranty stemming from her use of an injectable dermatological product. *Id.* The defendant manufacturer moved to dismiss, arguing that the plaintiff could not assert common law claims in a product liability action. The Court, relying on *In re Lead Paint*, granted the motion as to the common law claims. *Id.* The Court ruled that the plaintiff’s negligence claim was subsumed by the PLA and “must be dismissed as a matter of law.” *Id.* at 598. The Court also noted that courts consistently dismiss product liability claims based on common law causes of action. *Id.* at 597 n.5 (citing *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 313 (3d Cir. 1999) (dismissing negligence claim,

stating that “[u]nder New Jersey law negligence is no longer viable as a separate claim for harm caused by a product”); *Repola v. Morbark Indus., Inc.*, 934 F.2d 483, 489-94 (3d Cir. 1991) (dismissing claims of negligence and negligent failure to warn); *Thomas v. Ford Motor Co.*, 70 F. Supp. 2d 521, 528-29 (D.N.J. 1999) (dismissing common-law claim for negligent manufacture); *Reiff v. Convergent Techs.*, 957 F. Supp. 573, 583 (D.N.J. 1997) (dismissing negligence and breach of warranty claims); *McWilliams v. Yamaha Motor Corp. USA*, 780 F. Supp. 251, 262 (D.N.J. 1991) (dismissing claims of negligence and breach of implied warranty), *aff’d in part, rev’d in part on other grounds*, 987 F.2d 200 (3d Cir. 1993); *Tirrell v. Navistar Int’l, Inc.*, 248 N.J. Super. 390, 399 (2007) (dismissing negligence claim); *see also, e.g., Green v. Gen. Motors Corp.*, 310 N.J. Super. 507, 517, 709 A.2d 205 (App. Div. 1998) (stating that “causes of action for negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action” under the PLA); *Ramos v. Silent Hoist & Crane Co.*, 256 N.J. Super. 467, 473, 607 A.2d 667 (App. Div. 1992) (stating that the “Legislature has consolidated the negligence, breach of warranty and strict liability theories for product liability claims” into single product liability action under PLA)).

In assessing whether a cause of action is subsumed by the PLA, a court must look at the nature of Plaintiff’s alleged claim and injuries and determine whether they represent a traditional product liability claim. Here, there can be no doubt that

Plaintiff's claims against Adapt present a classic product liability case that clearly falls within the confines of the PLA. "A product liability action is statutorily defined as 'any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except for actions for harm caused by a breach of an express warranty.'" *Indian Brand Farms v. Novartis Crop Prot., Inc.*, 890 F. Supp. 2d 534, 540 (D.N.J. 2012) (quoting *N.J.S.A. 2A:58C-1(b)(3)*). Plaintiff's central allegation is that Decedent suffered fatal physical injuries following the administration of naloxone. This allegation is the basis of a traditional product liability claim.

Plaintiff's claim alleges Adapt was negligent "in their rollout and training of officers in administering [naloxone]" because it "did not properly inform officers or medical personnel of the detrimental and lethal effects their produce has on people with asthma and respiratory issues." Rose Cert., Ex. A, *Complaint*, at Fifth Count, ¶ 1. Stripped to its bare essentials, Plaintiff's Complaint states a claim for negligence. The elements of a negligence claim are "a duty of care, a breach of that duty, and that the breach proximately caused the harm." *Olivo v. Exxon Mobil Corp.*, 377 N.J. Super. 286, 292 (App. Div. 2005). Plaintiff's Fifth Count is a negligence claim because he alleges Adapt breached its duty to properly train officers and medical personnel how to use the product. "New Jersey law no longer recognizes breach of implied warranty, negligence, and strict liability as viable

separate claims for harm deriving from a defective product.” *Clements, Inc.*, 111 F. Supp. 3d at 596. Consequently, New Jersey state courts, the Third Circuit, and this Court have “consistently dismissed product liability claims based on those common-law theories.” *Id.* at 596-97. Plaintiff’s claim against Adapt should therefore be dismissed.

CONCLUSION

Based on the foregoing reasons, Adapt respectfully requests that the Court grant its motion and dismiss Plaintiff’s Complaint with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Respectfully submitted,
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Dated: December 10, 2018