FILED

June 8, 2023

HON. BRUCE J. KAPLAN, J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY
DOCKET NO. MID-L-6088-18

CASE TYPE: MCL NO. 628

Civil Action

In Re Taxotere Litigation

ORDER

KATHERINE ADAMS,

Plaintiff,

vs.

SANOFI U.S. SERVICES INC., formerly known as SANOFI-AVENTIS U.S. INC.; SANOFI-AVENTIS U.S. LLC, separately and doing business as WINTHROP U.S.; and SANDOZ, INC.,

Defendants.

THIS MATTER having been brough before the Court upon motion by Defendant Sanofi U.S. Services, Inc., and sanofi-aventis U.S., LLC. ("Sanofi"), by and through its attorneys DLA Piper LLP (US), upon notice to all interested parties, has moved before this Court for an Order granting Summary Judgment, and the Court having considered the papers submitted in this matter, opposition filed and reply thereto, arguments of counsel at oral argument on April 6, 2023, and for good cause having been shown;

IT IS on this 8th day of June, 2023,

ORDERED that Sanofi's Motion for Summary Judgment is hereby **GRANTED**; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to e-Courts. Pursuant to Rule 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this Order.

/S/ Bruce J. Kaplan
HONORABLE BRUCE J. KAPLAN, J.S.C.

OPPOSED

SEE MEMORANDUM OPINION ATTACHED

PURSUANT TO RULES 1:6-2(f) AND 1:7-4(a) THE COURT PROVIDES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

HON. BRUCE J. KAPLAN, J.S.C.

This matter comes before the Court by way of Defendants', Sanofi U.S. Services Inc. and Sanofi-aventis U.S. LLC's ("Sanofi"), Motion for Summary Judgment on Statute of Limitations for the following phase three bellwether plaintiffs:

Katherine Adams – Docket: MID L 006088-18
Elizabeth Linton – Docket: MID L 007663-18
Loretta Massey – Docket: MID L 007675-18
Betty King – Docket: MID L 007645-18

The Court thereafter received and reviewed plaintiffs' opposition, defendants' reply, and all exhibits submitted by the parties. In addition, the Court has considered the arguments of counsel at the April 6, 2023 oral argument. This opinion follows.

While this Court will discuss and decide each motion separately, the applicable body of law that governs these motions is identical. More specifically, there is no dispute that plaintiffs' tort claims in this Multi-County Litigation ("MCL") are governed by N.J. Stat. § 2A:14-2(a). N.J. Stat. § 2A:14-2(a) provides in relevant part that plaintiffs' injury claims "shall be commenced within two years next after the cause of any such action shall have accrued." Additionally, there is no dispute that plaintiffs' breach of warranty claim is governed by N.J. Stat. §12A:2-725(1), which provides in relevant part that a claim "must be commenced within four years after the cause of action has accrued."

The Court further finds the following facts common to all plaintiffs that are the subject of these motions. Specifically, the Court finds that each of the instant plaintiffs had been diagnosed with breast cancer, and as part of their treatment each was prescribed and did in fact receive a chemotherapy cocktail that included Taxotere[1]. In each of the cases, the plaintiffs were advised that the chemotherapy would cause temporary hair loss but should regrow after completion of the treatment. In each of the cases before the Court, plaintiffs did suffer hair loss during chemotherapy treatment.

In each of the cases that are the subject of the instant motions, plaintiffs allege some degree of continued hair loss that persists to date, despite completing chemotherapy. Specifically, each plaintiff represents in their individual plaintiff fact sheets ("PFS") that permanent hair loss[2] occurred six months from the date chemotherapy was completed. Each of the four plaintiffs who are the subject of the pending motions had completed chemotherapy treatment by 2008. At the time plaintiffs received chemotherapy, Taxotere's label did not include any warning regarding permanent hair loss. Pl. Ex. 1. On December 11, 2015, Taxotere's label was changed to reflect reports of permanent hair loss. Pl. Ex. 2.

The complaints for each bellwether plaintiff were filed on December 7, 2017, which was more than two years after completing chemotherapy but within two years of Taxotere's label change. The Court further finds that the complaints were filed only after plaintiffs were contacted directly by plaintiff's counsel or after plaintiffs viewed counsel's commercials advertising that a claim for permanent hair loss could be filed against the manufacturer of Taxotere.

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[1] Each plaintiff received a different chemotherapy cocktail. Katherine Adams received Adriamycin, Cytoxan, and Taxotere. Elizabeth Linton received Cyclophosphamide and Taxotere. Loretta Massey received Taxotere, Doxorubicin, and Cyclophosphamide. Betty King received Doxorubicin, Cyclophosphamide, and Taxotere.

[2] Each plaintiff experienced hair loss on their head and bodies, however deposition testimony makes clear that each plaintiff's claim focuses on their continued hair loss on their head. See also Third Amended Master Long Form Complaint ¶7 ("Plaintiffs are stigmatized with the universal cancer signifier—baldness—long after s/he underwent cancer treatment.").

The initial complaints for each of the instant plaintiffs were filed prior to the formation of this Multi-County Litigation ("MCL"). Upon designation of this litigation as an MCL, a Master Pleading Implementation Order, dated December 14, 2018, ¶2, was entered that provided "[a]ll claims pleaded in the Master Long Form Complaint will supersede and replace all claims pleaded in any previously filed Complaint. All Complaints in this litigation filed on or before October 31, 2018 shall be deemed amended to incorporate and conform to the Master Long Form Complaint." The Third Amended Master Long Form Complaint and Jury Demand was filed in this MCL on December 20, 2019. Like the Master Pleading Implementation Order, the Third Amended Master Long Form Complaint states that "[p]ursuant to this Court's December 14, 2018 Order, all allegations pled herein are deemed pled in any previously filed Complaint and any Short-Form Complaint hereafter filed." Thus, the Third Amended Master Long Form Complaint and Jury Demand governs the four bellwether plaintiffs' claims.

Pursuant to that Third Amended Long Form Complaint, each plaintiff pled the same three causes of action against Sanofi. Count one includes strict products liability, N.J. Stat. § 2A:58C-1, et seq., for failure to warn under the New Jersey Products Liability Act. Count two also involves strict products liability, N.J. Stat. § 2A:58C-1, et seq., for design and manufacturing under the New Jersey Products Liability Act. Count three claims a breach of express warranty.

As will be discussed more fully below, each plaintiff relies on the discovery rule and New Jersey equitable tolling principals in opposition to the instant motions. For each plaintiff, it is argued that the statute did not start to run until December 11, 2015, the day that Sanofi changed Taxotere's label to advise the possibility of permanent hair loss. Plaintiffs argue that their complaints were timely as they were filed within two years after said label change.

Discovery Rule

As stated above, the applicable statute at issue is N.J. Stat. § 2A:14-2(a) which reads in relevant part that plaintiffs' injury claims "shall be commenced within two years next after the cause of any such action shall have accrued." Additionally, N.J. Stat. §12A:2-725(1) provides that plaintiffs' breach of sales contract claims must be commenced within four years after the cause of action has accrued."

The discovery rule is an equitable doctrine that seeks to "avoid [the] harsh results that otherwise would flow from mechanical application of a statute of limitations." Caravaggio v. D'Agostini, 166 N.J. 237, 245 (2001) (quoting Vispisiano v. Ashland Chemical Co., 107 N.J. 416, 527); see Lopez v. Swyer, 62 N.J. 267, 273 (1973). Ordinarily, a cause of action for liability accrues at the time an alleged tortious act occurred. Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005). However, the discovery rule "provides that in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Lopez, 62 N.J. at 272. The discovery rule has been applied to claims arising out of tort.

Every discovery rule case involves the issue of "whether the facts presented would alert a reasonable person exercising ordinary diligence that he or she was injured due to the fault of another." Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 110 (2006). The discovery rule only prevents the statute of limitations from running "when injured parties reasonably are unaware that they have been injured, or, although aware of an injury, do not know that the injury is attributed to the fault of another." Baird v. Am. Med. Optics, 155 N.J. 54, 66 (1998). Thus, an injured party must have knowledge of two distinct elements—injury and fault. Lynch v. Rubacky, 85 N.J. 65,

70 (1981) (explaining that "the discovery rule centers upon an injured party's knowledge concerning the origin and existence of his injuries as related to the conduct of another person."). In sum, the discovery rule requires a plaintiff to have "knowledge not only of the injury but also that another is at fault." Martinez v. Cooper Hospital-University Med. Ctr., 163 N.J. 45, 52 (2000); see Savage v. Old Bridge-Sayreville Med. Group, 134 N.J. 241, 246 (1993).

Knowledge of injury and fault may occur simultaneously or independently. "Where the relationship between a plaintiff's injury and defendant's fault is not self-evident, it must be shown that a reasonable person, in plaintiff's circumstances, would have been aware of such fault in order to bar her from invoking the discovery rule. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 192 (2012). A plaintiff does not require legal consultation from an attorney, does not need to understand the legal significance of their claim, nor does a plaintiff require medical certainty for a claim to accrue. See Kendall, 209 N.J. at 193; Lapka v. Porter Hayden Co., 162 N.J. 545, 555-56 (2000); Lynch, 85 N.J. at 73; Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978). Similarly, a plaintiff does not require "knowledge of a specific basis for legal liability or a provable cause of action before the statute of limitations begins to run." Martinez, 163 N.J. at 52; see Savage, 134 N.J. at 248. If fault is not self-evident, "a plaintiff need only have 'reasonable medical information' that connects an injury with fault to be considered to have the requisite knowledge for the claim to accrue." Kendall, 209 N.J. at 193-94 (citing Vispisiano, 107 N.J. at 435).

The decision for whether the discovery rule applies is a question of law made by a judge outside the presence of the jury. Lopez, 62 N.J. at 275. The standard for deciding whether to apply the discovery rule is an objective one—"whether plaintiff 'knew or should have known' of sufficient facts to start the statute of limitations running." Szczuvelek, 182 N.J. at 281. When a plaintiff's credibility is significant, "a determination by the judge should ordinarily be made at a

preliminary hearing." Lopez, 62 N.J. at 275. However, when "credibility is not involved, affidavits, with or without depositions, may suffice; it is for the trial judge to decide." Ibid. A non-exhaustive list of determinative factors may include: "the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant." Id. at 276. "The burden is on the plaintiff seeking application of the discovery rule to establish that a reasonable person in her circumstances would not have been aware within the prescribed statutory period that she was injured through the fault of another." Kendall, 209 N.J. at 194.

Unlike in tort actions, the Court has found no support that the discovery rule applies to breach of warranty claims. Plaintiffs' counsel cites to one unpublished Appellate Division case, Collins v. PJW Servs., for the proposition that the discovery rule applies to breach of warranty claims. No. 1437-19, 2021 N.J. Super. Unpub. LEXIS 1566, at *18 (App. Div. July 26, 2021). However, Collins did not involve a breach of sales contract, which has a four-year statute of limitations governed by N.J. Stat. §12A:2-725(1). Instead, the plaintiff in Collins alleged a negligent construction breach of contract, which has a six-year statute of limitations governed by N.J. Stat. § 2A:14-1. Collins, 2021 N.J. Super. Unpub. LEXIS 1566 at *14. Moreover, the Collins Court did not apply the discovery rule and instead found that the complaint was timely because "the statute of limitations on an action for deficiencies in design or construction commences to run upon substantial completion of the structure." Collins, 2021 N.J. Super. Unpub. LEXIS 1566 at *16-17.

The Court finds the language of N.J. Stat. §12A:2-725 clear and unambiguous. Section one of that statute provides that "[a]n action for breach of any contract for sale must be commenced

within four years after the cause of action has accrued." N.J. Stat. §12A:2-725(1). Section two explains that "[a] breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods." N.J. Stat. §12A:2-725(2). Significantly section two also provides "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ibid. The only exception to the four-year statute of limitations is when a contract explicitly provides for future performance.

New Jersey Courts have consistently interpreted N.J. Stat. §12A:2-725 in the above fashion. See Deluxe Sales and Service, Inc. v. Hyundai Engineering & Const, Co., 254 N.J. Super. 370, 374 (App. Div. 1992) ("In an action on a sales contract, '[a] cause of action accrues when the breach occurs' . . . . This is to be distinguished from an action on a warranty where the cause accrues 'when tender of delivery is made.'"); Docteroff v. Barra Corp. of America, Inc., 282 N.J. Super. 230, 241 (App. Div. 1995) ("The exception embodied in N.J.S.A. 12A:2-725(2) provides that the cause of action accrues when 'the breach is or should have been discovered,' and applies only to cases where warranties 'explicitly extend [] to future performance.'"); Poli v. DaimlerChrysler Corp., 349 N.J. Super. 169, 175-76 (App. Div. 2002) ("[T]he UCC provides an exception to this general rule if 'a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance.'").

Accordingly, a breach of warranty occurs when tender is delivered, regardless of the aggrieved party's knowledge, and a cause of action must be commenced within four years of said breach—unless the warranty explicitly extends to future performance. See N.J. Stat. §12A:2-725.

New Jersey's Equitable Tolling

Within New Jersey jurisprudence is the principle of equitable tolling. However, New Jersey courts have historically and consistently applied equitable tolling sparingly. Freeman v. State, 347

N.J. Super. 11, 31 (App. Div. 2002). "[A] statute of limitations may be equitably tolled under very limited circumstances: '(1) [if] the defendant has actively misled the plaintiff, (2) if the plaintiff has "in some extraordinary way" been prevented from asserting his [or her] rights, or (3) if the plaintiff has timely asserted his [or her] rights mistakenly in the wrong forum.'" Barron v. Gersten, 472 N.J. Super. 572, 577 (App. Div. 2022). "Absent a showing of intentional inducement or trickery by a defendant, the doctrine . . . should be applied sparingly and only in the rare situation where it is demanded by sound legal principles and in the interest of justice." Binder v. Price Waterhouse & Co., L.L.P., 393 N.J. Super. 304, 313 (App. Div. 2007). Stated differently, "'the threshold factual predicate for plaintiff's equitable tolling claim is a finding that defendant's misconduct contributed to expiration of the applicable limitations period,' so '[a]bsent this finding, there would be no basis for equitable tolling.'" Bernoskie v. Zarinsky, 383 N.J. Super. 127, 136 (App. Div. 2006). Additionally, "equitable tolling requires plaintiffs to 'diligently pursue their claims' because although it 'affords relief from inflexible, harsh or unfair application of a statute of limitations,' [it] does not excuse claimants from exercising the reasonable insight and diligence required to pursue their claims." Barron v. Gersten, 472 N.J. Super 572, 577 (N.J. App. Div. 2022).

Discussion

It is against this backdrop that the Court will review the specific facts of each plaintiffs' case and the arguments of counsel in furtherance and in opposition to each of the motions filed. Critical to the Court's analysis is the timeline from diagnosis, to start of treatment, to end of treatment, to when hair loss occurred, and when or if any hair grew back. Equally critical to the analysis is what if anything each plaintiff did or did not do during this same time frame. Also critical to the Court is if any of the plaintiffs made any inquiry about their hair loss and if so to whom, what were they told, and what did they discover.

While all plaintiffs shared a common hope—that their hair would fully and completely grow back, that did not occur. After reading the depositions of each plaintiff, the Court sympathizes with plaintiffs need to heal, both emotionally and physically, before being burdened with the responsibility of having to determine whether their hair loss was in fact permanent, and if so whether there was a cause of action. However, even with that recognition, the Court must objectively determine "whether the facts presented would alert a reasonable person exercising ordinary diligence that he or she was injured due to the fault of another." Martinez v. Cooper Hospital-University Med. Ctr., 163 N.J. 45, 52 (2000).

Katherine Adams – Docket: MID L 006088-18

Plaintiff Katherine Adams ("Ms. Adams") was diagnosed with breast cancer on October 7, 2006. Fifth Amended Plaintiff Fact Sheet at 11. Ms. Adam's chemotherapy treatment began on February 1, 2007, ended on June 30, 2007, and consisted of fifty cycles with a frequency of every three weeks. Id. at 14. Ms. Adams does not remember any pre-chemotherapy conversations with her physicians regarding hair loss, but at that time Ms. Adams assumed she would lose her hair during chemotherapy and that it would grow back after. Ms. Adams Dep. 57:6-13; 90:9-16. Ms. Adams testified that she did in fact lose her hair after completing the first session of chemotherapy. Id. at 10:4-11. Specifically, Ms. Adams alleges permanent hair loss from December 1, 2007, to present. Fifth Amended Plaintiff Fact Sheet at 15-17, 23.

According to the record before this Court, Ms. Adam's hair loss continued despite the completion of chemotherapy in 2007. The records reviewed by this Court corroborate Ms. Adam's claim of continued hair loss post chemotherapy treatment. Specifically, as noted by Ms. Adam's primary physician Dr. Loeb, alopecia was listed as a present illness during her September 12, 2013 office visit. Adams Dep. at 117:5-24. In 2014, due to continued hair loss, Ms. Adams located and

met with Dr. Nussbaum, a dermatologist and specialist at the Hair Transplant Institute in Florida, who officially diagnosed her with alopecia on March 20, 2014. Fifth Amended Plaintiff Fact Sheet at 17, 19, 23; Adams Dep. at 37:15-38:8. The records also reflect that Ms. Adams took no further action relative to her hair loss until she received a letter in the mail from counsel in 2016. Ms. Adams Dep. 28:1-6; 29:9-15; Ms. Adams January 23, 2023 Cert. ¶7. Thereafter, Ms. Adams commenced her lawsuit on December 7, 2017.

Pursuant N.J. Stat. § 2A:14-2(a), Ms. Adam's tort claim had to be filed within two years of her injury. Thus, the statute of limitations would bar Ms. Adams from bringing a claim for an injury that occurred before December 7, 2015—unless the discovery rule or New Jersey's equitable principles tolled the statute from accruing. Additionally, pursuant to N.J. Stat. §12A:2-725(1), Ms. Adam's breach of warranty claim had to be filed within four years after the cause of action has accrued. As noted above, New Jersey has not extended the discovery rule to a breach of warranty claim involving a contract for a sale of a good. Here, the statute of limitations would bar Ms. Adams from bringing a claim for breach that occurred after 2011, four years after receiving chemotherapy in 2007.

Sanofi's Argument in Support of Motion for Summary Judgment

Sanofi argues Ms. Adams claims accrued, and the statute of limitations began to run on December 1, 2007, six months after Ms. Adams completed chemotherapy. Def. Mot. at 5-6. Sanofi basis this argument on Ms. Adam's answers to discovery responses where she indicated that she experienced permanent hair loss and thinning hair six months after completing chemotherapy. Ibid. As a result, Sanofi argues that the statute of limitations expired on December 1, 2009, and Ms. Adam's 2017 lawsuit is untimely. Id. at 6. Additionally, Sanofi argues that the discovery rule does not save Ms. Adam's claims as she possessed knowledge of her injury and knowledge that her

injury may have been caused by a third party in December 2007. Id. at 7-8. At the latest, Sanofi argues that Ms. Adams had knowledge of her claim in 2014 when she was diagnosed with alopecia. Id. at 8. Sanofi also asserts that if Ms. Adams had investigated the cause of her hair loss, she would have discovered numerous news and medical articles that linked Taxotere with hair loss. Id. at 9. Sanofi points out that the Third Amended Master Long Form Complaint and Jury demand includes citations to such articles published between 2006 and 2015. Ibid.

Sanofi also argues that Ms. Adam's breach of warranty claim is barred because N.J. Stat. §12A:2-725(1) requires a breach of warranty claim to be executed within four years of when the cause of action accrued. Id. at 11. Furthermore, Sanofi contends that pursuant to N.J. Stat. § 12A:2-725(2), Ms. Adam's cause of action accrued when the breach occurred, and the breach occurred when tender of delivery was made. Ibid. As a result, Sanofi argues that Ms. Adam's breach of warranty claim either accrued in February 2007 when chemotherapy began, and tender of delivery occurred, or in June 2007 when Ms. Adams completed her chemotherapy. Ibid. Sanofi contends that Ms. Adams did not require knowledge of a breach for the statute of limitations to run because the statute runs "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ibid. (quoting Argabright v. Rheem Mfg. Co., 258 F. Supp. 3d 470, 486 (D.N.J. 2017)). Additionally, Sanofi represents that New Jersey courts do not apply the discovery rule to claims involving a breach of warranty or contract. Ibid.

Next, Sanofi argues that New Jersey's equitable tolling principles do not toll the statute of limitations for Ms. Adam's claims. Id. at 12. According to Sanofi, equitable tolling occurs when a defendant's fraudulent conduct "induced or tricked" a plaintiff to miss a filing deadline. Ibid. Here, Sanofi argues that Ms. Adams has not alleged, or proved, that "Sanofi fraudulently acted after her cause of action arose to prevent Ms. Adams specifically from discovering *her* claims." Id. at 13

(emphasis in original). Instead, Sanofi maintains that between 2007 and 2014, Ms. Adams had knowledge of her injury but did nothing to pursue a claim. Ibid. Consequently, Sanofi asserts that equitable tolling does not apply here.

Finally, Sanofi argues that a Lopez hearing is not required because there are no disputed questions of fact or credibility. Id. at 14. Sanofi asserts that the record is clear that Ms. Adams knew, or should have known, that she had a claim, but failed to assert it. Specifically, Sanofi argues that Ms. Adams testified that she believed that her hair loss was permanent and was caused by her chemotherapy. Ibid. In sum, Sanofi asks this Court to find Ms. Adam's claims are barred by the statute of limitations, without a Lopez hearing.

Plaintiff's Argument in Opposition

Plaintiff's counsel asserts that New Jersey's equitable tolling principles apply under limited circumstances "(1) if the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his [or her] rights, or (3) if the plaintiff has timely asserted his [or her] rights mistakenly in the wrong forum." Pl. Opp. at 7 (quoting F.H.U. v. A.C.U., 427 N.J. Super. 354, 379, 48 A.3d 1130 (App. Div. 2012)). Plaintiff's counsel acknowledges that New Jersey equitable tolling principles do "not excuse [Ms. Adams] from exercising the reasonable insight and diligence required to pursue [her] claims," but argue that Ms. Adams could not have discovered the risks associated with Taxotere. Id. at 8.

Plaintiff's counsel asserts that Ms. Adams acted as a reasonable person to investigate her hair loss and investigate who was responsible for her hair loss. Id. at 9. Plaintiff's counsel contends that it was impossible to learn of any connection between Taxotere and her hair loss until December 11, 2015—when Sanofi updated its Taxotere label. Ibid. Prior to the label change, Taxotere's label that did not provide any warning of permanent hair loss and Ms. Adams, and her

doctors, relied on said label. Ibid. Plaintiff's counsel claims that Sanofi misled Ms. Adams and her doctors by failing to disclose risks associated with Taxotere and permanent hair loss. Id. at 8. Furthermore, Plaintiff's counsel asserts that Ms. Adams did not learn about the connection between her hair loss and Taxotere until 2016 when she received a legal advertisement in the mail. Id. at 9. Until Ms. Adams received the advertisement, Plaintiff's counsel argues that Ms. Adams still believed that her hair would grow back. Id. at 10. As a result of the above, Plaintiff's counsel asks the court to find that the statute of limitations was equitably tolled until December 11, 2015, when Taxotere's label was changed.

Plaintiff's counsel also argues that this Court may require a Lopez hearing to confirm the dates that Ms. Adams possessed knowledge of her injury and claim against a third party. Ibid.

Sanofi's Argument in Reply

Sanofi maintains that Plaintiff's arguments "are legally incorrect and cannot be reconciled with the undisputed factual record." Def. Reply at 2. First, Sanofi argues that Ms. Adam's undisputed testimony illustrates that she knew she was injured and that it was caused by a third party by 2007. Id. at 3. Sanofi represents that is immaterial that Ms. Adams was not diagnosed with alopecia until 2014 or that she received a Taxotere litigation advertisement in 2016 because "medical or legal certainty is not required" in New Jersey. Ibid. (quoting Lapka v. Porter Hayden Co., 162 N.J. 545, 555–56 (2000)). Sanofi argues that even if Ms. Adams did not know of her claim by 2007, she should have known by that time. Sanofi represents that Ms. Adam's undisputed testimony demonstrates that she knew, in December 2007, that some parts of her hair did not grow back and areas where hair did grow back, was thinner. Id. at 5. Thus, Ms. Adam's claims were barred in 2009, which is eight years before she initiated this suit. Id. at 4.

Sanofi also asserts that Plaintiff's argument that Ms. Adams could not have known she had a claim until Taxotere's label changed in 2015 is meritless for multiple reasons. Id. at 5. First, Ms. Adams has not provided any evidence that Sanofi told her that her hair would regrow. Ibid. Next, Sanofi represents that New Jersey's discovery rule applies an objective test which asks what a reasonable person would do. Sanofi argues that a reasonable person in Ms. Adam's shoes, who believed their hair would regrow after chemotherapy, would have known something was wrong after hair did not grow back after months and years. Ibid. Furthermore, Sanofi maintains that Ms. Adam's argument is devoid of any attempts by her to investigate the cause of her hair loss. Id. at 6. A reasonable person, Sanofi asserts, would have inquired about a claim instead of hoping that their hair would regrow for nine years. Id. at 7. Moreover, Sanofi explains that if Ms. Adams had investigated, the Third Amended Master Complaint provides evidence of information that was publicly available between 2006 and 2015 that linked hair loss with Taxotere. Id. at 6.

Next, Sanofi argues that Plaintiff's one sentence opposition that the discovery rule applies to a breach of warranty claim is incorrect for two reasons. Id. at 8. First, the one case cited, in the opposition, involved a different statute of limitations that what applies in our case. Ibid. Second, Sanofi asserts that "New Jersey law is clear that the discovery rule does not apply to N.J. Stat. § 12A2-725(1)." Ibid.

Sanofi also contends that Ms. Adam's equitable tolling arguments misapply New Jersey law. Id. at 9. Specifically, Sanofi represents that Ms. Adam's argument that Sanofi failed to warn the public about hair loss risks associated with Taxotere does not meet the standard required under New Jersey law. Ibid. In New Jersey, Sanofi maintains that Ms. Adams is required to provide evidence that Sanofi prevented her, specifically, from discovering her claim after her cause of action. Ibid. Here, Sanofi explains, Ms. Adams complains about Sanofi's actions before her cause

of action, receiving Taxotere. Ibid. Sanofi argues that Ms. Adam's failure to warn claim "cannot form the basis of both Ms. Adam's substantive product liability claim and her claim for equitable tolling . . . [because] otherwise, equitable tolling would apply to pause the statute of limitations in every case in which run-of-the-mill, failure-to-warn allegations were asserted against the defendant." Id. at 9-10. Because Ms. Adams does not provide evidence that Sanofi intentionally induced or tricked Ms. Adams from filing her claim, Sanofi argues that equitable tolling does not apply. Id. at 10.

Lastly, Sanofi reaffirms their position that a Lopez hearing is not necessary because there are no issues of credibility. Ibid.

Analysis

The central question before this Court is when did Ms. Adam's claims accrue. More specifically, did they accrue before, on, or after December 11, 2015 when Taxotere's label was changed. Pursuant to the discovery rule doctrine, the Court's analysis focuses on two distinct elements—injury and fault. Lynch v. Rubacky, 85 N.J. 65, 70 (1981). If the Court finds that Ms. Adams had, or should have had, knowledge of her injury and knowledge that her injury was caused by the fault of another before December 7, 2015, then the Compliant filed on December 7, 2017 must be dismissed. If the Court finds that she did not, then the Complaint was timely.

After due consideration of all the arguments presented, the Court concludes that the discovery rule does not render Ms. Adam's complaint timely, with the Court finding that Ms. Adams knew or should have known she was injured before December 7, 2015. Specifically, the record reflects that as early as 2007, Ms. Adams knew that her hair had grown back differently after chemotherapy. Ms. Adams, by way of her Plaintiff Fact Sheet ("PFS"), claimed that she experienced permanent hair loss since December 1, 2007. See Fifth Amended PFS at 15-16.

Similarly, at her deposition, Ms. Adams testified that she experienced permanent or persistent hair loss since December 2007 because there were areas where her hair did not grow back. Ms. Adams Dep. 43:10-21. Ms. Adams also testified that the hair that did grow back is thinner, a slightly different color, and with a different texture than prior to chemotherapy treatment. Id. at 45:7-22. Ms. Adam's hair loss is also noted in her medical records and was the reason Ms. Adams sought treatment with specialists in hair loss. The injury claimed in this lawsuit is permanent hair loss. Based on the undisputed and clear record, in 2007, Ms. Adams had knowledge of her injury comprising of permanent and persistent hair loss that, by her own admission, was present for ten years prior to the filing of her lawsuit.

Even if this Court were to accept that that Ms. Adams did not know that she suffered from an injury in 2007, Ms. Adams knew or should have known by 2013. On September 12, 2013, Ms. Adams met with her primary doctor, Dr. Loeb. Ms. Adam's medical records for said visit lists alopecia under the caption "History of Illness" and included comments detailing that Ms. Adam's symptoms were moderate. Ms. Adams Dep. 117:5-24. Additionally, Ms. Adam's medical records from her September 12, 2013 visit state that Dr. Loeb identified wig makers for Ms. Adams. Id. at 118:12-17. Accordingly, even if this Court were to find that the discovery rule applied and the statute of limitations did not begin to accrue until this September 12, 2013 doctor visit, Ms. Adam's 2017 complaint is still untimely.

Ms. Adam's recognition that she suffered an ongoing permanent injury is further confirmed by her 2014 appoint with hair transplant specialist Dr. Nussbaum, of the Hair Transplant Institute in Florida. Fifth Amended PFS at 17. This was the first time that Ms. Adams discussed her hair loss with a healthcare provider. Id. at 19; Ms. Adams Dep 37:15-38:8. Ms. Adams testified that one of the reasons why she sought out Dr. Nussbaum was for the possibility of a hair transplant.

Ms. Adams Dep. 119:4-8. At her first visit with Dr. Nussbaum, Ms. Adams informed him that she has experienced hair loss for the past five years. Id. at 39:19-24. Also at this appointment, Dr. Nussbaum diagnosed Ms. Adams with alopecia. Fifth Amended PFS at 17.

Accordingly, even if this Court were to ignore Ms. Adam's sworn testimony and plaintiff fact sheet, the Court finds that the Dr. Nussbaum appointment, wherein Ms. Adams sought a permanent hair loss solution, evidences that Ms. Adams knew or should have known of her injury by 2014. Ms. Adam's 2014 consultation with Dr. Nussbaum was more than two years prior to the filing of this lawsuit. Accordingly, even if this Court were to find that the discovery rule applied and the statute of limitations began running on March 20, 2014, Ms. Adam's 2017 complaint is still untimely.

In making the finding that Ms. Adams knew she was injured prior to December 7, 2015, the Court rejects plaintiff's argument that she did not know her hair loss was permanent. To that end, the Court again cites to Ms. Adam's testimony and plaintiff fact sheet, wherein Ms. Adams candidly testified that she believed her hair loss was permanent. Ms. Adams Dep. 39:22-40:6; 40:13-16; 43:10-21; 124:5-10; Fifth Amended Plaintiff Fact Sheet at 15-17, 23. Ms. Adam's belief is certainly supported by the seven years she suffered hair loss post-chemotherapy before seeking assistance from a specialist in hair loss. Moreover, the record is devoid of any doctor, including hair specialist Dr. Nussbaum, who ever stated, suggested, or hinted to Ms. Adams that her hair would still grow back after seven years.

In fact, the record reflects that Ms. Adams knew that her hair was not regrowing to its original fullness, but never discussed this with her physicians. Ms. Adams Dep. 111:10-23. Specifically, Ms. Adams testified that she did not discuss her hair loss with her physicians because she considered it a separate issue and did not know what could be done. Ibid. Ms. Adam's failure

to discuss her hair with her doctors is confirmed by way of her oncologist's, Dr. Celano's, testimony. Dr. Celano testified that he was unaware of Ms. Adam's hair loss and was under the impression that Ms. Adam's lawsuit injuries were related to her rheumatological complaints, joints complaints, or fatigue. Dr. Celano Dep. 14:8-16:1. Furthermore, Dr. Celano testified that in the nine years that he was Ms. Adam's oncologist, Ms. Adams never discussed any concerns relating to her hair and his medical notes are devoid of any notation regarding hair loss, hair thinning, or lack of hair growth. Id. at 139:17-141:3.

Further, certainty of injury is not required under the law. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012). The Court must answer the question of whether Ms. Adams as an objectively reasonable person knew or should have known they suffered permanent hair loss. Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005). To that end, after an extensive review of the record and analysis of the relevant timeline, the Court finds that Ms. Adams knew or should have known that she suffered a permanent injury prior to December 7, 2015.

Having found Ms. Adams possessed knowledge of her injury prior to December 7, 2015, the next question for the Court is whether an objectively reasonable person would have been aware their injury was due to the fault of another before December 7, 2015. Stated more specifically, the next question before the Court is whether Ms. Adams knew or should have known before December 7, 2015 that her permanent hair loss was caused by chemotherapy.

This case does not involve an unknown relationship between a pharmaceutical product and an injury. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012) (an acne drug causing ulcerative colitis). Similarly, this case does not involve hidden malpractice. Martinez v. Cooper Hospital-University Med. Ctr., 163 N.J. 45 (2000) (Doctor medical malpractice death by telling next of kin that nothing could have been done and lied about a significant treatment delay that

occurred.); Caravaggio v. D'Agostini, 166 N.J. 237 (2001) (Doctor told patient that their femur rod failure was due to a defective device and not his own malpractice.). Instead, this case involves a straightforward cause and effect relationship.

In 2007, Ms. Adams underwent chemotherapy to treat her breast cancer. This chemotherapy caused Ms. Adams to lose all of her hair. After completing chemotherapy, all of Ms. Adam's hair did not grow back and the hair that did grow back, grew back differently. Ms. Adams testified that months after completing chemotherapy "it was extremely discouraging" that her hair was not regrowing to its fullness. Ms. Adams Dep. 111:10-14. Ms. Adam's injury was self-evident, and the Court finds that a reasonable person in Ms. Adam's position would have realized, before December 7, 2015, that the chemotherapy that caused her to lose her hair also was responsible for her incomplete hair growth. Whether asked or not, no doctor ever told Ms. Adams that her hair loss and chemotherapy were unrelated. The Court finds that Ms. Adams possessed, or should have possessed, knowledge that her injury was caused by the fault of another before December 7, 2015. Baird v. Am. Med. Optics, 155 N.J. 54, 72 (1998).

The Court rejects plaintiff's arguments that Ms. Adams could not have known she had a claim against Sanofi until either the 2015 Taxotere label change or 2016 when Ms. Adams was contacted by counsel. As our New Jersey Supreme Court explained in Baird v. Am. Med. Optics, "the statute of limitations begins to run when the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another, not when a lawyer advises her that the facts give rise to a legal cause of action." 155 N.J. 54, 68 (1998); see Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012) (explaining that a plaintiff does not require legal consultation from an attorney, does not need to understand the legal significance of their claim, nor does a plaintiff require medical or legal certainty for a claim to accrue.). Accordingly,

the Court must find that the discovery rule does not save Ms. Adam's untimely complaint because Ms. Adams "'knew or should have known' of sufficient facts to start the statute of limitations running." Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005).

Prior to 2015, Ms. Adams possessed the requisite knowledge to have known she was injured by a third party. Additionally, prior to 2015, Ms. Adams had sufficient information to be able to make an informed decision as to whether to obtain additional information by way of seeking legal advice, medical advice, or by performing her own research to confirm her suspicions and get answers. Significantly, the application of the discovery rule requires Ms. Adams to diligently pursue her claims. McDade v. Siazon, 208 N.J. 463, 479 (2011) (explaining that despite having knowledge of their injury and knowledge of the responsible entity, "plaintiffs did not act with reasonable diligence required by the discovery rule."). The unfortunate reality is that Ms. Adams possessed the requisite knowledge for an actionable claim before December 7, 2015, however Ms. Adams did not exercise reasonable insight or diligence to discover the basis for her claim. Lopez v. Swyer, 62 N.J. 267, 272 (1973).

If Ms. Adams had made an inquiry, even if unsuccessful, the Court would be faced with a different issue and analysis. However, despite having personal knowledge of her hair loss and chemotherapy, Ms. Adams made no inquiry other than accepting her plight and dealing with it daily. McDade, 208 N.J. 463 at 479. The record reflects no initiative, inquiry, questions asked, or conversations initiated to investigate her claim. In fact, Ms. Adams did not consider filing or initiate this lawsuit until she received a legal solicitation letter in the mail. This is not the type of investigation anticipated or accepted by courts. At oral argument, plaintiffs' counsel argued that even if Ms. Adams had investigated her claim, she would not have found anything. Hr'g R. at 11:32:04; 11:32:35; 11:32:48. The Court will not predict what Ms. Adams would or would not

have found had she performed a reasonable inquiry; however, the Court notes the numerous news articles, studies, and publications cited to in plaintiffs' Master Complaint that were available as early as 2006. Third Amended Long Form Complaint ¶198-215.

The Court further finds that the discovery rule does not apply to Ms. Adam's claim for breach of express warranty because the statute of limitations for sale contracts are governed by the N.J. Stat. §12A:2-725. According to the statute, a claim for breach of any sale contract must be brought within four years of the cause of action and a breach of warranty occurs when delivery is made. N.J. Stat. §12A:2-725(1) & (2); Deluxe Sales and Service, Inc. v. Hyundai Engineering & Const, Co., 254 N.J. Super 370, 374 (App. Div. 1992). Here, the date of delivery is either February 2007, when Ms. Adams began chemotherapy, or June 2007, when Ms. Adams ended chemotherapy. The only exception that extends the statute of limitations greater than four years is when a "warranty explicitly extends to future performance of the goods." N.J. Stat. §12A:2-725(2); Docteroff v. Barra Corp. of America, Inc., 282 N.J. Super. 230, 241 (App. Div. 1995); Poli v. DaimlerChrysler Corp., 349 N.J. Super. 169, 175-76 (App. Div. 2002). However, our record does not contain any evidence that Sanofi included such explicit warranty extending to future performance. Furthermore, the statute expressly states that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ibid. Consequently, the discovery rule does not apply, regardless of Ms. Adam's knowledge, and Ms. Adams had until February 2011, or June 2011, to timely file her breach of warranty claim.

In addition to finding the discovery rule is inapplicable to both, the Court finds that a Lopez hearing is unnecessary and unwarranted because Ms. Adam's credibility is not at issue[3]. Lopez,

[3] The Court notes that discovery is still ongoing, however none of the parties have argued that more discovery is necessary other than suggesting a Lopez hearing. The Court finds that additional discovery is not needed because the record is well developed, and further discovery will not change the outcome. Minoia v. Kushner, 365 N.J. Super. 304, 307-08 (App. Div. 2004).

62 N.J. at 275. At oral argument, plaintiffs' counsel repeatedly affirmed their position that credibility was not at issue for any of the bellwether plaintiffs. Hr'g R. at 9:16:30; 9:17:00; 9:55:28; 9:55:50. Moreover, plaintiffs' brief does not argue that a Lopez hearing is required, but rather suggests that the Court "may want to conduct a Lopez hearing to clarify any ambiguity that may exist." Pl. Opp. at 10. As detailed above, Ms. Adam's deposition testimony is clear, unambiguous, and corroborates the statements made in her PFS.

To the extent Ms. Adam's updated certification, dated January 23, 2023, contradicts her prior testimony, the Court will not consider those inconsistencies or contradictions pursuant to the sham affidavit doctrine. This doctrine permits a trial court, at the summary judgment stage, to reject an affidavit that "patently and sharply" contradicts deposition testimony without any explanation for the contradiction. Shelcusky v. Garjulio, 172 N.J. 185, 201-02 (2002). If no explanation is provided within plaintiff's new certification and plaintiff's deposition testimony is clear, then a trial court does not abuse their discretion to reject said certification as a sham affidavit. Hinton v. Meyers, 416 N.J. Super 141, 150 (App. Div. 2010). For the reasons set forth below, the Court will be rejecting this certification.

Here, Ms. Adam's January 23, 2023 affidavit states that she was always under the impression that her hair would grow back until she received a legal advertisement in 2016. Ms. Adams January 23, 2023 Cert. ¶7. However, as previously detailed, Ms. Adams testified at her deposition that (1) she knew there were areas of her hair that never grew back after chemotherapy; (2) she realized six or seven years after chemotherapy that her current amount of hair was "all that was coming back"; and (3) she knew her hair loss was permanent before Dr. Nussbaum officially diagnosed her with alopecia on March 20, 2014. Ms. Adams Dep. 39:22-40:6; 40:13-16; 43:10-21; 124:5-10. As such, the Court finds that the newly filed affidavit patently and sharply

contradicts Ms. Adam's prior testimony and she failed to provide any explanation for the contradictions. In addition to contradicting her prior testimony, the Court also rejects this affidavit finding that this new certification is simply not objectively reasonable given the sequence of events and timeline as set forth in this opinion. The Court again finds that Ms. Adams knew or should have known she was injured due to the fault of another prior to December 7, 2015.

The Court also finds that New Jersey's equitable tolling does not save Ms. Adam's complaint for two reasons. Initially, the Court finds the record is devoid of any evidence that Sanofi actively mislead Ms. Adams or otherwise personally prevented Ms. Adams in some extraordinary way from asserting her rights. Barron v. Gersten, 472 N.J. Super. 572, 577 (App. Div. 2022). Instead, the record reflects that Sanofi's label did not include any warnings regarding permanent hair loss until 2015. Pl. Opp. at 9. However, Sanofi's failure, or omission, to warn does not rise to the level of intentional inducement, trickery, or other misconduct aimed personally at Ms. Adams that prevented her from filing her claim.

Moreover, equitable tolling requires Ms. Adams to diligently pursue her claims and "does not excuse claimants from exercising the reasonable insight and diligence required to pursue their claims." Barron v. Gersten, 472 N.J. Super 572, 577 (N.J. App. Div. 2022). For the same reasons as set forth above, the Court finds that a reasonable person in Ms. Adam's position would have realized that they were injured due to the fault of another before 2015. Here, Ms. Adams did not diligently pursue her claims. The record reflects that between 2007 and 2014, Ms. Adams suffered from hair loss but did nothing. In 2014, for the first time, Ms. Adams met with a dermatologist who diagnosed her with alopecia. Fifth Amended PFS at 19. However, as noted before, Ms. Adams knew that she suffered from hair loss, after completion of chemotherapy, well before her official diagnosis in 2014. Ms. Adams Dep. 39:19-24, 43:10-21, and 45:7-22. Even if Ms. Adams did not

realize that she suffered from an injury due to the fault of another until her official diagnosis in 2014, Ms. Adams waited almost three years to file her complaint on December 7, 2017. Accordingly, New Jersey's equitable tolling does not apply.

As a result, Sanofi's Motion for Summary Judgment is **GRANTED**.

Elizabeth Linton – Docket: MID L 007663-18

Plaintiff Elizabeth Linton ("Ms. Linton") was diagnosed with breast cancer on January 15, 2008. Fourth Amended Plaintiff Fact Sheet at 11. Ms. Linton's chemotherapy treatment began on February 1, 2008, ended on May 29, 2008, and consisted of six cycles with a frequency of every three weeks. Id. at 14. Before beginning chemotherapy, Ms. Linton was told by her oncologist, Dr. Clowney, that she would lose her hair and that it should grow back. Ms. Linton Dep. 30:5-25; 112:19-114:13; Dr. Clowney Dep. 72:13-25. Ms. Linton testified that she started to lose her hair a week after completing the first session of chemotherapy and lost all her hair the week after completing the second session of chemotherapy. Ms. Linton Dep. 128:20-129:3. Specifically, Ms. Linton alleges permanent hair loss from November 29, 2008, to present. Fourth Amended Plaintiff Fact Sheet at 16-17, 19, 23.

According to the record before this Court, Ms. Linton's hair loss continued despite the completion of chemotherapy in 2008. The records reviewed by this Court corroborate Ms. Linton's claim of continued hair loss post chemotherapy treatment. Specifically, those records reveal that Ms. Linton has worn a wig every day since February 1, 2008. Ms. Linton Dep. at 164:5-12. Those records also reflect that Ms. Linton spoke to her oncologist in 2008 or 2009 about her hair loss, but Ms. Linton took no further action relative to her hair loss until viewing a legal advertisement on television in 2016. Id. at 9:23-11:11; 217:7-219:4. Thereafter, Ms. Linton commenced her lawsuit on December 7, 2017.

Pursuant to N.J. Stat. § 2A:14-2(a), Ms. Linton's tort claim had to be filed within two years of her injury. Thus, the statute of limitations would bar Ms. Linton from bringing a claim for an injury that occurred before December 7, 2015—unless the discovery rule or New Jersey's equitable principles tolled the statute from accruing. Additionally, pursuant to N.J. Stat. §12A:2-725(1), Ms. Linton's breach of warranty claim had to be filed within four years after the cause of action has accrued. As noted above, New Jersey has not extended the discovery rule to a breach of warranty claim involving a contract for a sale of a good. Here, the statute of limitations would bar Ms. Linton from bringing a claim for breach that occurred after 2012, four years after receiving chemotherapy in 2008.

Sanofi's Argument in Support of Motion for Summary Judgment

Sanofi argues that Ms. Linton's claims accrued, and the statute of limitations began to run on November 29, 2008, six months after Ms. Linton completed chemotherapy. Def. Mot. at 6. Sanofi basis this argument on Ms. Linton's answers to discovery responses where she indicated that she experienced permanent and persistent hair loss on her scalp six months after completing chemotherapy. Ibid. As a result, Sanofi argues that the statute of limitations expired on November 29, 2010 and Ms. Linton's 2017 lawsuit is untimely. Id. at 7. Additionally, Sanofi argues that the discovery rule does not save Ms. Linton's claims as she possessed knowledge of her injury and knowledge that her injury may have been caused by a third party by 2009 at the latest. Id. at 8. Specifically, Sanofi represents that the last time Ms. Linton spoke with her oncologist about her hair was in 2009 and that Ms. Linton testified she believed her hair loss was permanent and caused by chemotherapy. Ibid. Additionally, Sanofi asserts that if Ms. Linton had investigated the cause of her hair loss, she would have discovered, numerous news and medical articles that linked Taxotere with hair loss. Id. at 10. Sanofi points out that the Third Amended Master Long Form

Complaint and Jury demand includes citations to such articles published between 2006 and 2015. Ibid.

Sanofi also argues that Ms. Linton's breach of warranty claim is barred because N.J. Stat. § 12A:2-725(1) requires a breach of warranty claim to be executed within four years of when the cause of action accrued. Id. at 11. Furthermore, Sanofi contends that pursuant to N.J. Stat. § 12A:2-725(2), Ms. Linton's cause of action accrued when the breach occurred, and the breach occurred when tender of delivery was made. Ibid. As a result, Sanofi argues that Ms. Linton's breach of warranty claim either accrued in February 2008 when chemotherapy began, and tender of delivery occurred, or in May 2008 when Ms. Linton completed her chemotherapy. Id. at 12. Sanofi contends that Ms. Linton did not require knowledge of a breach for the statute of limitations to run because the statute runs "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ibid. (quoting Argabright v. Rheem Mfg. Co., 258 F. Supp. 3d 470, 486 (D.N.J. 2017)). Additionally, Sanofi represents that New Jersey courts do not apply the discovery rule to claims involving a breach of warranty or contract. Ibid.

Next, Sanofi argues that New Jersey's equitable tolling principles do not toll the statute of limitations for Ms. Linton's claims. Id. at 12. According to Sanofi, equitable tolling occurs when a defendant's fraudulent conduct "induced or tricked" a plaintiff to miss a filing deadline. Ibid. Here, Sanofi argues that Ms. Linton has not alleged, or proved, that "Sanofi fraudulently acted after her cause of action arose to prevent Ms. Linton specifically from discovering *her* claims." Id. at 13 (emphasis in original). Instead, Sanofi represents that Ms. Linton testified that she knew that her permanent hair loss was caused by chemotherapy in 2009, but that she gave up. Ibid. Consequently, Sanofi asserts that equitable tolling does not apply here because Ms. Linton had knowledge of her injury but did nothing to pursue a claim. Ibid.

Finally, Sanofi argues that a Lopez hearing is not required because there are no disputed questions of fact or credibility. Id. at 15. Sanofi asserts that the record is clear that Ms. Linton knew, or should have known, that she had a claim, but failed to assert it. Specifically, Sanofi argues that Ms. Linton testified that she believed that her hair loss was permanent and was caused by her chemotherapy. Ibid. In sum, Sanofi asks this Court to find Ms. Linton's claims are barred by the statute of limitations, without a Lopez hearing.

Plaintiff's Argument in Opposition

Plaintiff's counsel asserts that New Jersey's equitable tolling principles apply under limited circumstances "(1) if the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his [or her] rights, or (3) if the plaintiff has timely asserted his [or her] rights mistakenly in the wrong forum." Pl. Opp. at 7 (quoting F.H.U. v. A.C.U., 427 N.J. Super. 354, 379, 48 A.3d 1130 (App. Div. 2012)). Plaintiff's counsel acknowledges that New Jersey equitable tolling principles do "not excuse [Ms. Linton] from exercising the reasonable insight and diligence required to pursue [her] claims," but argue that Ms. Linton could not have discovered the risks associated with Taxotere. Id. at 8.

Plaintiff's counsel asserts that Ms. Linton acted as a reasonable person to investigate her hair loss and investigate who was responsible for her hair loss. Id. at 9. Plaintiff's counsel contends that it was impossible to learn of any connection between Taxotere and her hair loss until December 11, 2015—when Sanofi updated its Taxotere label. Ibid. Prior to the label change, Taxotere's label that did not provide any warning of permanent hair loss and Ms. Linton, and her doctors, relied on said label. Ibid. Plaintiff's counsel claims that Sanofi misled Ms. Linton and her doctors by failing to disclose risks associated with Taxotere and permanent hair loss. Id. at 8. Furthermore, Plaintiff's counsel asserts that Ms. Linton did not learn about the connection between

her hair loss and Taxotere until 2016 when she saw a lawsuit advertisement on television. Id. at 9. Until Ms. Linton saw the advertisement, Plaintiff's counsel argues that Ms. Linton still believed that her hair would grow back. Id. at 10. As a result of the above, Plaintiff's counsel asks the court to find that the statute of limitations was equitably tolled until December 11, 2015, when Taxotere's label was changed.

Plaintiff's counsel also argues that this Court may require a Lopez hearing to confirm the dates that Ms. Linton possessed knowledge of her injury and claim against a third party. Ibid.

Sanofi's Argument in Reply

Sanofi maintains that Plaintiff's arguments "are legally incorrect and cannot be reconciled with the undisputed factual record." Def. Reply at 2. First, Sanofi argues that Ms. Linton's undisputed testimony illustrates that she knew she was injured and that it was caused by a third party by 2009. Ibid. Sanofi represents that is immaterial that Ms. Linton was not informed of the Taxotere litigation until 2016 because "medical or legal certainty is not required" in New Jersey. Id. at 4 (quoting Lapka v. Porter Hayden Co., 162 N.J. 545, 555–56 (2000)). Sanofi argues that even if Ms. Linton did not know of her claim by 2009, the record demonstrates that she should have known by that time. Id. at 5. Sanofi represents that Ms. Linton's undisputed testimony demonstrates that she knew, as early as two months after chemotherapy, that her hair had not grown back by the end of July 2008. Id. at 6. Furthermore, Ms. Linton testified that she believed, in 2009, that her hair loss was caused by chemotherapy. Ibid. Thus, Sanofi argues that Ms. Linton's claims were barred in 2011, which is six years before she initiated this suit. Id. at 5.

Sanofi also asserts that Plaintiff's argument that Ms. Linton could not have known she had a claim until Taxotere's label changed in 2015 is meritless for multiple reasons. Id. at 7. First, Ms. Linton has not provided any evidence that Sanofi told her that her hair would regrow. Id. at 6.

Next, Sanofi represents that New Jersey's discovery rule applies an objective test which asks what a reasonable person would do. Id. at 7. Sanofi argues that a reasonable person in Ms. Linton's shoes, who believed their hair would regrow after chemotherapy, would have known something was wrong after hair did not grow back after months and years. Ibid. Furthermore, Sanofi maintains that Ms. Linton's argument is devoid of any attempts by her to investigate the cause of her hair loss. Id. at 7. A reasonable person, Sanofi asserts, would have inquired about a claim instead of doing nothing for ten years after treatment when her hair loss remained unchanged. Ibid. Moreover, Sanofi explains that if Ms. Linton had investigated, the Third Amended Master Complaint provides evidence of information that was publicly available between 2006 and 2015 that linked hair loss with Taxotere. Id. at 7-8.

Next, Sanofi argues that Plaintiff's one sentence opposition that the discovery rule applies to a breach of warranty claim is incorrect for two reasons. Id. at 9. First, the one case cited, in the opposition, involved a different statute of limitations that what applies in our case. Ibid. Second, Sanofi asserts that "New Jersey law is clear that the discovery rule does not apply to N.J. Stat. § 12A2-725(1)." Id. at 10.

Sanofi also contends that Ms. Linton's equitable tolling arguments misapply New Jersey law. Id. at 10. Specifically, Sanofi represents that Ms. Linton's argument that Sanofi failed to warn the public about hair loss risks associated with Taxotere do not meet the standard required under New Jersey law. Ibid. In New Jersey, Sanofi maintains that Ms. Linton is required to provide evidence that Sanofi prevented her, specifically, from discovering her claim after her cause of action. Id. at 10-11. Here, Sanofi explains, Ms. Linton complains about Sanofi's actions before her cause of action, receiving Taxotere. Id. at 11. Sanofi argues that Ms. Linton's failure to warn claim "cannot form the basis of both Ms. Linton's substantive product liability claim and her claim for

equitable tolling . . . [because] otherwise, equitable tolling would apply to pause the statute of limitations in every case in which run-of-the-mill, failure-to-warn allegations were asserted against the defendant." Ibid. Because Ms. Linton does not provide evidence that Sanofi intentionally induced or tricked Ms. Linton from filing her claim, Sanofi argues that equitable tolling does not apply. Ibid.

Lastly, Sanofi reaffirms their position that a Lopez hearing is not necessary because there are no issues of credibility. Id. at 11-12.

Analysis

The central question before this Court is when did Ms. Linton's claims accrue. More specifically, did they accrue before, on, or after December 11, 2015 when Taxotere's label was changed. Pursuant to the discovery rule doctrine, the Court's analysis focuses on two distinct elements—injury and fault. Lynch v. Rubacky, 85 N.J. 65, 70 (1981). If the Court finds that Ms. Linton had, or should have had, knowledge of her injury and knowledge that her injury was caused by the fault of another before December 7, 2015, then the Compliant filed on December 7, 2017 must be dismissed. If the Court finds that she did not, then the Complaint was timely.

After due consideration of all the arguments presented, the Court concludes that the discovery rule does not render Ms. Linton's complaint timely. With the Court finding that Ms. Linton knew or should have known she was injured before December 7, 2015. Specifically, the record reflects that as early as 2008, Ms. Linton knew that her hair was not growing back after chemotherapy. Ms. Linton, by way of her PFS, claimed that she experienced permanent hair loss since November 29, 2008. See Fourth Amended Plaintiff Fact Sheet at 16-17, 19, 23. Similarly, at her deposition, Ms. Linton testified that she lost her hair during chemotherapy and that she has not seen any change in her hair loss since 2008. Ms. Linton Dep. at 28:18-29:3; 33:14-34:22.

Furthermore, Ms. Linton has worn a wig since 2008 because of her permanent hair loss. Id. at 164:5-12; 164:20-165:5; Fourth Amended Plaintiff Fact Sheet at 23. The injury claimed in this lawsuit is permanent hair loss. Based on the undisputed and clear record, in 2008, Ms. Linton had knowledge of her injury comprising of permanent and persistent hair loss that, by her own admission, was present for nine years prior to the filing of her lawsuit. Ms. Linton Dep. 33:14-34:22

The Court notes that the record includes evidence that Ms. Linton asked her oncologist, Dr. Clowney, about her hair loss. Specifically, Ms. Linton testified that she asked Dr. Clowney, in 2008 or 2009, when her hair would grow back and that he informed her that her hair would come back in a couple months. Ms. Linton Dep. 29:6-30:4; 30:5-25; 31:1-33:13; 33:14-34:22. According to Ms. Linton, this conversation with Dr. Clowney occurred about three or four months after starting chemotherapy. Id. at 112:19-114:13. At his deposition, Dr. Clowney did not remember this conversation; however, he confirmed that if Ms. Linton asked him after a few months of chemotherapy when her hair would come back, he would have told her that she will lose more hair with each cycle of chemotherapy and that her hair would not come back until she completes chemotherapy. Dr. Clowney Dep. 84:13-85:5.

For the purposes of this motion, the Court accepts that Dr. Clowney represented to Ms. Linton that her hair would grow back after completion of chemotherapy. Also, the Court accepts that Ms. Linton reasonably relied on Dr. Clowney's representation that her hair would grow back in a few months. However, the Court does not find that Ms. Linton exercised reasonable insight or diligence to discover her claim, after her hair did not grow back, before filing her lawsuit eight to nine years later, on December 7, 2017. McDade v. Siazon, 208 N.J. 463, 479 (2011). Ms. Linton repeatedly testified that after posing one question to Dr. Clowney in 2008 or 2009, she never spoke

with a doctor again about her hair loss. Ms. Linton Dep. 29:6-30:4; 30:5-25; 31:1-33:13; 33:14-34:22; 38:10-13; 42:19-24; 130:9-19; 143:15-17; 144:7-16. The Court understands that Ms. Linton required time to process Dr. Clowney's statements and heal from the chemotherapy, but after her hair did not regrow after a few months as promised, or after a year, or after a few years—the Court cannot find that reasonable person would continue to believe their hair would regrow. Here, the record reflects that Ms. Linton knew and accepted that her hair loss was permanent. Id. at 33:14-34:22; 144:22-146:15.

Further, certainty of injury is not required under the law. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012). The Court must answer the question of whether Ms. Linton as an objectively reasonable person knew or should have known they suffered permanent hair loss. Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005). To that end, after an extensive review of the record and analysis of the relevant timeline, the Court finds that Ms. Linton knew or should have known that she suffered a permanent injury prior to December 7, 2015.

Having found Ms. Linton possessed knowledge of her injury prior to December 7, 2015, the next question for the Court is whether an objectively reasonable person would have been aware their injury was due to the fault of another before December 7, 2015. Stated more specifically, the next question before the Court is whether Ms. Linton knew or should have known before December 7, 2015 that her permanent hair loss was caused by chemotherapy.

This case does not involve an unknown relationship between a pharmaceutical product and an injury. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012) (an acne drug causing ulcerative colitis). Similarly, this case does not involve hidden malpractice. Martinez v. Cooper Hospital-University Med. Ctr., 163 N.J. 45 (2000) (Doctor medical malpractice death by telling next of kin that nothing could have been done and lied about a significant treatment delay that

occurred.); Caravaggio v. D'Agostini, 166 N.J. 237 (2001) (Doctor told patient that their femur rod failure was due to a defective device and not his own malpractice.). Instead, this case involves a straightforward cause and effect relationship.

In 2008, Ms. Linton underwent chemotherapy to treat her breast cancer. This chemotherapy caused Ms. Linton to lose all of her hair. After completing chemotherapy, all of Ms. Linton's hair did not grow back and Ms. Linton has worn a wig ever since. Furthermore, Ms. Linton testified that as early as 2009, she believed her hair loss was caused by the chemotherapy. Ms. Linton Dep. 33:14-34:22. Ms. Linton's injury was self-evident, and the Court finds that a reasonable person in Ms. Linton's position would have realized, before December 7, 2015, that the chemotherapy that caused her initial hair loss, was also responsible for her permanent hair loss. Whether asked or not, no doctor ever told Ms. Linton that her hair loss and chemotherapy were unrelated. The Court finds that Ms. Linton possessed, or should have possessed, knowledge that her injury was caused by the fault of another before December 7, 2015. Baird v. Am. Med. Optics, 155 N.J. 54, 72 (1998).

The Court rejects plaintiff's arguments that Ms. Linton could not have known she had a claim against Sanofi until either the 2015 Taxotere label change or 2016 when Ms. Linton viewed counsel's television advertisement. As our New Jersey Supreme Court explained in Baird v. Am. Med. Optics, "the statute of limitations begins to run when the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another, not when a lawyer advises her that the facts give rise to a legal cause of action." 155 N.J. 54, 68 (1998); see Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012) (explaining that a plaintiff does not require legal consultation from an attorney, does not need to understand the legal significance of their claim, nor does a plaintiff require medical or legal certainty for a claim to accrue.). Accordingly, the Court must find that the discovery rule does not save Ms. Linton's untimely

complaint because Ms. Linton "'knew or should have known' of sufficient facts to start the statute of limitations running." Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005).

Prior to 2015, Ms. Linton possessed the requisite knowledge to have known she was injured by a third party. Additionally, prior to 2015, Ms. Linton had sufficient information to be able to make an informed decision as to whether to obtain additional information by way of seeking legal advice, medical advice, or by performing her own research to confirm her suspicions and get answers. Significantly, the application of the discovery rule requires Ms. Linton to diligently pursue her claims. McDade v. Siazon, 208 N.J. 463, 479 (2011) (explaining that despite having knowledge of their injury and knowledge of the responsible entity, "plaintiffs did not act with reasonable diligence required by the discovery rule."). The unfortunate reality is that Ms. Linton possessed the requisite knowledge for an actionable claim before December 7, 2015, however Ms. Linton did not exercise reasonable insight or diligence to discover the basis for her claim. Lopez v. Swyer, 62 N.J. 267, 272 (1973).

If Ms. Linton had made an inquiry, even if unsuccessful, the Court would be faced with a different issue and analysis. However, despite having personal knowledge of her hair loss and chemotherapy, Ms. Linton made no inquiry other than accepting her plight and dealing with it daily. McDade, 208 N.J. 463 at 479. The record reflects no initiative, inquiry, questions asked, or conversations initiated to investigate her claim. In fact, Ms. Linton did not consider filing or initiate this lawsuit until she saw a random television commercial detailing this Taxotere litigation. This is not the type of investigation anticipated or accepted by courts. At oral argument, plaintiffs' counsel argued that even if Ms. Linton had investigated her claim, she would not have found anything. Hr'g R. at 11:32:04; 11:32:35; 11:32:48. The Court will not predict what Ms. Linton

would or would not have found had she performed a reasonable inquiry; however, the Court notes the numerous news articles, studies, and publications cited to in plaintiffs' Master Complaint that were available as early as 2006. Third Amended Long Form Complaint ¶198-215.

The Court further finds that the discovery rule does not apply to Ms. Linton's claim for breach of express warranty because the statute of limitations for sale contracts are governed by the N.J. Stat. §12A:2-725. According to the statute, a claim for breach of any sale contract must be brought within four years of the cause of action and a breach of warranty occurs when delivery is made. N.J. Stat. §12A:2-725(1) & (2); Deluxe Sales and Service, Inc. v. Hyundai Engineering & Const, Co., 254 N.J. Super. 370, 374 (App. Div. 1992). Here, the date of delivery is either February 2008, when Ms. Linton began chemotherapy, or May 2008, when Ms. Linton ended chemotherapy. The only exception that extends the statute of limitations greater than four years is when a "warranty explicitly extends to future performance of the goods." N.J. Stat. §12A:2-725(2); Docteroff v. Barra Corp. of America, Inc., 282 N.J. Super. 230, 241 (App. Div. 1995); Poli v. DaimlerChrysler Corp., 349 N.J. Super. 169, 175-76 (App. Div. 2002). However, the record does not include any evidence that Sanofi included such explicit warranty that extending to future performance. Furthermore, the statute expressly states that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ibid. Consequently, the discovery rule does not apply and regardless of Ms. Linton's knowledge, Ms. Linton had until February 2012, or May 2012, to timely file her breach of warranty claim.

In addition to finding the discovery rule is inapplicable to both, the Court finds that a Lopez hearing is unnecessary and unwarranted because Ms. Linton's credibility is not at issue[4]. Lopez,

[4] The Court notes that discovery is still ongoing, however none of the parties have argued that more discovery is necessary other than suggesting a Lopez hearing. The Court finds that additional discovery is not needed because the record is well developed, and further discovery will not change the outcome. Minoia v. Kushner, 365 N.J. Super. 304, 307-08 (App. Div. 2004).

62 N.J. at 275. At oral argument, plaintiffs' counsel repeatedly affirmed their position that credibility was not at issue for any of the bellwether plaintiffs. Hr'g R. at 9:16:30; 9:17:00; 9:55:28; 9:55:50. Moreover, plaintiffs' brief does not argue that a Lopez hearing is required, but rather suggests that the Court "may want to conduct a Lopez hearing to clarify any ambiguity that may exist." Pl. Opp. at 10. As detailed above, Ms. Linton's deposition testimony is clear, unambiguous, and corroborates the statements made in her PFS.

To the extent Ms. Linton's updated certification, dated January 23, 2023, contradicts her prior testimony, the Court will not consider those inconsistencies or contradictions pursuant to the sham affidavit doctrine. This doctrine permits a trial court, at the summary judgment stage, to reject an affidavit that "patently and sharply" contradicts deposition testimony without any explanation for the contradiction. Shelcusky v. Garjulio, 172 N.J. 185, 201-02 (2002). If no explanation is provided within plaintiff's new certification and plaintiff's deposition testimony is clear, then a trial court does not abuse their discretion to reject said certification as a sham affidavit. Hinton v. Meyers, 416 N.J. Super 141, 150 (App. Div. 2010). For the reasons set forth below, the Court will be rejecting this certification.

Here, Ms. Linton's January 23, 2023 affidavit states that she was always under the impression that her hair would grow back until she saw a television commercial about this Taxotere litigation in 2016. Ms. Linton January 23, 2023 Cert. ¶6. However, as previously detailed, Ms. Linton testified (1) that she knew she lost her hair during chemotherapy; (2) that she has seen no change in her hair loss since 2008; (3) that she has worn a wig everyday since 2008; and (4) that since 2009, she has believed that her hair loss was permanent and that it was caused by the chemotherapy. Ms. Linton Dep. 28:18-29:3; 33:14-34:22; 128:20-129:3; 164:5-12; 164:20-165:5. As such, the Court finds that the newly filed affidavit patently and sharply contradicts Ms. Linton's

prior testimony and she failed to provide any explanation for the contradictions. In addition to contradicting her prior testimony, the Court also rejects this affidavit finding that this new certification is simply not objectively reasonable given the sequence of events and timeline as set forth in this opinion. The Court again finds that Ms. Linton knew or should have known she was injured due to the fault of another prior to December 7, 2015.

The Court also finds that New Jersey's equitable tolling does not save Ms. Linton's complaint for two reasons. Initially, the Court finds the record is devoid of any evidence that Sanofi actively mislead Ms. Linton or otherwise personally prevented Ms. Linton in some extraordinary way from asserting her rights. Barron v. Gersten, 472 N.J. Super. 572, 577 (App. Div. 2022). Instead, the record reflects that Sanofi's label did not include any warnings regarding permanent hair loss until 2015. Pl. Opp. at 9. However, Sanofi's failure to warn, or omission, does not rise to the level of intentional inducement, trickery, or other misconduct aimed personally at Ms. Linton that prevented her from filing her claim.

Moreover, equitable tolling requires Ms. Linton to diligently pursue her claims and "does not excuse claimants from exercising the reasonable insight and diligence required to pursue their claims." Barron v. Gersten, 472 N.J. Super 572, 577 (N.J. App. Div. 2022). For the same reasons as set forth above, the Court finds that a reasonable person in Ms. Linton's position would have realized that they were injured due to the fault of another before 2015. Even if Ms. Linton reasonably relied on Dr. Clowney's statements and did not realize she suffered an injury due to the fault of another in 2009, Ms. Linton did not diligently pursue her claims. The record reflects that between 2009 and 2015, Ms. Linton suffered from permanent hair loss but did nothing. Moreover, Ms. Linton testified that since 2009, she believed her permanent hair loss was caused

by the chemotherapy. Ms. Linton Dep. 33:14-34:22. Accordingly, New Jersey's equitable tolling does not apply.

As a result, Sanofi's Motion for Summary Judgement is **GRANTED**.

Loretta Massey – Docket: MID L 007675-18

Plaintiff Loretta Massey ("Ms. Massey") was diagnosed with breast cancer on February 7, 2007. Third Amended Plaintiff Fact Sheet at 11-12. Ms. Massey's chemotherapy treatment began on May 24, 2007, ended on September 6, 2007, and consisted of six cycles with a frequency of every three weeks. Id. at 14. Before beginning chemotherapy, Ms. Massey was told by someone in her oncologist's office that she would lose her hair and that it would grow back. Ms. Massey Dep. 95:25-96:22. Ms. Massey testified that she did in fact lose her hair after completing the first session of chemotherapy. Id. at 123:15-124:8. Specifically, Ms. Massy alleges permanent hair loss from March 21, 2008, to present. Third Amended Plaintiff Fact Sheet at 16-17.

According to the record before this Court Ms. Massey's hair loss continued despite the completion of chemotherapy in 2007. The records reviewed by this Court corroborate Ms. Massey's claim of continued hair loss post chemotherapy treatment. Specifically, those records reveal that Ms. Massey has worn a wig since December 1, 2007. Id. at 17. Those records also reflect that Ms. Massey took no further action relative to her hair loss until viewing a legal advertisement on television. Ms. Massey Dep. 250:25-251:22. Thereafter, and due to continued hair loss, Ms. Massey located and met with Dr. Shauna Ryder Diggs, a dermatologist, who officially diagnosed her with alopecia on September 20, 2017. Third Amended Plaintiff Fact Sheet at 17; Ms. Massey Dep. 190:12-191:24; 192:10-193:3; 193:10-194:9. Ms. Massey commenced her lawsuit on December 7, 2017.

Pursuant to N.J. Stat. § 2A:14-2(a), Ms. Massey's tort claim had to be filed within two years of her injury. Thus, the statute of limitations bars Ms. Massey from bringing a claim for an injury that occurred before December 7, 2015—unless the discovery rule or New Jersey's equitable tolling principles prevented the statute from accruing. Additionally, pursuant to N.J. Stat. §12A:2-725(1), Ms. Massey's breach of warranty claim had to be filed within four years after the cause of action has accrued. As noted above, New Jersey has not extended the discovery rule to a breach of warranty claim involving a contract for a sale of a good. Here, the statute of limitations would bar Ms. Massey from bringing a claim for breach that occurred after 2011, four years after receiving chemotherapy in 2007.

Sanofi's Argument in Support of Motion for Summary Judgment

Sanofi argues Ms. Massey's claims accrued, and the statute of limitations began to run on March 21, 2008, six months after Ms. Massy completed chemotherapy. Def. Mot. At 6-7. Sanofi basis this argument on Ms. Massey's answers to discovery responses where she indicated that she experienced permanent and persistent hair loss on her scalp six months after completing chemotherapy. Id. at 6. As a result, Sanofi argues that the statute of limitations expired on March 21, 2010 and Ms. Massey's 2017 lawsuit is untimely. Id. at 7. Additionally, Sanofi argues that the discovery rule does not save Ms. Massey's claims as she possessed knowledge of her injury and knowledge that her injury may have been caused by a third party. Id at 7-8. At the latest, Sanofi argues that Ms. Massey had knowledge of her injury by April 2008 because "Ms. Massey testified that seven months posttreatment some of her hair began to regrow but some of it 'never came back in,' leaving her with a bald spot that has been present since the time her hair fell out." Id. at 8. Sanofi also asserts that if Ms. Massey had investigated the cause of her hair loss, she would have discovered numerous news and medical articles that linked Taxotere with hair loss. Id. at 10. Sanofi

points out that the Third Amended Master Long Form Complaint and Jury demand includes citations to such articles published between 2006 and 2015. Ibid.

Sanofi also argues that Ms. Massey's breach of warranty claim is barred because N.J. Stat. § 12A:2-725(1) requires a breach of warranty claim to be executed within four years of when the cause of action accrued. Id. at 11. Furthermore, Sanofi contends that pursuant to N.J. Stat. § 12A:2-725(2), Ms. Massey's cause of action accrued when the breach occurred, and the breach occurred when tender of delivery was made. Id. at 12. As a result, Sanofi argues that Ms. Massey's breach of warranty claim either accrued in May 2007 when chemotherapy began, and tender of delivery occurred, or in September 2007 when Ms. Massey completed her chemotherapy. Ibid. Sanofi contends that Ms. Massey did not require knowledge of a breach for the statute of limitations to run because the statute runs "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Id. at 11 (quoting Argabright v. Rheem Mfg. Co., 258 F. Supp. 3d 470, 486 (D.N.J. 2017)). Additionally, Sanofi represents that New Jersey courts do not apply the discovery rule to claims involving a breach of warranty or contract. Id. at 12.

Next, Sanofi argues that New Jersey's equitable tolling principles do not toll the statute of limitations for Ms. Massey's claims. Ibid. According to Sanofi, equitable tolling occurs when a defendant's fraudulent conduct "induced or tricked" a plaintiff to miss a filing deadline. Ibid. Here, Sanofi argues that Ms. Massey has not alleged, or proved, that "Sanofi fraudulently acted after her cause of action arose to prevent Ms. Massey specifically from discovering *her* claims." Id. at 13 (emphasis in original). Instead, Sanofi maintains that Ms. Massey had knowledge of her injury in 2008, but did nothing to pursue a claim. Ibid. Consequently, Sanofi asserts that equitable tolling does not apply here.

Finally, Sanofi argues that a Lopez hearing is not required because there are no disputed questions of fact or credibility. Id. at 14. Sanofi asserts that the record is clear that Ms. Massey knew, or should have known, that she had a claim, but failed to assert it. Id. at 14-15. In sum, Sanofi asks this Court to find Ms. Massey's claims are barred by the statute of limitations, without a Lopez hearing.

Plaintiff's Argument in Opposition

Plaintiff's counsel asserts that New Jersey's equitable tolling principles apply under limited circumstances "(1) if the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his [or her] rights, or (3) if the plaintiff has timely asserted his [or her] rights mistakenly in the wrong forum." Pl. Opp. At 7 (quoting F.H.U. v. A.C.U., 427 N.J. Super. 354, 379, 48 A.3d 1130 (App. Div. 2012)). Plaintiff's counsel acknowledges that New Jersey equitable tolling principles do "not excuse [Ms. Massey] from exercising the reasonable insight and diligence required to pursue [her] claims," but argue that Ms. Massey could not have discovered the risks associated with Taxotere. Id. at 8.

Plaintiff's counsel asserts that Ms. Massey acted as a reasonable person to investigate her hair loss and investigate who was responsible for her hair loss. Id. at 9. Plaintiff's counsel contends that it was impossible to learn of any connection between Taxotere and her hair loss until December 11, 2015—when Sanofi updated its Taxotere label. Ibid. Prior to the label change, Taxotere's label that did not provide any warning of permanent hair loss and Ms. Massey, and her doctors, relied on said label. Ibid. Plaintiff's counsel claims that Sanofi misled Ms. Massey and her doctors by failing to disclose risks associated with Taxotere and permanent hair loss. Id. at 8. Furthermore, Plaintiff's counsel asserts that Ms. Massey did not learn about the connection between her hair loss and Taxotere until 2016 when she received a legal advertisement in the mail.

Id. at 9. Until Ms. Massey received the advertisement, Plaintiff's counsel argues that Ms. Massey still believed that her hair would grow back. Id. at 10. As a result of the above, Plaintiff's counsel asks the court to find that the statute of limitations was equitably tolled until December 11, 2015, when Taxotere's label was changed.

Plaintiff's counsel also argues that this Court may require a Lopez hearing to confirm the dates that Ms. Massey possessed knowledge of her injury and claim against a third party. Id. at 10-11.

Sanofi's Argument in Reply

Sanofi maintains that Plaintiff's arguments "are legally incorrect and cannot be reconciled with the undisputed factual record." Def. Reply at 2. First, Sanofi argues that Ms. Massey's undisputed testimony illustrates that she knew she was injured and that it was caused by a third party by 2008. Id. at 3-5. Sanofi represents that is immaterial that Ms. Massey was not diagnosed with alopecia or informed of the Taxotere litigation until 2017 because "medical or legal certainty is not required" in New Jersey. Id. At 4 (quoting Lapka v. Porter Hayden Co., 162 N.J. 545, 555–56 (2000)). Sanofi argues that even if Ms. Massey did not know of her claim by 2007, she should have known by that time. Id. at 5. Sanofi represents that Ms. Massey's undisputed testimony demonstrates that she believed her hair would regrow after completing chemotherapy in September 2008, but that never happened. Id. at 5-6. Instead, Sanofi explains, Ms. Massey has experienced an unchanged bald spot after completing chemotherapy and always attributed her hair loss with the medication she received. Id. at 6. Thus, Ms. Massey's claims were barred in 2010, which is seven years before she initiated this suit. Id. at 5.

Sanofi also asserts that Plaintiff's argument that Ms. Massey could not have known she had a claim until Taxotere's label changed in 2015 is meritless for multiple reasons. Id. at 6. First,

Ms. Massey has not provided any evidence that Sanofi told her that her hair would regrow. Ibid. Next, Sanofi represents that New Jersey's discovery rule applies an objective test which asks what a reasonable person would do. Sanofi argues that a reasonable person in Ms. Massey's shoes, who believed their hair would regrow after chemotherapy, would have known something was wrong after hair did not grow back after months and years. Id. 6-7. Furthermore, Sanofi maintains that Ms. Massey's argument is devoid of any attempts by her to investigate the cause of her hair loss for ten years. Id. at 7. A reasonable person, Sanofi asserts, would have inquired about a claim instead of hoping that their hair would regrow for ten years and only seeing a doctor in 2017. Id. at 7. Moreover, Sanofi explains that if Ms. Massey had investigated, the Third Amended Master Complaint provides evidence of information that was publicly available between 2006 and 2015 that linked hair loss with Taxotere. Id. at 7-8.

Next, Sanofi argues that Plaintiff's one sentence opposition that the discovery rule applies to a breach of warranty claim is incorrect for two reasons. Id. at 9. First, the one case cited, in the opposition, involved a different statute of limitations that what applies in our case. Ibid. Second, Sanofi asserts that "New Jersey law is clear that the discovery rule does not apply to N.J. Stat. § 12A2-725(1)." Id. at 9-10.

Sanofi also contends that Ms. Massey's equitable tolling arguments misapply New Jersey law. Id. at 10. Specifically, Sanofi represents that Ms. Massey's argument that Sanofi failed to warn the public about hair loss risks associated with Taxotere do not meet the standard required under New Jersey law. Ibid. In New Jersey, Sanofi maintains that Ms. Massey is required to provide evidence that Sanofi prevented her, specifically, from discovering her claim after her cause of action. Ibid. Here, Sanofi explains, Ms. Massey complains about Sanofi's actions before her cause of action, receiving Taxotere. Ibid. Sanofi argues that Ms. Massey's failure to warn claim

"cannot form the basis of both Ms. Massey's substantive product liability claim and her claim for equitable tolling . . . [because] otherwise, equitable tolling would apply to pause the statute of limitations in every case in which run-of-the-mill, failure-to-warn allegations were asserted against the defendant." Id. at 11. Because Ms. Massey does not provide evidence that Sanofi intentionally induced or tricked Ms. Massey from filing her claim, Sanofi argues that equitable tolling does not apply. Ibid.

Lastly, Sanofi reaffirms their position that a Lopez hearing is not necessary because there are no issues of credibility. Ibid.

Analysis

The central question before this Court is when did Ms. Massey's claims accrue. More specifically, did they accrue before, on, or after December 11, 2015 when Taxotere's label was changed. Pursuant to the discovery rule doctrine, the Court's analysis focuses on two distinct elements—injury and fault. Lynch v. Rubacky, 85 N.J. 65, 70 (1981). If the Court finds that Ms. Massey had, or should have had, knowledge of her injury and knowledge that her injury was caused by the fault of another before December 7, 2015, then the Compliant filed on December 7, 2017 must be dismissed. If the Court finds that she did not, then the Complaint was timely.

After due consideration of all the arguments presented, the Court concludes that the discovery rule does not render Ms. Massey's complaint timely. With the Court finding that Ms. Massey knew or should have known she was injured before December 7, 2015. Specifically, the record reflects that as early as 2008, Ms. Massey knew that her hair was not growing back after chemotherapy. Ms. Massey, by way of her PFS, claimed that she has experienced permanent hair loss since March 21, 2008. See Third Amended Plaintiff Fact Sheet at 16-17. Similarly, Ms. Massey testified that she lost her hair after her first chemotherapy session treatment and that she

realized seven months after completing chemotherapy that her hair was not growing back as expected. Ms. Massey Dep. 123:15-124:8; 147:11-22. Furthermore, the record reflects that due to permanent or persistent hair loss, Ms. Massey has worn a wig since 2007. Id. at 148:11-149:3; Third Amended Plaintiff Fact Sheet at 22-23. The injury claimed is permanent hair loss. Based on the undisputed and clear record, in 2008, Ms. Massey had knowledge of her injury comprising of permanent and persistent hair loss that, by her own admission, was present for nine years prior to the filing of her lawsuit.

The Court notes that Ms. Massey testified that someone at her oncologist's office told her that her hair would grow back after completion of chemotherapy. Ms. Massey Dep. 95:25-96:22; 142:4-143:8. According to Ms. Massey, this conversation occurred before she began chemotherapy, but she cannot remember who told her. Ibid. Similarly, Dr. Gartner, Ms. Massey's oncologist, testified that in 2007 her practice was to "describe to patients how long after chemotherapy hair generally starts to come back," but no guarantees were made. Dr. Gartner Dep. 62:15-63:4.

For the purposes of this motion, the Court accepts that Dr. Gartner, or someone from her office, represented to Ms. Massey that her hair would grow back after completion of chemotherapy. Also, the Court accepts that Ms. Massey reasonably relied on said representation that her hair would grow back. However, the Court does not find that Ms. Massey exercised reasonable insight or diligence to discover her claim, after her hair did not grow back, before filing her lawsuit nine years later, on December 7, 2017. McDade v. Siazon, 208 N.J. 463, 479 (2011). The record reflects that after completing chemotherapy, Ms. Massey checked her head every day and testified that she was disappointed that her hair was not regrowing. Ms. Massey Dep. 167:16-25. Despite her disappointment, Ms. Massey did not speak to her oncologist about her hair loss.

Id. at 168:2-11. Nor did Ms. Massey speak with her sister, who is a doctor, about her hair loss. Id. at 168:13-24. In fact, Ms. Massey testified that she never spoke with any doctor, before 2017, about her hair loss and simply resorted to wearing a wig. Id. 169:1-16. The Court understands Ms. Massey required time to heal from the chemotherapy, but after her hair did not grow back months and years after completing chemotherapy as expected—the Court cannot find that a reasonable person would continue to believe that their hair would regrow. Here, the record reflects that Ms. Massey knew and accepted that her hair loss was permanent. Ms. Massey Dep. 148:11-149:3.

Further, certainty of injury is not required under the law. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012). The Court must answer the question of whether Ms. Massey as an objectively reasonable person knew or should have known they suffered permanent hair loss. Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005). To that end, after an extensive review of the record and analysis of the relevant timeline, the Court finds that Ms. Massey knew or should have known that she suffered a permanent injury prior to December 7, 2015.

Having found Ms. Massey possessed knowledge of her injury prior to December 7, 2015, the next question for the Court is whether an objectively reasonable person would have been aware their injury was due to the fault of another before December 7, 2015. Stated more specifically, the next question before the Court is whether Ms. Massey knew or should have known before December 7, 2015 that her permanent hair loss was caused by chemotherapy.

This case does not involve an unknown relationship between a pharmaceutical product and an injury. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012) (an acne drug causing ulcerative colitis). Similarly, this case does not involve hidden malpractice. Martinez v. Cooper Hospital-University Med. Ctr., 163 N.J. 45 (2000) (Doctor medical malpractice death by telling

next of kin that nothing could have been done and lied about a significant treatment delay that occurred.); Caravaggio v. D'Agostini, 166 N.J. 237 (2001) (Doctor told patient that their femur rod failure was due to a defective device and not his own malpractice.). Instead, this case involves a straightforward cause and effect relationship.

In 2007, Ms. Massey underwent chemotherapy to treat her breast cancer. This chemotherapy caused Ms. Massey to lose all of her hair. After completing chemotherapy, all of Ms. Massey's hair did not grow back and Ms. Massey has worn a wig ever since. Furthermore, Ms. Massey testified that as early as 2008, she knew her hair was not growing back and, while not knowing the exact cause of her hair loss, Ms. Massey attributed it to "different medications and stuff." Ms. Massey Dep. 123:15-124:8; 147:11-22; 172:7-12. Ms. Massey's injury was self-evident, and the Court finds that a reasonable person in Ms. Massey's position would have realized, before December 7, 2015, that she suffered an injury because her hair never fully grew back. The Court also finds that a reasonable person in Ms. Massey's position would have realized, before December 7, 2015, that the chemotherapy that caused her initial hair loss, was also responsible for her permanent hair loss.

Ms. Massey's recognition that she suffered an ongoing permanent injury due to the fault of another is further confirmed by her 2017 appointment with dermatologist Dr. Shauna Ryder Diggs. Dr. Digg's medical notes state that Ms. Massey's hair loss has been present for more than ten years, that Ms. Massey lost her hair when she underwent chemotherapy, and that Ms. Massey's hair "never really grew back." Mathews Cert. Ex. C. Dr. Digg's notes corroborate Ms. Massey's PFS and testimony. The record reflects that Ms. Massey knew that the chemotherapy caused her initial hair loss, knew that her hair stopped growing seven months after completing chemotherapy, knew that her medication was to blame, and that Ms. Massey accepted her hair loss as permanent.

Ms. Massey Dep. 112:13-113:12; 123:15-124:8; 129:18-130:13; 143:9-145:1; 147:11-22; 148:11-149:3; 166:9-18; 167:16-25.

The Court rejects plaintiff's arguments that Ms. Massey could not have known she had a claim against Sanofi until either the 2015 Taxotere label change or 2016 when Ms. Massey was contacted by counsel. As our New Jersey Supreme Court explained in Baird v. Am. Med. Optics, "the statute of limitations begins to run when the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another, not when a lawyer advises her that the facts give rise to a legal cause of action." 155 N.J. 54, 68 (1998); see Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012) (explaining that a plaintiff does not require legal consultation from an attorney, does not need to understand the legal significance of their claim, nor does a plaintiff require medical or legal certainty for a claim to accrue.). Accordingly, the Court must find that the discovery rule does not save Ms. Massey's untimely complaint because Ms. Massey "'knew or should have known' of sufficient facts to start the statute of limitations running." Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005).

Prior to 2015, Ms. Massey possessed the requisite knowledge to have known she was injured by a third party. Additionally, prior to 2015, Ms. Massey had sufficient information to be able to make an informed decision as to whether to obtain additional information by way of seeking legal advice, medical advice, or by performing her own research to confirm her suspicions and get answers. Significantly, the application of the discovery rule requires Ms. Massey to diligently pursue her claims. McDade v. Siazon, 208 N.J. 463, 479 (2011) (explaining that despite having knowledge of their injury and knowledge of the responsible entity, "plaintiffs did not act with reasonable diligence required by the discovery rule."). The unfortunate reality is that Ms. Massey possessed the requisite knowledge for an actionable claim before December 7, 2015, however Ms.

Massey did not exercise reasonable insight or diligence to discover the basis for her claim. Lopez v. Swyer, 62 N.J. 267, 272 (1973).

If Ms. Massey had made an inquiry, even if unsuccessful, the Court would be faced with a different issue and analysis. However, despite having personal knowledge of her hair loss and chemotherapy, Ms. Massey made no inquiry other than accepting her plight and dealing with it daily. McDade, 208 N.J. 463 at 479. The record reflects no initiative, inquiry, questions asked, or conversations initiated to investigate her claim. In fact, Ms. Massey did not consider filing or initiate this lawsuit until she saw a random television commercial detailing this Taxotere litigation. This is not the type of investigation anticipated or accepted by courts. At oral argument, plaintiffs' counsel argued that even if Ms. Massey had investigated her claim, she would not have found anything. Hr'g R. at 11:32:04; 11:32:35; 11:32:48. The Court will not predict what Ms. Massey would or would not have found had she performed a reasonable inquiry; however, the Court notes the numerous news articles, studies, and publications cited to in plaintiffs' Master Complaint that were available as early as 2006. Third Amended Long Form Complaint ¶198-215.

The Court further finds that the discovery rule does not apply to Ms. Massey's claim for breach of express warranty because the statute of limitations for sale contracts are governed by the N.J. Stat. §12A:2-725. According to the statute, a claim for breach of any sale contract must be brought within four years of the cause of action and a breach of warranty occurs when delivery is made. N.J. Stat. §12A:2-725(1) & (2); Deluxe Sales and Service, Inc. v. Hyundai Engineering & Const, Co., 254 N.J. Super. 370, 374 (App. Div. 1992). Here, the date of delivery is either May 2007, when Ms. Massey began chemotherapy, or September 2007, when Ms. Massey ended chemotherapy. The only exception that extends the statute of limitations greater than four years is when a "warranty explicitly extends to future performance of the goods." N.J. Stat. §12A:2-725(2);

Docteroff v. Barra Corp. of America, Inc., 282 N.J. Super. 230, 241 (App. Div. 1995); Poli v. DaimlerChrysler Corp., 349 N.J. Super. 169, 175-76 (App. Div. 2002). However, the record does not include any evidence that Sanofi included such explicit warranty that extending to future performance. Furthermore, the statute expressly states that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ibid. Consequently, the discovery rule does not apply and regardless of Ms. Massey's knowledge, Ms. Massey had until May 2011, or September 2011, to timely file her breach of warranty claim.

In addition to finding the discovery rule is inapplicable to both, the Court finds that a Lopez hearing is unnecessary and unwarranted because Ms. Massey's credibility is not at issue[5]. Lopez, 62 N.J. at 275. At oral argument, plaintiffs' counsel repeatedly affirmed their position that credibility was not at issue for any of the bellwether plaintiffs. Hr'g R. at 9:16:30; 9:17:00; 9:55:28; 9:55:50. Moreover, plaintiffs' brief does not argue that a Lopez hearing is required, but rather suggests that the Court "may want to conduct a Lopez hearing to clarify any ambiguity that may exist." Pl. Opp. at 10. As detailed above, Ms. Massey's deposition testimony is clear, unambiguous, and corroborates the statements made in her PFS.

To the extent Ms. Massey's updated certification, dated January 24, 2023, contradicts her prior testimony, the Court will not consider those inconsistencies or contradictions pursuant to the sham affidavit doctrine. This doctrine permits a trial court, at the summary judgment stage, to reject an affidavit that "patently and sharply" contradicts deposition testimony without any explanation for the contradiction. Shelcusky v. Garjulio, 172 N.J. 185, 201-02 (2002). If no explanation is provided within plaintiff's new certification and plaintiff's deposition testimony is

[5] The Court notes that discovery is still ongoing, however none of the parties have argued that more discovery is necessary other than suggesting a Lopez hearing. The Court finds that additional discovery is not needed because the record is well developed, and further discovery will not change the outcome. Minoia v. Kushner, 365 N.J. Super. 304, 307-08 (App. Div. 2004).

clear, then a trial court does not abuse their discretion to reject said certification as a sham affidavit. Hinton v. Meyers, 416 N.J. Super 141, 150 (App. Div. 2010). For the reasons set forth below, the Court will be rejecting this certification.

Here, Ms. Massey's January 24, 2023 affidavit states that she was always under the impression that her hair would grow back until she saw a television commercial about this Taxotere litigation in 2017. Ms. Massey January 24, 2023 Cert. ¶6. However, as previously detailed, Ms. Massey testified that she realized about seven months after completing chemotherapy that her hair was not growing back and that she was dealing with her hair loss by using wigs. Ms. Massey Dep. 147:11-22; 148:11-149:3; 167:16-25. As such, the Court finds that the newly filed affidavit patently and sharply contradicts Ms. Massey's prior testimony and she failed to provide any explanation for the contradictions. In addition to contradicting her prior testimony, the Court also rejects this affidavit finding that this new certification is simply not objectively reasonable given the sequence of events and timeline as set forth in this opinion. The Court again finds that Ms. Massey knew or should have known she was injured due to the fault of another prior to December 7, 2015.

The Court also finds that New Jersey's equitable tolling does not save Ms. Massey's complaint for two reasons. Initially, the Court finds the record is devoid of any evidence that Sanofi actively mislead Ms. Massey or otherwise personally prevented Ms. Massey in some extraordinary way from asserting her rights. Barron v. Gersten, 472 N.J. Super. 572, 577 (App. Div. 2022). Instead, the record reflects that Sanofi's label did not include any warnings regarding permanent hair loss until 2015. Pl. Opp. at 9. However, Sanofi's failure to warn, or omission, does not rise to the level of intentional inducement, trickery, or other misconduct aimed personally at Ms. Massey that prevented her from filing her claim.

Moreover, equitable tolling requires Ms. Massey to diligently pursue her claims and "does not excuse claimants from exercising the reasonable insight and diligence required to pursue their claims." Barron v. Gersten, 472 N.J. Super 572, 577 (N.J. App. Div. 2022). For the same reasons as set forth above, the Court finds that a reasonable person in Ms. Massey's position would have realized that they were injured due to the fault of another before 2015. Even if Ms. Massey relied on Dr. Gartner's statements, or statements from someone else in Dr. Gartner's office, and did not realize she suffered an injury due to the fault of another in 2008, Ms. Massey did not diligently pursue her claims. The record reflects that between 2008 and 2015, Ms. Massey suffered from hair loss but did nothing. Accordingly, New Jersey's equitable tolling does not apply.

As a result, Sanofi's Motion for Summary Judgement is **GRANTED**.

Betty King – Docket: MID L 007645-18

Plaintiff Betty King ("Ms. King") was diagnosed with breast cancer on November 17, 2003. Third Amended Plaintiff Fact Sheet at 11-12. Ms. King's chemotherapy treatment began on January 9, 2004, ended on June 14, 2004, and consisted of four cycles with a frequency of every three weeks. Id. at 12, 14. Before beginning chemotherapy, Ms. King was told by her oncologist, Dr. Mandanas, or by a chemotherapy nurse, that she would temporarily lose her hair during chemotherapy treatment. Ms. King Dep. 26:6-18; 32:21-33:11; 47:11-17; 95:12-96:17; 125:13-126:1; 126:17-127:1. Ms. King testified that she lost all of her hair ten days after completing the second session of chemotherapy. Id. at 138:1-139:16; 150:20-23. Specifically, Ms. Kings alleges permanent hair loss from April 2, 2004, to present. Third Amended Plaintiff Fact Sheet at 16-17.

According to the record before this Court, Ms. King's hair loss continued despite the completion of chemotherapy in 2004. The records reviewed by this Court corroborate Ms. King's claim of continued hair loss post chemotherapy treatment. Specifically, those records reveal Ms.

King's hair loss continued through February 20, 2007, when Dr. Pamela Allen assessed Ms. King's persistent hair loss as scarring alopecia. Mathews Cert. Ex. C. Those records also reflect that Ms. King returned to the same dermatologist in 2021. Ms. King Dep. 35:17-36:13; 37:11-38:9; 38:25-39:18; 211:9-16. Ms. King took no further action relative to her hair loss until viewing a legal advertisement on television in 2017. Id. at 11:17-12:2; Ms. King January 24, 2023 Cert. ¶5-6. Thereafter, Ms. King commenced her lawsuit on December 7, 2017.

Pursuant to N.J. Stat. § 2A:14-2(a), Ms. King's tort claim had to be filed within two years of her injury. Thus, the statute of limitations would bar Ms. King from bringing a claim for an injury that occurred before December 7, 2015—unless the discovery rule or New Jersey's equitable principles tolled the statute from accruing. Additionally, pursuant to N.J. Stat. §12A:2-725(1), Ms. King's breach of warranty claim had to be filed within four years after the cause of action has accrued. As noted above, New Jersey has not extended the discovery rule to a breach of warranty claim involving a contract for a sale of a good. Here, the statute of limitations would bar Ms. King from bringing a claim for breach that occurred after 2008, four years after receiving chemotherapy in 2004.

Sanofi's Argument in Support of Motion for Summary Judgment

Sanofi argues that Ms. King's claims accrued, and the statute of limitations began to run on April 2, 2004. Def. Mot. at 6. Sanofi basis this argument on Ms. King's answers to discovery responses where she indicated that she experienced permanent and persistent hair loss on her scalp and a bald spot on the top of her head since April 2, 2004. Ibid. As a result, Sanofi argues that the statute of limitations expired on April 2, 2006 and Ms. King's 2017 lawsuit is untimely. Ibid. Additionally, Sanofi argues that the discovery rule does not save Ms. King's claims as she possessed knowledge of her injury and knowledge that her injury may have been caused by a third

party as early as 2005 and 2011 at the latest. Id. at 7-8. Specifically, Sanofi represents that Ms. King testified that her hair had stopped growing in March 2005 and has not changed since; Ms. King testified that she knew her hair loss was permanent seven years after finishing chemotherapy in 2011; and that Ms. King testified that she has known for sixteen or seventeen years that her hair loss was caused by the chemotherapy. Id. at 8-9. Additionally, Sanofi asserts that if Ms. King had investigated the cause of her hair loss, she would have discovered numerous news and medical articles that linked Taxotere with hair loss. Id. at 10. Sanofi points out that the Third Amended Master Long Form Complaint and Jury demand includes citations to such articles published between 2006 and 2015. Ibid.

Sanofi also argues that Ms. King's breach of warranty claim is barred because N.J. Stat. § 12A:2-725(1) requires a breach of warranty claim to be executed within four years of when the cause of action accrued. Id. at 10-11. Furthermore, Sanofi contends that pursuant to N.J. Stat. § 12A:2-725(2), Ms. King's cause of action accrued when the breach occurred, and the breach occurred when tender of delivery was made. Ibid. As a result, Sanofi argues that Ms. King's breach of warranty claim either accrued in January 2004 when chemotherapy began, and tender of delivery occurred, or in June 2004 when Ms. King completed her chemotherapy. Id. at 12. Sanofi contends that Ms. King did not require knowledge of a breach for the statute of limitations to run because the statute runs "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ibid. (quoting Argabright v. Rheem Mfg. Co., 258 F. Supp. 3d 470, 486 (D.N.J. 2017)). Additionally, Sanofi represents that New Jersey courts do not apply the discovery rule to claims involving a breach of warranty or contract. Ibid.

Next, Sanofi argues that New Jersey's equitable tolling principles do not toll the statute of limitations for Ms. King's claims. Id. at 12. According to Sanofi, equitable tolling occurs when a

defendant's fraudulent conduct "induced or tricked" a plaintiff to miss a filing deadline. Id. at 13. Here, Sanofi argues that Ms. King has not alleged, or proved, that "Sanofi fraudulently acted after her cause of action arose to prevent Ms. King specifically from discovering *her* claims." Ibid. (emphasis in original). Instead, Sanofi represents that Ms. King testified that she knew that her permanent hair loss was caused by chemotherapy in 2011, but that she gave up. Id. at 13-14. Consequently, Sanofi asserts that equitable tolling does not apply here because Ms. King had knowledge of her injury but did nothing to pursue a claim. Id. at 14.

Finally, Sanofi argues that a Lopez hearing is not required because there are no disputed questions of fact or credibility. Id. at 14-15. Sanofi asserts that the record is clear that Ms. King knew, or should have known, that she had a claim, but failed to assert it. Specifically, Sanofi argues that Ms. King testified that she believed that her hair loss was permanent and was caused by her chemotherapy. Id. at 15. In sum, Sanofi asks this Court to find Ms. King's claims are barred by the statute of limitations, without a Lopez hearing.

Plaintiff's Argument in Opposition

Plaintiff's counsel asserts that New Jersey's equitable tolling principles apply under limited circumstances "(1) if the defendant has actively misled the plaintiff, (2) if the plaintiff has 'in some extraordinary way' been prevented from asserting his [or her] rights, or (3) if the plaintiff has timely asserted his [or her] rights mistakenly in the wrong forum." Pl. Opp. at 7 (quoting F.H.U. v. A.C.U., 427 N.J. Super. 354, 379, 48 A.3d 1130 (App. Div. 2012)). Plaintiff's counsel acknowledges that New Jersey equitable tolling principles do "not excuse [Ms. King] from exercising the reasonable insight and diligence required to pursue [her] claims," but argue that Ms. King could not have discovered the risks associated with Taxotere. Id. at 8.

Plaintiff's counsel asserts that Ms. King acted as a reasonable person to investigate her hair loss and investigate who was responsible for her hair loss. Id. at 9. Plaintiff's counsel contends that it was impossible to learn of any connection between Taxotere and her hair loss until December 11, 2015—when Sanofi updated its Taxotere label. Ibid. Prior to the label change, Taxotere's label that did not provide any warning of permanent hair loss and Ms. King, and her doctors, relied on said label. Ibid. Plaintiff's counsel claims that Sanofi misled Ms. King and her doctors by failing to disclose risks associated with Taxotere and permanent hair loss. Id. at 8. Furthermore, Plaintiff's counsel asserts that Ms. King did not learn about the connection between her hair loss and Taxotere until 2017 when she saw a lawsuit advertisement on television. Id. at 9. Until Ms. King saw the advertisement, Plaintiff's counsel argues that Ms. King still believed that her hair would grow back. Id. at 10. As a result of the above, Plaintiff's counsel asks the court to find that the statute of limitations was equitably tolled until December 11, 2015, when Taxotere's label was changed.

Plaintiff's counsel also argues that this Court may require a Lopez hearing to confirm the dates that Ms. King possessed knowledge of her injury and claim against a third party. Ibid.

Sanofi's Argument in Reply

Sanofi maintains that Plaintiff's arguments "are legally incorrect and cannot be reconciled with the undisputed factual record." Def. Reply at 2. First, Sanofi argues that Ms. King's undisputed testimony illustrates that she knew she was injured by 2011 and always believed that her injury was caused by chemotherapy. Id. at 3. Sanofi represents that is immaterial that Ms. King was not informed of the Taxotere litigation until 2016 because "medical or legal certainty is not required" in New Jersey. Id. at 4 (quoting Lapka v. Porter Hayden Co., 162 N.J. 545, 555–56 (2000)). Sanofi argues that even if Ms. King did not know of her claim by 2011, the record

demonstrates that she should have known by that time. Id. at 5. Sanofi represents that Ms. King's undisputed testimony demonstrates that Ms. King expected her hair to grow back after completing chemotherapy, but that never happened, and Ms. King has had an unchanged bald spot since completing chemotherapy. Id. at 6. Furthermore, Ms. King testified that she always attributed her hair loss to chemotherapy. Ibid.

Sanofi also asserts that Plaintiff's argument that Ms. King could not have known she had a claim until Taxotere's label changed in 2015 is meritless for multiple reasons. Id. at 7. First, Ms. King has not provided any evidence that Sanofi told her that her hair would regrow. Id. at 6. Next, Sanofi represents that New Jersey's discovery rule applies an objective test which asks what a reasonable person would do. Id. at 7. Sanofi argues that a reasonable person in Ms. King's shoes, who believed their hair would regrow after chemotherapy, would have known something was wrong after hair did not grow back after months and years. Ibid. Furthermore, Sanofi maintains that Ms. King's argument is devoid of any attempts by her to investigate the cause of her hair loss. Id. at 7. A reasonable person, Sanofi asserts, would have inquired about a claim instead of doing nothing for thirteen years after treatment when her hair loss remained unchanged. Ibid. Moreover, Sanofi explains that if Ms. King had investigated, the Third Amended Master Complaint provides evidence of information that was publicly available between 2006 and 2015 that linked hair loss with Taxotere. Id. at 7-8.

Next, Sanofi argues that Plaintiff's one sentence opposition that the discovery rule applies to a breach of warranty claim is incorrect for two reasons. Id. at 9. First, the one case cited, in the opposition, involved a different statute of limitations that what applies in our case. Ibid. Second, Sanofi asserts that "New Jersey law is clear that the discovery rule does not apply to N.J. Stat. § 12A2-725(1)." Ibid.

Sanofi also contends that Ms. King's equitable tolling arguments misapply New Jersey law. Id. at 10. Specifically, Sanofi represents that Ms. King's argument that Sanofi failed to warn the public about hair loss risks associated with Taxotere do not meet the standard required under New Jersey law. Ibid. In New Jersey, Sanofi maintains that Ms. King is required to provide evidence that Sanofi prevented her, specifically, from discovering her claim after her cause of action. Id. at 10-11. Here, Sanofi explains, Ms. King complains about Sanofi's actions before her cause of action, receiving Taxotere. Id. at 11. Sanofi argues that Ms. King's failure to warn claim "cannot form the basis of both Ms. King's substantive product liability claim and her claim for equitable tolling . . . [because] otherwise, equitable tolling would apply to pause the statute of limitations in every case in which run-of-the-mill, failure-to-warn allegations were asserted against the defendant." Ibid. Because Ms. King does not provide evidence that Sanofi intentionally induced or tricked Ms. King from filing her claim, Sanofi argues that equitable tolling does not apply. Ibid.

Lastly, Sanofi reaffirms their position that a Lopez hearing is not necessary because there are no issues of credibility. Id. at 11.

Analysis

The central question before this Court is when did Ms. King's claims accrue. More specifically, did they accrue before, on, or after December 11, 2015 when Taxotere's label was changed. Pursuant to the discovery rule doctrine, the Court's analysis focuses on two distinct elements—injury and fault. Lynch v. Rubacky, 85 N.J. 65, 70 (1981). If the Court finds that Ms. King had, or should have had, knowledge of her injury and knowledge that her injury was caused by the fault of another before December 7, 2015, then the Compliant filed on December 7, 2017 must be dismissed. If the Court finds that she did not, then the Complaint was timely.

After due consideration of all the arguments presented, the Court concludes that the discovery rule does not render Ms. King's complaint timely. With the Court finding that Ms. King knew or should have known she was injured before December 7, 2015. Specifically, the record reflects that as early as 2004, Ms. King knew that her hair was not growing back after chemotherapy. Ms. King, by way of her PFS, claimed that she has experienced permanent hair loss since April 2, 2004. See Third Amended Plaintiff Fact Sheet at 16-17. Furthermore, Ms. King testified that she has seen no change in her hair since eight or nine months after completing chemotherapy. Ms. King Dep. 151:2-152:20; 314:10-16. The injury claimed in this lawsuit is permanent hair loss. Based on the undisputed and clear record, in 2004 and 2005, Ms. King had knowledge of her injury comprising of permanent and persistent hair loss that, by her own admission, was present for twelve years prior to the filing of her lawsuit. Id. at 151:2-152:20.

Even if this Court were to accept that Ms. King did not know she suffered an injury in 2004 or 2005, Ms. King knew or should have known by 2007. On February 20, 2007, Ms. King met with Dr. Pamela Allen, a dermatologist at the Oklahoma University Dermatology Clinic. Mathews Cert. Ex. C; 35:17-36:13; 37:7-9; 38:25-39:9. Ms. King's medical records for said visit lists scarring alopecia under the caption "Physical Examination" and under Dr. Allen's assessment plan. Mathews Cert. Ex. C. Significantly, Dr. Allen's notes state that during that visit Ms. King complained of hair loss that began three-years ago, after chemotherapy. Id. Accordingly, even if this Court were to find that the discovery rule applied and the statute of limitations did not begin to accrue until February 20, 2007, when Dr. Allen confirmed Ms. King's permanent hair loss observations, Ms. King's 2017 complaint is still untimely.

The Court notes that Ms. King's deposition also includes testimony that seven years after completing chemotherapy, Ms. King knew that her hair loss was permanent. Specifically, Ms.

King testified that her hair was "thin all over" five years after completing chemotherapy, but that she still thought it might be growing back slowly. Ms. King Dep. 28:20-29:1. However, seven years after completing chemotherapy Ms. King no longer thought her hair was slowly growing and considered her condition permanent. Id. at 29:2-8. Ms. King's deposition testimony demonstrates her recognition that she suffered an ongoing permanent injury by 2011. Accordingly, even if this Court were to find that the discovery rule applied and that statute of limitations began running in 2011, Ms. King's 2017 complaint is still untimely.

In making the finding that Ms. King knew she was injured prior to December 7, 2015, the Court rejects plaintiff's argument that she did not know her hair loss was permanent. To that end, the Court again cites to Ms. King's testimony and plaintiff fact sheet, wherein Ms. King candidly testified that she believed her hair loss was permanent. Ms. King Dep. 29:2-8; 151:2-152:20; 314:10-16; Third Amended Plaintiff Fact Sheet at 16-17. Ms. King's belief is certainly supported by the three years she suffered hair loss post-chemotherapy before seeking assistance from dermatologist Dr. Allen and the thirteen years before filing her claim. Moreover, the record is devoid of any doctor, including dermatologist Dr. Allen and oncologist Dr. Mandanas, who ever stated, suggested, or hinted to Ms. King that her hair would still grow back years after completing chemotherapy.

In fact, the record reflects that Ms. King knew that her hair was not regrowing to its original fullness, but never discussed this with her physicians. Ms. King Dep. 19:14-20:2; 26:19-25; 29:4-17; 154:21-155:3. Ms. King's failure to discuss her hair with her doctors is confirmed by way of her oncologist's, Dr. Mandana's, testimony that he did not become aware of Ms. King's hair complaints until receiving a request for records and a deposition. Dr. Mandanas Dep. 15:1-11. The Court notes that Ms. King testified that she spoke with Dr. Mandanas in 2020 about her hair loss

and revisited her dermatologist's office in 2021. Ms. King Dep. 16:23-17:25; 38:25-39:21; 154:21-155:3. However, both occurred after the filing of the instant lawsuit and are not relevant to the statute of limitations analysis.

The Court notes that the record indicates a conversation about hair loss occurred between Ms. King and her oncologist in 2005. Specifically, Ms. King's plaintiff fact sheet states that she spoke with her oncologist Dr. Mandanas on January 1, 2005 about why her hair was not growing back. Third Amended Plaintiff Fact Sheet at 18, 20. However, Ms. King clarified at her deposition that she does not remember this discussion; does not remember telling her counsel to list this conversation in her PFS; and believes that the date is wrong because she could not have met with her oncologist on January 1 because it is a holiday. Ms. King Dep. 158:2-174:23. Similarly, Dr. Mandanas does not recall or have a record of Ms. King discussing her hair loss with him. Dr. Mandanas Dep. 15:1-11; 116:1-14. Even if said conversation occurred, the Court's findings do not change because the Court finds that a reasonable person would have realized before December 7, 2015 that they were injured when their hair did not grow back years after completing chemotherapy.

Further, certainty of injury is not required under the law. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012). The Court must answer the question of whether Ms. King as an objectively reasonable person knew or should have known they suffered permanent hair loss. Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005). To that end, after an extensive review of the record and analysis of the relevant timeline, the Court finds that Ms. King knew or should have known that she suffered a permanent injury prior to December 7, 2015.

Having found Ms. King possessed knowledge of her injury prior to December 7, 2015, the next question for the Court is whether an objectively reasonable person would have been aware

their injury was due to the fault of another before December 7, 2015. Stated more specifically, the next question before the Court is whether Ms. King knew or should have known before December 7, 2015 that her permanent hair loss was caused by chemotherapy.

This case does not involve an unknown relationship between a pharmaceutical product and an injury. Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173 (2012) (an acne drug causing ulcerative colitis). Similarly, this case does not involve hidden malpractice. Martinez v. Cooper Hospital-University Med. Ctr., 163 N.J. 45 (2000) (Doctor medical malpractice death by telling next of kin that nothing could have been done and lied about a significant treatment delay that occurred.); Caravaggio v. D'Agostini, 166 N.J. 237 (2001) (Doctor told patient that their femur rod failure was due to a defective device and not his own malpractice.). Instead, this case involves a straightforward cause and effect relationship.

In 2004, Ms. King underwent chemotherapy to treat her breast cancer. This chemotherapy caused Ms. King to lose all of her hair. After completing chemotherapy, all of Ms. King's hair did not grow back. Ms. King testified that present hair growth has been the same since eight or nine months after completing chemotherapy. Ms. King Dep. 151:2-152:3. Ms. King's injury was self-evident, and the Court finds that a reasonable person in Ms. King's position would have realized, before December 7, 2015, that the chemotherapy that caused her to lose her hair also was responsible for her incomplete hair growth. In fact, Ms. King testified that eight or nine months after completing chemotherapy, she believed that the chemotherapy was responsible for her continued hair loss. Id. at 152:4-20. Ms. King further testified that for the last sixteen or seventeen years, there has never been a moment where she did not think that her hair loss was caused by anything other than the chemotherapy. Id. at 153:17-154:4. Ms. King's testimony is confirmed by her February 20, 2007 dermatologist appointment where she informed Dr. Allen that she believed

her hair loss started after chemotherapy. Mathews Cert. Ex. C. Whether asked or not, no doctor ever told Ms. King that her hair loss and chemotherapy were unrelated. The Court finds that Ms. King possessed, or should have possessed, knowledge that her injury was caused by the fault of another before December 7, 2015. Baird v. Am. Med. Optics, 155 N.J. 54, 72 (1998).

The Court rejects plaintiff's arguments that Ms. King could not have known she had a claim against Sanofi until either the 2015 Taxotere label change or 2016 when Ms. King was contacted by counsel. As our New Jersey Supreme Court explained in Baird v. Am. Med. Optics, "the statute of limitations begins to run when the plaintiff is aware, or reasonably should be aware, of facts indicating that she has been injured through the fault of another, not when a lawyer advises her that the facts give rise to a legal cause of action." 155 N.J. 54, 68 (1998); see Kendall v. Hoffman-La Roche, Inc., 209 N.J. 173, 193 (2012) (explaining that a plaintiff does not require legal consultation from an attorney, does not need to understand the legal significance of their claim, nor does a plaintiff require medical or legal certainty for a claim to accrue.). Accordingly, the Court must find that the discovery rule does not save Ms. King's untimely complaint because Ms. King "'knew or should have known' of sufficient facts to start the statute of limitations running." Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005).

Prior to 2015, Ms. King possessed the requisite knowledge to have known she was injured by a third party. Additionally, prior to 2015, Ms. King had sufficient information to be able to make an informed decision as to whether to obtain additional information by way of seeking legal advice, medical advice, or by performing her own research to confirm her suspicions and get answers. Significantly, the application of the discovery rule requires Ms. King to diligently pursue her claims. McDade v. Siazon, 208 N.J. 463, 479 (2011) (explaining that despite having knowledge of their injury and knowledge of the responsible entity, "plaintiffs did not act with reasonable

diligence required by the discovery rule."). The unfortunate reality is that Ms. King possessed the requisite knowledge for an actionable claim before December 7, 2015, however Ms. King did not exercise reasonable insight or diligence to discover the basis for her claim. Lopez v. Swyer, 62 N.J. 267, 272 (1973).

If Ms. King had made an inquiry, even if unsuccessful, the Court would be faced with a different issue and analysis. However, despite having personal knowledge of her hair loss and chemotherapy, Ms. King made no inquiry other than accepting her plight and dealing with it daily. McDade, 208 N.J. 463 at 479. The record reflects no initiative, inquiry, questions asked, or conversations initiated to investigate her claim. In fact, Ms. King did not consider filing or initiate this lawsuit until she received a legal solicitation letter in the mail. This is not the type of investigation anticipated or accepted by courts. At oral argument, plaintiffs' counsel argued that even if Ms. King had investigated her claim, she would not have found anything. Hr'g R. at 11:32:04; 11:32:35; 11:32:48. The Court will not predict what Ms. King would or would not have found had she performed a reasonable inquiry; however, the Court notes the numerous news articles, studies, and publications cited to in plaintiffs' Master Complaint that were available as early as 2006. Third Amended Long Form Complaint ¶198-215.

The Court further finds that the discovery rule does not apply to Ms. King's claim for breach of express warranty because the statute of limitations for sale contracts are governed by the N.J. Stat. §12A:2-725. According to the statute, a claim for breach of any sale contract must be brought within four years of the cause of action and a breach of warranty occurs when delivery is made. N.J. Stat. §12A:2-725(1) & (2); Deluxe Sales and Service, Inc. v. Hyundai Engineering & Const, Co., 254 N.J. Super. 370, 374 (App. Div. 1992). Here, the date of delivery is either January 2004, when Ms. King began chemotherapy, or June 2004, when Ms. King ended chemotherapy.

The only exception that extends the statute of limitations greater than four years is when a "warranty explicitly extends to future performance of the goods." N.J. Stat. §12A:2-725(2); Docteroff v. Barra Corp. of America, Inc., 282 N.J. Super. 230, 241 (App. Div. 1995); Poli v. DaimlerChrysler Corp., 349 N.J. Super. 169, 175-76 (App. Div. 2002). However, our record does not contain any evidence that Sanofi included such explicit warranty extending to future performance. Furthermore, the statute expressly states that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Ibid. Consequently, the discovery rule does not apply, regardless of Ms. King's knowledge, and Ms. King had until January 2008, or June 2008, to timely file her breach of warranty claim.

In addition to finding the discovery rule is inapplicable to both, the Court finds that a Lopez hearing is unnecessary and unwarranted because Ms. King's credibility is not at issue[6]. Lopez, 62 N.J. at 275. At oral argument, plaintiffs' counsel repeatedly affirmed their position that credibility was not at issue for any of the bellwether plaintiffs. Hr'g R. at 9:16:30; 9:17:00; 9:55:28; 9:55:50. Moreover, plaintiffs' brief does not argue that a Lopez hearing is required, but rather suggests that the Court "may want to conduct a Lopez hearing to clarify any ambiguity that may exist." Pl. Opp. at 10. As detailed above, Ms. King's deposition testimony is clear, unambiguous, and corroborates the statements made in her PFS.

To the extent Ms. King's updated certification, dated January 24, 2023, contradicts her prior testimony, the Court will not consider those inconsistencies or contradictions pursuant to the sham affidavit doctrine. This doctrine permits a trial court, at the summary judgment stage, to reject an affidavit that "patently and sharply" contradicts deposition testimony without any

[6] The Court notes that discovery is still ongoing, however none of the parties have argued that more discovery is necessary other than suggesting a Lopez hearing. The Court finds that additional discovery is not needed because the record is well developed, and further discovery will not change the outcome. Minoia v. Kushner, 365 N.J. Super. 304, 307-08 (App. Div. 2004).

explanation for the contradiction. Shelcusky v. Garjulio, 172 N.J. 185, 201-02 (2002). If no explanation is provided within plaintiff's new certification and plaintiff's deposition testimony is clear, then a trial court does not abuse their discretion to reject said certification as a sham affidavit. Hinton v. Meyers, 416 N.J. Super 141, 150 (App. Div. 2010). For the reasons set forth below, the Court will be rejecting this certification.

Here, Ms. King's January 24, 2023 affidavit states that she was always under the impression that her hair would grow back until she saw a television commercial about this Taxotere litigation in 2017. Ms. King January 24, 2023 Cert. ¶6. However, as previously detailed, Ms. King testified (1) that it took eight or nine months after chemotherapy for her hair to grow to its current length; (2) that she no longer thought that her hair was slowly growing seven years after completing chemotherapy; and (3) that she has always believed her hair loss was caused by the chemotherapy. Ms. King. Dep. 29:4-13; 151:2-152:20; 153:17-154:4. As such, the Court finds that the newly filed affidavit patently and sharply contradicts Ms. King's prior testimony and she failed to provide any explanation for the contractions. In addition to contradicting her prior testimony, the Court also rejects this affidavit finding that this new certification is simply not objectively reasonable given the sequence of events and timeline as set forth in this opinion. The Court again finds that Ms. King knew or should have known she was injured due to the fault of another prior to December 7, 2015.

The Court also finds that New Jersey's equitable tolling does not save Ms. King's complaint for two reasons. Initially, the Court finds the record is devoid of any evidence that Sanofi actively mislead Ms. King or otherwise personally prevented Ms. King in some extraordinary way from asserting her rights. Barron v. Gersten, 472 N.J. Super. 572, 577 (App. Div. 2022). Instead, the record reflects that Sanofi's label did not include any warnings regarding permanent hair loss

until 2015. Pl. Opp. at 9. However, Sanofi's failure to warn, or omission, does not rise to the level of intentional inducement, trickery, or other misconduct aimed personally at Ms. King that prevented her from filing her claim.

Moreover, equitable tolling requires Ms. King to diligently pursue her claims and "does not excuse claimants from exercising the reasonable insight and diligence required to pursue their claims." Barron v. Gersten, 472 N.J. Super 572, 577 (N.J. App. Div. 2022). For the same reasons as set forth above, the Court finds that a reasonable person in Ms. King's position would have realized that they were injured due to the fault of another before 2015. Here, Ms. King did not diligently pursue her claims. The record reflects that as early as 2005, Ms. King believed her continued hair loss was caused by the chemotherapy treatment, but Ms. King took no action. Even if Ms. King did not believe that she suffered an injury due to the fault of another until seeing a dermatologist in 2007 or when she stopped believing her hair was slowly regrowing in 2011, Ms. King waited until December 7, 2017 to file her complaint. Accordingly, New Jersey's equitable tolling does not apply.

As a result, Sanofi's Motion for Summary Judgment is **GRANTED**.