IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE

KATHLEEN M. SZCZERBA, Individually and as Executrix of the Estate of JOSEPH L. SZCZERBA, Deceased,	)	
Plaintiffs,	)	
v.	)	C.A. No. N13C-09-080 WCC
AMERICAN CIGARETTE OUTLET, INC., RAJ SINGH, LCM DISTRIBUTING, LLC, SOUTHERN DISTRIBUTORS CO., INC., ADRENALIN RUSH, INC., d/b/a SMOKECLEAR, GIULIO BERTOLI and ANTHONY CAPACCIO	)	
Defendants.	)	

Submitted: July 26, 2016
Decided: September 2, 2016

ON MOTION OF DEFENDANTS ADRENALIN RUSH, INC., d/b/a SMOKECLEAR, ANTHONY CAPACCIO AND GIULIO BERTOLI FOR SUMMARY JUDGMENT – DENIED

MEMORANDUM OPINION

Michael F. Duggan, Esquire, Marc Sposato, Esquire, Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., 300 Delaware Avenue, Suite 900, Wilmington, DE 19801. Attorneys for Defendants Adrenalin Rush, Inc., Anthony Capaccio, and Guilio Bertoli.

Francis J. Murphy, Esquire, Kelley M. Huff, Esquire, Murphy & Landon, 1011 Centre Road, Suite 210, Wilmington, DE 19805. Attorneys for Plaintiffs.

CARPENTER, J.

Before the Court is a Motion for Summary Judgment filed by Defendants Adrenalin Rush, Inc. ("Adrenalin"), Anthony Capaccio ("Capaccio"), and Giulio Bertoli ("Bertoli") (collectively, "Adrenalin Defendants"). Having reviewed the record, the Court finds Defendants' Motion will be DENIED.

I. FACTUAL & PROCEDURAL HISTORY[1]

On September 16, 2011, on-duty New Castle County Police Officer Joseph L. Szczerba ("Officer Szczerba") was fatally stabbed by David A. Salasky ("Salasky") while Salasky was under the influence of "bath salts" purchased from Defendant American Cigarette Outlet ("ACO").[2] The bath salts allegedly caused Salasky "to suffer hallucinations, delusions, and paranoia" and to "exhibit[] violent behavior" on the night of the stabbing.[3] Salasky later pled guilty but mentally ill to First Degree Murder in connection with Officer Szczerba's death. These unfortunate events precipitated the instant civil action filed by Officer Szczerba's widow, Kathleen M. Szczerba, individually and on behalf of his estate ("Plaintiffs"), against ACO and others allegedly affiliated with the bath salt products used by Salasky prior to the stabbing. Plaintiffs claim Salasky's use of

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[1] *See also Szczerba v. American Cigarette Outlet Inc. et al.*, 2016 WL 1424561 (Del. Super. Ct. Apr. 1, 2016).
[2] Pls.' Second Am. Compl. ¶¶ 2, 22, 24.
[3] *See id.* ¶ 23.

bath salts was a proximate cause of his mental condition that led to the stabbing of Officer Szczerba.[4]

According to police records, Salasky was taken into custody and transported to Christiana Hospital following the stabbing, where a container of bath salts labeled "Xtreme" was found in his possession.[5] The label contained the words "Plant Food," and indicated an amount of "300 mg."[6] The label also provided that Xtreme was "[n]ot for human consumption" and "[n]ot for sale to minors."[7] The toxicology tests revealed that Xtreme contained the synthetic drug compound methylenedioxypyrovalerone ("MDPV").[8] MDPV was also detected in Salasky's blood and urine.[9] As of September 16, 2011, it was not a criminal offense to manufacture, distribute, sell, and /or use bath salt products containing MDPV in the State of Delaware.[10]

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[4] Pls.' Opp'n Br. at 2.
[5] Pls.' Ex. 5.
[6] Pls.' Ex. 6.
[7] *See id.*
[8] Pls.' Ex. 5.
[9] *Id.*
[10] The Delaware Department of State adopted an emergency rule temporarily classifying bath salts products as controlled substances on September 30, 2011, and later banned bath salts permanently in January 2012. *See* 16 *Del. C.* § 4701 (including "designer drugs" in definition of "controlled substances"); *Governor Signs into Law Ban on Dangerous "Bath Salts" Drugs,* http://news.delaware.gov/2012/01/25/governor-signs-into-law-ban-on-dangerous-bath-salts-drugs/ (last visited August 20, 2016). While the Drug Enforcement Administration ("DEA") began investigating MDPV drugs in March 2011 and announced its intent on September 8, 2011 to classify MDPV as a Schedule 1 controlled substance, it was not identified as such until October 2011. *See* Jake Schaller, *Not for Bathing: Bath Salts and the New Menace of Synthetic Drugs*, 16 J. Health Care L. & Pol'y 245, 247-48 (2013) (citing 76 Fed. Reg. 174 (proposed Sept. 8, 2011) and 21 U.S.C. § 812(b)(1) (2011)).

There is no dispute that Salasky used bath salts heavily in the days and weeks leading up to September 16, 2011.[11] It is also undisputed that in September 2011 and prior thereto, ACO carried in its inventory and sold bath salt products to the public. The record indicates Salasky and his girlfriend, Aleigha Hart, often purchased bath salt products from ACO. The surveillance footage and deposition testimony reflect that Salasky and Hart made multiple bath salt purchases at ACO on September 14th and September 15, 2011.[12] Following Officer Szczerba's murder, ACO turned over its bath salt products to the New Castle County Police, which included Xtreme[13] and another bath salt product which was identified as Up.

Plaintiffs filed their initial Complaint on September 11, 2013, asserting negligence, gross negligence, recklessness, and willful and wanton conduct, breach of implied warranties, civil conspiracy, loss of consortium, and wrongful death claims against ACO and Raj Singh ("Singh"), an agent and/or employee of ACO.[14] On March 27, 2015, Plaintiffs filed an Amended Complaint naming the Adrenalin Defendants, LCM Distributing, LLC ("LCM"), and Southern Distributors Co., Inc. ("Southern") as additional defendants by virtue of their participation in either

[11] Pls.' Second Am. Compl. ¶¶ 22-23; Pls. Opp'n Br. at 1; Pls.' Ex. 31, at 11 (Salasky testified that he was likely using bath salts everyday in August and September of 2011).
[12] Pls.' Ex. 9.
[13] Pls.' Ex. 10.
[14] According to the Second Amended Complaint, Mr. Singh's responsibilities included "the purchasing, ordering, inventory, and sale of products sold by Cigarette Outlet, including the products sold at the DuPont Highway store" and "the training, supervision, and oversight of the other employees of the Cigarette Outlet." Pls.' Second Am. Compl. ¶¶ 15-16.

manufacturing, distributing, and/or selling the bath salt products purchased by Salasky at ACO.[15] Specifically, Adrenalin, a New Jersey-based corporation operated by Bertoli and Capaccio, allegedly manufactured and distributed bath salt products to LCM and/or Southern, and those entities sold the bath salts to ACO.[16]

Adrenalin filed a Motion to Dismiss on September 14, 2015, contesting Plaintiffs' survivorship and loss of consortium claims as time-barred by the statute of limitations and arguing the Amended Complaint failed to state claims for civil conspiracy and breach of warranty.[17] After briefing and a hearing on the Motion, it was denied.[18] In the meantime, Plaintiffs reached a confidential settlement agreement with Defendants Singh and ACO, and default judgment has been entered against Defendants LCM and Southern. [19]

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[15] *Id.* ¶¶ 12-13.

[16] *Id.* ¶¶ 10, 12-13, 17 (alleging the bath salts were purchased by ACO "from defendant LCM…and defendant Southern…").

[17] Adrenalin's Mot. to Dismiss ¶¶ 4, 8-10 (asserting the 2-year statute of limitations for survivorship and loss of consortium claims as barring all counts with the exception of that alleging breach of implied warranty). Adrenalin argued Plaintiffs failed to allege Adrenalin engaged in improper or unlawful conduct to support a claim for civil conspiracy. *Id.* ¶ 8. Adrenalin contested the warranty claims on the basis that no warranty ever existed between the buyer and seller in this case. *Id.* ¶¶ 9-10.

[18] The Court denied the Motion in so far as it relied on the statute of limitations following argument on December 2, 2015. Judicial Action Form, D.I. 59. The Court rejected Adrenalin's remaining grounds for dismissal in its April 1, 2016 Memorandum Opinion. *See Szczerba*, 2016 WL 1424561.

[19] The Plaintiffs also filed a Second Amended Complaint to clarify that their wrongful death claims extended to the Adrenalin Defendants. That Complaint is otherwise identical to the Amended Complaint.

On June 30, 2016, the Adrenalin Defendants filed the instant Motion for Summary Judgment pursuant to Superior Court Civil Rule 56(c). Plaintiffs filed a brief in opposition to the Adrenalin Defendants' Motion for Summary Judgment, accompanied by 102 exhibits and two certifications by Plaintiffs' Counsel. A hearing on the Motion was held before this Court on July 26, 2016. The Court's decision on the Motion is as follows.

II. STANDARD OF REVIEW

Rule 56 motions require the Court to determine whether "the pleadings, depositions, answers to interrogatories, and admissions…file[d], together with [any] affidavits…show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[20] On a motion for summary judgment, "[t]he burden initially falls upon the moving party to show the nonexistence of any issue of material fact, but then shifts to the non-moving party to show the contrary."[21] In other words, where the movant satisfies its burden, the party opposing summary judgment must respond with "some evidence

[20] *See* Super. Ct. Civ. R. 56(c). *See also Pathmark Stores, Inc. v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191 (Del. Ch. 1995) ("A motion for summary judgment requires the Court to examine the record to determine whether any genuine issues of material fact exist." (citing *Burkhart v. Davies,* 602 A.2d 56, 59 (Del.1991), *cert denied,* 504 U.S. 912 (1992))).

[21] *See Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005). *See also Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009) (citing *Grabowski v. Mangler,* 956 A.2d 1217, 1220 (Del.2008) and *Moore v. Sizemore,* 405 A.2d 679 (Del.1979)).

showing a dispute of material fact."[22] Importantly, "in deciding whether there is a disputed issue for trial," the Court must view the evidentiary record, and any inferences to be drawn therefrom, "in the light most favorable to the non-moving party."[23] Ultimately, where material issues of fact remain, "it is inappropriate to grant summary judgment and the case should be submitted to the fact finder to determine the disposition of the matter."[24]

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[22] *See Phillips v. Del. Power & Light Co.*, 216 A.2d 281, 285 (Del. 1966) ("In several cases, we have made it plain that the moving party has the initial burden; he [or she] has the job of seeing that the record contains enough evidence to justify the granting of his [or her] motion. If he [or she] fails, the resisting party need not introduce anything into the record. But if the movant performs his [or her] initial job satisfactorily, then his [or her] opponent is obliged to bring in some evidence showing a dispute of material fact."). *See also Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) ("It is not enough for the opposing party merely to assert the existence of such a disputed issue of fact. The opponent to a motion for summary judgment 'must do more than simply show that there is some metaphysical doubt as to material facts.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986))).

[23] *See Brzoska*, 668 A.2d at 1364 (citing *Moore*, 405 A.2d at 680). *See also Williams v. Geier*, 671 A.2d 1368, 1375–76 (Del. 1996) ("The facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party." (citing *Bershad v. Curtiss–Wright Corp.,* 535 A.2d 840, 844 (Del. 1987))); *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99–100 (Del. 1992) (explaining this "favorable light" as requiring the Court to "accept as established all undisputed factual assertions, made by either party, and accept the non-movant's version of any disputed facts" (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157-59 (1970))).

[24] *See Paul*, 974 A.2d at 145. *See also Bershad,* 535 A.2d at 844 ("A motion 'must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom.'" (quoting *Vanaman v. Milford Mem'l Hosp., Inc.,* 272 A.2d 718, 720 (Del. 1970))); *Pathmark Stores, Inc.*, 663 A.2d at 1191 ("[S]ummary judgment may not be granted when the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").

III. DISCUSSION

Defendants urge the Court to grant their Motion for Summary Judgment on the grounds that (1) Plaintiffs' survivorship, loss of consortium, and wrongful death claims are barred by the statute of limitations; (2) Plaintiffs have produced no evidence that the Adrenalin Defendants were involved with Xtreme bath salts; and (3) there is no evidence to support that implied warranties existed with respect to the bath salts.[25] Plaintiffs respond that genuine issues of material fact exist regarding the Adrenalin Defendants' connection to the bath salts Salasky used prior to the stabbing and whether the doctrine of fraudulent concealment tolled the two-year limitations period. Additionally, Plaintiffs argue that Defendants have failed to meet their burden for summary judgment with respect to the breach of implied warranty claims.[26] The Court will address each of these issues in turn.

A. STATUTE OF LIMITATIONS

First, Defendants correctly assert that Plaintiffs' survivorship, loss of consortium, and wrongful death claims, all of which relate to the September 16, 2011 stabbing and death of Officer Szczerba, are subject to a two-year limitation period.[27] While the original Complaint was filed September 11, 2013 in

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[25] Defs.' Mot. for Summ. J. ¶ 2.
[26] Pls.' Opp'n Br. at 15.
[27] Defs.' Mot. for Summ. J. ¶¶ 4-6; 10 *Del. C.* §§ 8107, 8119 (providing limitations periods of two-years). Defendants concede Plaintiffs' breach of warranty claims are not time-barred.

compliance with the statute of limitations, Plaintiffs requested leave to amend on February 23, 2015 and filed the Amended Complaint naming the Adrenalin Defendants on March 27, 2015, well after the limitations period had expired. Thus, in order for Counts XIII, XIV, and XVI-XVIII to survive Defendants' Motion for Summary Judgment, Plaintiffs are required to show either that the Amended Complaint relates back to the date of their original Complaint under Superior Court Civil Rule 15(c) or that a tolling doctrine applies, "making relation back unnecessary."[28]

The Adrenalin Defendants argue the Amended Complaint cannot relate back to September 11, 2013 because they did not receive notice of this litigation within the time frame required by Rule 15(c)(3).[29] While Plaintiffs do not dispute that the

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[28] *See Rodriguez v. Farm Family Cas. Ins. Co.*, 2005 WL 1654019, at *3 (Del. Super. Apr. 19, 2005) (finding that where Plaintiffs' amended complaint did not relate back under Rule 15, "the statute of limitations must have been tolled" making the requirements of Rule 15 "unnecessary").

[29] *See* Super. Ct. Civ. R. 15(c). Rule 15(c) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when:"

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or...(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or...(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, that action would have been brought against the party.

See id. Defendants acknowledge that the allegations set forth in the Amended Complaint arise from the same conduct and occurrence as the original Complaint under Rule 15(c)(2). The Motion thus focuses purely on failure to satisfy Rule 15(c)(3)(A)-(B).

Amended Complaint fails to relate back to the original filing date, they maintain summary judgment is nevertheless inappropriate because genuine issues of material fact exist as to whether the Adrenalin Defendants fraudulently concealed their role in supplying the bath salts sold by ACO.[30]

Fraudulent concealment involves "an affirmative act of concealment or some misrepresentation…intended to 'put a plaintiff off the trail of inquiry.'"[31] In Delaware, "[t]he doctrine of fraudulent concealment tolls the applicable statute of limitations until such time as the cause and the opportunity for bringing an action against another could have been discovered by due diligence."[32] For tolling to occur, there must be (1) "actual subjective knowledge by the defendants of the wrong done," and (2) "some affirmative act action on [the defendants' part] in concealing the wrong."[33]

Plaintiffs emphasize that Adrenalin Rush is a New Jersey corporation, Adrenalin's warehouse was located in New Jersey, laws had been proposed in New Jersey banning bath salts in as early as April 2011, and that the state had

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[30] Pls.' Opp'n Br. at 1. *See also Rodriguez*, 2005 WL 1654019, at *3 ("Because Defendants never received notice of this action within the time period prescribed by Rule 15(c)(3), …for Plaintiffs' action to survive Defendants' motion to dismiss, the statute of limitations must have been tolled making relation back unnecessary.").

[31] *See Silverstein v. Fischer*, 2016 WL 3020858, at *5 (Del. Super. May 18, 2016) (quoting *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *15 (Del.Ch. Dec. 23, 2008)).

[32] *See Walls v. Abdel-Malik*, 440 A.2d 992, 996 (Del. 1982).

[33] *See Taylor v. Wilmington Med. Ctr., Inc.*, 538 F. Supp. 339, 342 (D. Del. 1982) (citing *Tilden v. Anstreicher*, 367 A.2d 632 (Del. 1976)).

made it illegal to manufacture and/or distribute MDPV products by August 2011.[34] In his deposition, Bertoli testified that Adrenalin Defendants would have been aware as early as February 2011 of the dangers associated with bath salts and that the DEA and various state governments had either banned or were considering banning such products.[35] According to Plaintiffs, Defendants nevertheless sought to continue reaping the profits of their business and intentionally conducted their dealings in such a manner that would insulate them from liability for any harm to consumers resulting from their bath salt products. For example, the labels affixed to the bath salts Adrenalin allegedly supplied omitted the name ("Adrenalin Rush" and/or "SmokeClear") and address of their business, as well as any information about their distributors. The logos associated with their products were not trademarked, and no trademark symbols appear on the products. While the bath salts were clearly intended to land on the shelves of tobacco stores, like ACO, the labels identified the products as "plant food" and stated they were "not for human consumption", a representation that they clearly knew was inconsistent with the market through which the product was being sold.

Despite these allegations, the Adrenalin Defendants maintain Plaintiffs cannot toll the statute of limitations because they "were on inquiry notice not only

[34] Pls.' Opp'n Br. at 11; Pls.' Ex. 79, 80 (NJ S.B. 2829).
[35] Pls.' Opp'n Br. at 12; Pls' Ex. 80, 82 (testifying to his belief that Defendants would have been tracking the DEA's announcements regarding MDPV).

of the involvement of bath salts, but the name of the bath salt product and store from which it came, within weeks of the murder."[36] For example, the Adrenalin Defendants emphasize the media coverage following the stabbing, contents of the police and toxicology reports, and the State of Delaware's introduction of legislation banning bath salts in light of Officer Szczerba's murder.[37]

While there is no doubt this information would, and in fact did, lead Plaintiffs to initiate suit against ACO and Raj Singh, the Adrenalin Defendants' argument misses the mark with respect to identifying Xtreme's and Up's manufacturer and distributor. Indeed, it would appear Plaintiffs did not receive notice of potential Defendants beyond ACO and Singh until January 30, 2014. On that date, Plaintiffs received responses to their first set of interrogatories and document requests from ACO and Singh, which indicated that ACO purchased its bath salts from Southern and LCM.[38] The only documents ACO and Singh produced in this litigation were three invoices: one from LCM and two from Southern. By the time Plaintiffs learned of Southern and LCM, it appears both entities had dissolved or were otherwise defunct. Yet, at argument, Plaintiffs indicated that they first learned of the Adrenalin Defendants in August 2014, when their research led them to a case in Illinois involving the death of a young woman

[36] Defs.' Mot. for Summ. J. ¶ 17.
[37] *Id.*
[38] Pls.' Second Certification, Ex. C.

due to bath salts. That litigation was filed in April 2013 against the owner of the liquor store that sold the bath salts and the owner later filed a third party complaint against LCM, Adrenalin, Bertoli, and Capaccio.[39] It appears Adrenalin is alleged to have manufactured or at least distributed the bath salts that led to the Illinois litigation.

Ultimately, Plaintiffs have persuasively claimed the Adrenalin Defendants knew of the harm associated with bath salts and intentionally marketed and sold their products in a way that effectively concealed Adrenalin's participation from injured consumers. Moreover, it appears Plaintiffs did not learn of ACO's relationship with LCM and Southern until January 30, 2014, and it was this connection which conceivably allowed Plaintiffs to track down the Illinois litigation involving LCM and the Adrenalin Defendants. The Court finds the Defendants' acts of fraudulent concealment tolled the statute of limitations until at least January 30, 2014. As a result, to the extent the Adrenalin Defendants' Motion for Summary Judgment rests on the statute of limitations defense, it is denied.

[39] It is unclear from the docket sheet in the Illinois litigation when exactly LCM, Adrenalin, Bertoli, and Capaccio were ultimately named as third party defendants in that litigation. The first time Adrenalin Rush is referenced on the docket sheet appears to be August 2013. Nevertheless, the record supports that Plaintiffs would not have been on notice of LCM's involvement with ACO until the end of January 2014.

B. DEFENDANTS' INVOLVEMENT WITH XTREME BATH SALTS

The Adrenalin Defendants additionally maintain "there is no evidence supporting the inference that Defendants had anything to with…X-treme bath salt[s]."[40] Evidence has been produced associating the Adrenalin Defendants with a bath salt product called "Up," which is the subject of the lawsuit in Illinois.[41] The record shows Bertoli and Capaccio have also pled guilty to federal drug mislabeling charges in connection with the Up product.[42] In addition to Xtreme, Up was also located among the large quantities of bath salt products seized at ACO.[43]

In support of their Motion, Defendants cite the deposition testimony of Bertoli and Cappacio, in which they deny they had any involvement with Xtreme. Cappacio testified Up was the only bath salt product the Adrenalin Defendants were ever involved with.[44] Defendants emphasize that it was Xtreme that was located on Salasky the night of the stabbing. [45] Salasky testified ACO sold a number of bath salt products, which were stored in a glass case and could be purchased at the counter, and that Hart was typically the one who would go to

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[40] Defs.' Mot. for Summ. J. ¶ 18.
[41] *Id.* ¶ 19.
[42] *Id.*
[43] Defendants maintain an issue of fact exists as to whether they manufactured and sold Up, but that Up is irrelevant to this litigation because it is "undisputed" Salasky smoked Xtreme prior to killing Officer Szczerba. *Id.* ¶ 20.
[44] Defs.' Ex. B, at 40-41.
[45] Defs.' Mot. for Summ. J. ¶ 21.

ACO and purchase bath salts for the couple to smoke.[46] He identified both Xtreme and Up as bath salts products either he or Hart would purchase from ACO, but stated he would smoke Xtreme more often.[47] He also testified he smoked Xtreme on September 15, 2011 prior to the stabbing.[48] According to Salasky, he had not smoked Up since May 2011.[49]

Plaintiffs respond that genuine issues of material fact remain with regard to the Adrenalin Defendants' involvement with Xtreme and whether Salasky ingested both Xtreme *and* Up in the days and weeks preceding Officer Szczerba's murder. First, Plaintiffs emphasize that it was generally Hart who purchased the bath salts smoked by Salasky because he "had no money" and that Hart testified she bought both Xtreme and Up from ACO in the weeks leading up to September 16, 2011. Plaintiffs further emphasize that Salasky testified he could not recall "much of anything" prior to the stabbing because he had been using bath salts daily and had not slept for two weeks at that time.[50]

Plaintiffs also cite to an ACO surveillance video showing Defendant Singh "transferring quantities of UP and Xtreme to Singh's uncle, who managed a nearby gas station, and to another unidentified individual" as creating the inference that

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[46] Defs' Ex. J, at 27.
[47] *Id.* at 30.
[48] *Id.* at 57-58
[49] *Id.* at 99.
[50] *Id.* at 48-49.

Up and Xtreme are connected.[51] While the Court would view that footage alone as insufficient to form a reasonable inference that the two products are connected, Plaintiffs also cite to evidence illustrating that ACO and Adrenalin had working relationships with LCM , which lends more support to Plaintiffs' position.

Defendant Singh testified ACO purchased bath salts from between three to five distributors. Based on the products collected during the police investigation, three distributors are identified on the labels of various bath salt products sold at ACO. They were I.C.C., Southern Distributors, and AM-HI-CO. Neither Up, nor Xtreme identifies the product's manufacturer or distributor. Additionally, Defendant Singh provided that the bath salts sold at ACO were purchased from LCM and produced an LCM invoice dated March 8, 2011. The invoice does not identify which specific products were sold to ACO and instead just uses "bath salts." However, the record indicates that the Adrenalin Defendants conducted business with LCM, that LCM distributed Adrenalin bath salt products, and that ACO purchased bath salts from LCM. John Messina, LCM's sales manager up until June 2011, was also deposed in this matter. According to Messina, Capaccio introduced LCM to bath salt products, that the Adrenalin Defendants manufactured Up and several other synthetic marijuana products, and that Defendants ran their synthetic drug business on a national scale. Plaintiffs claim this evidence

[51] Pls.' Opp'n Br. at 4.

considered with the testimony that ACO only used between 3-5 bath salt distributors, three of which are expressly tied to other products, creates the inference that UP and Xtreme were manufactured and distributed by Adrenalin Rush and LCM.[52]

Ultimately, the Court finds there are genuine issues of fact as to whether the bath salts sold at ACO and used by Salasky leading up to the stabbing can be traced back to the Adrenalin Defendants. While many of the pieces of evidence relied upon by Plaintiffs, taken individually, seem underwhelming at best, when considered as a whole and along with their claims that these Defendants had deliberately been attempting to conceal their connection with bath salt products at all times relevant to this litigation, the Court cannot confidently decide this issue on a motion for summary judgment.

C. IMPLIED WARRANTY CLAIMS

To the extent the Adrenalin Defendants rely on the argument rejected above regarding their "lack of involvement" with Xtreme to support their Motion for Summary Judgment with respect to Plaintiffs' implied warranty claims, the Motion is denied. With that argument eliminated, all that remains is the same contention this Court rejected in deciding Adrenalin's Motion to Dismiss Plaintiffs' breach of implied warranty claims. In other words, the Adrenalin Defendants argue, in

[52] *Id.* at 10.

conclusory fashion, that Plaintiffs' claim fails because no implied warranties ever existed with regard to the bath salts.

As the Court noted in its earlier decision, Adrenalin, as an alleged manufacturer of bath salts, qualifies as a merchant under the Delaware Uniform Commercial Code ("UCC") and generally the warranties of merchantability and fitness would be implied in the sale of its product absent a valid disclaimer. The information provided to the Court would certainly suggest that the Adrenalin Defendants were aware their product was not being distributed or used as "plant food" and there appears to be little or no dispute that they knew it was being consumed by individuals. There also appears to be evidence to suggest that they were aware of the adverse effects caused by the consumption of their bath salts. Even with this knowledge, Defendants allowed their product to be placed into commerce and onto the shelves of tobacco stores without any legitimate warnings, and by doing so, the implied warranties of merchantability and fitness have been implicated. Whether the evidence supports this count must be decided at trial, but the Court finds there is a sufficient basis to allow this claim to move forward.

With that said, the Court continues to question the litigation strategy of Plaintiffs in pursuing this UCC count. As previously indicated, this concept is difficult to explain and understand by lay people and it adds a level of complexity

that the Court simply believes may be unnecessary and potentially harmful to the other claims made by Plaintiffs. The Court is allowing this count to move forward but suspect this will not be the last argument which the Court will hear on the viability of this contention.

IV. CONCLUSION

Based upon the above, the Motion of the Adrenalin Defendants for summary judgment is DENIED.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.