IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMANTHA J. AMIG,	:	
	:	1:19-cv-408
	:	
Plaintiff,	:	Hon. John E. Jones III
	:	
v.	:	
	:	
COUNTY OF JUNIATA, et al.,	:	
	:	
Defendants.	:	

ORDER AND MEMORANDUM

January 8, 2019

Presently pending before the Court is Defendant Premier Biotech, Inc.'s Motion to Dismiss Counts VII and VIII of Plaintiff's Amended Complaint ("the Motion"). (Doc. 28). In her Amended Complaint, Plaintiff Samantha Amig alleges a variety of constitutional and state law claims against Mifflin and Juniata Counties, the Mifflin County Correctional Facility ("the Facility"), its Warden, several Facility Correction Officers, and Premier Biotech, Inc. ("Premier") arising from her 45-day term of incarceration at the Facility. The claims relevant to the instant motion relate to an allegedly defective urine drug test which was

manufactured by Premier and administered to Plaintiff during her time at the Facility.

Plaintiff now alleges both a violation of 42 U.S.C. § 1983 (Count VII) and a product liability claim (Count VIII) against Premier for the harm caused her by their allegedly defective manufacture of the urine drug test she was administered. In the instant motion, Premier seeks to dismiss Plaintiff's claims against it for failure to state a claim for which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). The matter has been fully briefed and is ripe for disposition. For the reasons that follow, Premier's Motion shall be denied in full.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

We take the following from Plaintiff's Complaint and assume it to be true, as we must.

On February 6, 2018, Plaintiff Samantha Amig was sentenced to a minimum period of 45 days incarceration. (Doc. 16 at ¶ 12). Plaintiff was placed in the Facility, where she was granted work release. (*Id.* at ¶ 14). Under such release, Plaintiff was permitted to continue working as a receptionist at Clayton Homes in Lewistown, Pennsylvania, where she had been working from October 2017 until the time of her sentence. (*Id.* at ¶¶ 13, 14).

Defendant Premier is a private corporation which designs and manufactures urine drug tests, which it sells to the Facility to be administered to inmates. (*Id.* at

¶¶ 115, 125). Premier's test is designed such that the test-taker urinates into a cup, at which point a paper strip attached to the inside surface of the cup will show a specific color. (*Id.* at ¶ 42). The color is matched to a standardized color band chart, which identifies a drug's positive or negative presence in the urine. (*Id.* at ¶ 42). The test is administered to inmates by corrections officers at the Facility. (Doc. 16 at ¶ 39).

After her return from work release on February 21, 2018, Facility staff required Plaintiff to complete a urine screen drug test, which indicated a positive reading for suboxone and methamphetamines. (*Id.* at ¶ 38). Premier manufactured the urine drug test administered to Plaintiff. (*Id.* at ¶ 124). Plaintiff stated that she had not taken the substances indicated and requested a second urine test. (*Id*. at ¶ 38). The second test produced the same results. (*Id*). On February 22, 2018, Plaintiff requested a blood test to confirm the urine test results. (*Id.* at ¶ 46). Facility staff denied this request and informed Plaintiff that they would send her results to a lab for diagnostic testing. (*Id*). Facility staff further notified Plaintiff that, due to the failed urine screen drug tests, her work release privileges were terminated. (*Id.* at ¶ 48). The Facility then contacted her employer regarding the failed drug tests. *Id.* She was subsequently fired. (*Id.* at ¶ 68). Plaintiff was also placed in the Restrictive Housing Unit ("RHU"), where she was held in solitary confinement for 15 days. (*Id*. at ¶ 67).

On March 1, 2018, the Facility received the results of Plaintiff's laboratory test, which were negative for both suboxone and methamphetamines. (*Id.* at ¶ 64). On March 7, 2018—after 15 days of solitary confinement and 6 days after the Facility had obtained the results—Plaintiff was notified that the lab test results had returned negative results. (*Id.* at ¶ 67). Plaintiff was then moved back to the Facility's general population. (*Id*. ¶ 56).

Plaintiff filed a complaint on March 6, 2019 in which she alleged a § 1983 violation and a products liability claim against Premier. (Doc. 1). On May 21, 2019, Plaintiff filed an amended complaint. (Doc. 16). On August 28, 2019, Defendant Premier filed the instant motion to dismiss the claims against it pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 28). The matter has been fully briefed, (Docs. 29, 30, 31), and is now ripe for disposition. For the reasons that follow, the Motion shall be denied.

II. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6), courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)). In resolving a motion to dismiss pursuant to Rule

12(b)(6), a court generally should consider only the allegations in the complaint, as well as "documents that are attached to or submitted with the complaint, . . . and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirement of Rule 8(a). Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint attacked by Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, it must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a civil plaintiff must allege facts that "raise a right to relief above the speculative level…." *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Accordingly, to satisfy the plausibility standard, the complaint must indicate that defendant's liability is more than "a sheer possibility." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the

line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Under the two-pronged approach articulated in *Twombly* and later formalized in *Iqbal*, a district court must first identify all factual allegations that constitute nothing more than "legal conclusions" or "naked assertions." *Twombly*, 550 U.S. at 555, 557. Such allegations are "not entitled to the assumption of truth" and must be disregarded for purposes of resolving a 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 679. Next, the district court must identify "the 'nub' of the … complaint — the well-pleaded, nonconclusory factual allegation[s]." *Id.* Taking these allegations as true, the district judge must then determine whether the complaint states a plausible claim for relief. *See id.*

However, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Phillips*, 515 F.3d at 231 (citing *Twombly*, 550 U.S. at 556-57). Rule 8 "does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Id.* at 234.

III. DISCUSSION

Premier argues that Plaintiff fails to state a claim for which relief can be granted in both counts alleged against it. First, Premier argues that Plaintiff fails to

plead any facts that would establish Premier is a state actor such that §1983 liability may attach. Second, Premier argues that the economic loss doctrine bars Plaintiff's state-law products liability claim. In the alternative, Premier asserts that Plaintiff's Complaint alleges facts which indicate the drug test was not used as intended, thereby absolving Premier from liability for its allegedly defective product. We review each argument in turn.

a. Count VII - §1983 Claim

First, Premier argues that Plaintiff fails to state a claim under §1983 because Premier, a private corporation, is not a state actor that can be held liable under the statute. (Doc. 29 at 6). Premier acknowledges that there are circumstances in which a private entity will be considered a state actor for §1983 purposes. However, Premier avers that Plaintiff fails to plead facts that would satisfy any of the three tests that determine whether state action exists under § 1983. (*Id*).[1] Specifically, Premier argues that there are no allegations by Plaintiff that there was "any action on the part of Premier that is traditionally the exclusive prerogative of the state" such that §1983 liability may attach. (*Id.* at 9). Plaintiff has merely pled that Premier manufactured a drug test and sold it to the Facility pursuant to a contract.

[1] Finding state action for §1983 purposes requires fulfilling one of the following three tests: (1) the "exclusive state function" test; (2) the "close nexus" test; or (3) the "symbiotic relationship" test. *See Lugar v. Edmondson Oil Co., 475 U.S. 911, 939 (1982).* Here, we need only address the "exclusive state function test" because the parties agree that the other two tests do not apply.

(*Id*). Such facts, Premier argues, cannot support a §1983 claim under the "exclusive state function" test for state action.

In response, Plaintiff maintains that she has alleged sufficient facts to support an "exclusive state function" §1983 claim. In support of this argument, Plaintiff contends that all key functions of incarceration, including supervising inmates, are traditionally public functions. (Doc. 30 at 10-11). Furthermore, Plaintiff alleges that supervising inmates includes testing for drugs in the prison population, for which Premier was contractually bound to sell their drug testing kits. (*Id.* at 12). In addition, Plaintiff alleges that Premier's "policy, practice, or custom" of selling defective drug kits resulted in false positive results, the loss of her employment, and her placement in solitary confinement, thereby violating her constitutional rights. (Doc. 16. at ¶ 116). These facts, Plaintiff argues, are sufficient to support her §1983 claim. We agree.

Mindful of the relevant standard of review, we consider whether Plaintiff has alleged sufficient facts in her Complaint to plausibly support her claim. Our analysis reveals that she has.

To state a claim under §1983, a plaintiff must allege: (1) that a right or privilege accorded them by the Constitution was violated; and (2) that the violation was caused by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Generally, §1983 mandates that claims may only be brought against

state actors, not private entities. However, in limited circumstances we will accord "state actor" status to private individuals or corporations. The Supreme Court has established several tests to determine whether state action may be imputed onto a private actor. *See Lugar v. Edmondson Oil Co.*, 475 U.S. 911, 939 (1982) (enumerating the "exclusive state function," "close nexus," and "symbiotic relationship" tests for state action). At issue in the instant case is the application of the "public function" test. The requirements of the "public function" test are "rigorous" and "rarely satisfied." *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 165 (3d Cir. 2001) (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir. 1995)). It requires the court to determine whether the defendant was performing a function that is "traditionally and exclusively" the province of the state. *Leshko v. Servis*, 423 F.3d 337, 343 (3d Cir. 2005).

It has been well-established that "the function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state." *Giron v. Corrections Corp. of Am.,* 14 F.Supp.2d 1245, 1249 (D.N.M. 1998). Largely, the courts have considered whether private entities in prisons should be considered state actors in the context of *privately-run* prisons, finding that the state actor requirement was met for §1983 purposes. *See Street v. Corrections Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996) (holding that private prison company was a state actor when it incarcerated inmates for the state); *Kesler v. King*, 29 F.Supp.2d

356, 370–71 (S.D.Tex. 1998) (same); *Giron v, Corrections Corp. of Am.,* 14 F.Supp.2d 1245, 1247–51 (D.N.M. 1998) (finding that a corrections officer employed by a private prison company was a state actor for §1983 purposes when he raped an inmate); *Plain v. Flicker*, 645 F.Supp. 898, 907 (D.N.J.1986) ("[I]f a state contracted with a private corporation to run its prisons it would no doubt subject the private prison authorities to § 1983 suits under the public function doctrine.").

Furthermore, our colleagues in the Eastern District have considered what individual functions of incarceration are "public functions." In *McCullum v. City of Philadelphia,* the court found that a company which privately contracted with a public prison to provide dining services could be considered a state actor under the public function test because "providing food service, like medical care, to those incarcerated people is one part of the government function of incarceration." No. CIV. A. 98-5858, 1999 WL 493696, at *3 (E.D. Pa. July 13, 1999). In *McCullum*, the court held that, since the government had an Eighth Amendment duty to provide "humane conditions of confinement," providing adequate food could be considered acting under the color of state law. *Id*. In addition, "[i]f a state government must satisfy certain constitutional obligations when carrying out its functions, it cannot avoid those obligations and deprive individuals of their

constitutionally protected rights by delegating governmental functions to the private sector." *Giron*, 14 F.Supp.2d at 1249.

We similarly find that drug-testing in a prison may be considered a traditional state function. Under the Eighth Amendment, the state is required to provide "humane conditions of confinement." Such conditions must necessarily include providing a safe environment in which inmates may serve their periods of incarceration. An inmate's safety must, in part, include maintaining a drug-free setting to the greatest extent possible. We can easily conceive of the safety concerns that could arise from unchecked drug overdoses, inmates acting under the influence of illicit drugs, or even, as is the case here, the danger of a work-release inmate ingesting illicit drugs outside of the prison and potentially causing harm to herself, other inmates, or innocent bystanders. Because the Facility has a duty to provide a safe environment to its inmates, they also have a duty to monitor their prison population for illicit drug use. Indeed, drug crimes account for a significant number of incarcerations. The Facility cannot then delegate the duty to monitor drug use a private party and absolve inmates of constitutional rights by doing so.

Plaintiff has alleged that Premier is a private corporation. (Doc. 16 at ¶ 115). She has also alleged that Premier supplied the drug test to the Plaintiff and other inmates of the facility. (*Id*). Furthermore, she has alleged that the government delegated a traditional state function to Premier, and that a Constitutional violation

occurred as a result. (*Id.* at ¶ ¶ 115, 116). Assuming these facts to be true, as we must, we therefore find that Plaintiff has successfully stated a §1983 claim to survive Premier's motion to dismiss.

b. Count VIII — Product Liability Claim

Premier next asks that this Court to dismiss Plaintiff's product liability claim for two reasons. (Doc. 28 at 7). First, Premier contends that the economic loss doctrine bars Plaintiff's claim because, "no cause of action can be maintained in tort for negligence or strict liability where the only injury is 'economic loss.'" (*Id*). Because, Premier argues, Plaintiff was injured only economically by the loss of her job, she is barred from bringing a product liability claim under Pennsylvania law. (Doc. 9 at 14). Second, Premier contends, Plaintiff's allegation that corrections officers misused the drug test given to her bars a strict liability claim against the manufacturer. (*Id*). Because the test was not used as intended, Premier cannot be held liable for Plaintiff's alleged harms. (*Id*).

In response, Plaintiff contends that Pennsylvania law does not necessarily preclude torts actions for solely economic harms. (Doc. 30 at 13 (*citing Bilt Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270 (Pa. 2005) (holding that negligent misrepresentation tort claims are not barred by the economic loss doctrine)). Indeed, Plaintiff reasons, with products like drug tests, barring such claims under the economic loss doctrine would in effect immunize such

manufacturers from liability. (*Id*). The potential harms from such products would almost never result in injury or destruction of tangible property but, as evidenced herein, could cause significant harm if left unchecked. (*Id*). Moreover, Plaintiff argues, Pennsylvania law does not preclude her claim despite the correction officers' alleged misuse of the drug testing kit, because, even if the use was unintended, it was highly foreseeable. (*Id.* at 14). We take each argument in turn.

i. Economic Loss Doctrine

Traditionally, Pennsylvania's economic loss doctrine "developed in the product liability context to prevent tort recovery where the only injury was to the product itself." *Sarsfield v. CitiMortgage, Inc.* 707 F.Supp. 2d 546, 556 (M.D. Pa. 2010).[2] Eventually, the doctrine came to stand for the proposition that, "no cause of action can be maintained in tort for negligence or strict liability where the only injury was 'economic loss'—that is, loss that is neither physical injury nor damage to tangible property." *2–J Corp. v. Tice*, 126 F.3d 539, 541 (3d Cir. 1997) (citing *Aikens v. Baltimore & Ohio R.R. Co.,* 501 A.2d 277, 279 (Pa. Super. 1985)).

Recently, however, in *Dittman v. UPMC*, 196 A.3d 1036 (Pa. 2018), the Pennsylvania Supreme Court limited the doctrine's application and moved away

[2] For example, if a consumer purchased a toaster that later exploded, if the consumer's only injury was the loss of her toaster, such economic loss would be insufficient to sustain a product liability action.

from an analysis of whether plaintiff alleges solely economic harms. Instead, the Pennsylvania Supreme Court shifted to an examination of what *kinds of remedies* are available to the plaintiff. Under the new *Dittman* test, the economic loss doctrine bars a plaintiff's solely economic claim via a *tort* action if the breached duty arises under a *contract*. *Id.* at 1054. ("[I]f the duty [that the tortfeasor breached] arises under a contract between the parties, a tort action will not lie from a breach of that duty. However, if the duty arises independently of any contractual duties between the parties, then a breach of that duty may support a tort action."). "Thus, *Dittman* rejected the 'general pronouncement' that 'all negligence claims for economic losses are barred under Pennsylvania law . . . .' [and] held that 'under Pennsylvania's economic loss doctrine, recovery for purely pecuniary damages is permissible under a negligence theory provided that the plaintiff can establish the defendant's breach of a legal duty arising under common law that is independent of any duty assumed pursuant to contract.'" *Dalgic v. Misericordia Univ.*, No. 3:16-CV-0443, 2019 WL 2867236, at *26 (M.D. Pa. July 3, 2019).

Therefore, the central question in the application of the economic loss doctrine under *Dittman* now seems to be whether a duty between the parties was created by a contract, as opposed to in tort—not merely whether the plaintiff suffered solely economic injuries. In other words, if a plaintiff has contractual

remedies for her solely economic harms, she must seek those remedies in contract, not tort.

In the instant case, Plaintiff alleges "both a duty of care in designing, manufacturing, selling and distributing [the drug testing kits] and a duty to sell and /or distribute [those kits] free from defective condition." (Doc. 16 at 25). Thus, it is clear that these alleged duties arise "independently of any contract duties." There is no contract whatsoever alleged between Plaintiff and Premier. Plaintiff did not purchase the allegedly defective product from Premier, nor are there allegations of any agreement between the two parties. Accordingly, Plaintiff may turn to tort remedies to recover for her harms and, under *Dittman*, we find that Plaintiff's claim is not barred by the economic loss doctrine.

Although we acknowledge that the facts of *Dittman* involved a negligence claim, we are unpersuaded by Premier's insistence that *Dittman* does not extend to strict-products liability claims like the one *sub judice*.

At one point, the Pennsylvania courts regarded strict liability and negligence claims as entirely separate. *See Azzarello v. Black Brothers Co.*, 391 A.2d. 1020, 1026-27 (Pa. 1978). In 2014, however, the Pennsylvania Supreme Court overruled *Azzarello* as overbroad and, instead, acknowledged that negligence and strict liability frameworks are necessarily intertwined. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 376-78 (Pa. 2014). That is, nested within the framework of strict liability

lie principles of negligence. Indeed, Pennsylvania's new approach to design defect liability leaves open the ability to introduce negligence-based evidence like industry standards previously precluded under a strict liability analysis. *See Tincher*, 104 A.3d 328, at 431-32. *See also* A. Mayer Kohn, *A World After Tincher v. Omega Flex: Pennsylvania Courts Should Preclude Industry Standards and Practices Evidence in Strict Products Liability Litigation*, 89 TEMP. L. REV. 643, 645 (2017).

When we consider this recent shift in the strict liability-negligence dichotomy in conjunction with the Pennsylvania Supreme Court's explicit use of the more broad phrase "*tort* action" in its holding in *Dittman*, as opposed to the more limiting phrase "*negligence* action," we find that, absent further guidance from the Pennsylvania Supreme Court or the Third Circuit, *Dittman* applies to both strict-products liability claims and negligence actions. *Dittman*, 196 A.3d 1036 at 1054. We further note that, at this early procedural juncture, we are obliged to favor the non-moving party. We remain, therefore, unconvinced that Plaintiff's strict-products liability claim is barred by the economic loss doctrine.

ii. Alleged Misuse

Alternatively, Premier argues that Plaintiff's product liability claim must fail because strict liability claims may only lie when the product is used in the way it was intended by the manufacturer. (Doc. 28 at ¶¶ 33, 34). Here, Premier contends,

where Plaintiff averred in her Complaint that "officers Aumiller and Fagan . . . misused the test in that they unsealed and opened the test cup prior to handing it to [Amig] for use," her claim is barred by such misuse. (Doc. 29 at 15 (quoting Doc. 16 at ¶ 44)).

Plaintiff disagrees, asserting that Premier's drug kits were used as intended, specifically to test urine for the presence of drugs. (Doc. 30 at 14). Moreover, Plaintiff argues, her allegation that the officers misused the test does not preclude her products liability claim as manufacturers can still be held liable for unintended uses that are highly predictable and foreseeable. (*Id*). As opening a test kit prior to its use is neither unforeseeable nor outrageous, Plaintiff concludes, her claim remains viable. (*Id*).

We agree and, at this stage, will allow Plaintiff's product liability claim to survive. While Plaintiff has alleged misuse of the product by the Facility's corrections officers, she does so in the context of her §1983 equal protection violation against those same officers, not in relation to her products liability claim against Premier. (Doc. 16 at ¶ 107). Under our Federal Rules, Plaintiff is permitted to plead facts and assert claims in the alternative that may appear contradictory to each other without damaging the sufficiency of any one claim. Fed.R.Civ.P. 8(d) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party

makes alternative statements, the pleading is sufficient if any one of them is sufficient . . . A party may state as many separate claims or defenses as it has, regardless of consistency."). Setting aside the question of whether Plaintiff's claims are, in fact, inconsistent with one another, our standard of review requires us to favor the non-moving party. Therefore, we construe Plaintiff's Complaint as setting forth alternative theories which, consistent or not, will not preclude her product liability claim. Plaintiff has stated a claim for relief, and so will be permitted to proceed.

IV. CONCLUSION

For the reasons stated above, we shall deny the Defendant's Motion to Dismiss with respect to all counts.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant Premier Biotech, Inc.'s Motion to Dismiss Counts VII and VIII of Plaintiff's Amended Complaint, (Doc. 28), is be **DENIED** in all respects.

s/ John E. Jones
John E. Jones III
United States District Judge