

**Ansley v Wyeth**

2009 NY Slip Op 32905(U)

November 30, 2009

Supreme Court, New York County

Docket Number: 109479/05

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARTIN SHULMAN

PRESENT: \_\_\_\_\_ J.S.C.

PART 1

Justice

Index Number : 109479/2005

ANSLEY, ELIZABETH

INDEX NO. 109479/05

vs

WYETH

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS

MOTION CAL. NO. \_\_\_\_\_

s motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-C

1

Wyeth's Answering Affidavits — Exhibits A-BB; Upjohn's Ans. Aff.

2, 3

Replying Affidavits \_\_\_\_\_

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

DEC 14 2009

NEW YORK COUNTY CLERK'S OFFICE

Dated: NOV 30 2009

[Signature]  
MARTIN SHULMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 1

-----X  
 In re: NEW YORK HORMONE REPLACEMENT  
 THERAPY LITIGATION

Case Management Index No.  
 763000/06

|                       |                       |                                      |
|-----------------------|-----------------------|--------------------------------------|
| ELIZABETH ANSLEY      | (Index No. 109479/05) | Index Nos.: 109479/05, <i>et al.</i> |
| MYRA BEER             | (Index No. 109136/05) |                                      |
| EVELYN STREIT COHEN   | (Index No. 115200/04) | <b><u>DECISION AND ORDER</u></b>     |
| REGINA COHEN          | (Index No. 109133/05) |                                      |
| RACHEL EPSTEIN        | (Index No. 109359/05) |                                      |
| LEE FRANKEL           | (Index No. 402193/06) |                                      |
| MARGUERITE HJALMARSON | (Index No. 109360/05) |                                      |
| JUDITH KNECHT         | (Index No. 115613/04) |                                      |
| MARILYN LESSER        | (Index No. 110280/04) |                                      |
| FAITH LOBEL           | (Index No. 404179/06) |                                      |
| OFELIA MANUEL         | (Index No. 116030/04) |                                      |
| JUDITH MARSHALL       | (Index No. 105816/04) |                                      |
| JOAN MCKENNA          | (Index No. 401807/07) |                                      |
| SUSAN MECHANIC        | (Index No. 108276/05) |                                      |
| ROSE MARIE O'LEARY    | (Index No. 109135/05) |                                      |
| JEANNETTE RICK        | (Index No. 109134/05) |                                      |
| SANDRA ROSE           | (Index No. 100444/05) |                                      |
| SARAH JILL ROSENBERG  | (Index No. 400682/07) |                                      |
| ANNA SOLOMON          | (Index No. 109357/05) |                                      |
| NANCY STATES          | (Index No. 109358/05) |                                      |
| DALIA VERALLI         | (Index No. 112755/04) |                                      |
| SARAH WEISBERG        | (Index No. 404065/06) |                                      |
| JOYCE WORTHINGTON     | (Index No. 109480/05) |                                      |

Plaintiffs,

-against-

WYETH, et al.,

Defendants.

-----X

**Hon. Martin Shulman, J.:**

Before the court are approximately 60 motions involving these 23 female plaintiffs<sup>1</sup> who ingested hormone replacement therapy ("HRT") drugs<sup>2</sup> and primarily

<sup>1</sup> Where applicable, plaintiffs' spouses are also named as plaintiffs in connection with a loss of consortium cause of action.

<sup>2</sup> Plaintiffs contend that HRT "is an umbrella term used to refer to either the use of combination hormone therapy (i.e., estrogen and progesterone) or to the use of estrogen

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 NEW YORK  
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3] claim these medications caused them to develop breast cancer.<sup>3</sup> These plaintiffs' cases are part of a larger group of product liability actions<sup>4</sup> filed in or transferred to New York County Supreme Court against various defendants who manufactured, marketed, promoted and sold prescription HRT drugs.<sup>5</sup> By order dated August 7, 2006, these cases were consolidated in this court under Case Management Index No. 763000/06 (the "New York Coordinated HRT Proceeding").

Two groups of defendants, Wyeth<sup>6</sup> and Upjohn<sup>7</sup> (collectively "defendants") are affected by these motions, which fall into three categories: (1) plaintiffs' motions to

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alone." See proposed amended complaints annexed to plaintiffs' motions to amend (e.g., Exhibit B to Motions to Amend).

<sup>3</sup> Of the moving plaintiffs, only Weisberg alleges she developed deep vein thrombosis and suffered a pulmonary embolism as a result of ingesting HRT medication. In addition to breast cancer, HRT medications are alleged to cause other injuries including heart attacks and strokes.

<sup>4</sup> Generally, plaintiffs' complaints in the New York Coordinated HRT Proceeding allege the following causes of action: 1) strict product liability, failure to warn, manufacturing defect, design defect, negligence and negligent infliction of emotional distress; 2) breach of express and implied warranty; fraud, deceit, deceit by concealment, fraudulent misrepresentation and negligent misrepresentation; 3) violation of General Business Law ("GBL") §349; 4) loss of consortium (where applicable); 5) assault and battery; and 6) intentional infliction of emotional distress.

<sup>5</sup> Similar actions have been commenced and consolidated throughout the United States. The parties' liaison counsel have agreed to coordinate discovery in the New York Coordinated HRT Proceeding where possible with the federal multi-district litigation (the "MDL") entitled *In re: Prempro Products Liability Litigation*, MDL No. 1507, presently pending before the U.S. District Court, Eastern District of Arkansas.

<sup>6</sup> Defendants Wyeth and Wyeth Pharmaceuticals, Inc. are collectively referred to herein as "Wyeth."

<sup>7</sup> Defendants Pfizer, Inc. ("Pfizer"), Pharmacia Corporation, Pharmacia & Upjohn LLC, Pharmacia & Upjohn Company LLC and Greenstone Ltd. ("Greenstone") are collectively referred to herein as "Upjohn."

discontinue without prejudice; (2) defendants' motions for summary judgment; and (3) plaintiffs' motions to amend thirteen of the moving plaintiffs' complaints.

Twenty-two plaintiffs move to discontinue their actions without prejudice pursuant to CPLR 3217(b).<sup>8</sup> In addition to opposing the motions to voluntarily discontinue, Wyeth concomitantly moves for summary judgment in each case. Upjohn also opposes plaintiffs' motions and moves for summary judgment in all but the McKenna case (previously dismissed with prejudice against Upjohn), and does so by extensively adopting and incorporating Wyeth's argument in its papers.

Defendants' summary judgment motions rest on their claim that the statute of limitations has run in these cases. With respect to plaintiff Lesser, Upjohn's summary judgment motion asserts an additional ground for dismissal of her action grounded on its claim that Lesser never alleged she ingested any product Upjohn manufactured.

To affirmatively counter defendants' summary judgment motions, 13 of the 23 plaintiffs (E. Cohen, Frankel, Knecht, Lesser, Lobel, Manuel, Marshall, McKenna, Mechanic, Rose, Rosenberg, Veralli and Weisberg) move to amend their complaints to now allege facts regarding the discovery and accrual of their claims and additional facts in support of their fraud claims. Plaintiffs Manuel, Marshall and Rose further seek to add fraud causes of action previously omitted from their original complaints. And to counter Upjohn's separate summary judgment motion, plaintiff Lesser now seeks to amend the complaint to allege she used Provera, an Upjohn product. All of the approximately sixty motions are consolidated for disposition.

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<sup>8</sup> By letter dated August 3, 2009, plaintiffs' liaison counsel advised the court that plaintiff Evelyn Streit-Cohen's motion to voluntarily discontinue had been withdrawn.

**MOTIONS TO DISCONTINUE WITHOUT PREJUDICE**

Plaintiffs candidly admit their intention, upon voluntarily discontinuing these actions without prejudice, to recommence each action in the U.S. District Court, District of Minnesota, and seek to have the newly commenced cases transferred to the U.S. District Court, Eastern District of Arkansas, for consolidation into the MDL.<sup>9</sup> Plaintiffs have made it clear that their receipt of a favorable outcome-determination as to their voluntary discontinuance *without prejudice* ("w/o prej. discontinuance") will allow them to avail themselves of Minnesota's six year statute of limitations and get around New York's obviously shorter three year statute.<sup>10</sup>

Plaintiffs argue the following points: CPLR 3217(b) allows them to seek w/o prej. discontinuance at any time prior to submission of a cause to the court or jury; the court should routinely grant a w/o prej. discontinuance unless special circumstances compel otherwise such as prejudice to defendants; plaintiffs have received no negative rulings or orders in these actions and no adverse motions were pending at the time the discontinuance motions were served and/or filed (but see, discussion *infra*); no substantial rights of defendants will be compromised and/or adversely affected; and any and all discovery conducted, to date, can be used in subsequently filed actions.

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<sup>9</sup> To "hedge their bets" so to speak and preserve their rights, 22 of the 23 moving plaintiffs have already re-commenced these actions before Minnesota state or federal courts.

<sup>10</sup> CPLR 214 states, in relevant part: "Actions to be commenced within three years: for non-payment of money collected on execution; for penalty created by statute; to recover chattel; for injury to property; *for personal injury*; for malpractice other than medical, dental or podiatric malpractice; to annul a marriage on the ground of fraud." (Emphasis added).

In opposition to plaintiffs' motions for a w/o prej. discontinuance, Wyeth and Upjohn argue that: the statute of limitations has run in each case and plaintiffs are improperly attempting to avoid an adverse ruling on the merits; defendants are prejudiced by plaintiffs now seeking discontinuances after being engaged in substantial discovery during the ensuing 3-4 years<sup>11</sup> and defendants will incur additional expenses in hiring new counsel if plaintiffs are permitted to re-file elsewhere; and public policy and judicial economy considerations dictate against granting plaintiffs w/o prej. discontinuances as such litigation maneuvers would encourage forum shopping.

In reply, plaintiffs contend that discovery is not substantially complete in any of these cases, because a number of plaintiffs and/or their prescribing physicians have yet to be deposed. They further argue that any and all discovery completed, to date, is identical to anticipated discovery which would be conducted in the MDL litigation and defendants will not be prejudiced by incurring additional expenses in hiring new counsel as they have coordinated their defense with other counsel in the litigation pending in other states. Finally, plaintiffs assert that forum shopping considerations are not a factor the court should evaluate.

CPLR 3217(b) provides, in relevant part, that:

an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

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<sup>11</sup> In its summary judgment motion papers, Wyeth avers it collected 30,841 pages of medical records and 54 sales representatives' files, reviewed 36 Plaintiff's Fact Sheets ("PFS's"), deposed 6 plaintiffs and 2 non-party spouses and produced over 16 million pages of documents for plaintiffs' inspection.

Relevant to the court's determination of a CPLR 3217(b) application is "the nature of the litigation . . . at the time the application for discontinuance is interposed, including the extent to which pretrial proceedings have progressed (citations omitted)." *Keefe v. Hanover Ins. Group*, 2008 WL 695033 (Sup. Ct., Suffolk Co.). And relevant here is the Court of Appeals pronouncement in *Tucker v. Tucker*, 55 N.Y.2d 378, 383-384 (1982):

While the authority of a court to grant or to deny an application made to it pursuant to CPLR 3217 (subd [b]) by a party seeking voluntarily to discontinue litigation is within its sound discretion, ordinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted (4 Weinstein-Korn-Miller, NY Civ Prac, par 3217.06). *Particular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible or . . . obligatory.* (Emphasis added).

Against this backdrop and given defendants' contention that these w/o prej. discontinuance motions were filed to avoid adverse merit-based determinations of defendants' summary judgment motions, *NBN Broadcasting, Inc. v. Sheridan Broadcasting Networks, Inc.*, 240 A.D.2d 319 (1<sup>st</sup> Dept. 1997) is instructive.

In *NBN Broadcasting*, the First Department found that the lower court "properly discontinued the action with prejudice where plaintiff's request for a discontinuance without prejudice was an apparent attempt to evade the consequences of an adverse order on defendant's pending motion for summary judgment and preserve its ability to commence a Federal action." *See also, Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.*, 273 A.D.2d 55, 57 (1<sup>st</sup> Dept.), *lv. den.* 95 N.Y.2d 767 (2000); *Lui v. Chinese-American Planning Council, Inc.*, 300 A.D.2d 80 (1<sup>st</sup> Dept. 2002). Plaintiffs' replies attempt to distinguish *NBN Broadcasting* by emphasizing that the defendant's

dispositive motion in that case was already pending when plaintiff sought a discontinuance, which was not the case here.

During various court conferences and in dueling letters to each other, both parties hotly argued their respective "first in time, first in right" positions to support their respective w/o prej. discontinuance and summary judgment motions. For instance, Wyeth argues it acted first by sending two letters dated March 28, 2008 and April 8, 2008 (Exh. X to Falkenberry Aff. in Opp. to Plaintiffs' Motions to Dismiss Without Prejudice) to plaintiffs' liaison counsel requesting discontinuance of eight allegedly time-barred cases (seven of which are subject to the instant motions) to avoid motion practice. Plaintiffs argue these letters are deficient with respect to those plaintiffs not specifically mentioned therein and claim to have acted first by presenting defendants' liaison counsel with stipulations of discontinuance without prejudice on May 9, 2008, which defendants refused to sign.

However, the parties' respective claims to superior rights based on whose motion(s) filings successfully made first place in their race to the courthouse is academic. This is so because the parties entered into a consent order on May 9, 2008 deeming any motions to discontinue and for summary judgment to have been filed simultaneously (Exh. Y to Falkenberry Aff. in Opp. to Plaintiffs' Motions to Dismiss Without Prejudice).

This being said, this court's sole inquiry must focus on whether defendants will suffer prejudice if w/o prej. discontinuance orders are granted which would ostensibly allow plaintiffs' Minnesota actions to continue.

On this record, while plaintiffs' position is superficially reasonable, still, under the circumstances presented it is truly difficult for this court to fathom anything more prejudicial to defendants than being deprived of their right to judgment on the merits dismissing these clearly time-barred actions. As will be discussed, *infra*, having established the right to judgment in their favor, the court finds that defendants will be severely prejudiced if plaintiffs' w/o prej. discontinuance motions are granted. See *Schachter v. Royal Ins. Co. of America*, 21 A.D.3d 1024 (2d Dept. 2005)(lower court "improvidently exercised its discretion in granting the plaintiff leave to discontinue the action . . . since it would allow the plaintiff to avoid the adverse consequences of having commenced an untimely action . . ."); see also, *NBN Broadcasting, Inc. v. Sheridan Broadcasting Networks, Inc.*, *supra*; *Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.*, *supra*; *Lui v. Chinese-American Planning Council, Inc.*, *supra*. Accordingly, these appellate precedents compel this court to deny plaintiffs' w/o prej. discontinuance motions in their entirety.

#### **SUMMARY JUDGMENT**

To support their claim that summary judgment should be granted dismissing plaintiffs' untimely actions, Wyeth and Upjohn rely on each moving plaintiff's sworn statements and/or their PFS's exchanged in accordance with Case Management Order No. 3 in the New York Coordinated HRT Proceeding. Further, all parties reiterated their arguments made in connection with plaintiffs' w/o prej. discontinuance motions.

### Product Liability Causes of Action

It is undisputed that plaintiffs' strict product liability, failure to warn, manufacturing defect, design defect, negligence and negligent infliction of emotional distress causes of action are subject to a three year statute of limitations. CPLR §214-c. Under CPLR §214-c, plaintiffs' claims accrued on the date their injuries were discovered. Here, defendants argue plaintiffs' diagnosis dates (as set forth in each plaintiff's PFS or sworn statement) are the latest possible dates on which the statute of limitations began to run.<sup>12</sup> Since each moving plaintiff discovered her injuries more than three years before filing suit, defendants contend summary judgment should be granted in their favor dismissing the complaints.

Defendants' motion also anticipated plaintiffs' potential reliance on CPLR §214-c(4) to overcome the former's otherwise rock-solid statute of limitations defense. Known as the Discovery Rule, CPLR §214-c(4) allows a plaintiff allegedly injured from exposure to harmful substances to start a lawsuit within one year from discovery of the cause of the injury:

[W]here the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury; provided, however, if any such action is commenced or claim filed after the period in which it would otherwise have been authorized pursuant to subdivision two or three of this section the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information ["scientific

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<sup>12</sup> Plaintiffs were diagnosed with an allegedly HRT caused disease between 1987 and 2002 and each commenced her respective New York action in 2004 or 2005 (those cases bearing 2006 and 2007 New York County index numbers were commenced in other New York State counties in 2004 or 2005).

information”] sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized and that he has otherwise satisfied the requirements of subdivisions two and three of this section. (Bracketed matter added).

Defendants contend the delayed accrual benefit of CPLR §214-c(4) is not available to plaintiffs because the absolute latest date plaintiffs were capable of discovering the scientific information necessary to draw conclusions about the alleged cause of their injuries was July 9, 2002, the publication date of the Women’s Health Initiative Study (“WHIS”).<sup>13</sup> Here, all of the plaintiffs filed their cases after July 9, 2003. Thus, Wyeth and Upjohn jointly argue that even if CPLR §214-c(4) is implicated and the WHIS’s publication date is the relevant date for accrual purposes, which defendants do not concede, plaintiffs still failed to timely commence their actions.

### **Plaintiffs’ Opposition**

In opposition to summary judgment, plaintiffs jointly (and severally, where appropriate) argue:

- They are entitled to w/o prej. discontinuances under CPLR 3217 and as such, defendants’ motions for summary judgment should be denied as moot;
- Summary judgment is premature because a jury must determine certain material issues of fact which remain as to whether or not Wyeth affirmatively misled the medical community and the public as to the benefits and risks of HRT both before and after the publication of the WHIS leaving women unable to learn if

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<sup>13</sup> Plaintiffs’ Consolidated Response in Opposition to Defendants’ Motions for Summary Judgment (Beer, R. Cohen, O’Leary and Rick) elaborates that the National Institutes of Health performed the WHIS which was “the first ever long-term study evaluating the relationship between Prempro and breast cancer . . .” See Marshall Opp. Aff. at Exh. B. The WHIS concluded that “the overall risks of Prempro outweigh its benefits.” Plaintiffs have asserted that Wyeth significantly changed its Prempro labeling after release of the WHIS. *Id.* at pp. 13-14.

HRT drugs caused their injuries before July 2002,<sup>14</sup> thus, implicating the equitable estoppel doctrine which should toll the statute of limitations for all plaintiffs except Manuel, Marshall and Rose;

- Certain plaintiffs (Marshall and Veralli) were effectively barred from starting their New York actions until the May 21, 2003 dismissal of *Lewers v. Wyeth*, an Illinois class action<sup>15</sup> (now part of the MDL), another plaintiff (Manuel) was effectively barred from commencing her New York action until the October 20, 2005 dismissal of the class action portion of *Michael v. Wyeth*,<sup>16</sup> a West Virginia class action (also now part of the MDL) and three other plaintiffs (R. Cohen, Epstein and Rose) were barred from starting their New York actions because of the pendency of both class actions (“6 plaintiffs”, where applicable);
- Further discovery is still needed as the only discovery to date has been the completion of a PFS for each case, depositions in some cases and production of limited records;
- There is a dispute regarding the date of plaintiff Epstein's diagnosis in that her PFS notes her being diagnosed with breast cancer in July 2000, whereas her medical records indicate she was diagnosed with this disease on August 1, 2000 (the date of her needle biopsy);<sup>17</sup>

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<sup>14</sup> Plaintiffs contend Wyeth *inter alia* conducted no studies prior to the WHIS to determine whether long-term use of combined HRT could cause breast cancer and “ghost wrote” medical journal articles in an effort to downplay the potential risks associated with its HRT products.

<sup>15</sup> *Lewers v. Wyeth* (Case No. 02-04970)(“*Lewers*”) was commenced before the U.S. District Court, Northern District of Illinois on July 15, 2002. The class of plaintiffs sought to be represented included all persons injured as a result of ingesting Prempro. *Lewers* was transferred to the MDL docket in the Eastern District of Arkansas and was voluntarily dismissed on May 21, 2003.

<sup>16</sup> *Michael, et al. v. Wyeth Pharmaceuticals, Inc., et al.* (Civ. Action No. 2:04-0435) (“*Michael*”) was commenced before the U.S. District Court, Southern District of West Virginia on May 6, 2004, was transferred to the MDL on July 26, 2004 and the class action portion was voluntarily dismissed on October 20, 2005. The represented class of plaintiffs would have consisted of women who were injured as a result of ingesting defendants' estrogen, progestin or combination estrogen/progestin medications at any time prior to July 9, 2002.

<sup>17</sup> The legal significance of this date discrepancy remains unclear from Epstein's opposition to defendants' summary judgment motion. Perhaps, this allegation was made to meet a CPLR §214-c(4) requirement that plaintiff must discover the cause of her injury within five years of discovering the injury.

- There is a dispute according to plaintiffs Epstein and Marshall about whether the publication date of the WHIS was really the latest possible date plaintiffs could have learned what caused their injuries because Wyeth's alleged actions after the publication of the WHIS raise material issues of fact as to the sufficiency of the scientific information needed for them to conclude their ingestion of HRT medication caused their breast cancer implicating the delayed accrual provisions of CPLR §214-c(4); and
- As to plaintiff Marshall, there exists an additional disputed issue of fact as to when there was sufficient scientific information for her to conclude that HRT caused her breast cancer and, therefore, her cause of action did not accrue until the August 9, 2003 publication date of the Million Women Study ("MWS").<sup>18</sup>

In reply, Wyeth counters: 1) equitable tolling is inappropriate based upon findings of other courts nation-wide in HRT cases; 2) equitable estoppel cannot be applied because plaintiffs' fraud causes of action are based upon the same conduct alleged to be fraudulent concealment; 3) plaintiffs fail to establish two elements of estoppel, *viz.*, reliance and reasonable diligence in investigating the cause of their injuries; 4) plaintiffs' own experts have conceded in other pending actions that Wyeth never misrepresented or concealed the risk of breast cancer; 5) the association between HRT and breast

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<sup>18</sup> Marshall was diagnosed with breast cancer on April 16, 1999 and filed her New York action on April 14, 2004. This plaintiff argues that at the time of her diagnosis, there was insufficient scientific information for her to learn whether HRT drugs caused her breast cancer. This plaintiff claims CPLR §214-c(4) gave her an extended one year accrual period to file from the time she obtained such purportedly definitive knowledge. Marshall further claims that because Wyeth paid for an article refuting the WHIS in May 2003, this published material added to the technical, medical and scientific literature questioning whether HRT drugs with progestin cause breast cancer. Wyeth's self-serving contribution to this growing body of literature, Marshall contends, forecloses Wyeth from establishing the WHIS publication date as the latest date for Marshall to have discovered the scientific information necessary to conclude that HRT caused this plaintiff's breast cancer (Ashkin Opp. Aff. at ¶18). Rather, Marshall argues she timely filed her action within one year of the publication date of the MWS, the first study that "conclusively showed a doubling of the risk of breast cancer from combination HRT." See Plaintiffs' Memorandum of Law in Opp. to Wyeth Defendants' Motion for Summary Judgment submitted in Marshall, at p.13. Alternatively, Marshall argues that if this court finds sufficient scientific information existed when the WHIS was published, the statute of limitations was tolled by the *Lewers* class action.

cancer was widely discussed at the time plaintiffs were diagnosed with this disease; 6) tolling of the three year statute of limitations under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) ("*American Pipe*") is inapplicable because: a) this case has not been adopted in New York; b) the 6 plaintiffs filed their actions before the class action claims were dismissed; c) tolling is given effect only to the first class action; and d) tolling is unavailable in personal injury product liability actions; 7) *Lewers* and *Michael* were sham class actions; and 8) Epstein and Marshall's cases are time-barred notwithstanding CPLR §214-c(4) *inter alia* because plaintiffs have not pleaded entitlement to the extra one year.

Upjohn's own reply incorporates Wyeth's reply arguments, but further notes the following distinctions. *Lewers* did not name any Upjohn defendant so there can be no tolling on the basis of *Lewers* as against the two Upjohn defendants (Pfizer and Greenstone) named in the Marshall action. Further, the Upjohn defendants named in the R. Cohen, Epstein, Rose, Veralli and Manuel actions were not named in *Michael* and, similarly, there can be no tolling of the accrual period on the basis of *Michael* as against the named Upjohn defendants. Finally, Upjohn contends that since plaintiffs make no claim of fraudulent concealment against Upjohn, only Wyeth, plaintiffs should not be allowed to rely on this ground to toll the statute of limitations regarding their New York actions against Upjohn.

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943 (1<sup>st</sup> Dept., 1984), *aff'd* 62 N.Y.2d 938 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). In order to prevail on

a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

It is undisputed that plaintiffs did not file their respective complaints within three years of their diagnoses of breast cancer. Unless plaintiffs can demonstrate that either: 1) CPLR §214-c(4) is applicable; 2) defendants should be equitably estopped from asserting their statute of limitations defense; or 3) the statute of limitations was tolled pursuant to *American Pipe*, defendants must be granted summary judgment dismissing these complaints.<sup>19</sup>

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<sup>19</sup> The court's analysis in the ensuing discussion is applicable to all moving plaintiffs except Weisberg. This plaintiff's complaint must be dismissed as time-barred since her action was not commenced within three years of her diagnosis. Weisberg is the sole moving plaintiff who did not develop breast cancer. As noted, *supra*, although the moving and opposition

### CPLR §214-c(4)

Defendants essentially claim plaintiffs are unequivocally time-barred. However, to the extent plaintiffs seek the extended accrual benefits of CPLR §214-c(4) to render their complaints timely, defendants argue the Discovery Rule's one year extension would still not save their actions because the WHIS publication date of July 9, 2002 was the latest possible date when there was sufficient scientific information for plaintiffs to learn the cause of their injuries (i.e., the toxic, inorganic etiology of their breast cancer). To be timely, plaintiffs would have had to file their actions no later than July 9, 2003. Twenty one of plaintiffs do not even address this argument. But, they identically argue they were unable to discover the true nature as to the cause of their injuries due to Wyeth's misleading campaign promotions and bring forward this argument to invoke the equitable estoppel doctrine to vitiate defendants' time-bar defense (see discussion, *infra*).

Except for Marshall and Epstein, any discussion as to the applicability of CPLR §214-c(4) to salvage the remaining plaintiffs' complaints would be a hypothetical one because defendants preemptively raise this issue in their summary judgment motions anticipating plaintiffs' potential counterattack relying on the Discovery Rule. This never materialized and, therefore, this court declines to issue an advisory opinion regarding this issue *vis-a-vis* these plaintiffs.

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papers identify her as having suffered deep vein thrombosis and a pulmonary embolism, Weisberg's opposition to defendants' motion for summary judgment solely addresses the link between HRT and breast cancer without associating HRT with her pleaded conditions. Since Weisberg fails to meet her burden, there is no basis to equitably toll the statute of limitations and her action must fail.

Only plaintiffs Epstein and Marshall advance the notion that an issue of fact exists as to whether there was sufficient (credible), published scientific information for them to discover the cause of their breast cancer, information they claim was not available during the ensuing years following their diagnoses of this disease. As more fully discussed *infra*, these plaintiffs contend Wyeth "contaminated" the scientific literature with ghost-written articles disputing the findings contained in the WHIS and other alleged attempts to downplay the risk of HRT thereby creating a material issue of fact regarding their delay in timely filing their claims against defendants.

Marshall alone claims that the publication date of the MWS marks the point at which sufficient scientific information as to the cause of her breast cancer was available, noting that the MWS built upon the WHIS and found a doubling of the risk of breast cancer from combined HRT. Using the MWS's August 9, 2003 publication date for CPLR §214-c(4) tolling purposes, Marshall's action having been commenced on April 14, 2004 would otherwise be timely.<sup>20</sup>

Although the date when sufficient scientific information was available for plaintiffs to determine the cause of their injuries is generally a question for the jury, this court finds Marshall's arguments regarding the MWS to be unavailing. While no plaintiff has argued/briefed the question requiring the court to determine whether the date of WHIS's publication is definitive for CPLR §214-c(4) tolling purposes,<sup>21</sup> nonetheless, as between

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<sup>20</sup> Epstein would be unable to adopt this argument to maintain her lawsuit, because she filed suit on July 6, 2005, more than one year after the MWS August 9, 2003 publication date.

<sup>21</sup> Wyeth refers to *inter alia* testimony from the MDL plaintiffs' own experts, decisions from other state and federal courts and their HRT products' warning labels to credibly demonstrate that linkage between HRT and breast cancer was known to doctors and

the WHIS and MWS, the earlier study indubitably linked HRT to breast cancer. In fact, this conceded, well publicized study actually caused Wyeth to change its HRT product labels *inter alia* to include a black box warning<sup>22</sup> advising of this study's finding of an increased risk of breast cancer. What is significant here and dispositive of the tolling issue is that a comparison of the WHIS and MWS reveals the latter study to have established more certainty about the linkage between HRT and breast cancer.

Despite Wyeth's role in publishing articles subsequent to the WHIS disputing its findings, nonetheless, scientific information about the potential risks of taking HRT medication was publicized and made available prior to the publication of the MWS. Defendants have shown this to be the case thus foreclosing Marshall from relying on the MWS to render her claims timely.

Nor do Marshall and Epstein create any issue of fact as to the unsettled nature of the general knowledge of the medical and scientific community after the WHIS was published. Indeed, Epstein's opposition to the summary judgment motion fails to identify what particular action Wyeth took, post-WHIS, to prevent her from discovering the scientific information she needed to conclude that her ingesting HRT medication caused her breast cancer. To corroborate Wyeth's alleged misleading efforts to muddy the waters surrounding the body of scientific literature, Epstein points to *Progestins and*

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consumers as early as the 1970's. See Falkenberry Reply Aff. at Exhs. 15, 20, 21, 24, 25, 26 and 27.

<sup>22</sup> In the United States, the FDA can require a black box warning on a package insert for a prescription drug. It is described as such because of a black border that surrounds the printed warning. It is the strongest type of warning for a drug and generally warns a prescriber that medical studies have shown the drug's adverse side effects can cause serious injury or death ([http://en.wikipedia.org/wiki/Black\\_box\\_warning](http://en.wikipedia.org/wiki/Black_box_warning)).

*Breast Cancer*, a Wyeth published 2003 article authored by John Eden, M.D. and published in the American Journal of Obstetrics and Gynecology, Vol. 188, No. 5. Using 2003 as the operative year and *arguendo* applying the Discovery Rule, this plaintiff's action would still be untimely.

Finally, as to Marshall, Wyeth's ghost-written medical journal articles, even if contradictory to the WHIS, demonstrate an ongoing medical debate. However, their existence in the body of scientific literature does not undermine the fact that taking HRT exposes the consumer to the potential risk of breast cancer, information that was a matter of public knowledge for decades and duly disclosed after the publication of the WHIS on Wyeth's HRT product labels themselves. See *Falkenberry Reply Aff.* at Exhs. 20 and 21. For the foregoing reasons, plaintiffs Marshall and Epstein cannot rely on the extended accrual provisions of CPLR §214-c(4) to render their claims timely.

### **Equitable Estoppel**

"It is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action (internal citations omitted)." *Simcuski v. Saeli*, 44 N.Y.2d 442, 448-449 (1978); *Kaufman v. Cohen*, 307 A.D.2d 113, 122 (1<sup>st</sup> Dept. 2003). As explained in *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 127-128 (1966):

The principle that a wrongdoer should not be able to take refuge behind the shield of his own wrong is a truism. The United States Supreme Court has espoused the doctrine in these terms: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes

of limitations.” (*Glus v. Brooklyn Eastern Term.*, 359 U.S. 231, 232-233 [1959].) . . .

Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant’s affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding . . .

This doctrine “requires proof that a defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action [internal citations omitted] . . . However, . . . equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff’s underlying cause of action . . .”

*Kaufman v. Cohen, supra.*

The equitable estoppel doctrine is an extraordinary remedy and plaintiffs “must demonstrate reasonable reliance on the defendant’s misrepresentations (citations omitted), and due diligence on the part of the plaintiff in ascertaining the facts, and in commencing the action, is an essential element . . .” *Pahlad v. Brustman*, 33 A.D.3d 518, 519-520 (1<sup>st</sup> Dept. 2006), *aff’d* 8 N.Y.3d 901 (2007).<sup>23</sup> See also, *Marincovich v. Dunes Hotels & Casinos, Inc.*, 41 A.D.3d 1006, 1010 (3<sup>rd</sup> Dept. 2007)(“a party must be diligent in starting the lawsuit “within a reasonable time after the facts giving rise to the estoppel have ceased to be operational . . .”).

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<sup>23</sup> As noted earlier and discussed below, plaintiffs E. Cohen, Frankel, Knecht, Lesser, Lobel, McKenna, Mechanic, Rosenberg, Veralli and Weisberg subsequently moved to amend their complaints to allege *inter alia* reasonable reliance and due diligence. Plaintiffs Manuel, Marshall and Rose seek to amend their complaints to add a cause of action for fraud.

As previously noted, plaintiffs charge Wyeth with actively misleading the medical community and the public as to the benefits and risks of HRT both before and after publication of the WHIS. As a result, these plaintiffs argue, women were unable to discover that HRT drugs caused their injuries before July 2002. Plaintiffs also contend that Wyeth's conduct raises a material issue of fact as to whether a woman taking HRT medication, who reasonably relied on Wyeth's misinformation, was legitimately frustrated in exercising due diligence to ascertain the requisite facts needed to start a lawsuit within the prescribed limitations period. Based thereon, plaintiffs urge the application of the equitable estoppel doctrine to toll the statute of limitations for certain plaintiffs.

Plaintiffs' typical fraud cause of action (implicitly pleading fraudulent concealment) alleges defendants jointly and severally pursued a deliberate course of conduct to omit, suppress and misrepresent material factual information "designed to obscure the truth and induce reliance on the part of doctors and consumers like . . . [plaintiffs] . . ." (bracketed matter added)(*illustratively, see* Complaint of E. Cohen as Exhibit A to Motion for Leave to File Amended Complaint at ¶ 65). Nowhere in this second cause of action or in the body of the complaint does plaintiff allege she was only able to learn of defendants' alleged acts of deceit, fraud and/or misrepresentation especially after the publication of the WHIS entitling this plaintiff and others similarly situated to benefit from the tolling or delayed accrual provisions of CPLR §214-c(4). More to the point, neither has any of plaintiffs, by sworn affidavit, averred to being lulled by Wyeth's alleged misleading tactics and/or deliberate concealment of scientific information to refrain from timely filing their claims.

This court concludes that plaintiffs' complaints do not plead the necessary elements of reasonable reliance and due diligence (*Robare v. Fortune Brands, Inc.*, 39 A.D.3d 1045 [3<sup>rd</sup> Dept. 2007]). Moreover, even if these requisite allegations could be teased out of their fraud causes of actions via a liberal reading thereof, this court nonetheless finds that plaintiffs have not established any probative evidentiary basis to even litigate the issue of equitable estoppel against defendants and bar them from asserting their statute of limitations defenses (*cf.*, *General Stencils, Inc. v. Chiappa*, *supra*, 18 N.Y.2d at 128). While plaintiffs' proffered evidence is extensive, a review of the material and the record as a whole contain no evidence of fraud, misrepresentation or deception by virtue of Wyeth's alleged failure to conduct further studies regarding the side effects of HRT and its "ghost writing" of medical journal articles, post-WHIS, which specifically caused plaintiffs to refrain from timely starting their lawsuits. To negate their claim that Wyeth pursued an ongoing campaign to hide what they allege to be the cause of their injuries, Wyeth cites to a plethora of articles linking breast cancer with HRT, many of which were published and made known to the medical and scientific community at the time of plaintiffs' diagnoses.

It is readily apparent to this court that the conflict between plaintiffs' research and defendants' research strongly suggests an ongoing medical debate as to the risks versus benefits of taking HRT. Though this debate does not appear to be settled, the potential risk of contracting breast cancer from taking HRT medication was well known and at all times out there in the stream of public information. On this record, this court simply cannot conclude that Wyeth engaged in any intentionally fraudulent or deceptive

act which ostensibly lulled plaintiffs into inactivity and induced them to refrain from filing timely actions.

For the foregoing reasons, plaintiffs fail to raise a triable issue of fact as to whether equitable estoppel is available to prevent defendants from asserting the limitations period as a defense. See *D'Agostino v. Town of Pound Ridge*, 41 A.D3d 760, 762 (2<sup>nd</sup> Dept. 2007); *Robare v. Fortune Brands, Inc.*, *supra*, 39 A.D.3d at 1047.

Finally, as to Upjohn, plaintiffs' allegations of alleged wrongdoing to preclude the assertion of a statute of limitations defense are directed solely to Wyeth. Plaintiffs do not seek to invoke this equitable tolling doctrine against Upjohn as they do not claim nor even suggest Upjohn was in any way complicit in Wyeth's alleged misdeeds. Finally, plaintiffs cite no authority for the implied, albeit novel, proposition that Upjohn should otherwise be held accountable for Wyeth's acts.

#### **Tolling Under *American Pipe***

Under *American Pipe*, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. The U.S. Supreme Court's rationale is simple to understand. This class action tolling doctrine protects those proposed class members who actually or constructively awaited the outcome of a federal court decision granting or denying class certification under Federal Rule of Civil Procedure 23, a decision invariably made after the controlling federal statute of limitations has expired.<sup>24</sup> In *Crown, Cork & Seal Co., Inc.*

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<sup>24</sup> In the State of Utah's underlying federal antitrust action, the District Court denied class certification because the numerosity requirement was not satisfied. Thereafter, putative

*v. Parker*, 462 U.S. 345 (1983) ("*Crown, Cork*"), the U.S. Supreme Court extended its *American Pipe* tolling ruling to proposed class members who filed individual actions after denial of class certification. The *American Pipe* holding had previously been applied to certified class members who timely intervened but decided to opt out and file their individual actions (otherwise time-barred) after class certification was granted (see *Eisen v. Carlisle & Jacquelin*, 417 U.S.156 [1974]).

To briefly reiterate, defendants argue tolling under *American Pipe* is inapplicable to toll the 6 plaintiffs' claims *inter alia* because this federal tolling rule has not been adopted in New York, particularly where, as here, these actions do not involve federal questions and are based upon federal class action suits filed outside New York. Defendants further argue that even if New York followed *American Pipe*, the 6 plaintiffs' claims are still untimely since: 1) these plaintiffs filed their actions before the *Lewers* and *Michael* class action claims were dismissed; 2) if applied, the *American Pipe* rule would only allow tolling as to *Lewers*, the first class action and not to the successive *Michael* action; 3) tolling is unavailable in personal injury product liability actions; and 4) *Lewers* and *Michael* were sham class actions.

Notably, no binding appellate authority exists as to the applicability of *American Pipe* to New York actions. Nonetheless, this court finds defendants' arguments persuasive to conclude that the tolling remedy authorized under the *American Pipe* doctrine is inapplicable here and does so relying on case law from the federal courts

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class members sought to intervene after the controlling statute of limitations had expired. Thus, the U.S. Supreme Court ultimately held that the tolling of the statute of limitations rendered these putative class members' intervention motions timely.

sitting in New York. As defendants note, *American Pipe* and *Crown, Cork* both involve limitations periods derived from federal statutes<sup>25</sup>, whereas here only New York law is implicated. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 210, 213 (2d Cir. 1987) (the implicated limitation statutes of Hawaii do not provide for tolling under the circumstances underlying *American Pipe* and *Crown, Cork* and, therefore, "it is doubtful that either *American Pipe* or *Crown, Cork* can be treated as applicable precedent."); see also, *In re Rezulin Prod. Liab. Litig.*, 2005 WL 26867, \*3 (S.D.N.Y. 2005)(rejecting tolling of state statute of limitations on purely state law claims). As further noted in *In re Rezulin*, "[t]he wisdom of adopting the *American Pipe* rule in mass tort cases is, to say the least, highly debatable." *Id.* Finally, *American Pipe* cannot be used to toll the statute of limitations as to Upjohn where this defendant was not named in any class action. *Id.* at \*2.

Parenthetically, relevant to Wyeth's argument point as to whether the *American Pipe* rule can be applied where a proposed class member starts a time-barred lawsuit before the class certification issue is decided,<sup>26</sup> the Second Circuit recently issued a ruling at odds with the First Circuit (see *Glater v. Eli Lilly & Co.*, 712 F.2d 735 [1<sup>st</sup> Cir. 1983]) and Sixth Circuit (see *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553 [6<sup>th</sup> Cir. 2005]). In *In re WorldCom Secs. Litig.*, 496 F.3d 245 (2<sup>nd</sup> Cir. 2007), the

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<sup>25</sup> See *Stone Container Corp v. U.S.*, 229 F.3d 1345, 1354 (Fed. Cir. 2000) ("*American Pipe* and *Crown, Cork & Seal* were not based on judge-made equitable tolling, but rather on the Court's interpretation of Rule 23 . . .").

<sup>26</sup> See Wyeth's omnibus Reply Memorandum in Support of Summary Judgment Motion to Dismiss Plaintiffs' Claims With Prejudice at p. 30, fn. 130.

Second Circuit reversed the District Court's dismissal of untimely actions putative class members commenced before the class certification motion was decided, a ruling that *inter alia* relied on these earlier federal appellate precedents and now holds that the tolling benefits of *American Pipe* are not limited to those putative class members who filed individual actions after class certification has been denied. This court's recent research also discloses that the U.S. Supreme Court, given the split among the circuit courts, has yet to definitively determine whether the *American Pipe* rule is equally available to putative class members who file individual actions both before and after the determination of the class certification issue (see Special Supplement Section, Class Action Trends, Lowenthal and Haggerty, '*American Pipe*' and Tolling for Individual Claims, N.Y.L.J., May 18, 2009, S6 [p. 62, col. 1]). Because the foregoing factors have greater certainty in the body of case law addressing this tolling rule, it is unnecessary to consider this point in deciding whether *American Pipe* tolls the 6 plaintiffs' claims.

Based on the foregoing, as plaintiffs failed to establish that the three year statute of limitations should be tolled either under CPLR § 214-c(4), pursuant to the equitable estoppel doctrine and/or under *American Pipe*, both Wyeth's and Upjohn's motions for summary judgment should be granted dismissing plaintiffs' time-barred causes of action filed after the three year limitation period. As an additional matter, Upjohn's summary judgment motion is granted dismissing plaintiff Lesser's complaint against these defendants based upon lack of product identification.<sup>27</sup>

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<sup>27</sup> Lesser's initial 2004 complaint (Exhibit A to Motion to Amend) does not plead a single fact about her taking any Upjohn HRT product. This plaintiff's 2008 proposed amended complaint signed by counsel (Exhibit B to Motion to Amend at ¶¶ 154-162)), for the first time mentions Provera, an Upjohn HRT drug and other alleged facts to support the various causes

### Fraud and Remaining Causes of Action

To round out this discussion involving subject matter for the most part rendered academic by the foregoing ruling, defendants' motions for summary judgment also briefly address the timeliness of plaintiffs' other causes of action, to wit: breach of express and implied warranty (four year statute of limitations under New York Uniform Commercial Code ["UCC"] §2-725[1]-[2] commencing from the date of delivery); fraud, deceit, deceit by concealment, fraudulent misrepresentation and negligent misrepresentation (under CPLR 213(8), the statute of limitations is the greater of 6 years from the date of accrual or 2 years from the time plaintiffs discovered the fraud or with reasonable diligence could have discovered the fraud); GBL §349 violations (3 year limitations period under CPLR 214[2]); loss of consortium (statute of limitations is the same as that of the underlying action); assault and battery (1 year statute of limitations accruing when the tortious act occurs); intentional infliction of emotional distress (1 year statute of limitations accrues when plaintiff first suffered extreme emotional distress as a result of her injury).

Plaintiffs' opposition does not address the foregoing causes of action and therefore this court concludes that these causes of action having a statute of limitations of 3 years or less are clearly time-barred. Defendants having established their right to summary judgment dismissing these claims, the burden of proof shifted to plaintiffs to demonstrate by admissible evidence the existence of a factual issue requiring a trial.

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of action previously pleaded against Wyeth. There is no affidavit in opposition to Upjohn's summary judgment motion and in support of her motion to amend to competently explain Lesser's failure to mention her use of this drug in her initial complaint and/or other competent proof to show she actually took this drug.

*Zuckerman, supra*; see also, *Desouter v. HRH Const. Corp.*, 216 A.D.2d 249 (1<sup>st</sup> Dept. 1995). As set forth in *Spearmon v. Times Square Stores Corp.*, 96 A.D.2d 552, 553 (2<sup>nd</sup> Dept. 1983):

It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." Bare conclusory allegations are insufficient to defeat a motion for summary judgment [citations omitted].

If the opposing party fails to submit evidentiary facts to controvert the allegations set forth in the movant's papers, the movant's allegations may be deemed admitted.

*Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539, 544 (1975). Summary judgment may then be granted, as no triable issue of fact exists. *Id.*

As to the fraud causes of action which potentially have a 6 year limitations period, plaintiffs' fraud claims are merely incidental to their product liability claims and are subject to the same 3 year statute of limitations. As set forth in *New York Seven-Up Bottling Co., Inc. v. Dow Chemical Co.*, 96 A.D.2d 1051, 1052-1053 (2d Dept. 1983), *aff'd* 61 N.Y.2d 828 (1984):

Since we find that plaintiff's strict products liability action is time-barred, its cause of action sounding in fraud must likewise be dismissed (see *Western Elec. Co. v Brenner*, 41 NY2d 291; *Brick v Cohn-Hall-Marx Co.*, 276 NY 259). The six-year fraud Statute of Limitations (CPLR 213, subd 8) is only applicable when there would be no injury but for the fraud (*Glover v National Bank of Commerce*, 156 App Div 247, 256). Where the allegations of fraud are only incidental to another cause of action, the fraud Statute of Limitations cannot be invoked (*Brick v Cohn-Hall-Marx Co.*, *supra*). Here, the genesis of plaintiff's claim is that it was injured by a defective product. It cannot, by adding an allegation of *scienter*, invoke the longer period of limitations. Since Dow's alleged fraud consisted of representations made while marketing the styrofoam at the time plaintiff's plant was being constructed, such allegations are only incidental to

plaintiff's cause of action sounding in products liability. Thus, plaintiff's claims are time-barred.

*See also, St. Patrick's Home for Aged & Infirm v. Laticrete Int'l, Inc.*, 264 A.D.2d 652, 653-654 (1<sup>st</sup> Dept. 1999). Accordingly, the fraud causes of action are dismissed.

Finally, as to the remaining causes of action for breach of warranty, which are subject to a 4 year statute of limitations, plaintiffs also fail to address this issue and Wyeth rests on its arguments related thereto as contained in its motions. See Wyeth's Reply Memorandum of Law in Support of its Motion for Summary Judgment, at p. 1, fn. 1. As plaintiffs fail to "lay bare their proof" in support of this claim, this court similarly dismisses this claim. *See Kuøhne & Nagel, Inc. v. Baiden, supra*.

**Motion to Amend Complaints in E. Cohen, Frankel, Knøcht, Lesser, Lobel, Manuel, Marshall, McKenna, Mechanic, Rose, Rosenberg, Veralli and Weisberg**

In light of this court's foregoing decision granting defendants summary judgment dismissing plaintiffs' complaints, the motions to amend must be denied as moot. The allegations plaintiffs seek to plead in their proposed amended complaints would not render their claims timely.

Based on the foregoing, it is hereby

ORDERED that the plaintiffs' motions to discontinue, without prejudice, are denied; and it is further

ORDERED that defendants' motions for summary judgment are granted and the complaints in each of the above captioned actions are dismissed; and it is further

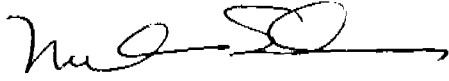
ORDERED that plaintiffs' motions to amend are denied as moot.

The Clerk is directed to enter judgment accordingly.

Counsel for the parties shall appear for a status conference on the remaining HRT cases not affected by the determination of these motions on January 12, 2010 at 2:15 p.m. at I.A.S. Part 1, Room 1127B, 111Centre Street, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to plaintiffs' and defendants' liaison counsel.

Dated: New York, New York  
November 30, 2009

  
HON. MARTIN SHULMAN, J.S.C.

**FILED**  
DEC 14 2009  
NEW YORK  
COUNTY CLERK'S OFFICE