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FILED
ALAMEDA COUNTY

AUG 02 2016

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LANCE;
BIANCHI;
BROWN;
HYDE & KELLER;
MATTERN;
RIPPERGER,

Plaintiffs,

v.

Bayer Essure Inc., Bayer Corporation, Bayer
HealthCare LLC, and Bayer HealthCare
Pharmaceuticals, Inc.

Defendants.

Case No. RG16809860;
RG16813262;
RG16813616;
RG16812313;
RG16809878;
RG16804878.

ORDER ON STATUTE OF
LIMITATIONS DEMURRER

The Demurrer of defendants Bayer Essure Inc., Bayer Corporation, Bayer HealthCare LLC and Bayer HealthCare Pharmaceuticals, Inc. ("Defendants") on the basis of statute of limitations ("SOL Demurrer") came on regularly for hearing on July 29, 2016 in Department 21 of this Court, the Honorable Winifred Y. Smith, presiding. Appearances are reflected in the attendance sheet filed on the date of the hearing.

After full consideration of the moving papers, the opposition thereto, the authorities cited by the parties, as well as arguments presented at the hearing, and the matter having been submitted for decision, and good cause appearing,

IT IS HEREBY ORDERED as follows:

PROCEDURAL BACKGROUND:

Currently before the court are eleven lawsuits against Defendants arising from the use by the plaintiffs of a medical permanent birth control device manufactured, formulated, tested, packaged, labeled, produced, created, made, constructed, assembled, marketed, advertised, promoted, distributed, and sold by Defendants called "Essure." Represented in these eleven suits are fourteen women in whom the device was implanted, and six spouses with loss of consortium claims.

Of the eleven suits, four (RG16809860, Lance v. [Defendants]; RG16809292, Migliaccio v. [Defendant]; RG16813262, Bianchi v. [Defendants]; and RG16813616, Brown v. [Defendants]) utilized complaints that are virtually identical to one another, except for the section entitled "Plaintiff's History" (hereafter, "Lance Complaint"). Similarly, the other seven cases (RG16809875, Birruete v. [Defendants]; RG16812313, Hyde & Keller v. [Defendants]; RG16810409, Journey, Thomas & Melgar v. [Defendants]; RG16809878, Mattern v. [Defendants]; RG16804887, Parades & Moreno v. [Defendants]; RG16804878, Ripperger v. [Defendants]; and RG16809876, Webb v. [Defendants]) utilize

complaints that are virtually identical to one another, again with the exception of the section entitled "Plaintiff's History" ("Birruete Complaint").

The Lance Complaint includes causes of action for (1) Negligent Failure to Warn, (2) Negligence, (3) Strict Products Liability, and (4) Fraud, and the Birruete Complaint includes causes of action for (1) Negligent Failure to Warn, (2) Strict Products Liability - Inadequate Warnings; (3) Negligence / Negligence Per Se, (4) Breach of Express Warranty, (5) Negligent Misrepresentation, and (6) Fraud. Four of the Birruete Complaints also include a cause of action for Loss of Consortium.

By agreement of the parties, Defendants' challenges to the pleadings in these eleven cases have been coordinated. Concurrently with this SOL Demurrer, the court will rule separately on whether, or to what extent, Plaintiffs' claims are preempted by the Medical Device Act ("MDA") ("Preemption Demurrer").

SOL Demurrer:

By way of this demurrer, Defendants challenge the complaints in six cases, RG16809860, Lance v. [Defendants]; RG16813262, Bianchi v. [Defendants]; RG16813616, Brown v. [Defendants]; RG16812313, Hyde & Keller v. [Defendants]; RG16809878, Mattern v. [Defendants]; and RG16804878, Ripperger v. [Defendants].

Defendants assert that in each of these cases the claims of the named plaintiffs are subject to the two-year statute of limitations in Code of Civil Procedure ("CCP") section 335.1, that each of their claims accrued more than two

years prior to the filing of their complaints, and that none of these plaintiffs have alleged facts that would entitle them to the benefit of the discovery rule (citing, inter alia, *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397).

For reasons they fail to explain, Plaintiffs begin their opposition with reference to CCP section 340.8, which by its express terms applies only to actions based on exposure to hazardous material or toxic substance, dropping reference to CCP section 335.1 to a footnote stating "[b]oth the rules relating to actions involving personal injury and injuries based upon exposure to hazardous materials and toxic substances have wrongfulness components." This is an accurate statement, and both code sections carry the same two year SOL. Nevertheless, Plaintiffs' claims in these cases clearly fall within the scope of CCP section 335.1, not 340.8.

Plaintiffs argue that they have adequately pleaded facts to invoke the discovery rule. They allege that the discovery of their causes of action occurred in September, 2015 when the FDA held hearings, and that they were unable to have made earlier discovery despite reasonable diligence of speaking with physicians about their injuries because of Defendants' concealment of essential relevant facts (citing, inter alia, *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797, 809 ("*Fox*")). The court agrees.

Important to the discovery rule analysis in these cases is that the gravamen of Plaintiffs' claims is Defendants' alleged failure to provide adequate warnings

regarding the risks attendant to the use of the Essure device, and the related allegations that Defendants concealed adverse information and misrepresented the safety of the device. These are not medical malpractice claims, and whether Plaintiffs are ultimately able to state a manufacturing defect claim remains an open question (Preemption Demurrer to manufacturing defect claims sustained, with leave to amend). Accordingly, while it cannot be denied that each of these Plaintiffs became aware of some form of injury more than two years before their respective complaints were filed, they had all been warned that the use of this particular device carried some level of risk. Their injuries only became actionable when they later discovered that level of risk may actually have been much higher than they were originally led to believe, and this occurred when the FDA convened its public hearing. The court concludes that these factual allegations fall within the scope of the *Fox* decision.

In light of this conclusion, it is unnecessary for the court to reach the question of whether the longer SOL potentially available in certain Plaintiffs' home states might apply in this case.

RULING:

The SOL Demurrer is OVERRULED.

August 1, 2016

Date

Winifred Y. Smith

Winifred Y. Smith
Judge of the Superior Court

Superior Court of California, County of Alameda
Department 21, Administration Building

Case Number: RG16809860, RG16813262, RG16813616, RG16804878,
RG16812313, RG168049878

Case Name: Lance VS Bayer Corp., an Indian Corporation

RE: ORDER ON STATUS OF LIMITATIONS DEMURRER

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

Executed on August 2, 2016

Executive Officer/Clerk of the Superior Court

By Christopher Wright
Deputy Clerk

Motley Rice LLC
Breanne V. Cope
28 Bridgeside Blvd.
Mt. Pleasant, SC 29464

Sidley Austin Brown & Wood LLP
Alycia A. Degen
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013

Gibbs Law Group LLP
Eric H. Gibbs
One Kaiser Plaza, Suite 1125
Oakland, CA 94612

Grant & Eisenhower P.A.
Elizabeth M. Graham
123 Justison St.
Wilmington, DE. 19801