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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 11-1509

MARLA FAIR
and
TERRY FAIR,
Plaintiffs

v.

BIOGEN IDEC INC.
and
ELAN PHARMACEUTICALS, INC.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR LACK OF STANDING or BY APPLICATION OF JUDICIAL ESTOPPEL

BACKGROUND

The plaintiffs Marla Fair ("Fair") and Terry Fair ("T. Fair" or "Mr. Fair") (collectively, where appropriate, "the plaintiffs") have brought suit against the defendants Biogen Idec Inc. ("Biogen") and Elan Pharmaceuticals, Inc. ("Elan") (collectively, where appropriate, "the defendantns") through an unverified compliant alleging Design Defect (Count I); Failure to Warn (Count II); Breach of Implied Warranty (Count III); and violation of G. L. c. 93A (Count IV). The plaintiffs allege that Fair was harmed and that damages were incurred because of infusions of "Tysabri," a drug manufactured and/or distributed by the defendants, and whose purpose was the treatment of persons afflicted with multiple sclerosis ("MS").

The Complaint was filed in the Middlesex Superior Court on April 28, 2011. After some

clarification of the cause of action (See Paper Nos. 3, 4, 5), Biogen and Elan filed Answers on July 15, 2011, and July 18, 2011, respectively. (Paper Nos. 9, 10).

I. The Motion to Dismiss Standard

In addressing the sufficiency of a plaintiff's complaint pursuant to a motion to dismiss, this court takes as true the allegations in the complaint, as well as "such reasonable inferences as may be drawn therefrom" in the plaintiff's favor. Eyal v. Helen Broad. Corp., 411 Mass. 426, 429 (1991). The Supreme Judicial Court has clarified the standard of review this court must apply when evaluating a motion to dismiss, adopting the language set forth by the United States Supreme Court in Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007). See Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008), modifying Nader v. Citron, 372 Mass. 96, 98 (1977). In Bell Atl. Corp., the United States Supreme Court stated that "[w]hile a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . [a] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief above the speculative level ... [based] on the assumption that all allegations in the complaint are true (even if doubtful in fact)." Iannacchino, 451 Mass. at 636, quoting Bell Atl. Corp., 127 S. Ct. at 1964-1965. In order to survive a motion to dismiss, the pleadings must raise "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect[ ] the threshold requirement of [Fed. R. Civ. P] 8(a)(2) that the plain statement possess enough heft to sho[w] that the pleader is entitled to relief." Id. at 636, quoting Bell Atl. Corp., 127 S. Ct. at 1966 (alterations in original, internal quotations omitted). The review is ordinarily limited to the four corners of the complaint. Reliance Ins. Co. v. Boston, 71 Mass. App. Ct. 550, 554-55 (2008).

Consideration of the sufficiency of the complaint may be supplemented, where appropriate, by resorting to documents attached to or referenced in the complaint, and matters of public record. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000); Harhen v. Brown, 431 Mass. 838, 840 (2000).

II. The Motion to Dismiss (Paper No. 13)

A. By motion filed on December 13, 2011 (Paper No. 13), Biogen and Elan request the court to dismiss with prejudice plaintiff Marla Fair's causes of action on the ground that Fair lacks standing to pursue the claims plead within her complaint. In the alternative, the defendants request dismissal by asking the court to apply the doctrine of judicial estoppel.

In brief summary, the defendants assert that Fair filed for bankruptcy protection in August, 2010, in the United States District Court for the Southern District of Indiana, and that her debts were discharged less than four months before she filed this Massachusetts lawsuit. The defendants claim that Fair and her bankruptcy legal counsel failed to disclose her claims against Biogen and Elan during the bankruptcy proceedings – claims that they contend became actionable on or about May 14, 2009, when Fair was diagnosed with a condition known as Progressive Mutifocal Leukoencephalopathy ("PML"). PML is known to arise from Tysabri treatment.

The defendants further allege that Fair and her legal counsel represented affirmatively to the United States District Court that no such claims existed. The defendants contend that, as a matter of law, all causes of action owned by Fair, whether or not disclosed, became property of her bankruptcy estate at the time that the bankruptcy petition was filed. Further, the defendants contend that only the bankruptcy Trustee has legal authority to pursue, abandon, or to dispose of

such claims, including the tort claims asserted in the Massachusetts case.

Alternatively, the defendants urge the court to determine that Fair should be estopped from pursuing these tort claims because of Fair's failure to disclose the claims in the bankruptcy proceedings.

Attached to the defendants' Memorandum of Law in support of their Motion to Dismiss are the following:

> (1) a copy of Fair's Bankruptcy Code Chapter 7 Voluntary Petition (Case 10-13050-AJM-7) in the United States Bankruptcy Court, Southern District of Indiana.[1] Among other things, the form suggests that estimated number of creditors is 1-49, and that the estimated assets and liabilities both fall into the $100,00 to $500,000 range. Secured and unsecured creditors are listed. No cause of action is scheduled.
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> (2) a copy of the documents recording the Standard Discharge of Fair's Petition, dated January 6, 2011.
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> (3) a copy of the Discharge of Debtor Order pursuant to 727 of title 11, United States Code (the Bankruptcy Code), issued by Judge Anthony J. Metz III of the U. S Bankruptcy Court, Southern District of Indiana.

B. In their concurrently-filed Memorandum and Opposition to the Motion to Dismiss, the plaintiffs do not dispute that her personal injury lawsuit was initiated in Massachusetts approximately three months after her bankruptcy matter was discharged in Indiana.[2] The Fairs' Memorandum also acknowledges that under Indiana law, "[o]nce a bankruptcy action has been commenced, any unliquidated lawsuits, such as a personal injury claim become part of the bankruptcy estate" and that "the real party in interest is the bankruptcy

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[1] Mr. Fair is not listed as a joint debtor in the filing.

[2] Both plaintiff and defendants rely upon Indiana case law to support their respective legal positions.

trustee." Hammes. v. Brummley, 633 N.E.2d 266 (Ind. Ct. App. 1994).

Nevertheless, the plaintiffs' Opposition Memorandum asserts that they, not the bankruptcy trustee, are entitled to any proceeds that may accrue from this Massachusetts case. The plaintiffs declare that Fair "was not aware that she had a claim until after her petition for bankruptcy had been discharged, and that "Mr. Fair was notified by undersigned [legal counsel] in mid-January 2011 that he and his wife had a potential claim against Defendants."[3]

Fair thereafter asserts that she is the injured party and has a personal stake in the outcome of this tort litigation. Additionally, she contends that the aforementioned discharge removes the bankruptcy trustee from having an interest in the instant case.

Alternatively, Fair argues that even if the court finds that a "failure to disclose a real party in interest" constitutes error on her part, the appropriate remedy is to allow an amendment of the pleadings to substitute a real party in interest, not dismissal of this tort action. Regarding the defendants' alternative rationale for dismissal, i.e., judicial estoppel, Fair asserts that application of that remedy is improper when the outcome will harm [the plaintiff s'] creditors who would otherwise benefit from the plaintiff's recovery in the instant cause of action.

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[3] This position may be contradicted by Paragraph No. 5 of an April 17, 2012, affidavit of Terry Fair. That affidavit Paragraph suggest that the Fairs contacted the law firm at an unspecified time "after September, 2010." See Section E, infra.

Whether Mr. Fair's statement is intentionally vague or vague or not – as to when the plaintiffs initiated contact with the attorneys in this Superior Court case – Mr. Fair's averment suggests clearly that between the August, 2010 filing the bankruptcy petition in Indiana and the January, 2011 discharge and extinguishing of the bankruptcy trustee's powers, the plaintiffs were contemplating filing a lawsuit against one or both of the defendants. It is also reasonable to infer that the Fair's would not have contacted this case's attorneys if they did not already believe that they had been harmed physically, financially, or otherwise, by the defendants. However, it is not reasonable to infer that the thought of seeking legal redress for the harm was absent when Ms. Fair sought bankruptcy protection.

C. Defendants' concurrently-filed Reply to Plaintiffs' Memorandum and Opposition[4] sets forth what they claim are "uncontroverted facts," including but not necessarily limited to:

(1) Fair is and was an Indiana resident at all relevant times;

(2) that Fair suffered from multiple sclerosis ("MS") and was prescribed Tysabri infusions beginning in July, 2007, until May, 2009;

(3) that Fair was diagnosed with PML in Indiana in May, 2009;

(4) that Fair filed for bankruptcy in August, 2010 in the Southern District of Indiana, fifteen months after being diagnosed with PML;

(5) that Fair exited bankruptcy in January, 2011, eighteen months after being diagnosed with PML; and

(6) that Fair failed to list any potential causes of action in her schedule of assets in her bankruptcy filings in the Southern District of Indiana.

Further, relying upon Boucher v. Exide Corp., 398 N.E.2d 402 (Ind. Ct. App. 1986)[5] and

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[4] The Reply Memorandum attaches the affidavit of Brian Prunier ("Prunier"), Biogen's Senior Director, Patient Services. Prunier describes therein the FDA-approved Risk Evaluation and Mitigation Strategies ("REMS") plan, otherwise known as the TOUCH Prescribing Program. This is the treatment program referenced in Complaint ¶ 23. Additionally, attached to the Reply as Exhibit A are a series of photocopied records, including a purported copy of Fair's executed enrollment form for the Program; and a series of photocopied "Pre-Infusion Patient Checklist" forms relating to Fair's Tysabri treatments in 2007, 2008, and up to May 6, 2009. The Enrollment Form warns that Tysabri "increases your chance of getting a rare brain infection that usually causes death or severe disability." Further, the Form contains a two-part advisory: (1) that even if Tysabri is taken alone for treatment for MS, that it was "not known if [one's] chance for getting PML will lower;" and, (2) that it was not known "if treatment for a long period of time with Tysabri can increase [one's] chance for PML." At another location ("Prescriber Acknowledgment") page, it appears that Fair and her doctor executed the document, thereby indicating that Fair and her physician had reviewed the Tysabri Program and that Fair was duly informed of the increased PML risk she was taking by agreeing to Tysabri infusions.

[5] In Boucher, the court noted: Section 541(a)(1) of the Bankruptcy Code provides that the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). This broad provision includes any interest the debtor may have in causes of action. "It is ... intended that *all* interests of the debtor in rights of action be included as property of the estate under § 541(a)(1)." 4 *Collier on Bankruptcy*

Robson v. Texas Eastern Corp., 833 N.E.2d 461, 473 (2005), the defendants propose that Indiana case precedent establishes that a debtor who fails to schedule her cause of action as an asset in her bankruptcy, only the Trustee in bankruptcy has standing to pursue a lawsuit [to obtain property of the bankruptcy estate].

In the December, 2011 Reply (Paper No. 13), the defendants reiterate their understanding of the position that Fair is taking regarding discovery of her claim, to wit: that only in January, 2011, did Fair come to know or discover that she had a claim for her diagnosed PML. Diaz v. Carpenter, 650 N.E.2d 688, 691 (Ind. Ct. App. 1995). The defendants nevertheless assert that Fair's participation in the Tysabri treatment program ("TOUCH Prescribing Program") beginning in 2007, required continual acknowledgment of her understanding and familiarity with the potential negative effects of Tysabri infusion, including PML.

Accordingly, the defendants contend that when the PML diagnosis was confirmed in May, 2009, many months before she filed for bankruptcy, Fair was on notice of her potential tort claim against the defendants.

D. On or about March 12, 2012, the plaintiffs submitted a Supplemental Authority in

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§ 541.10 (15th Ed. 1979).

Interestingly, the Boucher decision referenced a Massachusetts case: As the Appeals Court of Massachusetts noted in addressing a case with similar facts, "Unless scheduled by the debtor (the plaintiff here did not do so) and abandoned by the trustee ..., such rights of action may not thereafter be pursued by the debtor." Cole v. Pulley, 18 Mass. App. Ct. 950 (1984). Because the trustee had not abandoned Bouchers' right of action against Exide it remained in the bankruptcy estate and Bouchers had no standing to bring the lawsuit.

Indeed, the Cole decision holds, specifically: Unless scheduled by the debtor ... and abandoned by the trustee in bankruptcy ... such rights of action may not thereafter be pursued by the debtor. Truver v. Fall River Trust Co., 6 Mass. App. Ct. 951 (1978). Compare Buker v. National Management Corp., 16 Mass. App. Ct. 36 , 40-41 (1983).

Opposition to the defendants' alternative request for application of the "judicial estoppel" to dismiss this tort case (Paper No. 16). Citing a Worcester County Superior Court case, Perry-Flynn v. Maki, 29 Mass. L. Rptr. No. 4, 75 (December 5, 2011), the plaintiffs rely upon this case to argue against application of judicial estoppel in the instant case.

E. Subsequently, on April 20, 2012, plaintiffs filed a second Supplemental Memorandum and Opposition to Defendants' Motion to Dismiss (Paper No. 22).

Attached to this Memorandum is the April 17, 2012 affidavit of co-plaintiff Terry Fair. In the eight-paragraph affidavit, Mr. Fair avers that:

> (1) his wife was diagnosed with multiple sclerosis in 2002; that on advice of Fair's physician, Fair began Tysabri infusions in July, 2007; and that on May 14, 2009, Fair was diagnosed with Progressive Multifocal Leukoencephalopathy. ¶ 2
>
> (2) his wife has been severely injured by her PML; that she cannot walk without use of a cane, and is confined to her bed; that Fair requires twenty-four hour care; that the Fairs have incurred approximately $900,000.00 in medical expenses since the PML diagnosis was rendered [in May, 2009]; and that it was the medical expense that caused the Fairs to file for bankruptcy. ¶ 3.
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> (3) at the time that Fair filed for bankruptcy in August, 2010, the Fairs did not know whether they had a personal injury claim and that they had not contacted an attorney regarding any potential personal injury claim; that because the Fairs had not contacted an attorney regarding a potential personal injury claim, they did not disclose this claim in their bankruptcy petition. ¶ 4.
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> (5) the Fairs' first contact with their attorneys in this action was after the bankruptcy filing in September, 2010; that when the Fairs contacted the attorneys in this cause of action, they had no knowledge of any filed lawsuits related to PML; that the Fairs "did not know whether this was a claim that the attorneys could or would pursue and we waited until the attorneys evaluated the case to inform us as to whether it was a potentially valuable claim" that the attorneys were willing to pursue on the Fairs' behalf. ¶ 5.
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> (6) the bankruptcy was discharged on January 6, 2011; that the attorneys did not inform the Fairs that they had a potential claim to pursue until mid-January, 2011; and that until that time, i.e., mid-January, 2011, the Fairs "did not know

whether we would be able to file a lawsuit or pursue litigation for Marla's injuries." ¶ 6.

(7) the attorneys did not file this lawsuit until April 28, 2011; and that prior to filing the case, the Fairs "were not aware of any actions that the attorneys had taken on our behalf to ascertain whether or not they [the attorneys] were willing to pursue this case on our behalf." ¶ 7.

(8) to date [April 17, 2012], "we do not know whether this lawsuit will result in a valuable claim." ¶ 8.

The defendants filed a Supplemental Briefing (Paper No. 23) on April 23, 2012, requesting the court to consider several additional cases: In re Tomailo, 205 B.R.10, 14 (Br. D. Mass. 1997) and Degussa Corp. v. Mullens, 744 N.E.2d, 407, 410-411 (Ind. 2001).

III. The Discovery Rule

Indiana case law suggests than when it comes to application of the so-called "discovery rule," a theoretical parallel exists with Massachusetts case law.[6]

For example, in a recent Indiana appellate court decision, Reed v. City of Evansville, ___ N.E.2d ___ (Ind. Ct. App. 2011), Cause No. 82A05-1012-PL-768, the Indiana Appeals Court

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[6] See Albrecht v. Clifford, 436 Mass. 706, 714 (2002), in which the Supreme Judicial Court stated iterated the essential parameters of the discovery rule in Massachusetts:

"The [discovery] rule, which operates to toll a limitations period until a prospective plaintiff learns or should have learned that he has been injured, may arise in three circumstances: where a misrepresentation concerns a fact that was 'inherently unknowable' to the injured party, where a wrongdoer breached some duty of disclosure, or where a wrongdoer concealed the existence of a cause of action through some affirmative act done with the intent to deceive." Patsos v. First Albany Corp., 433 Mass. 323 , 328 (2001), citing Protective Life Ins. Co. v. Sullivan, 425 Mass. 615 , 631-632 (1997).

See also Bowen v. Eli Lilly & Co., Inc., 408 Mass. 204, 206 (199) ("Medical malpractice 'causes of action accrue when the plaintiff learns, or reasonably should have learned, that he has been harmed by the defendant's conduct.'")

stated:

> A loss is said to occur, "when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." Wehling v. Citizens Nat'l Bank, 586 N.E.2d 840, 843 (Ind.1992); See Irwin Mortg. Corp. v. Marion Cnty. Treasurer, 816 N.E.2d 439, 447 n. 8 (Ind. Ct. App.2004) (applying the discovery rule to determine when the loss occurred for purposes of tort claim notice under the ITCA). Our supreme court has clarified that a claim subject to the discovery rule accrues when a plaintiff is informed of a "reasonable possibility, if not a probability" that an injury was sustained as a result of the tortious act of another, and that a person's "mere suspicion or speculation" as to causation of an injury is insufficient to trigger accrual. Degussa Corp. v. Mullens, 744 N.E.2d 407, 411 (Ind.2001) (citation omitted).
>
> This discovery rule allows suit by persons who "have a fair opportunity to investigate available sources of relevant information and to decide whether to bring their claims in court within the time limitations in the statute." Barnes v. A.H. Robins Co., Inc., 476 N.E.2d 84, 88 (Ind.1985) ...

In the context of the Reed set of facts, the court went on to declare:

> The proper question is: when, in the exercise of ordinary diligence, did the Reeds learn of a reasonable possibility, if not a probability – and not by mere speculation or suspicion – that a causal relationship existed among the mold, the sewer line, and their injuries? See Degussa, 744 N.E.2d at 411.

Accordingly, in deciding the defendants' Motion to Dismiss, this court must first determine whether, based on the pleadings of the plaintiff's complaint, the discovery rule applies herein. Most central to this determination is an examination of the portions of the Complaint that address the plaintiffs personal knowledge and actions when and after Ms. Fair decided to undergo the Tysabri treatment regimen.

IV. The Complaint

Plaintiffs' complaint alleges that at least since 1992, there was scientific evidence that Tysabri was "too dangerous" for humans, and that individuals who take Tysabri become susceptible to PML. ¶¶ 15, 16, 20. Scientific reports of diagnosed PML (including two

fatalities) resulted in withdrawal of Tysabri from the marketplace in February, 2005. ¶ 22.

After reintroduction of Tysabri in mid-2006, the TOUCH prescribing program was instituted, requiring that every Tysabri prescriber, infusion site, and MS patient receiving Tysabri treatment to enroll in the risk management program conducted by Biogen. The Biogen program in intended to monitor Tysabri patients for signs of PML. ¶ 23.

In 2008, two more Tysabri-related PML cases were reported. Both cases seemed to be linked to long-term usage of Tysbari, i.e., seventeen months and fourteen months. ¶ 25.

Plaintiffs' complaint suggests that approximately twelve cases of suspected PML were reported privately before July, 2008. Nine additional PML cases were reported publicly, between October, 2008, and July, 2009. ¶¶ 26-28.

Fair was diagnosed with MS in 2002. In July, 2007, she commenced Tysabri infusions. Fair received Tysabri infusions on a monthly basis for almost two years, undergoing twenty-four treatments by May, 2009. ¶¶ 35-37.

In May, 2009, Fair began to manifest slurred speech, numbness, confusion, left-sided weakness and facial drooping. An MRI performed on May 12, 2009, led to a diagnosis of PML in the right frontal lobe of Fair's brain. The Tysabri infusions were then discontinued. ¶ 38.

During the course of the treatment, the plaintiffs' complaint declares that there was no warning that there is an increased risk of developing PML with longer treatment duration. ¶¶ 39.

Subsequent to the diagnosis of PML and cessation of Tysabri infusion therapy, Fair's day-to-day activities have been curtailed dramatically. In order to walk, she requires a cane to assist her. Ordinary personal hygiene activities are troubling to accomplish. She is now incontinent. She requires twenty-four hour assistance. Fair's parents care for her on the days that Mr. Fair

works. The Complaint alleges that medical assistance and twenty-four hour care will be required for the rest of Fair's life. ¶¶ 40-41.

V.. Standing

After consideration of the record presented by the parties, it is clear that Fair was given due notice of the increased risk of incurring PML should she agree to the Tysabri infusion regimen. See Footnote 4, supra.

Next, applying Diaz v. Carpenter, 665 N.E.2d 688, 691 (1995) (an appeal relating to a pro se defendant's legal malpractice claims), as Fair requests in her Opposition Memorandum, Indiana case law holds:

> The cause of action of a tort claim accrues when the plaintiff knew, or, in the exercise of ordinary diligence, could have discovered that an injury has been borne as a result of the tortious act of another. Wehling v. Citizens Nat'l Bank (1992), Ind., 586 N.E.2d 840.

Plaintiffs' Memorandum also directs the court to Hoffman v. Bank of Akron (in re Hoffman), 99 Bankr. 929, 933 (N.D. Iowa 1989) for the proposition that, in bankruptcy, a known cause of action is one in which the debtor knows of "all the facts that were pertinent to its current lawsuit when it filed bankruptcy."

Moreover, Browning Manufacturing v. Mims (In re Coastal Plains, Inc.), 179 F.3d 197, 207-08 (5th Cir.1999), cert. denied, 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000) states clearly:

> It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims. 11 U.S.C. § 521(1) ("The debtor shall–(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs"). "The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is

> required to disclose all potential causes of action". Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n, 932 F. Supp. 859, 867 (E.D. Tex. 1996). "'The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed'". Id. (brackets omitted; quoting Union Carbide Corp. v. Viskase Corp. (In re Envirodyne Indus., Inc.), 183 B.R. 812, 821 n.17 (Bankr. N.D. Ill. 1995)). "Any claim with potential must be disclosed, even if it is 'contingent, dependent, or conditional'". Id. (quoting Westland Oil Dev. Corp. v. MCorp Management Solutions, Inc., 157 B.R. 100, 103 (S.D. Tex. 1993)) (emphasis added).

Here, it cannot reasonably be disputed that at the time she filed her bankruptcy petition, Fair was aware of all the essential and elemental facts underlying a potential tort claim against the defendants for the harm alleged to have been caused by the Tysabri infusions. Under Youngblood, supra, and Union Carbide, supra, that knowledge is enough to trigger disclosure in the bankruptcy court. Further, it is unreasonable to find that – having consulted with legal counsel during the months that her petition was pending discharge – she had no sense that she might also have the grounds to file a legal case, based in tort, against the defendants. That she now asserts (apparently, along with her spouse) that she was not aware of the potential "value" of her claims is immaterial to this discussion. Plaintiffs' counsel provides no legal support for the notion that yet-to-be-determined "value" is somehow determinative of the questions before this court.

In any event, Fair's Massachusetts tort case has pre-petition roots. In re Tomaiolo, 205 B.R. 10, 14-16 (Bankr. D. Mass. 1997) (alleged negligent legal advice to file bankruptcy petition, the failure to cure the errors and omissions relative to the petition and the failure to advise the debtor of his rights, duties and obligations had pre-petition roots and were property of the estate even though they may not have accrued under state law prior to the time of the filing of the

petition), aff'd, No. 90-40350, 2002 WL 226133 (D. Mass. 2002). See also Youngblood, supra, at 867.

Regarding the concept of judicial estoppel, it will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset. Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555, 557 (9th Cir. 1992) ("We recognize that all facts were not known ... but enough was known to require notification of the asset to the bankruptcy court."). Judicial estoppel is "an equitable principle which generally operates to preclude a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation." USLIFE Corp. v. U.S. Life Ins. Co.,560 F.Supp. 1302, 1304 (N.D.Tex.1983). The doctrine aims to prevent litigants from playing fast and loose with the courts by "deliberately changing positions based upon the exigencies of the moment." Ergo Science, Inc. v. Martin,73 F.3d 595, 598 (5th Cir.1996). Cf. Houghton v. United States (In re Szwyd), 394 B.R. 230, 241 (Bankr. D. Mass. 2008). The doctrine of judicial estoppel applies in the bankruptcy context, where its principal purpose is to protect the integrity of the bankruptcy process and to promote finality of confirmed reorganization orders. Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir.1988). The doctrine is often applied to ensure strict adherence with common law and statutory concepts of complete and candid disclosure. See, e.g., 11 U.S.C. §§ 521(1), 1125(b); Freedom Ford, Inc. v. Sun Bank & Trust Co. (In re Freedom Ford, Inc.),140 B.R. 585 (Bankr. M.D.Fla.1992); Louden v. Federal Land Bank (In re Louden),106 B.R. 109 (Bankr. E.D.Ky.1989); Hoffman v. First Nat'l Bank (In re Hoffman), supra.

VI. FINDINGS

This court finds:

(1) that at the time that she entered bankruptcy proceedings in Indiana in August, 2010, Fair possessed sufficient and pertinent facts at the core of this this current lawsuit to warrant disclosure in her bankruptcy filings and schedules pursuant to 11 U.S.C. § 521(1);

(2) that Fair had a continuing duty to amend or update her petition schedules after she contacted her present attorneys in or about the month of September, 2010, and, presumably, sought legal advice on how best to seek and obtain compensation for the injury and harm that she claims to have incurred from undergoing the defendants' Tysarbi infusion process;

(3) that Fair failed continually to perform her express, affirmative duty to disclose this reasonably foreseeable tort cause of action while her bankruptcy matter was pending;

(4) that, notwithstanding the fact that she may have some form of a personal stake in the outcome of this litigation, Fair's failure to disclose to the bankruptcy court nevertheless extinguishes her standing to pursue personal compensation this Massachusetts case;

(5) that, in reaching this conclusion to apply judicial estoppel in this case this court is acting in accordance with the doctrine's primary purpose to protect the integrity of the bankruptcy process and to promote finality of confirmed reorganization orders.

In reaching these findings, the court takes no position on whether, if, and/or how the Indiana bankruptcy matter ought to be reopened, so that a bankruptcy trustee might be appointed or reappointed to address issues relating to the plaintiffs' rightful creditors.

ORDER

The court finds that Plaintiff Marla Fair lacks standing, and, also, that judicial estoppel is appropriate to apply to the instant circumstances, to preclude Fair from pursuing relief in this cause of action.

Therefore, after hearing, for the foregoing reasons, and for reasons otherwise set forth in the defendants' Motion to Dismiss , supporting Memoranda of Law, and Supplemental Memorandum of Law (Paper Nos. 13 and 23 and Attachments), the court **ALLOWS** the defendants' Motion and hereby **ORDERS DISMISSAL** of each of Plaintiff Marla Fair's Caused of Action, with Prejudice.

Joseph M. Walker III
Associate Justice of the Superior Court

DATED: June 12, 2012

Commonwealth of Massachusetts
County of Middlesex
The Superior Court

CIVIL DOCKET#: **MICV2011-01509-C**

RE: Fair et al v Biogen Idec, Inc. et al

TO: Joseph G Blute, Esquire
Mintz Levin Cohn Ferris Glovsky & Popeo PC
1 Financial Center
Boston, MA 02111

CLERK'S NOTICE

SEE ATTACHED COPIES.

Dated at Woburn, Massachusetts this 13th day of June, 2012.

Michael A. Sullivan,
Clerk of the Courts

BY: Arthur DeGuglielmo
Assistant Clerk

Telephone: 781-939-2757

Disabled individuals who need handicap accommodations should contact the Administrative Office of the Superior Court at (617) 788-8130

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Commonwealth of Massachusetts
County of Middlesex
The Superior Court

CIVIL DOCKET#: **MICV2011-01509-C**

RE: Fair et al v Biogen Idec, Inc. et al

TO: John B. Koss, Esquire
Mintz Levin Cohn Ferris Glovsky & Popeo PC
1 Financial Center
Boston, MA 02111

CLERK'S NOTICE

SEE ATTACHED COPIES.

Dated at Woburn, Massachusetts this 13th day of June, 2012.

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BY: Arthur DeGuglielmo
Assistant Clerk

Telephone: 781-939-2757

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