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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: FOSAMAX PRODUCTS
LIABILITY LITIGATION

MDL NO. 1789
1:06-md-1789 (JFK)

This Document Relates to:

ALL ACTIONS

**DEFENDANT MERCK SHARP & DOHME CORP.'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION
FOR A FEDERAL RULES OF CIVIL PROCEDURE 16 AND 26
CASE MANAGEMENT ORDER**

Defendant Merck Sharp & Dohme Corp. (“Merck”) respectfully submits this memorandum in support of its motion for entry of a Fed. R. Civ. P. 16 and 26 Case Management Order (“CMO”) and states as follows.

PRELIMINARY STATEMENT

Late last year, the Plaintiff’s Steering Committee (“PSC”) and Merck announced that after years of active litigation, including extensive motion practice and several trials, they had entered into a Master Settlement Agreement that contemplated the resolution of all pending domestic claims seeking damages for alleged ONJ injuries. With the goal of a complete global resolution, the Master Settlement Agreement required participation from 100% of the pending plaintiffs. The deadline for claimants to affirm their participation in the ONJ Settlement has now passed, and approximately 95% of the claimants alleging ONJ have indicated that they wish to participate in this settlement by submitting all or at least some of the required papers and supporting documentation.¹ Because this participation level, while robust, falls short of 100%, leaving 70 claims pending (54 in the MDL), Merck still has the option to either terminate the Agreement or proceed with the Settlement.

On information and belief and based on Merck’s attorneys conversations with the PSC and various Plaintiffs’ counsel, the majority of the roughly 5% of domestic cases where there has been no expressed desire to participate in the settlement involve situations where Plaintiffs have also not affirmatively indicated that they wish to pursue their cases. Merck has been informed that there are apparently a substantial number of cases where there has been non-existent or

1. Approximately 160 of the MDL claimants have indicated an intent to participate in the settlement, but have submitted documents with deficiencies. The time to cure has not yet passed and Merck is working with the attorneys for these claimants to cure these deficiencies. Merck hopes to be able to successfully work to resolve the deficiencies in all, or substantially all, of these cases, and is not requesting Lone Pine proceedings for any of these cases at this time.

limited recent contact between Plaintiffs and their attorneys, or the attorneys designated to dismiss the cases. Consistent with that information, Merck has been informed of less than ten claimants who indicated affirmatively that they wish to turn down the settlement and pursue their cases. Under these circumstances, a Lone Pine Order will at a minimum allow the parties to determine “what is what” with these remaining cases, will “ensure that the home districts receive only viable cases” (In re Fosamax Prods. Liab. Litig., MDL 1789, Op. & Order at 7, Nov. 20, 2012 (“November 2012 Lone Pine Order”)) if some do need to be remanded, and will provide courts on remand with some basic information about these cases, too.

For the reasons set forth more fully below, Merck hereby requests that the Court enter a CMO in the form of the proposed order attached to Merck’s motion as Exhibit 1. Such an order will apply only to those plaintiffs who have not demonstrated that they wish to participate in the ONJ Settlement, which claimants are listed on the attached Exhibit 2.

ARGUMENT

I. **THE COURT HAS AUTHORITY TO ISSUE LONE PINE ORDERS IN MASS TORT PROCEEDINGS IN FURTHERANCE OF SETTLEMENT AND TO ENSURE THAT ONLY MERITORIOUS CASES REMAIN FROM NON-PARTICIPANTS IN THAT SETTLEMENT**

The Court has already recognized in the context of this MDL the unquestionable utility of a Lone Pine Order to “target potentially spurious claims without imposing undue obligations.” November 2012 Lone Pine Order at 9. Here, the requested CMO pertains only to those plaintiffs who have not indicated their desire to participate in a global settlement. There is a well-developed body of case law supporting this Court’s authority to issue a Lone Pine Order in an MDL where a settlement program is underway in order to encourage global resolution and

ensure that only meritorious cases remain for nonparticipants in that settlement.² See In re Vioxx Prods. Liab. Litig., MDL No. 1657, 557 F.Supp.2d 741, 744 (E.D. La. May 30, 2008) (denying non-settlement-participating plaintiffs’ motion to suspend Lone Pine order, holding that “[A]t this advanced stage of the litigation, it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury, whether that injury be deep vein thrombosis, a heart attack, an ulcer, or some other malady.”); In re Avandia Mktg. Sales Practices and Prods. Liab. Litig., MDL No. 1871, 2010 WL 4720335, at 1 (E.D. Pa. Nov. 15, 2010) (noting that the court’s “overriding concern is the need to objectively identify which of the many thousand plaintiffs have injuries which can credibly be attributed to [the product’s] usage, as alleged in their complaints,” and finding a Lone Pine Order “necessary in furtherance of settlement agreements”); In re Zyprexa Prods. Liab. Litig., MDL No. 1596, at 4 (E.D.N.Y. June 2, 2010) (ordering plaintiffs to produce “expert reports satisfying the requirements of Rule 26 . . . and all relevant medical records” following a June 9, 2005 settlement agreement³); In re Bextra and Celebrex Mktg. Sales Practice and Prod. Liab Litig., MDL No. 1699 (N.D. Cal. Aug. 1, 2008) (Pretrial Order No. 29) (granting Lone Pine order following settlements that began in May of 2008⁴ and which culminated in the settlement of 90% of the claims by October of 2008⁵); In re Rezulin Prods. Liab. Litig., MDL No. 1348, 2005 WL 1105067, at 1 (S.D.N.Y. May 9, 2005) (granting Lone Pine Order “requiring plaintiffs to produce case-specific expert

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2. Per the Court’s Order dated June 9, 2014, these orders are attached hereto as Exhibit 3.
 3. *Eli Lilly Agrees to Pay Approximately \$700M in Zyprexa Settlement*, PRWEB (June 15, 2005), <http://www.prweb.com/releases/2005/06/prweb250959.htm>
 4. Nathan Koppel and Heather Won Tesorio, *Pfizer Settles Lawsuits Over Two Pain Killers*, WSJ.COM, (May 3, 2008), <http://online.wsj.com/news/articles/SB120974533694962989>
 5. Pfizer, *Pfizer Reaches Agreements in Principle to Resolve Litigation Involving Its NSAID Pain Medications*, BUSINESS WIRE, (October 17, 2008), <http://press.pfizer.com/press-release/pfizer-reaches-agreements-principle-resolve-litigation-involving-its-nsaid-pain-medica>

reports” following 2004 settlement resolving all but three of 35,000 claims⁶); In re Baycol Prods. Liab. Litig., MDL 1431, 2004 WL 626866, at 1 (D. Minn. Mar. 18, 2004) (ordering plaintiffs to provide case-specific reports from a medical expert in part to “further develop an efficient and effective settlement and mediation program”).

II. THE PROPOSED LONE PINE ORDER TARGETS ONLY “POTENTIALLY” SPURIOUS CLAIMS AND AFFORDS SUFFICIENT SAFEGUARDS

As stated in the Court’s November 2012 Lone Pine Order pertaining to certain cases in these proceedings, the benefit of such an Order – “ensur[ing] that the home districts receive only viable cases” – is worthwhile if there is a reasonable and sound means for identifying the “potentially” meritless cases, and effective safeguards protect the Plaintiffs’ rights. Id. at 7, 9. Here, the proposed CMO would apply only to those fifty-four MDL plaintiffs who are not participating in the mass settlement program that has already been initiated.⁷

The success of the November 2012 Lone Pine Order and the related history of plaintiffs dismissing non-meritorious cases when pressed to comply with basic discovery obligations provides a reasonable basis “to believe that spurious or meritless cases” are still lurking on the docket.⁸ Id. at 9. Here, where the initiation of a global settlement has already achieved 95% participation, there is no reason that this Court – or in the event of remand, other district courts – should be burdened with meritless cases that likely exist among the non-participants. See

6. Jef Feeley, *Pfizer Ends Rezulin Cases With \$205 Million to Spare (Update1)*, (Mar. 31, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=act0akCefQwo>

7. As the Court is aware, the Global ONJ Settlement is meant to apply to all domestic cases pending in any court. While most of the domestic Fosamax ONJ cases are before this Court, there are other cases pending in other courts, including several hundred in a state coordinated proceeding in Atlantic County, New Jersey. Most of those cases have now entered into the settlement program, too. Merck’s counsel’s letter dated June 6, 2014 cited a figure of 67 non-participants, which included non-MDL cases. The lower figure cited here (54 cases) and included on Exhibit 2 reflects only the MDL cases to which the current Lone Pine order would apply.

8. See November 2012 Lone Pine Order at 9 (“Merck has certainly demonstrated that specific discovery is likely to eliminate a significant number of meritless claims from this MDL.”).

November 2012 Lone Pine Order at 7 (“Indeed, the primary purpose of Lone Pine orders is to eliminate meritless cases.”). The fifty-four non-participants are represented by thirty-three different law firms. There are only four law firms who represent three or more of the non-participants, and none represent more than seven non-participants. Most of the law firms represent no more than one non-participant. Merck believes, based on communications with the PSC and counsel for several of the non-participants, that most of the non-participants are simply no longer in contact with their counsel and, consequently, counsel were not able to secure the necessary documents (executed Release and authorized Stipulation of Dismissal) to confirm participation. Indeed, Merck believes that fewer than ten of the non-participants are intentional non-participants who knowingly elected not to participate in the Master Settlement Agreement. A Lone Pine process will remove from the MDL those non-participants who have no true desire to pursue their claims. At the same time, a Lone Pine process will impose on those non-participants who wish to continue their actions no burden greater than they would have to assume by agreeing to pursue their claims in the court system.

Because the proposed CMO (1) applies to only those who are not already participating in the mass settlement program that has been initiated, (2) affords those plaintiffs an easy method for complying with the Order, and (3) would ultimately “impose a minimal burden on plaintiffs, as it merely asks them to produce information they should already have,” the requested CMO falls squarely within what this Court has already recognized as an appropriate step for this MDL. Id. at 6.

CONCLUSION

A Lone Pine process in support of settlement will remove from the MDL those non-participants who have no true desire to pursue their claims, while providing basic information, all of which would be required in the discovery process in any event about the other remaining claims. The requested Lone Pine Order would apply only to those claimants who have declined the opportunity to participate in the ONJ Settlement Plan. The proposed CMO (a copy of which is annexed as Exhibit 1) would require those claimants to produce a Fed. R. Civ.P. Rule 26(a)(2) report from a qualified expert sufficient to establish a causal relationship between the claimant's use of Fosamax and ONJ related injuries. The Order would also require the claimant to produce all records evidencing the usage of Fosamax and the alleged injuries sustained because of that usage.

DATED: New York, New York
June 11, 2014

Respectfully submitted,
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By: _____ /s/

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