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 *Anna Huffman v. Merck Sharp & Dohme Corp.* Case No. 1:06-cv-14238 *Constance Alexander, personal representative of the estate of Julie Lowell v. Merck Sharp & Dohme Corp.* Case No. 1:06-cv-3130	:	

OSBORN LAW, P.C.'s RESPONSE TO MERCK'S THIRD MOTION FOR A *LONE PINE* ORDER

Osborn Law, P.C., counsel for plaintiffs Anna Huffman and Constance Alexander, the daughter and personal representative of the estate of Julie Lowell, hereby responds to the third motion of Merck Sharp & Dohme Corp. for a *Lone Pine* Order (DE 1670) and this Court's Order (DE 1666) relating to that motion.

1. Anna Huffman. On June 12, 2014, Osborn Law filed a motion to withdraw as counsel on behalf of plaintiff Anna Huffman due to our inability to contact Ms. Huffman (DE 1674). The efforts we undertook to contact Ms. Huffman are set forth in the attached Declaration of Daniel A. Osborn, dated June 18, 2014. Osborn Law does not oppose Merck's motion as it relates to Ms. Huffman. However, if this Court grants Osborn Law's motion to withdraw, and if a *Lone Pine* Order is entered as requested by Merck, Osborn Law will not be responding to that Order on behalf of Ms. Huffman.

2. Constance Alexander, as personal representative for the estate of her mother, Julie Lowell. Osborn Law opposes Merck's motion on several grounds. First, if the parties had not reached a settlement, Ms. Alexander's case would have been remanded (and likely transferred) by now. On August 22, 2013, this Court issued an Order (DE 1465) in which it declared its intention to terminate the multi-district litigation and begin the remand of MDL cases beginning in November 2013. No Rule 26 report would have been required prior to remand and no Rule 26 report should be required now.

Second, none of the *Lone Pine* Orders cited by Merck in its brief were entered in the context of "a prelude to the dismissal of unresponsive plaintiffs during settlement." (See DE 1666). For example, the *In re Rezulin Prod. Liab. Litig.*, the *Lone Pine* Order was entered in 2005, four years before the MDL was terminated by Judge Kaplan. Moreover, the Order was issued to flush out viable claims following the granting of three MDL-wide motions for summary judgment, one *Daubert* motion and one judgment on the pleadings on the issue of statute of limitations. It was not issued to prompt unresponsive plaintiffs to respond.

The *Lone Pine* Order entered in *In re Avandia Marketing, Sales Practices and Products Liability Litig*. came just three-years into an MDL that is ***still pending***. And while Merck quotes that portion of the Order that suggests that the *Lone Pine* Order "is necessary in furtherance of settlement agreements," the next clause in the sentence says that the Order is necessary "for the selection of bellwether trials, and for the timely remand of cases to the sending courts for resolution." Clearly, the Order had nothing to do with "unresponsive plaintiffs" and settlement.

The other Orders are equally irrelevant. Even the Order in *In re Vioxx Prod. Liab. Litig*., which arguably involves facts closest to those here, is easily distinguishable, as it did not require an actual Rule 26 expert report. Instead, the Court directed only that plaintiffs "make a minimal

showing consistent with Rule 26 that there is some kind of scientific basis that Vioxx could have caused the alleged injury."

Third, Ms. Alexander is not an "unresponsive plaintiff." Osborn Law has been in regular contact with both Ms. Alexander and her brother, John Lowell. The companion case against Novartis Pharmaceuticals Corporation has been extensively litigated, including no fewer than 15 depositions. Ms. Alexander and Mr. Lowell have been actively involved in that litigation. Moreover, Osborn Law has had discussions with Merck's counsel about this case. Specifically, Osborn Law inquired about whether certain physician records, coupled with certain pharmacy records, would be sufficient to establish the requisite period of Fosamax use. This inquiry was made because Ms. Alexander's case is either a Category 1 case (worth $500) or a Category 4 case (worth $80,000 or more). If it's a Category 4 case, Ms. Alexander participates in the settlement program. Counsel wanted to see if, in Merck's opinion, the non-pharmacy records would be sufficient to get Ms. Alexander's case to Category 4. This Court has acknowledged that "evidence of Fosamax usage can be derived from pharmacy records or physician and dentists' records." (DE 1457). Unfortunately, the settlement program does not. In any event, in the absence of any assurance that the case would be deemed a Category 4, Ms. Alexander and her brother John are proceeding with the lawsuit. Merck knows this.

CONCLUSION

Plaintiff Constance Alexander respectfully requests that the Court deny Merck's motion (DE 1670) as it relates to her case.

Dated: June 18, 2014
New York, New York

Respectfully submitted,

OSBORN LAW, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by operation of the court's electronic case filing system on counsel or record in Case No. 1:06-md-1789 (JFK) on this 18th day of June, 2014.

s/ Daniel A. Osborn
Daniel A. Osborn