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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

As this Court is aware, in late 2013 the Plaintiff’s Steering Committee (“PSC”) and Merck announced that they had entered into a Master Settlement Agreement that contemplated the resolution of all pending domestic claims seeking damages for alleged ONJ injuries and required participation from 100% of the pending plaintiffs. In June 2013, after the deadline for claimants to affirm participation by submitting all or at least some of the required papers and supporting documentation had passed, Merck moved for the entry of a CMO in the form of a Lone Pine Order that would apply to only those plaintiffs who failed to submit the paperwork required for participation in the settlement. In July 2014, the Court granted Merck’s motion, recognizing the utility of a Lone Pine Order “to ensure that only viable cases be remanded to their home districts.” In re Fosamax Prods. Liab. Litig., MDL 1789, Op. & Order at 1, July 30, 2014 (“July 2014 Lone Pine Order”). See also In re Fosamax Prods. Liab. Litig., MDL 1789, Op. & Order at 7, Nov. 20, 2012 (“November 2012 Lone Pine Order”).

As Merck noted in its June 2014 motion, approximately 160 MDL claimants indicated an intent to participate in the settlement by submitting paperwork, but had submitted documents with deficiencies. See In re Fosamax Prods. Liab. Litig., No. 06 Civ. 1789, ECF No. 1670 at 2, n.1. Nevertheless, instead of including those claimants in its June 2014 motion, Merck continued to work with the attorneys for these claimants to cure any deficiencies. The time to cure has now passed, and although the majority of cases were resolved, nine cases remain in which the deficiencies have not been cured. Like the July 2014 Order, the further Order that Merck seeks

is limited to only those plaintiffs who are not participating in the Master Settlement Agreement and “would impose a minimal burden on plaintiffs, as it merely asks them to produce information they should already have.” July 2014 Lone Pine Order at 1 (internal citations and quotation marks omitted).

For the reasons set forth 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 failed to cure deficiencies as required for participation in the settlement, which claimants are listed on the attached Exhibit 2. The PSC has informed Merck that it does not oppose this motion.

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; see also July 2014 Lone Pine Order at 1. Here, the requested CMO pertains only to those plaintiffs who have failed to submit sufficient paperwork required for participation in the global settlement. Moreover, this Court and the PSC have previously acknowledged that there is a well-developed body of case law supporting entry of 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 as nonparticipants in that

settlement. July 2014 Lone Pine Order at 2 (Lone Pine orders are “frequently granted after the parties have agreed to a mass settlement program”) (citing ECF No. 1226 at 6-8).¹

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. November 2012 Lone Pine Order at 7, 9. Here, the Order Merck seeks would apply to no more than the nine remaining plaintiffs who Merck has identified as having potentially meritless cases.

In its July 2014 Lone Pine Order applying to claimants who failed to submit any paperwork required for the settlement, this Court previously acknowledged that “[i]n view of the fact that over 95 percent of the claimants in this MDL are participating in the settlement . . . efforts should be made to ensure that only viable cases be remanded to their home districts.”

July 2014 Lone Pine Order at 1. Merck submits that for the same reason, and considering the

1. See also ECF No. 1670 at 4-5 (citing 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 agreement); 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 20081 and which culminated in the settlement of 90% of the claims by October of 20081); 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 reports” following 2004 settlement resolving all but three of 35,000 claims); 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”).

minimal burden such an Order would impose on plaintiffs, the Court should enter an Order applying to the nine claimants who failed to submit sufficient paperwork as required for participation in the mass settlement.

Because the proposed CMO (1) applies to only those who have failed to submit sufficient paperwork as required for participation in the mass settlement program, (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. See July 2014 Lone Pine Order at 1, November 2012 Lone Pine Order 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 is not opposed by the PSC, would apply only to those claimants who have failed to submit sufficient documentation required for participation 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
August 15, 2014

Respectfully submitted,
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