UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: MIRAPEX PRODUCTS LIABILITY LITIGATION	Case No. 07-md-1836 (MJD/FLN)
This document relates to:	
MARY MAGALHAES and JOSEPH MAGALHAES,	Case No. 11-cv-412 (MJD/FLN)
Plaintiffs,	**DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENTS**
vs.	
BOEHRINGER INGELHEIM PHARMACEUTICALS, INC., *et al,*	
Defendants.	

INTRODUCTION

The Court's prior rulings on Defendants' pending Motion to Enforce Settlement Agreements have whittled down the unresolved issues to one: "whether Plaintiffs' attorney, H. Lee Thompson, had authority – actual or apparent – to enter the settlement agreements or whether equitable estoppel applies to enforce the agreements." Memorandum of Law & Order, ECF No. 69, at 3. With the benefit of new evidence received on April 30 and May 28, 2013, the Court now can, and should, answer that question in the affirmative.

When Mr. Thompson demanded $30,000 in full and final settlement of Plaintiffs' claims on March 2, 2012, Plaintiffs themselves contributed to the appearance that their counsel possessed all necessary authority to do so. Plaintiffs' first four settlement

demands in this case, made before, during and after the November 1, 2011 settlement conference, were presented on their behalf based upon actual authority and direction from Plaintiffs. When Plaintiffs, through their counsel, continued settlement talks in conformity with the Court's November 7, 2011 order – a ruling known to Plaintiffs – at no time did Plaintiffs indicate that counsel's authority to negotiate on their behalf was limited in any manner. And when Plaintiffs learned that their counsel presented and Defendants accepted a $30,000 demand to settle their claims, Plaintiffs did nothing to disabuse Defendants of their reasonable assumption that Mr. Thompson was authorized to make that demand under after Defendants filed the instant Motion.

These are actions and non-actions by Plaintiffs themselves – not by their counsel, defense counsel, the Court, or anyone else – that contributed to the reasonable appearance that Mr. Thompson was authorized to settle their claims for $30,000 on March 2, 2012. That being the case, under the doctrine of apparent authority, Plaintiffs are estopped from denying that counsel was so authorized. Defendants respectfully ask the Court to so hold.

PROCEDURAL HISTORY

On June 29, 2012, Defendants moved the Court to enforce settlement agreements with five individual Mirapex plaintiffs, including Plaintiffs herein, represented by attorney H. Lee Thompson.[1] Defendants contended that, though exchanges of written communications on March 2, 7 and 8, 2012, counsel for the parties formed a valid and

[1] On May 24, 2013, Defendants voluntarily withdrew their motion without prejudice as to the other plaintiffs included within Defendants' Motion. 07-md-1836, ECF No. 1891.

enforceable contract to settle Plaintiffs' claims against Defendants for $30,000 and that Mr. Thompson was authorized to bind Plaintiffs to that agreement.

Following briefing and argument, on August 3, 2012 Judge Noel recommended that Defendants' motion be granted. Report and Recommendation, ECF No. 64. Judge Noel found that Plaintiffs' counsel's March 2, 2012 e-mail, containing a $30,000 settlement demand on behalf of Plaintiffs, and Defendants' written acceptance thereof created a valid, enforceable contract. *Id.* at 2-3. Judge Noel also held that Mr. Thompson possessed apparent authority to settle Plaintiffs' claims for $30,000. *Id.* at 3-4.

Plaintiffs objected thereto, and on January 11, 2013 Chief Judge Davis adopted in part and rejected in part Judge Noel's Report and Recommendation and remanded Defendants' motion for further proceedings. Memorandum of Law & Order, ECF No. 69. The Court agreed that counsels' March 2, 7 and 8 exchanges created a valid contract for the settlement of Plaintiffs' claims against Defendants for $30,000 and adopted Sections I and II(A) of the Report and Recommendation. *Id.* at 2 and 7.[2] The Court also concurred that, "based upon Thompson's actions and representations, Defendants reasonably inferred that he was fully authorized to make binding settlement offers in the amounts listed in his email." *Id.* at 3. However, noting that "apparent authority must be based on action or non-action by the client, not just the attorney," *id.* at 3, Chief Judge Davis rejected Section II(B) of the Report and Recommendation and remanded for further proceedings relating to the issue of Mr. Thompson's settlement authority. *Id.* at 3,

[2] This holding is the settled law of the case – thus rendering meaningless Plaintiffs' twice-rejected but continuing refrain that their counsel's March 2 e-mail was somehow not a firm offer. *See, e.g.*, Transcript of Proceedings, May 28, 2013, at 31:1-11.

6 ("the Court remands this matter . . . for issuance of a Report and Recommendation solely on the issue of Thompson's authority and estoppel").

UNDISPUTED MATERIAL FACTS

On April 30 and May 28, 2013, this Court conducted evidentiary hearings on the issue of Plaintiff's counsel's settlement authority and received evidence via the testimony of Nicole Washienko, Patrick Klee, Mary Magalhaes and Joseph Magalhaes and Exhibits D-1 through D-33. Defendants respectfully submit that the full Record, now augmented by the evidentiary hearings, conclusively demonstrates that (1) Mr. Thompson possessed apparent authority to settle Plaintiffs' claims against Defendants for $30,000 and (2) Plaintiffs are therefore estopped from denying the existence of that authority.

The relevant history begins in 2010, when counsel for BIPI's insurers, counsel for Pfizer, and Mr. Thompson negotiated and ultimately settled Mr. Thompson's first-filed Mirapex actions: *Mrus*, 10-cv-485, and *Javery*, 10-cv-486. Declaration of Arthur J. Liederman, ECF No. 49, ¶ 3. During the remainder of 2010 and 2011, Mr. Thompson filed 18 new Mirapex actions on behalf of 26 individual plaintiffs and their spouses, including this case. Beginning in June, 2011, counsel for the parties began what proved to be lengthy settlement negotiations in all of Mr. Thompson's cases. *Id.*, ¶¶ 4-5.

In its Order of August 11, 2011, ECF No. 29, the Court instructed the parties and counsel to appear in Minneapolis for settlement conferences on November 1 and 2, 2011 and to participate in settlement discussions prior thereto. To that end, Mr. Thompson and defense counsel met in Columbus, Ohio on October 4, 2011 to discuss settlement of Mr.

Thompson's Mirapex cases, including this one. *Id.*, ¶ 5; ECF No. 30 (correspondence from Plaintiffs' counsel to the Court, dated October 7, 2011); Transcript of Proceedings, April 30, 2013 ("Day 1 Transcript") at 63:12-17.

After that meeting, on October 26, 2011 Mr. Thompson sent to defense counsel a written settlement demand for Plaintiffs' claims of $475,000. Day 1 Transcript at 10:17-11:5; Exhibit D-29. Plaintiffs gave Mr. Thompson actual authority to make this demand. Transcript of Proceedings, May 28, 2013 ("Day 2 Transcript") at 9:5-10.

During the November 1, 2011 settlement conference, attended by Plaintiffs and Mr. Thompson, Plaintiffs renewed their settlement demand of $475,000; Plaintiffs gave Mr. Thompson and/or the Court actual authority to present that demand. *Id.* at 9:19-10:2. Later that day, Plaintiffs revised their settlement demand to $450,000 and gave their attorney and/or the Court actual authority to present that demand as well. *Id.* at 10:3-10. Although Plaintiffs' claim did not settle that day, neither Plaintiffs nor their attorney subsequently informed Defendants or the Court that Mr. Thompson no longer had full authority to settle their case. *Id.* at 10:11-21; Day 1 Transcript at 15:13-19.

On November 7, 2011, the Court ordered all counsel in those cases that did not resolve during the November 1-2 settlement conferences to continue negotiations. Exhibit D-1. Plaintiffs received a copy of the November 7 Order from their attorney. Day 2 Transcript at 11:3-9. In conformity with that ruling, on November 22, 2011 counsel for Plaintiffs transmitted to Defendants a new written settlement demand in the amount of $475,000. Exhibit D-2. Like their previous demands, Plaintiffs gave Mr. Thompson actual authority to make this demand. Day 2 Transcript at 12:19-13:4.

In response, in early January, 2012 Defendants made an inventory settlement offer of $1,070,000, encompassing the claims of all plaintiffs then represented by Mr. Thompson, including this matter, but excluding the *Sabaj* case – a total of 19 individual cases. Day 1 Transcript at 19:14-21:18; Exhibit D-8.[3] The $1,070,000 aggregate offer consisted of two components: (1) individual settlement offers for each of the 19 cases, totaling $870,000 in the aggregate; and, (2) a $200,000 "bucket" which Plaintiffs' counsel was free to dip into as needed to reach final agreements with individual clients. *Id.* at 21:6-18. Defendants' offer on Plaintiffs' claim was $25,000. *Id.* at 22:16-18. Under the terms of the inventory offer, Mr. Thompson would attempt to obtain firm settlement authority from all 19 of his clients; if those individual commitments totaled $1,070,000 or less, all 19 matters would be settled, each for the specific amount authorized by each plaintiff. *Id.* at 21:19-25. If Mr. Thompson could not obtain settlement authority from his clients totaling $1,070,000 or less, Defendants had various options available to them: (1) reject the settlement in its entirety, (2) settle with fewer than all 19, or (3) increase their aggregate offer to the entire group. *Id.* at 22:1-15.

In response to Defendants' $1,070,000 inventory offer, Mr. Thompson informed defense counsel that he would attempt to obtain the necessary settlement authority from his individual clients. *Id.* at 22:24-23:2. Thereafter, Mr. Thompson and defense counsel communicated every week or two over the progress of Mr. Thompson's efforts, during which Mr. Thompson identified those plaintiffs who had authorized him to settle their

[3] Defendants had previously resolved hundreds of other Mirapex cases through an inventory settlement format, including claims brought by the Robins Kaplan, Salkow and Bahe Cook firms. Id. at 18:17-19:13.

claims within the parameters of the inventory offer. *Id.* at 23:6-24:21, 26:3-27:9; Exhibits D-7 and D-8. As of February 22, 2012, Mr. Thompson informed defense counsel that he possessed authority to settle the claims of 11 or 12 of his clients, Plaintiffs' claim not being among them. *Id.* at 29:19-31:19; Exhibit D-10.

In a telephone discussion on March 2, 2012, Mr. Thompson informed defense counsel that he was still awaiting authority from certain plaintiffs, including the Magalhaeses, to accept the inventory offer and asked Defendants to add another $35,000 to the "bucket." Defense counsel took this to mean that, with $35,000 added to the aggregate offer of $1,070,000, an inventory settlement might work. *Id.* at 33:12-34:4.

Later on March 2, Mr. Thompson sent to defense counsel an e-mail containing individual settlement demands for 18 of the 19 plaintiffs included within the inventory offer. *Id.* at 34:6-17; Exhibit D-11.[4] Counsel's individual demand for Plaintiffs' case was $30,000. *Id.* Defense counsel subsequently observed that the e-mail contained demands for plaintiffs whom Mr. Thompson had not previously identified as having authorized him to accept the inventory offer, including the Magalhaeses. *Id.* at 34:24-35:12; Exhibit D-12. To clarify the issue of settlement authority, on March 7, 2012 defense counsel called Mr. Thompson and asked him to confirm that (1) he possessed authority to settle the claims of all of the plaintiffs listed in his March 2, 2012 e-mail and (2) the figures listed therein were final demands for each. *Id.* at 37:11-24. In response, according to defense counsel's uncontradicted testimony, "*he said that they were his final*

[4] The 19th case was the *Robinson Estate* claim, which was part of the inventory offer of $1,070,000 but which counsel were separately working to resolve. *Id.* at 34:18-23.

demands, that he had authority and to move ahead with the inventory settlement and send him releases." *Id.* at 38:1-3 (emphasis added); *see also* 38:23-39:1 ("Q.: He told you that those were his final demands and he had settlement authority for all the clients that were listed in his March 2 e-mail? A.: Yes.") and Exhibit D-13.

In reliance upon this discussion, and after obtaining authorization from both defendants to settle the 18 cases for the amounts listed in the March 2 e-mail,[5] defense counsel sent an e-mail to Mr. Thompson dated March 7, 2012 formally accepting each of the settlement demands contained in Mr. Thompson's March 2, 2012 e-mail, including Plaintiffs' $30,000 demand. *Id.* at 39:2-15; Exhibit D-14. The next day, defense counsel confirmed in writing Plaintiffs' $30,000 settlement demand, Defendants' acceptance thereof, and the full and final resolution of Plaintiffs' case. Exhibit D-16. Notably, in response to these communications Mr. Thompson made no assertion that he was not authorized to demand $30,000 to settle Plaintiffs' claim, *id.* at 41:11-16; to the contrary, after receiving Exhibit D-16, verifying that Plaintiff's claim was settled for $30,000, Mr. Thompson's response was "THANK YOU." *Id.* at 41:25-43:19; Exhibit D-15.

After March 8, defense counsel and Mr. Thompson exchanged numerous phone calls and e-mails relating to the mechanics of the settlements. *See, e.g., id.* at 43:20-44:21 and Exhibit D-18; *id.* at 46:20-48-14 and Exhibits D-19 and D-30; and, *id.* at 45:5-46-9. At no time during these communications did Plaintiffs' counsel indicate he was not

[5] The aggregate amount of the settlement demands listed in counsel's March 2, 2012 e-mail, plus the settlement allocation for the 19th case not listed in the e-mail, totaled $1,083,000, or $13,000 above the $1,070,000 inventory offer. *Id.* at 35:15-37:5; Exhibit D-12. Accordingly, defense counsel sought and obtained authority from their clients to accept the 18 demands in the amounts presented. *Id.* at 37:6-10.

authorized to demand $30,000 to settle Plaintiffs' claims in his e-mail of March 2. *Id.* at 44:22-45:3, 46:6-9 and 48:15-18. Similarly, in correspondence dated May 14, 2012, responding to defense counsel's inquiry as to why Plaintiffs had not yet signed their release, Mr. Thompson made no claim that he was not authorized on March 2, 2012 to demand $30,000 in settlement of Plaintiffs' claims. *Id.* at 50:6-9; Exhibit D-21.

Meanwhile, sometime between March 8 and 10, 2012, Plaintiffs received from their counsel a copy of Defendants' March 8, 2012 settlement confirmation letter, Exhibit D-16. Day 2 Transcript at 22:22-23:19. Although Plaintiff claimed that that letter "was quite a shock," *id.* at 24:4, Plaintiffs made no attempt to inform Defendants that Mr. Thompson was purportedly not authorized to demand $30,000 to settle their claims until after Defendants moved to enforce the settlement agreement, via an affidavit in opposition to Defendants' motion. *Id.* at 13:12-21; ECF No. 55; Exhibit D-26.

ARGUMENT

I. The Enhanced Record Demonstrates That Plaintiffs, Through Their Own Action And Non-Action, Contributed To The Appearance That Mr. Thompson Was Authorized To Demand $30,000 In Full And Final Settlement Of Their Claims.

In his January 11, 2013 Memorandum of Law & Order, Chief Judge Davis described additional evidence that, in the Court's view, could support a finding that Mr. Thompson possessed apparent authority to demand $30,000 in settlement of Plaintiffs' claims. For instance, the requisite "action or non-action by the client, not just the attorney," might be seen via proof that, following the November 1, 2011 settlement conference, Plaintiffs "took [no] action to inform Defendants that Thompson no longer

had such full settlement authority." *Id.* at 5-6. Alternatively, Chief Judge Davis observed that Plaintiffs' awareness of the Court's November 7, 2011 order requiring their attorney to make a new settlement demand, while "[doing] nothing to disabuse Defendants of the reasonable inference that Thompson had authority to present settlement offers on their behalf," could satisfy the "action or non-action by the client" requirement. *Id.* at 6.

That evidence, and much more, is now plain from the enhanced Record. Among other things, the Record demonstrates that:

- Plaintiffs' counsel and defense counsel participated in settlement negotiations on this case even before the settlement conference of November 1, 2011, including a face-to-face conference among counsel in Columbus, Ohio on October 4, 2011;
- Plaintiffs gave Mr. Thompson actual authority for an initial settlement demand of $475,000, which counsel presented on October 26, 2011, one week before the November 1, 2011 settlement conference;
- Plaintiffs gave Mr. Thompson and the Court actual authority for two settlement demands presented during the settlement conference of $475,000 and $450,000;
- After the November 1, 2011 conference concluded without a settlement, Plaintiffs gave no indication to the Court or to Defendants that Mr. Thompson no longer possessed full settlement authority on their behalf;
- Plaintiffs knew of the Court's November 7, 2011 order requiring the parties, through counsel, to engage in further settlement negotiations;

- In conformity with the November 7 order, Plaintiffs gave Mr. Thompson actual authority to renew their new settlement demand of $475,000, which Mr. Thompson presented on November 22, 2011; and,
- Although Plaintiffs knew by March 10, 2012 that Mr. Thompson demanded and Defendants accepted $30,000 to settle Plaintiffs' claims in full, Plaintiffs made no attempt to inform Defendants or their attorneys that their counsel was *not* so authorized until after the filing of this Motion.

Each of these items, Defendants submit, constitutes "action or non-action by the client" directly contributing to the appearance that Mr. Thompson was authorized to settle their claims for $30,000 on March 2, 2012. Plaintiffs *themselves* initiated the exchange of demands and offers by expressly authorizing their counsel to make their initial demand on October 26, 2011. Plaintiffs *themselves* authorized their counsel and the Court to present two separate demands on their behalf during the November 1, 2011 settlement conference. After the Court directed the parties to continue further negotiations through their counsel, Plaintiffs *themselves* authorized their counsel to present yet another demand. At no time after those demands were rejected did Plaintiffs *themselves* indicate or intimate, to Defendants or to the Court, that their counsel no longer possessed full authority to negotiate on their behalf. And even after learning that their attorney presented and Defendants accepted a settlement demand of $30,000, Plaintiffs *themselves* took no action to disabuse Defendants of the reasonable inference that their counsel was authorized to make that demand until after Defendants brought this Motion.

Client "actions" and "non-actions" similar to these have been found to amply support a finding of apparent authority. *See. e.g., Barry v. Barry*, 172 F.3d 1011, 1015 (8th Cir. 1999) (where client sent attorney into courtroom to settle case and remained outside while agreement was memorialized, *held* that attorney was vested with apparent authority to settle related indemnity claim that client allegedly intended to reserve); *Bergstrom v. Sears, Roebuck & Co.*, 532 F. Supp. 923, 933-34 (D. Minn. 1982) (apparent authority found to exist where, *inter alia*, client failed to inform opposing party that its counsel had less than full authority to settle, and after learning of settlement agreement's terms did not advise opposing party of intent to disavow it); *Andrews v. Minneapolis Park & Recreation Board*, 2011 U.S. Dist. LEXIS 25893, *12 (D. Minn. Feb. 23, 2011) (Brisbois, M.J.), *adopted*, 2011 U.S. Dist. LEXIS 25778 (D. Minn. Mar. 11, 2011) (Schiltz, J.) ("Plaintiff never took any action indicating to Magistrate Judge Brisbois or Defendant that his attorneys did not have authority to settle the case on the terms of his "last best offers" during or after the settlement conference . . ."); *Sowada v. Luberts*, 2011 U.S. Dist. LEXIS 52275, *11 (D. Minn. Mar. 28, 2011) (Brisbois, M.J.), *adopted*, 2011 U.S. Dist. LEXIS 52307 (D. Minn. May 16, 2011) (Davis, C.J.) (same).

Defendants anticipate that Plaintiffs will argue that they never extended "blanket settlement authority" to Mr. Thompson, which in their view negates any authority for his March 2, 2012 demand. *See, e.g.*, Day 2 Transcript at 18:19-22 and 26:25-27:3. That argument, should Plaintiffs make it, is meritless. The essence of *apparent* authority is that a party may be bound to a settlement agreement made by the party's attorney even where the attorney possesses *no actual* authority to enter into it. *Powell v. MVE*

Holdings, Inc., 626 N.W.2d 451, 457 (Minn. App. 2001) ("[a] principal is bound not only by an agent's actual authority but also by authority that the principal has apparently delegated to the agent"); *Austin Farm Center, Inc. v. Austin Grain Co.,* 418 N.W.2d 181, 185 (Minn. App. 1988) (apparent authority may lie even where actual authority is absent); *Bergstrom, supra,* 532 F. Supp. at 933 (same). Under the doctrine of apparent authority, it matters not whether Mr. Thompson possessed actual authority (whether through a "blanket" grant or otherwise) to demand $30,000 in settlement of Plaintiffs' clams; if the elements of apparent authority are satisfied, Plaintiffs are estopped as a matter of law from claiming that Mr. Thompson was *not* so authorized. *See, e.g., Barry, supra,* 172 F.3d at 1015; *Sowada, supra,* 2011 U.S. Dist. LEXIS 52275 at *11-12. Inasmuch as all elements to a finding of apparent authority exist here, whether or not Plaintiffs extended "blanket" settlement authority to their counsel is irrelevant.

Finally, it is worth noting that Defendants reached an inventory settlement with all of Mr. Thompson's clients in good faith and in reliance upon counsel's assurance that he had full authority from *all* of his clients, including Plaintiffs, to fully and finally settle their cases for the amounts demanded in his March 2 e-mail. The aggregate value of Mr. Thompson's demands, accepted by Defendants, made possible an inventory settlement and obviated the need for Defendants to resort to other options, including voiding the entire inventory offer if the aggregate amount of plaintiffs' demands was simply too high. *See* Day 1 Transcript at 22:1-15. Allowing Plaintiffs to retreat from their settlement would greatly prejudice Defendants by, *inter alia,* subjecting them to potential liability

and defense costs over and above the bargained-for $1,083,000 cap that Defendants achieved when they accepted the 18 demands contained in counsel's March 2 e-mail.

The bottom line, Defendants respectfully submit, is this: Plaintiffs themselves cloaked their attorney with actual settlement authority at several stages during the settlement process; never informed Defendants or the Court of any limitation on their attorney's settlement authority; and, even after learning that their counsel made an allegedly unauthorized settlement demand, did nothing to disabuse Defendants of their assumption that Mr. Thompson possessed the requisite settlement authority until after the filing of this Motion. Plaintiffs' *own* "actions" and "non-actions" clearly contributed to the appearance that their counsel was authorized to demand $30,000 to settle their claims against Defendants in full – thus supporting a finding of apparent authority in this case.

II. The Expanded Record Also Buttresses The Conclusion That Defendants Reasonably Understood Plaintiffs' Counsel To Be Fully Authorized To Demand $30,000 In Settlement Of His Clients' Claims.

The other prerequisite to a finding of apparent authority – that Defendants reasonably and justifiably assumed, based upon the attendant circumstances, that Plaintiffs' counsel was authorized to present a settlement demand of $30,000 – stands as the law of the case. *See* Memorandum of Law & Order at 3 ("Defendants reasonably inferred that [Mr. Thompson] was fully authorized to make binding settlement offers in the amounts listed in his email"). However, new evidence adduced during the evidentiary hearing further confirms the point.

The uncontradicted testimony of Nicole Washienko establishes that, after Defendants in January, 2012 presented an inventory settlement offer to Mr. Thompson,

he and defense counsel communicated regularly regarding his efforts to secure authority from his clients to accept it. *See*, *e.g.*, Exhibits D-7 (e-mail recounting January 18, 2012 phone conversation in which Mr. Thompson advised Ms. Washienko that he had secured agreement from 5 of his 18 or 19 Mirapex clients, by name, and was in communication with the others), D-8 (e-mail recounting similar January 23, 2012 phone conversation), D-10 (e-mail recounting February 22, 2012 conversation in which Mr. Thompson informed Ms. Washienko that "he continues to work on the few remaining" plaintiffs), and D-9 (exemplar of approximately ten letters from Mr. Thompson to defense counsel indicating that various plaintiffs, again identified by name, "[have] given me settlement authority;" *see* Day 1 Transcript at 27:23-29:8). Importantly, after receiving counsel's March 2 e-mail, which for the first time since the making of the inventory offer suggested that the Magalhaeses had also given settlement authority to Mr. Thompson, out of an abundance of caution Ms. Washienko called Mr. Thompson on March 7, 2012 and specifically asked whether he possessed settlement authority for *all* of the plaintiffs named in his March 2 e-mail, including Plaintiffs – to which Mr. Thompson replied that "*they were his final demands, that he had authority and to move ahead with the inventory settlement and send him releases.*" *Id.* at 37:11-38:3 (emphasis added).

Under Minnesota law, counsel's settlement authority may be established where, as here, a party's attorney explicitly represents that he or she has been in contact with the client and possesses authority to present a settlement demand to opposing counsel. *See, e.g., Skalbeck v. Agristor Leasing*, 384 N.W.2d 209, 213 (Minn. App. 1986) (letter from plaintiff's counsel to defense counsel, stating that "Bob (plaintiff) authorized me to settle

his case," held to support claim of settlement authority), relied upon by the Eighth Circuit in *Barry, supra*, 172 F.3d at 1015; *Andrews v. Minneapolis Park and Recreation Board, supra*, 2011 U.S. Dist. LEXIS 25893, *12 ("Plaintiff's attorneys represented . . . that they had authority to settle the case . . . [i]n addition, during all relevant times, Plaintiff's attorney continued to represent to the Defendant's attorney that he was in contact with the Plaintiff"; apparent authority held to exist as a matter of law).

Simply stated, Defendants submit, there is nothing more Defendants could have done – save for violating the Rules of Professional Conduct by contacting Plaintiffs directly – to ascertain whether Mr. Thompson was authorized by Plaintiffs to settle their claims in full for $30,000. That Defendants were reasonably justified in assuming that Plaintiffs' counsel was fully authorized to present a $30,000 settlement demand to Defendants on March 2, 2012 is beyond dispute. Inasmuch as Plaintiffs' own actions and non-actions contributed to that belief, Plaintiffs are estopped from denying that their attorney possessed that authority. *Barry, supra.*

III. Any Concerns The Court May Have Regarding Counsel's Representation Of Plaintiffs Cannot Nullify A Settlement Which Counsel Had Authority To Make And Which Was Negotiated By Defendants In Good Faith.

During the May 28, 2013 evidentiary hearing, the Court expressed concerns over how Plaintiffs' counsel arrived at his March 2, 2012 $30,000 settlement demand. *See* Day 2 Transcript at 30:12-31:11. So long as that demand was supported by apparent authority – which, Defendants submit, is clearly the case here – any issues the Court may have over Mr. Thompson's performance or conduct do not allow the Court to nullify a valid, binding and enforceable settlement agreement made by the parties.

Numerous federal appellate and district courts have squarely held that, where a party reaches an otherwise-valid settlement, allegations of counsel's misconduct, malpractice or other inadequate representation do not permit a reviewing court to set the settlement aside. In perhaps the leading case on this issue, *Petty v. Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988), the Fourth Circuit stated:

> *When a litigant voluntarily accepts an offer of settlement, either directly or indirectly through the duly authorized actions of his attorney, the integrity of the settlement cannot be attacked on the basis of inadequate representation by the litigant's attorney*. In such cases, any remaining dispute is purely between the party and his attorney.

(Emphasis added.) Other federal courts, many citing *Petty* with approval, agree. *See, e.g., Afolabi-Brown v. Chrysler Corp.,* 2001 U.S. App. LEXIS 18429, *2 (D.C. Cir. Jul. 26, 2001) (citing to *Petty*); *Taylor v. Gordon Flesch Co.,* 793 F.2d 858, 864 (7th Cir. 1986) (". . . we do not regard competency of counsel as a relevant factor for district courts to consider in evaluating whether a settlement is knowingly reached"); *Martens v. Smith Barney Inc.,* 2002 U.S. Dist. LEXIS 8037, *13 n.4 (S.D.N.Y. May 3, 2002) (citing to *Petty*); *In re Petition of Mal de Mer Fisheries, Inc.,* 884 F. Supp. 635, 640 (D. Mass. 1995) (citing to *Petty*); *Mercer v. Richardson Brands, Inc.,*1992 U.S. Dist. LEXIS 9302, *11 (E.D. Pa. Jul. 2, 1992) (". . . regarding the alleged misconduct of Plaintiff's attorney, . . . Plaintiff's remedy lies in an action for malpractice and not in an action seeking to invalidate the terms of a binding settlement," citing to *Petty*); *Harrison v. Arlington Independent School Dist.,* 717 F. Supp. 453, 458 (N.D. Tex. 1989). *See also Link v. Wabash R.R. Co.,* 370 U.S. 626, 634 n. 10, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) where,

affirming dismissal of an action due to counsel's unexcused failure to prosecute his client's case, the Supreme Court observed:

> . . . [I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. *But keeping [a] suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant.*

(Emphasis in original and added.)

Also irrelevant is the fact that the $30,000 settlement Plaintiffs stand to receive is apparently well below their own valuation of their claim.[6] As the Fourth Circuit observed in *Petty*, 849 F.2d at 133:

> A litigant who enters the judicial process through the agency of freely chosen counsel always assumes a certain risk that the result achieved will not be satisfactory. Defeated expectations do not, therefore, entitle the litigant to repudiate commitments made to opposing counsel or to the court.

See also Mal de Mer Fisheries, supra.

In sum, however Plaintiffs' counsel arrived at the $30,000 demand he presented on March 2, 2012, the parties' settlement agreement remains valid and enforceable.

[6] As part of their inventory offer, Defendants valued Plaintiffs' claim at $25,000. Most of the plaintiffs covered by counsel's March 2, 2012 e-mail settled their claims for amounts at or close to Defendants' valuations of them; Plaintiffs' $30,000 settlement is consistent with those other agreements. Moreover, Plaintiffs' claim suffers from a variety of factual and legal problems, including learned intermediary/post-label change use (Plaintiff started on Mirapex in 2006), lack of proximate causation (no reported scientific studies link compulsive knitting to Mirapex use), and a strong statute of limitations defense. In light of the foregoing, a $30,000 settlement is hardly unreasonable.

CONCLUSION

For these reasons, and those set forth in Defendants' motion to enforce settlement agreements and supporting memoranda and exhibits, Defendants respectfully submit that Plaintiffs are estopped as a matter of law from denying that their counsel possessed all necessary authority on March 2, 2012 to settle their claims for $30,000. Based thereon, and in accordance with Sections I and II(A) of the Magistrate Judge's August 3, 2012 Report and Recommendation and Chief Judge Davis' Memorandum of Law & Order of January 11, 2013, Defendants request that the Court enter an appropriate order enforcing the terms of the settlement agreement between Plaintiffs and Defendants.

Dated: June 6, 2013

By: s/ Scott A. Smith

Scott A. Smith (#174026)
Attorneys for Defendant Boehringer Ingelheim Pharmaceuticals, Inc.
NILAN JOHNSON LEWIS PA
120 South Sixth Street, Suite 400
Minneapolis, MN 55402
Phone: (612) 305-7500
Fax: (612) 305-7501
ssmith@nilanjohnson.com

Bruce R. Parker
Jason C. Rose
Attorneys for Defendant Boehringer Ingelheim Pharmaceuticals, Inc.
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
(410) 244-7400
brparker@venable.com
jcrose@venable.com

Dated: June 6, 2013

By: s/ Joseph M. Price

Joseph M. Price (#88201)
Attorneys for Defendants Pfizer, Inc., Pharmacia Corporation, and Pharmacia & Upjohn Company LLC
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3905
Phone: (612) 766-7000
jprice@faegre.com

Lori B. Leskin
C. Kawezya Burris
Attorneys for Defendants Pfizer, Inc., Pharmacia Corporation, and Pharmacia & Upjohn Company LLC
KAYE SCHOLER LLP
425 Park Avenue
New York, New York 10022
(212) 836-8541
lori.leskin@kayescholer.com
kawezya.burris@kayescholer.com