UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: MIRAPEX PRODUCTS LIABILITY LITIGATION	No. 07-md-1836 (MJD/FLN)
MARY MAGALHAES AND JOSEPH MAGALHAES, Plaintiffs, v. BOEHRINGER INGELHEIM PHARMACEUTICALS, INC., PFIZER, INC., PHARMACIA CORPORATION, and PHARMACIA & UPJOHN COMPANY LLC, Defendants.	No. 11-cv-412 (MJD/FLN) **DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION TO ENFORCE JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENFORCEMENT OF SETTLEMENT AGREEMENT AND DISMISSAL WITH PREJUDICE**

INTRODUCTION

Intent on rewriting both history and the law of this case, Plaintiffs ask this Court in essence to reverse a ruling made by Magistrate Judge Noel in August, 2012, adopted by Chief Judge Davis in January, 2013, and implicitly reconfirmed in the Court's August 26, 2013 now-final-and-unappealable order of enforcement, that confidentiality is a material term of the settlement agreement made by the parties nearly two years ago. It is far too late in this litigation, and far too disingenuous, for Plaintiffs now to argue that confidentiality was never part of the deal. *Every* settlement agreement reached in Mirapex litigation has been conditioned upon confidentiality language essentially identical to that contained in Defendants' proposed order – a fact well known to Plaintiffs' counsel, through course of dealing, at the time counsel made his authorized

March, 2012 settlement demand. Defendants respectfully submit that the same confidentiality-related language is necessary to effectuate the law of the case, ensure that Plaintiffs will abide by it, and finally bring this matter to a long-overdue close.

ARGUMENT

I. Plaintiffs' Motion To Strike Defendants' Motion For Enforcement Of Settlement Agreement And Dismissal With Prejudice Is Frivolous

At the outset, Plaintiffs urge the Court to strike Defendants' Motion for Enforcement of Settlement Agreement and Dismissal With Prejudice (ECF No. 115) on the purported basis that "[the motion] does not contain . . . a concise statement of material facts as to which the moving party contends there is no genuine issue to be tried." Memorandum of Law in Support of Motion to Enforce Judgment ("Pl. Memo."), ECF No. 121, at 2. This argument is specious. Defendants' Memorandum of Law plainly sets forth the material facts, with citations to the Record, upon which rely. *See* ECF No. 117, at 2-4. Plaintiffs are more than familiar with those facts, and neither the Federal nor Local Rules requires more. Furthermore, as discussed in greater detail below, whether confidentiality is a material term of the parties' contract for settlement is no longer a disputed question of material fact, but the established law of this case. For these reasons, Plaintiffs' procedural challenge to Defendants' motion is frivolous and should be denied.

II. The Requirement Of Confidentiality Is The Established Law Of The Case And May Not Be Relitigated At This Juncture By Plaintiffs

The "law-of-the-case doctrine" prevents the relitigation of settled issues in a case. *United States v. Bartash*, 69 F.3d 864, 866 (8th Cir. 1995). Under it, when a trial court

finally decides facts or law adverse to one party and that party fails to timely appeal therefrom, that decision controls the same issues in subsequent stages of the same case. *Gander Mountain Co. v. Cabela's, Inc.*, 540 F.3d 827, 830 (8th Cir. 2008); *Jensen-Carter v. Hedback (In re Stephens)*, 2012 U.S. Dist. LEXIS 72916, *17-18 (D. Minn. May 24, 2012) (Tunheim, J.).

In Section II(A) of his Report and Recommendation of August 3, 2012, Judge Noel expressly found that, based upon the prior course of dealing between counsel for Plaintiffs and Defendants, the requirement of confidentiality was a material term of the parties' settlement agreement. ECF No. 64 at 3 n. 4 ("[t]he terms of every settlement agreement in this Mirapex [litigation] have been made confidential. *See* Restatement (Second) of Contracts §221 (agreements may be supplemented by usage)") and at 5 ¶ 3(c) ("[t]he terms of the settlement agreement are to remain confidential"). In his Memorandum of Law & Order of January 11, 2013, Chief Judge Davis expressly adopted Section II(A) of the Report and Recommendation. ECF No. 69 at 2. Subsequently, after the issue of counsel's settlement authority was resolved, on August 23, 2013 the Court issued its final order granting Defendants' motion for enforcement in all respects. ECF No. 112. Though the August 23, 2013 ruling did not expressly dismiss the case, it was nonetheless an appealable final decision under 28 U.S.C. § 1291. *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1139 (9th Cir. 2003); *Evans-Carmichael v. United States*, 250 Fed. Appx. 256, 261, 2007 U.S. App. LEXIS 22927, *11-13 (10th Cir. 2007).

Plaintiffs have not appealed the Court's August 23, 2013 order. Hence, consistent with the authorities cited above, the Court's finding that confidentiality is a material term

of the parties' agreement now stands as the law of the case. As a result, Plaintiffs' thirteenth-hour pleas that the Court treat "the addition of [the] material term [of confidentiality] . . . as a rejection of plaintiffs [*sic*] demand and thus a Counter-Offer" (Pl. Memo. at 3) and construe "the settlement agreement . . . [as including] solely the terms and conditions contained in the plaintiffs [*sic*] demand dated March 3, 2013" (*id.* at 5) are factually and legally meritless.

Finally, Plaintiffs suggest that they possess "a First Amendment right of access and expression" that, in their view, somehow overrides their confidentiality obligations in the settlement agreement. Pl. Memo. at 5. Plaintiffs are wrong. Through their authorized agent, Plaintiffs entered into a binding contract that contains promises of confidentiality. That contract is enforceable under state law according to its terms, the First Amendment notwithstanding. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) ("the First Amendment does not confer . . . a constitutional right to disregard promises that would otherwise be enforced under state law"). And the legal authorities cited by Plaintiffs on pages 4 and 5 of their Memorandum of Law are totally inapposite here, as this case does not involve public access to judicially-sealed court filings.

In sum, the law of this case is that the obligation of confidentiality is a material term of the parties' contract for settlement. As much as Plaintiffs may now wish to evade that obligation, there exists no factual or legal basis by which they may now relitigate the Court's prior holdings.

III. The Confidentiality-Related Terms Contained In Defendants' Amended Proposed Order Are Appropriate And Reasonable.

Apart from their contention that there should be no confidentiality obligations imposed upon them whatsoever, Plaintiffs challenge none of the specific confidentiality-related terms of the proposed order submitted by Defendants as unreasonable or inappropriate,[1] and with good reason: each and every one of the several hundred written release and settlement agreements reached between plaintiffs and Defendants in MDL 1836, including numerous agreements reached between Plaintiffs' counsel and Defendants prior to March 2, 2012, has contained the same language. Declaration of Arthur Liederman, dated December 13, 2013, ECF No. 118, at 3. That prior course of dealing, Defendants respectfully submit, points toward the adoption of the same language by this Court in its final order of dismissal with prejudice.

Plaintiffs' suggestion that Defendants seek to "gag" them (Pl. Memo. at 1), or place them in fear of litigation for the rest of their lives (Affidavit of Mary D. Magalhaes, ECF No. 130, at 2 ¶¶ 6-7), is unfounded hyperbole. Defendants want nothing more than closure, finality and peace – exactly what Defendants thought they were buying nearly two years ago when they accepted Plaintiffs' settlement demand. The language of the amended proposed order is tailored to protect those interests without imposing

[1] Plaintiffs do challenge Defendants' original request to pay the settlement proceeds into a Court-supervised fund, claiming that whatever disagreement may once have existed as to the division of the settlement proceeds between Plaintiffs and their counsel, no such disagreement exists today. Affidavit of Mary D. Magalhaes, dated December 16, 2013, ECF No. 130, at 1 ¶¶ 5-6. Defendants accept this representation and are submitting with this memorandum an amended proposed order that modifies paragraphs 3 and 4 of their original proposed order accordingly.

unnecessary or inappropriate burdens upon Plaintiffs. Notably, of the hundreds of other Mirapex plaintiffs whose written settlement agreements have incorporated the same confidentiality language, not once have Defendants yet found it necessary to go to court to enforce those terms – clear proof that the confidentiality language in Defendants' amended proposed order achieves closure and finality without unduly burdening Plaintiffs. There is no reason to believe, and Plaintiffs offer none, that those terms will somehow fan the flames of future litigation. What they do ensure is peace.

CONCLUSION

Nearly two years have now elapsed since Defendants accepted Plaintiffs' settlement demand of March 2, 2012, believing they were buying closure, finality and peace. To the contrary, Plaintiffs' repeated attempts at derailing a settlement voluntarily made by their authorized counsel have caused Defendants substantial additional expense, delay, and uncertainty. Plaintiffs are no better off for their efforts, and Defendants are substantially worse off for them. The Court, too, has been forced to expend additional time, effort and resources of its own to protect the integrity of the settlement process.

The time has come – indeed, it is long past – for the parties to move on. Dismissing this case upon the terms contained in their amended proposed order, Defendants respectfully submit, will fairly and appropriately bring this matter to a final conclusion, allow Plaintiffs to receive their settlement proceeds without further ado, and protect Defendants' legitimate, bargained-for interests in closure and peace. Defendants urge the Court to do so.

Dated: January 8, 2014

By: s/ Scott A. Smith

Scott A. Smith (#174026)
Tracy J. Van Steenburgh (#141173)
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
tvan@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: January 8, 2014

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@faegrebd.com

Lori B. Leskin
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