IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: AVANDIA MARKETING SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	:	**AVANDIA MDL 1871** **2007-MD-1871** **HON.CYNTHIA M. RUFE**
THIS DOCUMENT RELATES TO BRANCH LAW FIRM CLAIMANTS	:	

MOTION TO ENFORCE MASTER SETTLEMENT AGREEMENT ON AN EXPEDITED HEARING

COME NOW the Plaintiffs, by and through their attorneys of record, the Branch Law Firm (Turner W. Branch, Esq.) and respectfully request from this Honorable Court for an Order enforcing payment and compelling compliance by the Defendant, GlaxoSmithKline, LLC, with the Master Settlement Agreement.

Nearly two years have passed since the Branch Law Firm claimants agreed to settle their claims, and yet, hundreds of claimants included in the Master Settlement Agreement (MSA) have yet to receive the full amount of their settlement value. The 620 Plaintiffs ("Plaintiffs") that are subject to this Motion have satisfied all Medicare and Medicaid liens (or Medicare/Medicaid have affirmed that no liens exist) and no private insurer, including Medicare Advantage organizations ("MAO"), has asserted a valid claim for subrogation or reimbursement.

The requirements for asserting a valid lien—whether constructive or statutory—have not been met in the instant case and thus these liens are unrecognizable and unenforceable. This Court, as well as others, has long recognized the necessity for compliance with certain elementary prerequisites before enforceable recognition is given to a lien. Additionally, Movants

complain about the fact that many claims in the Avandia settlement have been paid to claimants without recognition or enforcement of liens that are now unilaterally agreed upon by GlaxoSmithKline, Garretson Resolution Group, and their attorneys.

Without order of Court, Plaintiffs' settlement funds will apparently be held ***indefinitely*** until Defendant is satisfied that every health care provider has asserted or waived its reimbursement or subrogation rights against the settling claimants. This was not the intention of the parties at the time of entering into the Settlement Agreement nor does it comply with the legal requirements for asserting a lien. Plaintiffs should not be held hostage, and prevented from resolving this litigation and receiving settlement funds, by the possibility that some health care provider could bring a claim at some point in the future. Accordingly, Plaintiffs respectfully request that this Court issue an Order requiring GSK to release the remaining settlement funds to Plaintiffs or, alternatively, issue an Order requiring any and all private insurance companies with potential outstanding reimbursement and subrogation claims to come forward and assert a claim within thirty (30) days or lose all rights to funds received in the Avandia litigation.

PROCEDURAL BACKGROUND

On December 22, 2010, The Branch Law Firm and GlaxoSmithKline, LLC, entered into the MSA to settle the claims of all BLF clients who alleged injuries from their ingestion of the pharmaceutical drug Avandia. The MSA, while confidential, is the backbone of the agreement between the parties in this case and can be argued and reviewed "*in camera*" by this Court. The specific language of the MSA that totally supports our argument cannot be included here or discussed in detail in this Motion because of the "Confidentiality Agreement" contained therein but can be shared with the Court "in camera". In summation, the terms of the MSA dictated that the Branch Law Firm was to provide GSK with all information necessary to comply with the

reporting requirements of Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA)(P.L. 110-173), codified 42 U.S.C. 1395y(b)(8). Additionally, prior to the distribution of any payment, the settling claimant was required to represent and warrant to GSK that all claims by any lien holders have been or will be satisfied. *Id.* As part of the settlement process, GSK set aside a reserve or "hold back" for the payment and satisfaction of governmental liens, including Medicare and Medicaid. After the eligible claimants in the Branch Law Firm settlement group were determined, and the settlement funds were allocated among these claimants, the parties authorized The Garretson Resolution Group (GRG was appointed as Settlement Administrator and Lien Resolution Administrator in the terms of the MSA) to release settlement funds to the claimants while withholding a certain percentage to satisfy the healthcare liens.

On November 17, 2010, Humana Medical Plan, Inc. and Humana Insurance Company (collectively "Humana") filed a class action complaint against GSK, on behalf of themselves and all others similarly situated, to recover the money that MAOs paid on behalf of enrollees for medical treatment for illness or injury attributable to the use of Avandia.[1] *Humana Medical Plan, et al. v. GlaxoSmithKline, L.L.C.*, 10-6733 (E.D. Pa.). The lawsuit was filed by Rawlings & Associates, PLLC and Lowey Dannenberg Cohen & Hart PC (collectively "Rawlings Group"). In response to the lawsuit, GSK froze the Branch Law Firm Fund pending resolution of the class action allegations with Humana.

Following the filing of the class action lawsuit, The Rawlings Group agreed to participate in a voluntary Medicare Part C Plan ("Part C Plan") to resolve the interests of the Part C providers with those claimants who were identified as being settling parties in the Avandia

[1] Humana also sought damages for GSK's failure to pay such reimbursements.

litigation and members of the Participating Plans. Each claimant was presented with educational materials explaining their potential reimbursement obligations and given the opportunity to enter the Part C Plan so that any MAO interests could be identified and resolved. As a result of the agreement, GSK agreed to release funds to eligible claimants subject to a 20% holdback to satisfy any Medicare Part C liens. In accordance with the Medicare Plan, the Branch Law Firm authorized the release of identifying information to the Rawlings Group in order to allow them to identify claimants who received Part C benefits from Participating Providers.

In addition to the Part C Plan, the Branch Law Firm also entered into a Private Lien Resolution Program ("PLRP") to resolve potential reimbursement and subrogation claims with approximately 48 Private Healthcare organizations represented by the Rawlings Group. The Program was established to "verify, resolve, and satisfy" outstanding claims "arising from any of their private health coverage, including coverage under Medicare Part C and any managed Medicaid program." In accordance with the agreement, the Rawlings Group identified any claimant who received benefits through one of the Private Healthcare organizations. At this time, the Branch Law Firm has notification of 20 pending Medicaid liens and 170 pending Medicare Part C liens. No other valid liens – whether constructive or statutory – have been demonstrated at this time.

As stated above, the Branch Law Firm voluntarily enrolled in the Medicare Part C lien resolution program and the PLRP in order to accurately and efficiently demonstrate that all claims by any lien holders have been or will be satisfied, per the terms of the MSA and in fulfillment of BLF's responsibility to GSK and to our clients. Despite this, funds have not been released. Furthermore, the Movant herein alleges, among other arguments, that GlaxoSmithKline (GSK) and Garretson Resolution Group (GRG) have refused to comply with the MSA and pay

Plaintiffs who have acknowledged that no private liens exist against their claim but who GSK and GRG allege could or *might* have liens asserted as to them or against them. This is a violation of the spirit, intent and wording of the Plaintiffs' Agreement for the settlement of cases as set forth with specificity in the MSA.

ARGUMENT

Settlement is a judicially favored manner to terminate litigation. *See Petty v. General Accidental Fire & Life Assurance Corp.*, 365 F. 2d 419, 421 (3d Cir. 1966). It is well settled that "a district court has 'inherent authority to enforce agreements settling litigation before it.'" *McClure v. Township of Exeter*, (E.D. Pa. Sept. 27, 2006); *quoting New Castle County v. U.S. Fire Ins. Co.*,728 F. Supp. 318, 319 (D. Del. 1989). A district court can enforce settlement agreements summarily, upon motion. *Gross v. Penn Mutual Life Ins. Co.*, 396 F. Supp. 373, 374 (E.D. Pa. 1975).

A settlement agreement is a contract that must be interpreted and enforced in accordance with the principles of contract law. *Joy Techs., Inc. v. North American Rebuild Co.,* 2012 U.S. Dist.LEXIS 68062, 14-15 (W.D. Pa. May 15, 2012); *quoting Enterprise Energy Corp. v. United States*, 50 F.3d 233, 238 (3d Cir. 1995). Under Delaware law, a settlement agreement and release is a contract, and construction of the contract is a matter of law.[2] *Jackson v. Carroll*, 643 F. Supp. 2d 602, 612 (D. Del. 2009). To state a claim for breach of contract, plaintiffs must allege: 1) the existence of an enforceable contract; 2) a breach of a contractual obligation; and 3) resulting damages. *MacKay v. Donovan*, 2012 U.S. Dist. LEXIS 18606, at * 6-7 (E.D. Pa. Feb. 14, 2012); quoting *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

[2] The Settlement Agreement provides that Delaware law will apply to disputes between the parties under the Agreement.

Under Delaware law, the courts must determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent." *Future Fibre Techs. Pty. Ltd. v. Optellios, Inc.*, 2011 U.S. Dist. LEXIS 90548, 9-10 (D. Del. Aug. 15, 2011); *quoting MicroStrategy, Inc. v. Acacia Research Corp.*, No. 5735-VCP, 2010 Del. Ch. LEXIS 254, 2010 WL 5550455, *5 (Del. Ch. Dec. 30, 2010). As part of that review, the Court interprets the words "using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise." Id.

I. The MSA Describes The Specific Responsibilities Of Both Parties With Respect To Third Party Liens

In the negotiation of the MSA, the Branch Law Firm and GSK negotiated and specifically detailed the parties' responsibilities with respect to liens, assignment rights and other third party payor claims. Section IV(M) of the MSA provides in pertinent part:

> Each settling Participating Claimant shall identify all statutory lien holders; any other holders of liens as to which the Participating Claimant or his or her respective Participating Law Firm(s) has received notice; parties to lawsuits or interventions, including by subrogation; and also, regardless of notice, government payors, including Medicare and Medicaid liens if they exist (collectively "lien holders"), through procedures and protocols to be established by the parties, having or asserting claims for and/or having reimbursed settling Participating Claimants or interests they represent for hospital expenses, medical expenses, physician expenses, or any other health care provider expenses or drug costs arising from or based upon the provision of medical care or treatment in connection with any claimed injury due to the use of Avandia.

Once the lien holders were identified, it was the "sole responsibility of the Participating Claimant and his or her respective Participating Law Firm(s)" to satisfy or resolve any and all liens, assignments or other claims made by third parties. As such, "[p]rior to distribution of any

payment, the settling Participating Claimant and his or her respective Participating Law Firm(s) shall represent and warrant that all claims by any of the foregoing lien holders have been ***or will be*** satisfied or otherwise resolved by the Participating Claimant in a manner acceptable to GSK, ***which acceptance shall not be unreasonably withheld***. MSA:Section IV(M)(emphasis added). *Id.*

Additionally, the standard Joint Authorization utilized for the release of funds provides Defendants with a representation and warranty regarding the satisfaction of liens and assignments. The Joint Authorization states[3]:

> By executing this Joint Authorization, BLF represents and warrants that any liens, assignment rights or other claims addressed in Section IV. M of the MSA have been or will be satisfied for each Claimant whose settlement disbursement is included within this Joint Authorization. By executing this Joint Authorization, GRG represents and warrants that any reimbursement obligations related to Medicare Part A & B and Medicaid and any MMSEA reporting obligations of GSK have been or will be satisfied....GRG also represents and warrants that all obligations of which GRG was notified....including Medicare C-related claims against those of the listed Claimants who opt into any private lien resolution program in which GRG is involved, have been or will be satisfied.

Plaintiffs have waited patiently while all Medicaid, Medicare and private liens have been negotiated and resolved. Plaintiffs have satisfied all governmental liens and any private liens, including those asserted by MAOs, for which they have been provided notice. Additionally, Plaintiffs have expressly represented to Defendant that all identified liens have been or will be satisfied. Having met their contractual requirements under the MSA, Defendant cannot unreasonably withhold the remaining settlement funds on the basis of a third party representation that another insurance company *may* have a potential lien.

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[3] The Joint Authorization contains confidential information regarding the 620 Plaintiffs at issue in this Motion. Accordingly, Plaintiff has not filed the Joint Authorization as an Exhibit to this Motion. Should the Court so require, Plaintiffs can provide a copy of this document to the Court, under seal.

II. The Parties Did Not Intend That All Private Insurance Liens, Including Medicare Advantage Claims, Be Satisfied Prior to The Distribution of Final Payment To Eligible Claimants

Under Delaware law, the courts must determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent." *Future Fibre Techs. Pty. Ltd. v. Optellios, Inc.*, 2011 U.S. Dist. LEXIS 90548, 9-10 (D. Del. Aug. 15, 2011); *quoting MicroStrategy, Inc. v. Acacia Research Corp.*, No. 5735-VCP, 2010 Del. Ch. LEXIS 254, 2010 WL 5550455, *5 (Del. Ch. Dec. 30, 2010). The language of the settlement agreement clearly dictates that Plaintiff had a responsibility to: (1) provide GSK with all information that GSK may need to comply with reporting requirements applicable to it, including under Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007; and (2) identify holders of liens as to which they "received notice" and warrant that all known liens have been or will be satisfied. The parties never intended, at the time of entering into the MSA, that all liens, including those of Medicare Advantage carriers, be identified and satisfied prior to the release of settlement funds.

The intent of the parties is evident in GSK's Motion to Dismiss the Complaint of Humana Insurance Company. See Exhibit A; *Humana Medical Plan, Inc. v. GlaxoSmithKline, LLC, et al.*, 2:10-cv-06733 [Doc. 8]. As GSK explained the "claims asserted here by plaintiffs on behalf of the putative class of Medicare Advantage organizations do not constitute liens for which GSK is responsible to assure payment." *Id.* at 2. The understanding that there was no "statutory obligation of reimbursement to MA organizations by primary payers" was shared by the parties at the time of entering into the MSA. *Id.* at 4. Further, as GSK recognizes in its Motion, MAOs have an obligation to come forward and inform the parties of the identity of individuals for whom they are asserting a claim; an obligation these insurers failed to meet. *Id.* at 5, 16.

Under the express terms of the MSA, the parties agreed that Participating Claimants would identify statutory lien holders, Medicare and Medicaid liens, and "any other holders of liens as to which the Participating Claimant or his or her respective Participating Law Firm(s) has received notice." MSA; Section IV(M). The parties entered into the contract with the understanding that GSK did not have a statutory obligation, and would not, assure payment to MAOs. Further, the parties agreed that any obligation for reporting and satisfying claims with MAOs would be governed by the insurance contracts entered into by the Participating Claimants. There is absolutely nothing within the MSA that prevents GSK from issuing final payments to Plaintiffs following a representation that all liens have been or will be satisfied.

III. The Third Circuit's Ruling in *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 685 F.3d 353 (3rd Cir. 2012) Does Not Prevent GSK From Releasing Final Payment to Plaintiffs

By Order of June 13, 2011, this Court dismissed Humana's class action complaint finding that a "private cause of action within the MSP Act did not apply to MAOs, nor did the secondary payer provision in the MA statute create a private right of action for MAOs. [Doc. 1523]; *In re Avandia Marketing, Sales Practices and Products Liability Litigation*, 685 F.3d 353 (3d Cir. 2012). Recently, the Third Circuit reversed this Court's dismissal of the complaint finding that affording MAOs access to a private cause of action "comports with the broader policy goals of the MA program." *Id.* Accordingly, the Third Circuit remanded the case for further proceedings. Importantly, the Third Circuit opinion did not address whether GSK was required to reimburse

Humana, or other MAOs, for costs incurred to cover treatment for Avandia-related illnesses and injuries on behalf of Participating Claimants.[4]

While the Third Circuit held that 42 U.S.C. § 1395y(b)(3)(A) does provide Humana with a private cause of action, the issue of notice was not presented to the Third Circuit. Guidance on this issue is clear and it is the MAOs who are responsible for identifying primary payers and the amounts payable. The procedures and obligations of MAOs are detailed in 42 CFR 422.108 which provides:

> (b) Responsibilities of the MA organization. The MA organization must, for each MA Plan--
>
> (1) Identify payers that are primary to Medicare under section 1862(b) of the Act and part 411 of this chapter;
>
> (2) Identify the amounts payable by those payers;
>
> (3) Coordinate its benefits to Medicare enrollees with the benefits of the primary payers, including reporting, on an ongoing basis, information obtained related to requirements in paragraphs (b)(1) and (b)(2) of this section in accordance with CMS instructions.[5]

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[4] Humana appealed only the issue of whether a private cause of action in the MSP Act extended to MAOs. Humana did not appeal this Court's denial of its claim for equitable relief where it was seeking GSK to disclose the identity of every MAO insured individual with whom GSK has settled.

[5] The Medicare Statute authorizes the Secretary to establish standards by regulation for MAOs "provided that any standard so established shall supersede any State law or regulation...to the extent such law or regulation is inconsistent with such standards. The Secretary adopted Federal Regulation Section 422.108.

As a result of the Third Circuit opinion and the guidance provided by the Federal Regulations, GSK may arguably be warranted in holding funds for those Claimants that have been identified as having received benefits from an MAO that has come forward and asserted its reimbursement rights through the Rawlings Group.[6] Plaintiffs, however, do *not* have a reimbursement obligation to any of the MAOs who have failed to provide notice to the Branch Law Firm, Garretson Firm or GSK. As no MAOs have come forward asserting its rights against these Plaintiffs, there is no justifiable reason for continuing to hold these Plaintiffs funds.

IV. Should The Court Deny Plaintiffs' Motion to Enforce The Settlement, Any Healthcare Organization Asserting A Claim For Reimbursement Should Be Required To Come Forward And Assert Its Rights Within 30 Days Or Waive Its Subrogation Rights

As the obligation to come forward and assert its right of recovery lies with the MAOs and private health care organizations, Plaintiffs settlement funds could be held **indefinitely** until Defendant is satisfied that no MAO will ever be asserting a claim against any of the settling plaintiffs. This was surely not Congress's goal in creating the Medicare Advantage Program. If Defendant is permitted to hold funds, with no identifiable lien, based solely on the representation of a third party that other MAOs may assert a claim seeking reimbursement for costs incurred to cover treatment for Avandia-related injuries, there must be a time limit for these carriers to come forward.

The requirements for intervention under Fed. R. Civ. P. 24 provide guidance as to setting a time limit for a third party to assert its rights in a litigation. One of the fundamental

[6] For these cases, GSK may have an argument that the contractual language that the warranty that all lien holders have or will be satisfied "in a manner acceptable to GSK" precludes releasing funds until the claims with the MAOs who have come forward are resolved. Here, Plaintiffs have been cleared as not having any liens with the identifiable MAOs.

requirements for intervention is "timeliness". "Timeliness is fundamental not only to intervention, but to the overall conduct of a lawsuit." *Reid v. Illinois State Board of Education*, 289 F. 3d 1009, 1017-18 (7th Cir. 2002). "The purpose of the timeliness requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *Id.* at 1018; *quoting Sokaogon Chippewa Community v. Babbitt*, 214 F. 3d 941, 949 (7th Cir. 2000).

After nearly two years, Plaintiffs have been cleared as having resolved any and all liens and reimbursement obligations related to their Avandia-related injuries. Each Plaintiff was encouraged and given the opportunity to participate in the Part C Plan in an effort to proactively identify and address any potential MAO interests. The Branch Law Firm also willingly entered into the PLRP as advised by Garretson Resolution Group. The unnamed health care organizations knew or should have known about the creation of the Avandia MDL in 2007, the settlement of these cases in May 2010, and the filing of the Humana lawsuit in November 2010. Despite this knowledge, these organizations never contacted Plaintiffs, Branch Law Firm, or GSK about the possibility of seeking reimbursement for expended costs on injuries related to this litigation. The prejudice to Plaintiffs in withholding their remaining settlement funds would far outweigh any prejudice to a sophisticated insurer who knew of this litigation but "were content to participate on the sidelines for a long period of time." *Reid*, 289 F. 3d at 1018. "Any such loss is of their own making." *Id.*

If the Court should deny Plaintiffs Motion to Enforce the Settlement, Plaintiffs respectfully request that the Court require any additional MAOs, not previously identified, to come forward within 30 days or lose their right of recovery. Thirty days is more than sufficient to allow any un-named MAO to come forward and assert its rights.

CONCLUSION

The 620 Plaintiffs who may be subject to this Motion have waited patiently to resolve this litigation and be paid the full settlement value for their injuries. Each of the Plaintiffs has expressly warranted that they have or will satisfy any and all liens, assignment rights or other claims related to their injuries. Neither Plaintiff nor GSK have identified, or been notified, of any additional liens or other claims relating to this litigation. Accordingly, Plaintiffs have satisfied their obligations under the Master Settlement Agreement and GSK should be ordered to release the remaining funds. Disbursement will harm no one but will benefit the plaintiffs and claimants who have an absolute and unqualified right to receive their entitlements and payments immediately.

Alternatively, this Court should issue an Order that any additional Medicare Advantage organizations who may have a potential claim against Plaintiffs to come forward and assert its rights within 30 days or forever waive its rights for reimbursement. These insurers were on ample notice of their claims and chose not to take any action. Under the Medicare laws and regulations, it incumbent upon these insurers to take affirmative steps to protect their interests. Plaintiffs should not continue to be punished for these organizations failure to act.

WHEREFORE, premises considered, Plaintiffs pray that this Honorable Court enter an order requiring Defendant, GlaxoSmithKline, LLC, to pay the Claimants forthwith in compliance with the MSA; for interest from the date of the execution of the MSA on December 22, 2010 to the present; for attorneys' fees, costs, and expenses incurred in having to file and argue this Motion; and, for travel expenses to Philadelphia to argue this Motion, and any other relief as this Honorable Court deems just and proper.

Dated this 5th day of September, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed the foregoing using the CM/ECF system which provides notice of Electronic Filing to counsel of records as reflected in the Court's service list.

Turner W. Branch, Esq.