

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI**

**IN RE NUVARING PRODUCTS  
LIABILITY LITIGATION**

**: 4:08 MD 1964 RWS**  
**:**  
**: Honorable Rodney W. Sippel**

***DOCUMENT ELECTRONICALLY FILED***

**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' PROPOSED CASE  
MANAGEMENT ORDER NO. 3 COMMON BENEFIT ORDER  
BY DEFENDANTS ORGANON USA, INC., ORGANON INTERNATIONAL, INC.,  
ORGANON PHARMACEUTICALS USA, INC. LLC (F/K/A ORGANON  
PHARMACEUTICALS USA, INC.), AND MERCK & CO., INC. (F/K/A SCHERING-  
PLOUGH CORPORATION)**

Defendants Organon USA Inc., Organon International Inc., Organon Pharmaceuticals USA, Inc. LLC (f/k/a Organon Pharmaceuticals USA Inc.) and Merck & Co., Inc. (f/k/a Schering-Plough Corporation) (collectively, "Defendants") submit this memorandum in opposition to Plaintiffs' Proposed Case Management Order No. 3 (Establishing Common Benefit Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for MDL Administration and Otherwise for Plaintiffs' General Benefit) ("Common Benefit Order").

**INTRODUCTION**

Defendants oppose the Common Benefit Order to the extent its provisions seek to impose significant and improper obligations upon Defendants. The proposed order submitted by the Plaintiffs' Steering Committee creates issues for the Defendants, including vague obligations and procedures that will vitiate the confidentiality of any settlements which might be reached some day and erode the discovery protective order currently in place. Accordingly, Defendants

request that the Court enter its version of the Common Benefit Order, with revisions based on language from similar orders entered in other MDLs. A copy of Defendants' proposed order is attached hereto as Exhibit A (with a redline version, highlighting the changes made to plaintiff's proposed order attached hereto as Exhibit B).

### **ARGUMENT**

#### **The Court Should Enter the Revised Proposed Common Benefit Order In Order to Avoid Prejudice to Defendants.**

If the Court grants the Plaintiffs' Steering Committee's order, Defendants request that the Court enter their version instead of Plaintiffs, contained in Exhibit A, in order to clarify the Defendants' obligations, protect confidentiality and avoid the potential for prejudice.<sup>1</sup>

As Plaintiffs' Steering Committee have framed it, the Common Benefit Order places the burden of depositing funds into an escrow account – for distribution to the Plaintiffs' Steering Committee – upon Defendants. However, this obligation is more appropriately placed on counsel for each settling Plaintiff. Defendants should not, for the convenience of Plaintiff's counsel, be required to assess each settlement to determine (i) whether the Plaintiff is required to contribute the common benefit fund; (ii) the amount of such withholding or (iii) when, if ever, Defendants' obligation vis-à-vis the funds comes to an end. Defendants accordingly propose that language be added to the Common Benefit Order clarifying that it is each Plaintiff's burden to deposit the specified funds into the escrow account and that Defendants bear no obligation with regard to withholding or depositing such funds.

The Common Benefit Order also should indicate that Defendants bear no responsibility for deciding which Plaintiffs are required to pay into the fund or are entitled to disbursements from the fund. Further, Defendants language should be added clarifying that Defendants bear no

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<sup>1</sup> Some MDL courts would consider Plaintiff's request for a Common Benefit Order to be premature and deny Plaintiffs' motion at this stage, as in most instances, these funds are not established until after at least some of the cases are resolved by settlement or otherwise. See, e.g., *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, MDL No. 1785, Pretrial Order No. 15 (D.S.C. May 21, 2008); *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, Document No. 1396 (E.D.N.Y. Aug. 1, 2007); *In re Diet Drugs*, MDL No. 1203, Order No. 467 (E.D. Pa. Feb. 10, 1999); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926 (N.D. Ala. Oct. 7, 1998).

responsibility for the proper division of funds as between Plaintiffs and their counsel. Those are disputes that should be resolved amongst the Plaintiffs themselves, with the Court's assistance if necessary, but are disputes in which Defendants should have no role. *See e.g., In re Bextra and Celebrex Marketing Sales Practices & Prod. Liab. Litig.*, MDL No. 1699, Pretrial Order No. 8 at p. 3 (N.D. Ca. Feb. 27, 2006) (attached hereto as Exhibit C); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Pretrial Order No. 19 at p. 2-3 (E.D. La. Aug. 4, 2005) (attached hereto as Exhibit D).

Defendants also seek to eliminate the requirement, contained in the proposed Common Benefit Order, that no dismissals may be entered until funds are paid into the escrow account. Defendants should not remain entangled in a case where a Plaintiff is ready to stipulate to dismissal simply because the Plaintiffs' Steering Committee may have an issue with whether that Plaintiff contributed adequately to the fee pool. Again, that is an issue between Plaintiffs' counsel that should not involve Defendants or create obstacles for them.

As written, Plaintiffs' Common Benefit Order also has the potential to cause significant prejudice to the Defendants with regard to confidentiality of settlements. As proposed by Plaintiffs, the Common Benefit Order fixes the percentage of each settlement that Defendants must contribute to the fund. Given that the Plaintiffs' Steering Committee also would require Defendants to notify them about all settlements and to provide them with a quarterly accounting of all amounts to be paid into the fund, it will be a simple task for the Plaintiffs' Steering Committee to calculate the amount of any given settlement, particularly if only a handful of cases were to settle during a given quarter.

Other MDL courts that have recognized similar confidentiality concerns have entered common benefit orders which protect against the problem. For example, several common benefit fund orders have required defendants to make payment to a designated escrow agent, who may not disclose the payment amount or information, except upon order of the court. *See, e.g., In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, MDL No. 1785, Pretrial Order No. 18 (D. S.C. Oct. 1, 2008) (attached hereto as Exhibit E); *In re St. Jude Med. Inc.*

*Silzone Heart Valves Prods. Liab. Litig.*, MDL No. 1396, Pretrial Order No. 18 (D. Minn. Aug. 1, 2002) (attached hereto as Exhibit F); *In re Baycol Prods. Litig.*, MDL No. 1431, Pretrial Order No. 25 (D. Minn. June 5, 2002) (attached hereto as Exhibit G); *In re Diet Drugs*, MDL No. 1203, Pretrial Order No. 467 (E.D. Pa. Feb. 10, 1998) (attached hereto as Exhibit H).

Such orders thus specify that “[t]he purpose of maintaining confidentiality is to protect the defendants’ concerns regarding disclosure of the amounts that they deposit into the escrow fund inasmuch as knowledge of such amounts would allow calculation of any sums defendants determine should be paid.” See *Silzone Heart Valves Prods. Liab. Litig.*, MDL No. 1396, Pretrial Order No. 18 (Exhibit F). In conjunction with this type of confidentiality requirement, such orders require the escrow agent to only periodically report to the Court, for its confidential, in camera review, with an aggregate of deposits, disbursements and other financial information. *Id.*

There are also related confidentiality concerns pertaining to use of MDL discovery and Plaintiffs’ Steering Committee work product by attorneys who are not participating in the MDL and thus have not yet agreed to be bound by the provisions of the MDL Protective Order, adopted on October 15, 2008, regarding confidential information. Much of the information that Defendants have agreed to provide in this litigation falls under the terms of the Protective Order and has been produced only subject to the terms of that Order. As Plaintiffs have proposed it, the Common Benefit Order purports to make such materials available to non-participating attorneys *without* any assurance that those non-MDL attorneys agree to subject themselves to this Court’s jurisdiction and the terms of the protective order, and thus no assurance that such information will be kept confidential.

Other MDL courts have recognized that dissemination of confidential materials to non-MDL counsel requires execution of a written agreement to be bound by the terms of pretrial orders regarding confidential information, and have entered orders containing such provisions. See, e.g., *In re Bextra and Celebrex Marketing Sales Practices and Prod. Liab. Litig.*, MDL No. 1699, Pretrial Order No. 8 at p. 5 (N.D. Ca. Feb. 17, 2006) (Exhibit C); *In re Baycol Prods.*

*Litig.*, MDL No. 1431. Pretrial Order No. 25 (D. Minn. June 5, 2002) (Exhibit G). The Common Benefit Order here should be revised to include this requirement as well.

**CONCLUSION**

For all of the foregoing reasons, Defendants respectfully request that the Court enter the Revised Proposed Common Benefit Order submitted by Defendants. Defendants' Revised Proposed Common Benefit Order is attached as Exhibit A hereto.

DATED: November 17, 2009

Respectfully submitted,

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