IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In re: **AREDIA® and ZOMETA®** **PRODUCTS LIABILITY LITIGATION** (MDL No. 1760) This Document Relates to: ALL CASES	No. 3:06-md-1760 JUDGE CAMPBELL MAGISTRATE JUDGE BROWN

VALAD & VECCHIONE PLAINTIFFS' AND THE PSC'S MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS FOR WILLFUL FAILURE TO COMPLY WITH MEDIATION ORDER

INTRODUCTION

Defendant's conduct at last week's Court-ordered mediation requires the Valad & Vecchione Plaintiffs ("V&V Plaintiffs") and the Plaintiffs' Steering Committee ("PSC") to file this motion asking for relief for failure to comply with Court Ordered Mediation. Novartis did not mediate in good faith and did not have present anyone with authority to mediate the cases to conclusion. Novartis should be sanctioned the fees and costs for Valad & Vecchione's John J. Vecchione travel and lodging in New Orleans and time spent at mediation, as well as Jack Girardi of Girardi Keese's travel, lodging and time, as well as any mediators' fees incurred to John Perry, the Court-appointed mediator. While it is likely such a sanction will have no effect on a multibillion dollar corporation bent on flouting the Orders of this Court—unless the Court can craft a more effective sanction—it is relief that is available to the PSC and V&V Plaintiffs and should be awarded.

NOVARTIS DID NOT MEDIATE IN GOOD FAITH

On August 1, 2012, U.S. District Judge Todd J. Campbell entered an Order ordering the parties to participate in alternative dispute resolution pursuant to Rules 16.02

– 16.08 of the Local Rules of Court. (Docket Entry "DE" 6072, Ex. 1, at p. 2)("[T]he Court hereby orders the parties to participate in alternative dispute resolution . . . ."). The Order further directed that "The Magistrate Judge shall issue all necessary orders to implement the type of alternative dispute resolution he/she selects as appropriate." (*Id*.). The Court may recall this relief was not requested by the PSC or by Mr. Vecchione on behalf of his clients.

Further to the directives in Judge Campbell's Order, on August 16, 2012 Magistrate Judge Joe B. Brown entered an Order implementing Judge Campbell's directives regarding alternative dispute resolution. (DE 6127, Ex. 2). The Order states:

> An individual with **full settlement authority** must attend the mediation. Full settlement authority means the ability of the Plaintiff to accept the last offer and the Defendant to pay the last demand. Failure to have such a person present could result in the imposition of sanctions pursuant to Rule 16(f) of the Federal Rules of Civil Procedure.

Id. (emphasis in original).

Rule 16(f) of the Federal Rules of Civil Procedure, cited in Magistrate Judge Brown's Order states:

> (f) Sanctions.
>
> > (1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:
> >
> > (A) fails to appear at a scheduling or other pretrial conference;
> >
> > (B) is substantially unprepared to participate--***or does not participate in good faith***--in the conference; or
> >
> > (C) fails to obey a scheduling or other pretrial order.
> >
> > (2) Imposing Fees and Costs. Instead of **or in addition to any other sanction,** the court **must** order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred

> because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. Rule 16(f) (emphasis added).

What happened at last week's Court-Ordered mediation is that Novartis did not engage in discussions regarding the Valad & Vecchione / Girardi Keese cases. Behavior such as this—refusing to talk to counsel about any case except to say "no" and bringing no one with authority to settle counsel's whole group of client cases (or even one!)—is simply not mediating in good faith. *See Pucci v. 19th District Court, slip. op.*, 2009 WL 596196 (E.D. Mich.)(when no decision maker with settlement authority present at court-ordered ADR sanctions appropriate). In *Pucci* the court also noted the factors a court should consider. The first factor is willfulness, bad faith or fault. The second is whether the adversary was prejudiced. The third factor is whether the party was warned it could be sanctioned and the fourth is whether a lesser sanction than dismissal [or default] were first imposed or considered. *Id.* at 6. The party trying to avoid the sanction has to show inability to comply. *See also General Conference Corp. of Seventh Day Adventists v. McGill, slip. op.*, 2009 WL 1505710 (W.D. Tenn.)(ordering default on case subject to mediation).

Novartis had no intention of mediating the portfolios or even a single case of any of the PSC members. The Court will recall that at the oral argument on Plaintiffs' motion to dispense with duplicate briefing, Mr. Johnston for Novartis noted one concept of determining these cases:

> …I would point out though that a global settlement is not the only way to end an MDL. The PPA litigation which had at one point over close to 3,500 claims in it never had a global settlement…..They were tried, but at the end of the process, most weren't tried; they were settled on the eve of trial.

Transcript of Proceedings, In Re Aredia and Products Liability Litigation, July 20, 2012, 25:19-25 Ex. 3).

This method delays settlement and burdens courts because the Defendant uses a process of "slotting." It claims that there are too many trials so the schedule must be extended for counsel or witnesses convenience. If this is the Novartis strategy (and Hollingsworth LLP was involved in PPA) it is even more unconscionable to have Plaintiffs' counsel appear at mediation and prepare to mediate cases that are not set for trial. *See In re Phenylpropanolamine (PPA) Products Liability Litigation*, 2004 WL 178348 (W.D. Wash)(Kate Latimer, Esq as defense counsel). In sum, Novartis utterly failed to comply with the two referenced Orders of this Court, and their conduct makes a mockery of Rule 16.

NOVARTIS FAILED TO FOLLOW THIS COURT'S ORDERS

1. Counsel For Plaintiffs Flew From All Over The Country to New Orleans For Mediation on September 10, 2012[1]

In compliance with this Court's Orders, Plaintiffs' counsel promptly contacted the mediator, and scheduled a mediation session with John Perry in New Orleans at a time that was convenient to counsel at the Hollingsworth, LLP firm. On Sunday, September 9,

[1]Counsel is constrained from the rules surrounding mediation, confidentiality and the rest from becoming to explicit in reciting events. We urge the Court to obtain written permission from Novartis to hear from the mediator specifically what was said and done at the mediation. Mr. Perry was agreed to by both sides, even when the PSC suggested other mediators as an option. The existing Orders and Court Rules, and the consent of Novartis garnered years ago, already permit the Court to speak with Mr. Perry and have its opinion informed by him. As referenced above, Plaintiffs hereby further agree in writing and consent to the Court hearing from Mr. Perry precisely what the parties did and said at this purported mediation session and all prior ones. To the extent Novartis does not unambiguously affirm its consent to this as well, this is reason enough to grant this Motion.

2012 Plaintiffs' liaison counsel C. Patrick Flynn flew into New Orleans from Nashville, Tennessee, PSC member John Vecchione, who has a remanded trial in a Novartis BRONJ case he is preparing for on October 2, 2012 flew into New Orleans from Virginia. Plaintiffs' counsel John Girardi who is preparing for a Novartis BRONJ trial October 9, 2012 flew into New Orleans from Los Angeles, and Plaintiffs' counsel Daniel Osborn flew into New Orleans from New York. The time, effort and expense of the preparations, travel, and out-of-town accommodations were all undertaken with the belief that Novartis would similarly comply with this Court's Orders and mediate this litigation in good faith. The declarations of Jack Girardi and John Vecchione with their time and expenses are filed contemporaneously herewith.

Unfortunately, that is not what transpired. Instead, Novartis did not engage in any mediation or discussions regarding cases represented by Messrs. Flynn, Germany and Kelly, nor regarding cases represented by Messrs. Vecchione and Girardi. Prior to the mediation, Mr. Vecchione was on a call with Mr. Hollingsworth with Judge Mayer in New Jersey and Mr. Hollingsworth told Judge Mayer he would come prepared to discuss the New Jersey cases as well. He discussed not a one, including the *Meng* case set for trial in New Jersey October 9, 2012.

Instead, Novartis's discussions, *such as they were*, were directed only at Mr. Osborn's cases. This means, of course, that all other attorneys (most of whom have a busy calendar of trial preparation for upcoming trials against Novartis in these very cases) were overtly and premeditatedly inconvenienced. No discussions, concessions, offers, or responses to these Plaintiffs' various pending settlement demands were made ***on any case whatsoever, including those ready for trial in the next three months***. It

appears from the conduct of negotiations—as predicted by Mr. Vecchione to Magistrate Brown in a telephone conference this summer—that Charna Gerstanhaber, the Novartis in-house lawyer who attended, did not have full settlement authority for Novartis. She was only empowered to say "no."

Novartis should have simply informed the Court that it was not going to engage in meaningful discussions of any kind with these litigants. It told this Court and the court in New Jersey the exact opposite. In short, Novartis plainly did not act in good faith as regards Messrs. Flynn, Vecchione, and Girardi in dragging them all the way to New Orleans merely so that Novartis's counsel could utterly ignore them and refuse to engage in any mediation discussions with them whatsoever. No one at that meeting had the authority to say "yes" or even to counter any demand, they were only empowered to say "no."

2. <u>This is a Repeat of the Pattern Novartis Already Engaged In in This Case</u>

The Court will recall that Mr. Perry was initially selected as mediator in this case when Novartis stated that it agreed to mediation and the use of Mr. Perry's mediation services. (*See*, Letter to Magistrate Judge Brown from Catherine R. Baumer, Esq. of Hollingsworth LLC. June 27, 2008 (f/k/a Spriggs & Hollingsworth), Ex. 4).[2]

Novartis did not seek to resolve a single case through mediation with the agreed-

[2]The fact that a mediator for this litigation was purportedly agreed to by Novartis more than ***four years ago*** and ***not a single case*** has been successfully mediated here, in New Jersey, or in any remand or other venue because Novartis refuses to engage in substantive mediation discussions is itself quite revealing. To date, Novartis has settled three cases with the Valad & Vecchione, PLLC firm, but this has been done by discussions directly between the attorneys soon before trial or right after a jury is picked. Novartis has not shown good faith whenever a mediator is involved, even when subject to Court order to do so.

to mediator in 2008 – 2009. This was complete bad faith by Novartis, albeit using the vehicle of false consent to mediate in good faith rather than an Order requiring them to do so. Again Plaintiffs consent to the Court inquiring of the mediator exactly what transpired, and invite Novartis to similarly consent. This Court is not presiding over the trial of any of these cases, and it is proper in the same manner as the conduct of a settlement conference by the Magistrate Judge not hearing the trial of the case.

3. **That Novartis's Actions Were Willful is Evidenced by its Previous Behavior and Choice of Counsel.**

A. Kugel Mesh MDL Litigation

Novartis failed to mediate in good faith the first three scheduled sessions with John Perry in this case, starting back in 2008. Novartis failed to mediate in good faith on September 10, 2012 despite two Orders from this Court specifically requiring them to do so. The Court needs to determine Novartis's willfulness and it can do so by prior behavior of Novartis and its chosen counsel.

In the MDL designated *In Re: Kugel Mesh Hernia Patch Products Liability Litigation*, MDL Docket No. 07-1842-ML (D. Rhode Island) (Lisi, J.), counsel from Spriggs & Hollingsworth, LLP were the subject of a motion for sanctions for precisely the same conduct at issue here: purposefully failing to mediate in good faith when ordered to do so.

In *Kugel Mesh*, the plaintiffs' motion papers alleged the following:

> Mr. Collins and his counsel prepared for a productive and meaningful session with Magistrate Judge Lovegreen - and attended the settlement conference in good faith. The Defendants, however, had no intention of participating fully in the process, and did not do so. The session began at 2:00 p.m. as scheduled. Plaintiffs and Defendants briefly presented their cases to the Magistrate Judge, after which Defendants and Plaintiffs were placed in separate rooms. It was *only* then – after much preparation, travel and attending the initial portion of the mediation in good

> faith – that Mr. Collins and his counsel were made aware that Defendants did not intend to do the same. Until this point, Defendants had told no one (despite having ample opportunity to do so or even seek leave to cancel the conference) that they had no intention of not even making an offer.
>
> Defendants caused Mr. Collins, who is 80 years old and walks with the aid of a cane, to travel to Providence all the way from Kentucky for a fruitless meeting with Defendants and their counsel on an unusually hot day. Not only did Mr. Collins and his son-in-law, Terry Border fly to Providence from Kentucky, Mr. Border was required to take time off from his job as a private music teacher, which resulted in lost income. Additionally, Plaintiffs were caused to incur expenses for items such as meals and car service to and from the airport. Plaintiffs' counsel spent time preparing for and attending the settlement conference, and Plaintiffs seek compensation for the related fees for Donald A. Migliori, Ernest Cory, and Jon C. Conlin.

In Re Kugel Mesh, Memorandum In Support Of Plaintiffs' Motion For Sanctions Against Defendants Davol, Inc. and C.R. Bard and Their Attorneys, June 12, 2008 at pp. 5-6 Ex. 5 (footnote omitted).

What happened after this motion was filed in *Kugel Mesh*? That is not clear from the record. There is a stipulation between Plaintiffs' counsel and the Hollingsworth firm withdrawing the motion, and withdrawing the Defendants' motion to strike. (Ex. 6). The record of what happened after that is apparently sealed. However, it is clear from the public record that Joe G. Hollingsworth, Katherine R. Latimer, Kirby T. Griffis, and Dana Alan Gausepohl, all lawyers from the Hollingsworth firm, left the case in April 2009 according to the Court's docket on PACER. It is also public record that thereafter cases began to settle. (Excerpt of Motley Rice Web Site, Ex. 7). On August 16, 2011, the parties filed a *Joint Motion For Leave To File Under Seal, The Memorandum In Support Of Joint Motion To Establish A Qualified Settlement Fund And Issue Related Orders With Supporting Memo*. On October 6, 2011, the Court granted an Order to establish a qualified settlement fund. (Ex. 8).

B. Phenylpropanolamine (PPA) Litigation - *In Re: PPA*

As the Court knows from the PSC's reply brief filed on September 12, 2012 in support of Plaintiffs' motion for the *de bene esse* deposition of Dr. Marx (DE 6168), the Hollingsworth, LLP firm was counsel for the Defendant in the federal Phenylpropanolamine (PPA) Litigation. Counsel for the Hollingsworth firm sought to be admitted to practice *pro hac vice* in the *In Re: PPA (Phenylpropanolamine)* mass tort in New Jersey Superior Court, but Hollingsworth firm's motion for admission was vigorously opposed by the Weitz & Luxenberg law firm. (*In Re: PPA (Phenylpropanolamine)*, Plaintiffs' Memorandum in Opposition to Defendant's Motion(s) for Admission(s) Pro Hac Vice, October 9, 2003, ("PPA Opp. to Hollingsworth Admission", Ex. 9).

The first page of the PPA Opp. to Hollingsworth Admission is instructive:

> Defendant Novartis, through its New Jersey counsel, has moved for the pro hac vice admission of five attorneys from the Washington, D.C. law firm Spriggs & Hollingsworth, which has represented the corporation as its "national counsel" in various pharmaceutical products liability litigation for several years. Plaintiffs in the above-captioned matters oppose the admission of Spriggs & Hollingsworth attorneys due to their ***history of inappropriate tactics designed to impede efficient litigation, a demonstrated lack of civility and professional courtesy, and a lack of candor in presenting material facts to the tribunal***.

(PPA Opp. to Hollingsworth Admission at p. 1, Ex. 9). A certification by plaintiff's attorney Ellen Relkin accompanied this motion, and details much of the behavior leading to the filing of the motion. (Certification of Ellen Relkin in Opposition to Defendant's Motion(s) for Admission(s) *Pro Hac Vice*, *In Re: PPA*, Oct. 9, 2003, Ex. 10).The Court should read the entire motion and certification in light of the course of behavior of Novartis in this mediation.

Subsequent to this motion the Hollingsworth firm did not become counsel in the state PPA litigation. There is no order denying such relief and no order granting it as far as counsel knows. The motion was filed and the Hollingsworth Firm did not become counsel is all that appears in the record. Nonetheless the statements there are consistent with the actions of the litigant in this case. Novartis or affiliated corporation was one of the Defendants in the PPA litigation represented by the Hollingsworth firm.

C. Novartis Has Already Been Severely Sanctioned Within This Case for Grossly Improper Conduct

The PSC will not belabor the point on this matter. The Court sanctioned Novartis on May 27, 2010 for improperly obstructing the discovery of direct to consumer marketing information over the course of many requests concerning it. (DE 3298, Ex. 11). Plaintiff retook the depositions and followed up on discovery and Defendant was ordered to pay nearly $60,000 in fees and costs of the attorneys working on behalf of the Plaintiffs Steering Committee (PSC). (DE 5242, Ex. 12). A $60,000 sanction is a lot, but not to a multi-billion dollar company apparently.

D. Other Behavior In This Litigation

Earlier this year, Plaintiffs brought a motion to end double-briefing of *Daubert* and summary judgment motions here and in the remand courts, a request that was necessitated by Novartis repeatedly demanding double-briefing once these cases are remanded for trial. At oral argument on Plaintiffs' motion before Judge Campbell on July 20, 2012, Hollingsworth LLP counsel Robert Johnston stated:

> Now, we had opposed the relief that the PSC sought initially because we believe that there has been value to what's happened so far. But we have thought about it a little bit, and we think that there may be something to the point that -- ***we would like to not have to brief these things twice***.

Transcript of Proceedings, In Re Aredia and Products Liability Litigation, July 20, 2012, 27:15 to 27:20, Ex. 3).

This statement implying double-briefing had somehow been imposed on Novartis by some unnamed outside force demanding that Novartis re-brief every case, when Novartis was in fact requesting it repeatedly over Plaintiffs' objection. In reliance on this representation, on August 1, 2012, Judge Campbell issued an Order saying "The parties agree that these cases should be remanded before *Daubert* and dispositive motions are filed to *avoid wasteful and duplicate briefing*."[3] DE 6072, Ex. 1 (emphasis added). A week after the oral argument on July 20, 2012, where Hollingsworth LLP counsel Robert Johnston made the statement relied upon by this Court, when on July 27, 2012 Novartis placed the following demand in the Joint Case Management Statement in the remanded *Messick v. Novartis* case:

> ***NPC's Position:*** Shortly before the matter was remanded, NPC filed, and plaintiff responded to, summary judgment and *Daubert* motions. The MDL court did not rule on the summary judgment motion or case-specific *Daubert* motion filed in this case. Although the parties previously briefed the case-specific *Daubert* and summary judgment motions, NPC notes that the additional discovery (as discussed in Section VII) may raise additional issues to be resolved. Further, the parties' briefs were drafted pursuant to the law of the Sixth Circuit rather than that of the Ninth Circuit. The prior briefing also reflects the understanding that because the Court with jurisdiction at the time the motions were filed had several years of experience with the litigation giving rise to the motions, the Court would have substantial factual and procedural knowledge of the matters. ***NPC requests that any schedule entered allow time for the submission of revised and updated briefs to provide the Court with the benefit of the Ninth Circuit law and a fuller factual explication.***

(*Messick v. Novartis*, Joint Case Management Statement, July 27, 2012 (N.D. Cal.), at 4, Ex. 13).

Novartis tells this Court at argument on July 20, 2012 that it "agrees" no need to

[3]The PSC has a caveat with this statement as it wanted case wide expert *Dauberts* to end here but that is of no concern to this motion.

brief issues in this case twice. One week later, Novartis makes a demand in a case remanded from this Court that wasteful and duplicative re-briefing must be allowed.

Plaintiffs direct the Court to the top of page one of the *Messick* Joint Case Management Statement to the name of the Defendants' attorneys making this statement to the federal court in the Northern District of California, Robert Johnston of Hollingsworth LLP, the same Robert Johnston and the same Hollingsworth LLP who said to this Court on July 20, 2012 "we would like to not have to brief these things twice."

V&V Plaintiffs believe this motion will be opposed based on the argument that no one has to settle a case and the parties simply disagree as to value of the cases. But were that the issue it could have been taken care of by a letter to the Court and the parties that in no circumstances was Novartis going to mediate this case in the manner contemplated by the Court and saved the Plaintiff's counsel and the mediator wasted time and effort. The foregoing, as well as the statements made by Novartis in its various filings are placed in the record so the Court can gauge willfulness for itself.

E. SANCTIONS ARE WARRANTED.

Novartis can settle or not settle as it likes. What it can not do is waste the litigants' time and disregard this Court's Orders. The PSC and V&V Plaintiffs ask for their travel, hotel and hourly rate as sanction, as well as a request that the mediating fees of John Perry be paid by Novartis, and such other relief as this Court deems just and proper. Novartis is a $50 billion company and no monetary sanction will affect its behavior as demonstrated by the previous sanctions motion and its violating the instant Orders, but the Court still has the power to enforce its Orders in at least this minor way.

Respectfully submitted,

THE PLAINTIFFS' STEERING COMMITTEE

By: s/ John J. Vecchione

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Dated: September 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on September 17, 2012 by operation of the Court's Electronic Case Filing System, on counsel of record in case No. 3:06-MD-1760.

s/ John J. Vecchione
John J. Vecchione, Esq.