

**IN THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF TENNESSEE  
AT NASHVILLE**

<b>IN RE: AREDIA<sup>®</sup> AND ZOMETA<sup>®</sup> PRODUCTS LIABILITY LITIGATION (MDL No. 1760)</b>	)	<b>No. 3:06-MD-1760</b>
<b>This Document Relates To:</b>	)	<b>JUDGE CAMPBELL</b>
<b>All Cases</b>	)	<b>MAGISTRATE JUDGE BROWN</b>
	)	

**MEMORANDUM IN OPPOSITION TO THE MOTION OF THE PLAINTIFFS’  
STEERING COMMITTEE TO ALTER OR AMEND PRETRIAL ORDER  
ESTABLISHING PLAINTIFFS’ LITIGATION FUND TO COMPENSATE AND  
REIMBURSE ATTORNEYS FOR SERVICES PERFORMED AND EXPENSES  
INCURRED FOR MDL ADMINISTRATION AND COMMON BENEFIT**

As a general matter, Novartis Pharmaceuticals Corporation (“NPC”) has not taken any position regarding the propriety of any MDL Administration and Common Benefit fund. Such a fund is for the sole benefit of plaintiffs and their counsel and, except to the extent that an Order establishing such a fund impinges on NPC’s rights or places inappropriate obligations on NPC, NPC has no interest in the details of any such arrangement. However, paragraph 7 of the PSC’s proposed “Amended Pretrial Order Establishing Plaintiffs’ Litigation Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for MDL Administration and Common Benefit” (the “Proposed Amended Order”) (attached to the PSC’s Motion as Exhibit 1) unfairly impinges on NPC’s rights and places burdens on NPC that are not required by

law or the Federal Rules of Civil Procedure. Accordingly, this Court should deny the PSC's Motion [Docket # 641] as it relates to paragraph 7 of the Proposed Amended Order.

**Paragraph 7(a)** of the Proposed Amended Order provides “[a]ny plaintiff counsel in a State Court action may obtain the PSC’s Common Benefit Resource Materials by executing an Agreement substantially in the form attached to this Order as ‘Exhibit 1’ . . . and becoming an Associated State Court Personal Injury Counsel.” Proposed Amended Order ¶ 7(a). Among those resources denominated “Common Benefit Resource Materials” under the “Agreement” are “a virtual depository containing images of the key documents selected by the PSC counsel from the document productions of the Defendant in MDL 1760.” *See* Exhibit 1 to the Proposed Amended Order at 11.

A number of the documents likely to be contained in such a “key document” depository will have been designated by NPC as “confidential” pursuant to the terms of the Protective and Confidentiality Order in effect in this litigation [Docket # 100]. Under the express terms of that Order, no state-court plaintiffs’ attorney is entitled to access such documents unless and until they are involved in litigation against NPC and a protective order is entered in that litigation providing NPC’s confidential documents the same or greater protection than the Protective and Confidentiality Order in effect in this case. *Id.* at ¶ 9. Accordingly, paragraph 7(a) fails to adequately describe the steps required before “Associated State Court Personal Injury Counsel” will be given access to confidential materials in the “key document” depository.

The PSC includes in the Proposed Amended Order paragraph 7(c), which states, “Nothing in this order limits the applicability of the Confidentiality Order [Docket No. 100].” This one sentence, however, fails to disclose to attorneys interested in becoming “Associated State Court Personal Injury Counsel” the requirements that they 1) initiate litigation against NPC

on behalf of a plaintiff and 2) procure an appropriate protective order in their case before being given access to documents designated confidential in the depository. Neither does the Agreement itself, attached to the Proposed Amended Order as Exhibit 1. NPC respectfully requests that this Court deny the Motion to the extent that paragraph 7 of the Proposed Amended Order fails to fully disclose the requirements for state-court counsel to gain access to confidential documents contained within the PSC's document depository.

**Paragraph 7(b)** of the Proposed Amended Order improperly imposes discovery obligations on NPC beyond those required by the Federal Rules of Civil Procedure. Paragraph 7(b) of the Proposed Amended Order requires that “[i]n the event that a party in a non-MDL proceeding serves a document demand for ‘all documents produced to the PSC in MDL 1760’ (or a substantially similar demand), the Defendant shall notify the PSC of that document demand promptly upon receipt and prior to producing responsive materials.” There is no basis for the imposition of such a burden on NPC.

Federal Rule of Civil Procedure 26(b)(1) permits discovery of any matter “not privileged, that is relevant to the claim or defense of any party.” Whether NPC receives a document request in litigation other than MDL-1760 seeking all documents produced in this litigation has no relevance to any claim or defense at issue here. Accordingly, paragraph 7(b) imposes a burden beyond that required by the Civil Rules. The PSC's clear intent is to facilitate a monopoly over documents produced by NPC and to require that any plaintiff seeking production of such materials barter with the PSC for access to the documents. The costs of the PSC obtaining such a market benefit should not be borne by NPC through a requirement that it provide the PSC with “notice” of document requests served upon NPC in other litigation regarding Zometa<sup>®</sup> and/or

Aredia<sup>®</sup>. The requirements of paragraph 7(b) thus impose undue burdens on NPC and the PSC's Motion should be denied on this limited point as well.

**CONCLUSION**

For the foregoing reasons, NPC respectfully requests that the Court deny the Plaintiffs' Steering Committee's Motion to Alter or Amend the Pretrial Order Establishing Plaintiffs' Litigation Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred in MDL Administration and Common Benefit as related to paragraph 7 of the Proposed Order.

Respectfully submitted,

October 11, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 11th day of October 2007 served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO THE MOTION OF THE PLAINTIFFS' STEERING COMMITTEE TO ALTER OR AMEND PRETRIAL ORDER ESTABLISHING PLAINTIFFS' LITIGATION FUND TO COMPENSATE AND REIMBURSE ATTORNEYS FOR SERVICES PERFORMED AND EXPENSES INCURRED FOR MDL ADMINISTRATION AND COMMON BENEFIT, by operation of the Court's Electronic Case Filing System, on Plaintiffs' Liaison Counsel:

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s/Katharine Latimer  
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