

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In Re: _____)
AREIDIA AND ZOMETA PRODUCTS)
LIABILITY LITIGATION) No. 3:06-MDL-1760
(MDL NO. 1760)) Judge Campbell
This Document Relates to:) Magistrate Judge Brown
All Cases _____)
)
)
)

**MEMORANDUM IN SUPPORT OF
PLAINTIFF STEERING COMMITTEE’S MOTION TO REMAND ALL CASES FROM
THE MDL**

In 2011, the fifth year of this MDL litigation, this Court deemed the purposes of the MDL complete and upon review, so did the JPML. JPML DE 477 (Apr. 8, 2011). As we enter 2014, the eighth year of this litigation, approximately 200 cases remain. On October 10, 2013 the magistrate judge issued an order rejecting a stay of discovery and an orderly remand of all cases. DE 7054 (Order on Stay and Remand). The request for a Rule 16 conference was also denied unless the PSC could present a plan for faster discovery. DE 7054. Since that time the litigation in the Fosamax MDL has apparently resolved. The instant motion does not ask for stay but only for administration of the MDL and should be decided by Judge Campbell. Weekly, each side files at least one Suggestion of Death or substitution. No matters of case wide importance are being decided any longer. Upon remand, Novartis sometimes seeks a stay of the proceedings, promising that “dozens of similar, earlier-filed cases involving Aredia and/or

Zometa are advancing rapidly to trial and developments in those cases will assist the efficient resolution of this lawsuit." *McCurdy v. Novartis Pharms. Corp.*, slip. op., 2012 WL 1551344 (E.D.Cal. May 1, 2012)(1:11-cv 740)(recounting Novartis' request for a stay on similar grounds in numerous other remanded Aredia/Zometa cases). In other instances, Novartis seeks a lengthy discovery period, although only the damage witnesses remain. Because of the JPML Court's Order, those subsequently files cases will and have been scheduled for trial before the cases which have been transferred from this Court, as is already happening in February with the case of *Stanley v. Novartis Pharms. Corp.* filed in California subsequent to that Order and reaching trial before any in the MDL from that time, in February 2014.

The cases are now at a manageable size about 212 cases and the purposes of the MDL having been completed it makes no juridical sense, nor is it in keeping with the Manual on Complex Litigation for this proceeding to continue here for anything but administrative matters. Finally, a similar order by Judge Keenan in Fosamax apparently was the impetus to resolve that litigation.

Background and Current State of MDL

Since the last Rule 16 conference and this Court's Order case-specific discovery has proceeded in well over 150 cases and the remand of Wave V and Group I and Group II, has been accomplished. The Court just remanded ninety five cases to the district courts for trial in Group II. DE 7153 (Nov. 19, 2013). The PSC believes there are about 200 cases remaining in the PSC. Group III is now proceeding in discovery in this Court. The JPML agreed the purposes of the MDL were complete. JPML DE 477 (Apr. 8, 2011) . The Court has issued an Order to the remand courts for use upon remand. *In re Aredia/Zometa Products. Liab. Lit.*, 2011 WL

2182824 (M.D.Tenn., June 3, 2011). On October 10, 2013 when the Order on Stay and Remand was issued, immediately thereafter three more notices of deaths or substitution were filed.

Previous to that a Court ordered mediation failed and the Magistrate Judge refused to speak to the mediator which the mediator was willing to do, or to sanction Novartis for failing to mediate in good faith. DE 6213 . The MDL Court in this motion asks for no discovery changes and it is directed solely to the continuation of this MDL and should be determined by Judge Campbell.

The day after the Order on Stay and Remand, Judge Spatt who has taken three remanded cases from this Court-had two settle¹-and one tried to verdict filed the Order on the *Davids v. Novartis Pharms. Corp.*, ___F.Supp.2d ___, 2013 WL 5603824 (E.D.N.Y., Oct. 9, 2013). This demonstrates the seriousness of these case and why no more delay should be tolerated. Also, on October 7, 2013 the Supreme Court of the United States rejected Novartis petition for *certiorari* on the first case to be tried upon remand from this Court. *Fussman v. Novartis Pharms. Corp.*, 2011 WL 5836928 (E.D.N.C., Nov. 21, 2011), *aff'd* 509 Fed.Appx. 215, 2013 WL 474330 (4th Cir., Feb. 8, 2013)(unpublished), *cert. denied.*, 134 S.Ct. 88, (Mem.)(U.S., Oct. 7, 2013). All of this Court's rulings in *Fussman v. Novartis Pharms. Corp.*, have been upheld and are now final. Finally, Judge Keenan issue an order as this PSC asks earlier this year. *In re Fosamax Products Liability Lit.*, 06 MD-1789, slip copy, (S.D.N.Y., August 29, 2013) (attached as Exhibit 1). Yesterday Judge Keenan noted by ECF a settlement in the Fosamax MDL. (Attached as Exhibit 2). News reports today note that all cases in that MDL were settled subsequent to his order remand. (Exhibit 3).

ARGUMENT

¹ *Deutsch v. Novartis Pharms. Corp.* and *Forman v. Novartis Pharms. Corp.* (Wave I).

Given the number and now maturity of the rulings of this Court and the limited number of case remaining in the MDL this Court should either remand all of the cases after deciding this motion or hold a Rule 16 conference to expedite the remand of cases.

The manual on complex litigation, all precedent, and all common sense rejects continuing on the path this MDL is currently on. Manual for Complex Litigation (4th Ed. 2013) §10.13 (One of the characteristics of effective judicial management is that “[i]t is timely: [t]he judge decides disputes promptly, particularly those that may substantially affect the course or scope of further proceedings. Delayed rulings may be costly and burdensome for litigants and will often delay other litigation events”) The MDL Court’s “plan must include an appropriate schedule for bringing the case to resolution.” *Id.*

1. The Fosamax MDL is Ending For Reasons That Are Even More Persuasive Here.

The template for ending a bisphosphonate drug MDL twice as large as this one has been issued by Judge Keenan. *In re Fosamax Products Liability Lit.*, 06 MD-1789, slip copy, (S.D.N.Y., August 29, 2013) (attached as Exhibit 1). In that Order and Opinion the Court noted that it had tried five cases itself and completed case wide expert discovery. The Court stated “In this Court’s view, all that is left for each of the cases is case-specific discovery and trial.” *Id.* at 1. Judge Keenan noted that the transferor courts will have the benefit of the MDL Court’s rulings on *Daubert* and many other rulings (most of which have been cited to this Court by both sides over the many years of this litigation). *Id.*

The Court specifically rejected the Defendant’s suggestion to maintain the MDL while doing case-specific discovery in the oldest 100 cases, stating “In rejecting this proposal, the Court notes that it does not seem prudent for case-specific discovery to proceed in this district, as it would unnecessarily prolong the MDL and introduce disputes that are more properly

adjudicated in their home districts.” *Id.*² He then ordered 200 cases remanded on the first of every month starting November 1, 2013, “unless a settlement has been reached.” *Id.* at 2. This means that the Fosamax MDL, which is not largely made up of cancer patients, and which started after the one *sub judice* would have remand all 900 cases no later than March of 2014 (there were about 900 cases in that MDL.³ By comparison, under this Court’s current schedule, plaintiffs will still be in this Court, perhaps, into 2015.

This MDL is even more mature than Fosamax. Ten cases remanded from this Court have been tried to verdict in states as diverse as New York (twice but once under Rhode Island law), North Carolina, Florida (twice), California (twice) and Missouri (twice) and Kentucky. Defendant lost six of those trials, two with awards of punitive damages over ten million dollars, and had a defense verdict returned four times. Even in the loss in Kentucky the jury explicitly found that Novartis’s drug caused the plaintiff’s injury. Plaintiffs with meritorious cases ought not be delayed any longer. This is particularly true as cases filed outside the MDL get to trial faster than those filed here years ago.

2. Cases Should Proceed Before the Courts That Will Try Them.

Novartis, whenever a case is remanded, explains to the remand court that nothing has been accomplished in the MDL Court, everything is just too complicated, and that two years are needed to get the case to trial. For instance, in the case of *Arnold v. Novartis Pharms. Corp.*, 8:06-cv-1709 (M.D.Fla.)--- which was remanded earlier this year-- Novartis argued:

Examples of prior cases in this district are instructive. Consider for example the three remanded cases in this district with scheduled trial dates. Unlike *Arnold*, these cases were remanded after the completion of expert discovery, as well as *Daubert* and dispositive motions briefing. The first case, *Chiles v. NPC*, was remanded to the Middle District of Florida on December 23, 2010.

² That is exactly what is occurring under the current system.

³ Judge Keenan has since stayed his Order, presumably as its pendency prompted settlement talks.

Trial commenced in *Chiles* over 25 months after remand on February 11, 2013 (Ex. 8). The second, *Dopson-Troutt v. NPC*, was remanded to the Middle District of Florida on May 23, 2012, and trial is scheduled for October 21, 2013 (Ex. 9). In *Dopson-Troutt*, approximately 17 months will pass between remand and the commencement of trial. The third, *Guenther v. NPC*, was remanded to the Middle District of Florida on September 5, 2012 (Ex. 10). Trial has been set to begin in *Guenther* on September 9, 2013. Therefore, over 12 months will pass between remand and the commencement of trial. Here, the *Arnold* case was remanded to the Middle District of Florida on March 21, 2013, without the benefit of completed expert disclosures, expert discovery, and *Daubert* motions and dispositive motions briefing previously completed in the MDL. The proposed schedule allows approximately 12 months for the proceedings that typically have occurred in the MDL, and then about 10 months for the proceedings that have typically occurred in remand courts (two months faster than *Guenther* and *Dopson-Troutt*).

Arnold Joint Case Management Statement (Attached as Exhibit 4).

In addition, Novartis challenges every Order of this Court that it does not like and so plaintiffs must rebrief already decided issues. In fact, Novartis has just gotten one Magistrate Judge to order new depositions of Case Wide experts on no new reports. *Stevens v. Novartis Pharms. Corp.* (Attached as exhibit 5). Since the Orders of this Court don't bind Novartis, case specific issues should not continue here as delay is the only function this MDL serves any longer.

Another factor in delay is that many cases were not filed in the home district of the Plaintiff. Once the cases are remanded they again are moved to where the Plaintiff was infused. Novartis resists applying—as is required- the statute of limitations choice of law of those filings. See *Sheffer v. Novartis Pharms. Corp.*, ___ F.Supp.2d ___, 2012 WL 2775027 *7 (D.D.C 2012)(D.C. statute of limitations would apply upon transfer to Ohio plaintiff); *Sheffer v. Novartis Pharms.*, 2013 WL 5276658 (S.D.Ohio, Sept. 18, 2013)(same and denying summary judgment). There is now no further reason to clog this Court with motion practice and case-specific

discovery when remand would both familiarize the remand court with the proceedings for all of discovery and also prevent the log jam that Novartis uses in each transfer.

An Order like that issued in the Fosamax MDL makes eminent sense, is completely manageable given the number of cases remaining and should be entered.

CONCLUSION

The PSC requests that the Court remand the remaining cases within thirty days of determining this motion so that discovery is completed and trial dates obtained without the two step process that Novartis---again—uses to delay adjudication. Failing that, it requests a Rule 16 conference with Judge Campbell.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by operation of the court's electronic case filing system on counsel or record in Case No. 3:06-MD-1760 on this 10th day of December, 2013.