# EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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| GARY STEVENS, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Case No. 12-1414-EFM |
| | ) | |
| NOVARTIS PHARMACEUTICALS CORPORATION, | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

**SCHEDULING ORDER**

On April 24, 2013, pursuant to Fed. R. Civ. P. 16(b), the undersigned U.S. Magistrate Judge, James P. O'Hara, conducted a scheduling conference in this case.[1] The plaintiff, Gary Stevens, appeared through local counsel, Lawrence J. Lennemann, who candidly was not intimately familiar with the case's extensive procedural background, which have included multi-district litigation proceedings (No. 06-1760) in the U.S. District Court for the Eastern District of Tennessee. Daniel A. Osborn, plaintiff's lead counsel and only other lawyer of record, who is familiar with the MDL, failed to attend the scheduling conference even

[1] This is a pharmaceutical product liability lawsuit. It involves a Novartis Pharmaceuticals Corporation ("NPC") drug, Zometa®, which typically is prescribed by oncologists to reduce pathological fractures, spinal cord compression, and other skeletal complications in patients with Stage IV cancer that has metastasized to bone. Plaintiff alleges that he developed osteonecrosis of the jaw ("ONJ") as a result of taking Zometa®. Plaintiff's suit challenges defendant's development, testing, manufacturing, labeling, and marketing of Zometa®. Plaintiff asserts basic common law tort claims, including product liability, negligence, failure to warn, and breach of warranty. Plaintiff contends his claims hinge primarily on proximate cause and the adequacy of the warning.

though he had nearly six weeks advance notice (*see* doc. 28). The defendant, Novartis Pharmaceuticals Corporation ("NPC"), appeared through lead counsel, Matthew J. Malinowski, along with local counsel, Todd N. Tedesco.

After consultation with the lawyers, the court now enters this scheduling order, summarized in the table that follows:

| SUMMARY OF DEADLINES AND SETTINGS | |
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| Event | Deadline/Setting |
| Defense counsel to send letter to plaintiff's counsel re MDL record for remand | April 26, 2013 |
| Plaintiff's counsel to respond to defense counsel's proposed MDL record for remand | May 3, 2013 |
| Defense counsel to arrange conference with court to resolve any disputes re record for remand | May 10, 2013 |
| Defense counsel's letter specifying deficiencies re discovery responses on damages | May 3, 2013 |
| Motion to compel re discovery responses on damages | May 10, 2013 |
| Response to motion to compel re discovery responses on damages | May 17, 2013 |
| Reply in support of motion to compel re discovery responses on damages | May 21, 2013 |
| Plaintiff's list of damages witnesses | May 10, 2013 |
| Motions to join additional parties or otherwise amend the pleadings | May 24, 2013 |
| Supplementation of disclosures | as required by Rule 26(e), and in any event no later than 40 days before the close of fact discovery |
| All fact discovery completed | August 26, 2013 |
| Experts disclosed by plaintiff | September 13, 2013 |
| Rule 35 medical examination | October 17, 2013 |
| Experts disclosed by defendant | October 31, 2013 |
| Expert discovery and depositions completed | December 20, 2013 |
| Proposed pretrial order due | January 24, 2014 |
| Pretrial conference | February 4, 2014, at 10:00 a.m. |
| All other potentially dispositive motions (e.g., summary judgment) | March 3, 2014 |
| Motions challenging admissibility of expert testimony | 60 days before trial |

**1. Alternative Dispute Resolution (ADR).**

Although of course the parties are free to negotiate a settlement any time they see fit, the court believes nothing likely would be gained by requiring the parties to participate in mediation or any other ADR process at this time. But the court intends to revisit this issue at the pretrial conference. An ADR report, on the form located on the court's Internet website, must be filed by defense counsel within 5 days of any scheduled ADR process *(http://www.ksd.uscourts.gov/adr-report/)*.

**2. Discovery.**

a. The parties previously exchanged some of the information required by Fed. R. Civ. P. 26(a)(1) while this case was pending in the MDL.[2]

b. Fact and expert discovery were due to be completed in the MDL by June 1, 2010 and October 1, 2010, respectively, with the understanding that most damages-related discovery would be conducted after remand to the various transferor courts. But plaintiff's medical records, which have been produced on a rolling basis, show ongoing treatment. The court agrees with defendant that since the time that discovery closed in the MDL this new

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[2] The parties are respectfully reminded that, although Rule 26(a)(1) is keyed to disclosure of information that the disclosing party "may use to support its claims or defenses, unless solely for impeachment," the advisory committee notes to the 2000 amendments to that rule make it clear that this also requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. In addition to other sanctions that may be applicable, a party who without substantial justification fails to disclose information required by Fed. R. Civ. P. 26(a) or Fed. R. Civ. P. 26(e)(1) is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. *See* Fed. R. Civ. P. 37(c)(1).

information warrants extending the period allowed for discovery.[3] But it should be clear that this court will not allow either party to re-plow ground that already has been sufficiently covered during the MDL, and further that this court has no intention of re-litigating legal issues which already have been litigated and decided in the MDL.

c. As discussed during the scheduling conference, by **May 10, 2013**, plaintiff shall serve a list of the names, addresses, and telephone numbers of all witnesses plaintiff intends to use on the issue of damages, consistent with the requirements of Fed. R. Civ. P. 26(a)(1)(A)(i).

d. Supplementations of disclosures under Fed. R. Civ. P. 26(e) shall be served by the parties at such times and under such circumstances as required by that rule – to be clear, this duty to supplement is mutual and is not confined to damages. In addition, such supplemental disclosures shall be served in any event 40 days before the deadline for completion of all fact discovery. The supplemental disclosures served 40 days before the deadline for completion of all fact discovery must identify the universe of all witnesses and exhibits that probably or even might be used at trial. The rationale for the mandatory

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[3] According to NPC, pursuant to orders entered in the MDL, plaintiff served a completed "Plaintiff Fact Sheet," or PFS, on May 24, 2007. With that information, NPC conducted fact discovery within the MDL-imposed deadline of June 1, 2010. NPC asserts that deposition testimony during that discovery time-frame revealed that plaintiff's alleged ONJ symptoms were cured by Dr. Steven Wilson in November 2004. Although plaintiff disputes he was ever "cured," the parties do seem to agree that medical and dental records from after the close of discovery show that plaintiff has continued to be treated for ONJ symptoms (whether a continuation of the ones previously experienced or those newly onset).

supplemental disclosures 40 days before the fact discovery cutoff is to put opposing counsel in a realistic position to make strategic, tactical, and economic judgments about whether to take a particular deposition (or pursue follow-up "written" discovery) concerning a witness or exhibit disclosed by another party before the time allowed for discovery expires. Counsel should bear in mind that seldom should anything be included in the final Rule 26(a)(3) disclosures, which as explained below usually are filed 21 days before trial, that has not previously appeared in the initial Rule 26(a)(1) disclosures or a timely Rule 26(e) supplement thereto; otherwise, the witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

e. All fact discovery, whether related to issues of liability, causation, or damages, shall be commenced or served in time to be completed by **August 26, 2013**.

f. The parties shall complete all Fed. R. Civ. P. 35 physical or mental examinations by **October 17, 2013**. If the parties disagree about the need for or the scope of such an examination, a formal motion shall be filed sufficiently in advance of this deadline in order to allow the motion to be fully briefed by the parties and decided by the court before the examination deadline.

g. Disclosures required by Fed. R. Civ. P. 26(a)(2), including final reports from retained experts, whether pertaining to liability, causation, or damages issues, shall be served

by plaintiff by **September 13, 2013**, and by defendant by **October 31, 2013**.[4] The parties have stipulated that rebuttal experts will not be permitted in this case. The parties shall serve any objections to such disclosures (other than objections pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law), within 14 days after service of the disclosures upon them. These objections should be confined to technical objections related to the sufficiency of the written expert disclosures (e.g., whether all of the information required by Rule 26(a)(2)(B) has been provided, such as lists of prior testimony and publications). These objections need not extend to the admissibility of the expert's proposed testimony. If such technical objections are served, counsel shall confer or make a reasonable effort to confer consistent with requirements of D. Kan. Rule 37.2 before filing any motion based on those objections. As noted below, any motion to compel discovery in compliance with D. Kan. Rules 7.1 and 37.2 must be filed and served within 30 days of the default or service of the response, answer, or objection which is the subject of the motion, unless the time for filing such a motion is extended for good cause shown; otherwise, the objection to the default, response, answer, or objection shall be deemed waived. *See* D. Kan. Rule 37.1(b).

[4] As discussed during the scheduling conference, at the same time these expert disclosures are served, at least three full-day deposition settings shall be made available to opposing counsel within the ensuing 30-day period.

h. All expert discovery, including but limited to experts' depositions, shall be commenced or served in time to be completed by **December 20, 2013**.

i. At the final pretrial conference after the close of discovery, the court will set a deadline, usually 21 days prior to the trial date, for the parties to file their final disclosures pursuant to Fed. R. Civ. P. 26(a)(3)(A)(i), (ii) & (iii). As indicated above, if a witness or exhibit appears on a final Rule 26(a)(3) disclosure that has not previously been included in a Rule 26(a)(1) disclosure (or a timely supplement thereto), that witness or exhibit probably will be excluded at trial. *See* Fed. R. Civ. P. 37(c)(1).

j. Beyond what was earlier served in the MDL concerning plaintiff's claims and defendant's defenses to those claims, neither party shall serve more than 25 interrogatories, including all discrete subparts, on the other party.

k. The parties have previously agreed to the procedures adopted by the MDL court regarding depositions and will continue to do so. *See* Case Management Order, 3:06-MD-1760, ECF No. 89 (M.D. Tenn. July 28, 2006), at 21-22.

l. As suggested by the parties, the court hereby adopts the Confidentiality and Protective Order set in place in the MDL. *See* Protective and Confidentiality Order, 3 :06-MD-1760, ECF No. 100 (M.D. Tenn. Aug. 15, 2006).

m. To avoid the filing of unnecessary motions, the court encourages the parties to utilize stipulations regarding discovery procedures. However, this does not apply to extensions of time that interfere with the deadlines to complete all discovery, for the briefing

or hearing of a motion, or for trial. *See* Fed. R. Civ. P. 29; D. Kan. Rule 6.1(a). Nor does this apply to modifying the requirements of Fed. R. Civ. P. 26(a)(2) concerning experts' reports. *See* D. Kan. Rule 26.4(b).

n. Civil litigation unfortunately often involves improper discovery requests and objections. To ensure discovery in this case is conducted in the "just, speedy, and inexpensive" manner mandated by Fed. R. Civ. P. 1, the parties are respectfully reminded that this court plans to strictly enforce the certification requirements of Fed. R. Civ. P. 26(g). Among other things, Rule 26(g)(1) provides that, by signing a discovery request, response, or objection, it's certified as (i) consistent with the applicable rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. If a certification violates these without substantial justification, Rule 26(g)(3) requires the court to impose attorneys' fees as a sanction on the responsible attorney or party, or both. Therefore, *before* the parties and counsel serve any discovery requests, responses, or objections in this case, lest they incur sanctions later, the court *strongly* suggests that they carefully review the excellent discussion of Rule 26(g) found in *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

**3. Motions.**

a. Interrogatories were served in the MDL. However, NPC contends that plaintiff has yet to respond fully to defendant's interrogatory requesting damages claims and calculations; plaintiff maintains that he has fully and properly responded to NPC's interrogatories. As discussed during the scheduling conference, by **May 3, 2013**, defense counsel shall send a letter to plaintiff's counsel specifying the alleged deficiencies. If the meet-and-confer process required by D. Kan. Rule 37.2 fails to resolve the matter, any motion to compel shall be filed by defendant by **May 10, 2013**. Plaintiff's responsive brief shall be filed by **May 17, 2013**, and any reply shall be filed by **May 21, 2013**. The parties' principal briefs shall be limited to 5 double-spaced pages, and the reply to 2 pages. The court will decide the motion quickly and plaintiff shall be prepared to comply with the court's ruling within 2 business days.

b. As discussed at length during the scheduling conference, plaintiff intends to file a motion to amend his complaint to assert a claim for punitive damages; this motion will be opposed by defendant as untimely and in any event futile. All motions by either party for leave to join additional parties or to otherwise amend the pleadings shall be filed by **May 24, 2013**.

c. All other potentially dispositive motions (e.g., motions for summary judgment) shall be filed by **March 3, 2014**.

d. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, shall be filed no later than **60 days before trial**.[5]

e. Any motion to compel discovery in compliance with D. Kan. Rules 7.1 and 37.2 shall be filed and served within 30 days of the default or service of the response, answer, or objection which is the subject of the motion, unless the time for filing such a motion is extended for good cause shown. Otherwise, the objection to the default, response, answer, or objection shall be waived. *See* D. Kan. Rule 37.1(b). As discussed during the scheduling conference, the above-described 30-day "clock" begins with the filing of this scheduling order to the extent either party contends that discovery was not properly responded to during the MDL.

**4. Other Matters.**

a. In the "Order Summarizing MDL 1760 Proceedings Upon Suggestion of Remand" which was filed on June 3, 2011, by U.S. District Judge Todd J. Campbell (see doc. 70 in Case No. 06-392, at p. 12), the parties were to file within 14 days of remand of this particular case a joint designation of the contents of the MDL record to be remanded. Even though this case arrived back in the District of Kansas on November 2, 2012, the parties have

[5]This deadline, which is different from what was discussed during the scheduling conference, is per a directive from Judge Melgren that was received today.

not yet complied with Judge Campbell's directive. As discussed during the scheduling conference, by **April 26, 2013**, defense counsel shall re-send his proposed MDL record designation to plaintiff's counsel, to which the latter shall respond by **May 3, 2013**. If counsel cannot resolve any disagreements about the record by **May 10, 2013**, then defense counsel shall email the undersigned magistrate judge's chambers to arrange an expedited conference, which will be held in person with both parties' lead counsel present.

b. Once the record upon remand has been finalized, the court will determine how to handle the summary judgment and *Daubert* motions which were filed by defendant in the MDL relating to this case but which still have not been ruled. Plaintiff asserts that those motions are fully briefed and that this court should proceed to rule. But defendant asserts that it would be more efficient for those motions to be withdrawn, with the understanding they would be re-filed and briefed after the above-described discovery is complete.

c. Pursuant to Fed. R. Civ. P. 16(e), a pretrial conference is scheduled for **February 4, 2014, at 10:00 a.m.**, in the U.S. Courthouse, Room 236, **Kansas City**, Kansas. **All lawyers who plan to be involved with trying the case must attend the pretrial conference unless otherwise ordered.** Unless otherwise notified, the undersigned magistrate judge will conduct the conference. No later than **January 24, 2014**, defendant shall submit the parties' proposed pretrial order (formatted in Word or WordPerfect) as an attachment to an Internet e-mail sent to *ksd_ohara_chambers@ksd.uscourts.gov.* The proposed pretrial order shall not be filed with the Clerk's Office. It shall be in the form

available on the court's Internet website (*www.ksd.uscourts.gov*), and the parties shall affix their signatures according to the procedures governing multiple signatures set forth in paragraphs II(C) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

d. The parties agree that principles of comparative fault do not apply to this case.

e. The parties expect the trial of this case to take approximately 10 days. The court will subsequently set the case for trial before the presiding U.S. District Judge, Eric F. Melgren.

f. The parties are not prepared to consent to trial by a U.S. Magistrate Judge, even as a backup if the assigned Judge Melgren determines that his schedule is unable to accommodate the scheduled trial date.

g. The arguments and authorities section of briefs or memoranda submitted shall not exceed 30 pages, absent an order of the court.

This scheduling order shall not be modified except by leave of court upon a showing of good cause.

IT IS SO ORDERED.

Dated April 25, 2013, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge