



**I. Paragraph 2**

Paragraph 2 of the Proposed Order improperly brings within its mandatory scope actions that this Court has remanded to state court or has remanded out of the MDL to another federal district court by requiring a portion of settlements reached in any “action which is *or ever has been* transferred into this MDL” to be paid into the fund that the Proposed Order would establish.<sup>2</sup> *See* Proposed Order at 1 (emphasis added). This Court does not have jurisdiction to provide the PSC’s requested relief in cases not before it. *See In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig. II*, 953 F.2d 162 (4th Cir. 1992) (MDL court lacks jurisdiction to place requirements on settlements in cases not properly before that court).

**II. Paragraph 3**

Paragraph 3 of the Proposed Order likewise seeks to involve this Court in the administration of settlement proceeds from state-court cases and federal-court cases not coordinated in MDL 1760. Although Paragraph 3 purports to establish a voluntary mechanism by which plaintiffs in other state and federal courts acquiesce to the jurisdiction of this Court in administering the settlement fund, Paragraph 7(a) renders Paragraph 3 mandatory by stating that “unauthorized use of the PSC’s Common Benefit resource materials shall be deemed equivalent in all respects to execution of the Agreement attached as Exhibit 1.” *See* Proposed Order at 5. The compulsory power of MDL courts is limited to the cases centralized in the MDL and does not extend to cases pending in other federal or state courts. *See, e.g., In re Showa Denko*. Moreover, the Court established the PSC to execute certain duties “on behalf of plaintiffs in *all actions which are consolidated with the instant multidistrict litigation*,” not plaintiffs in any

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<sup>2</sup> *LeCompte v. NPC*, which was remanded to the Superior Court of New Jersey in August 2007 (*see* August 24, 2007 Order [Docket #575]), is one example of a case that is currently pending in state court but which would fall within the scope of Paragraph 2.

other court. *See* PSC's Memorandum in Support of Third Motion at 2 (emphasis added) [Docket #2183]; *see also* July 21, 2006 Pretrial Order #1 at 2 [Docket #87]. NPC observes that the Court previously stated that it is not interested in "extensive involvement" in "the internal business arrangements of a group of attorneys," *see* September 7, 2007 Order [Docket #602]; *see also* November 29, 2007 Order at 2 [Docket #815]; August 21, 2008 Hr'g Tr. at 4, but as drafted, Paragraph 3 would involve the Court in management of the business arrangements of not only the PSC but other MDL counsel as well as counsel for plaintiffs in other state and federal courts.

In addition, the Protective and Confidentiality Order in effect in this case precludes the sharing of documents and information designated confidential with counsel who are not a party to the MDL unless (1) the attorney is counsel of record in a pending case against NPC arising out of treatment with Aredia<sup>®</sup> and/or Zometa<sup>®</sup> in state or federal court and (2) a substantially similar protective order has been entered *in that case*. *See* August 15, 2006 Order at 5 [Docket #100]. But neither the Proposed Order nor the Agreement (attached to the Proposed Order as Exhibit 1) indicate that only those counsel with actual pending cases against NPC may be participants in the fee sharing Agreement and gain access to the PSC's "Common Benefit Resource Materials," which is defined in the Agreement in the second "WHEREAS" clause and which clearly encompasses information and documents designated confidential by NPC. *See* Proposed Order at ¶7(a); Agreement at 10-11. In fact, notwithstanding the citation of the Protective and Confidentiality Order in section 9(b) of the Proposed Order, the proposed Agreement seems to anticipate its applicability in cases that have never been filed in any court and the use of the PSC Common Benefit Resource Materials in cases in which "Associated Non-MDL Counsel" do not appear as counsel of record, in violation of the Protective and Confidentiality Order and to the unfair prejudice of NPC. *See* Agreement at ¶3.

Paragraph 3(b) provides “the PSC shall make their best efforts to provide the names of the plaintiffs that each associated non-MDL attorney represents; however, the defendant’s withholding of the assessment is tied to the identity of the state court attorney, not the identity of the plaintiff.” *See* Proposed Order at 2. The provision unfairly prejudices NPC; if the PSC seeks to have the federal court administer state-court claims payments and seeks to impose obligations on NPC to pay a percentage of state-court claims into an escrow account created by the MDL court, the PSC should be required to clearly identify each plaintiff any “associated non-MDL attorney” represents, as well as any plaintiffs such attorney comes to represent in the future. After all, the payment obligations imposed under the Proposed Order are triggered by the settlement of *cases* not the association of non-MDL counsel with the PSC. It is unclear how NPC will know when to remit payments to the fund if the cases subject to the Agreement are not identified, particularly where the Agreement contemplates that unfiled cases or cases in which “associated non-MDL counsel” have not appeared fall within its scope. *See* Agreement at ¶3. NPC’s concerns are especially acute in light of the ongoing disputes among plaintiffs’ counsel regarding representation of specific plaintiffs in state court and the dissolution of the law firm of Beatie & Osborn.

### **III. Paragraph 8**

Paragraph 8 of the Proposed Order provides “[t]he Court may by separate order appoint a trustee, *who may be a member of the PSC*, to administer the Fee and Expense Trust Account in accord with the orders of the Court.” *See* Proposed Order at 5 (emphasis added). Appointment of a plaintiffs’ attorney who has pending cases against NPC would or could defeat NPC’s confidentiality interests entirely, to NPC’s severe prejudice.

The importance of confidentiality in settlement negotiations and settlements themselves cannot be underestimated. “While protecting the confidentiality of settlement agreements

encourages settlement, which is in the public interest, permitting disclosure would discourage settlement contrary to the public interest.” *Hasbrouck v. BankAmerica Housing Servs.*, 187 F.R.D. 453, 459 (N.D.N.Y. 1999). Accordingly, Courts have recognized the importance of protecting the parties’ rights to enter into confidential settlement agreements. *Id.* at 462 (strong public interest in encouraging settlement justifies protective order precluding disclosure of confidential settlement agreement); *see also Baella-Silva v. Hulsey*, 454 F.3d 5, 12 (1st Cir. 2006) (awarding sanctions against party who violated confidentiality provision of settlement agreement); *Kalinauskas v. Wong*, 151 F.R.D. 636, 365 (D. Nev. 1993) (precluding inquiry into confidential settlement terms and recognizing public policy interest in permitting confidential settlements); *In re Franklin Ntl. Bank Sec. Litig.*, 92 F.R.D. 468, 472 (E.D.N.Y. 1981) (rejecting efforts to discuss terms of confidential settlement agreement on grounds agreement would not have been reached but for confidentiality provisions).

The PSC’s Proposed Order itself recognizes NPC’s right to confidentiality of settlements, stating that all settlement records “be maintained as highly confidential material . . . to protect the Defendant’s concerns regarding disclosure of the amounts that it deposits into the escrow fund, inasmuch as knowledge of such amounts would allow calculation of settlements paid by the Defendant, which settlements may be confidential.” *See* Proposed Order at 6. Appointing a member of the PSC as trustee would render the confidentiality protections provided in 9(a) a nullity.

#### **IV. Paragraph 9(b)**

Paragraph 9(b) requires the trustee of the escrow account to “report *to the Court* from time to time the sums that are deposited in the account together with *the information supplied to the trustee* by the Defendant at the time of the deposit.” *See* Proposed Order at 6 (emphasis added). Routine transmittal of detailed settlement information to the Court undermines the

Court's independent role in the litigation as well as the parties' objectives of confidentiality, without any added benefit, and unnecessarily burdens the Court and its personnel with handling confidential information.

**CONCLUSION**

For the foregoing reasons, NPC respectfully requests that its objections be sustained and that the Court deny entry of the proposed Order as drafted.

Respectfully submitted,

May 11, 2009

s/Katharine Latimer  
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*Attorneys for Defendant  
Novartis Pharmaceuticals Corporation*

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 11th day of May 2009 served a true and correct copy of the foregoing, NOVARTIS PHARMACEUTICALS CORPORATION'S OBJECTIONS TO TERMS OF THE PROPOSED ORDER ATTACHED TO THIRD MOTION OF PLAINTIFFS' STEERING COMMITTEE TO ENTER AN MDL FEE AND EXPENSE ASSESSMENT ORDER, by operation of the Court's Electronic Case Filing System, on Plaintiffs' Liaison Counsel:

C. Patrick Flynn  
Flynn and Radford, Attorneys, P.C.  
320 Seven Springs Way, Suite 150  
Brentwood, TN 37027

Katharine Latimer  
Katharine R. Latimer

# Exhibit

# 1

March 19, 2009

Robert E. Johnston  
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**VIA E-MAIL AND FIRST-CLASS MAIL**

Robert Germany, Esq.  
Pittman, Germany, Roberts & Welsh  
410 South President St.  
P.O. Box 22985  
Jackson, MS 39201

Re: *In re Aredia<sup>®</sup> and Zometa<sup>®</sup> Prods. Liab. Litig.*, 3:06-MD-1760 (M.D. Tenn.)

Dear Bob:

We have reviewed the draft Fee and Expense Assessment Order you circulated and offer the following comments.

NPC objects to that portion of paragraph 8 which would permit the Court to appoint a member of the PSC as trustee for the MDL 1760 Fee and Expense Trust Account. Appointment of a plaintiffs' attorney who has pending cases against NPC would or could defeat NPC's confidentiality objectives entirely. It is NPC's position, consistent with the concerns regarding confidentiality expressed in paragraph 9 of the draft order, that a neutral third party should administer any trust account established by the Court for the payment of counsel fees and expenses.

NPC objects to paragraph 3 in its entirety. While we appreciate that there is no New Jersey state-court provision for the existence of a Common Benefit Fund or even a PSC at all, we do not believe it appropriate for the federal court to monitor issues related to state-court suits, including settlements. Thus, NPC should not be obligated to pay a percentage of any state-court settlement or judgment into a fund established in federal court and Judge Campbell and Magistrate Judge Brown should not be required to become involved in the administration of funds associated with state-court cases. We propose, therefore, that paragraph 3 be stricken.

Similarly, NPC objects to the inclusion of cases pending in federal court that have not been transferred to the MDL within the scope of paragraph 2. MDL courts do not have jurisdiction or power to provide the relief the PSC seeks here with respect to cases pending in other federal courts. *See, e.g., Showa Denko K.K L-Tryptophan Products Liability Litigation – II*, 953 F.2d 162 (4th Cir. 1992). We propose that the first clause of the first sentence of

Robert Germany, Esq.  
March 19, 2009  
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paragraph 2(a) be changed as follows: "Before making any claim payment to a plaintiff in MDL 1760 whose claim has been resolved, ...."

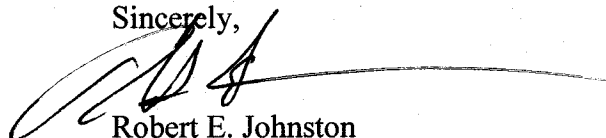
In the event that the PSC refuses to strike paragraph 3 in its entirety, NPC also objects to the definition in paragraph 3(a) of "Associated State Court Personal Injury Counsel." The "individuals who have cases pending" are the plaintiffs, not plaintiff's counsel. Accordingly, all references to "individuals" ought to be changed to "counsel representing individuals." NPC also objects to the PSC providing access to the referenced material to any attorney who is not representing a plaintiff who has asserted a claim against NPC arising out of treatment with Aredia<sup>®</sup> and/or Zometa<sup>®</sup> in a case in state or federal court in which a substantially similar protective order has been entered. Accordingly, the words "those individuals who have executed an agreement substantially in the form attached to this Order as Exhibit 1 and/or" should be stricken from paragraph 3(a).

NPC also objects to the language following the semi-colon in the second sentence of paragraph 3(b). If the PSC seeks to have the federal court administer state-court claims payments and seeks to impose obligations on NPC to pay a percentage of state-court claims payments into an escrow account created by the MDL court, the PSC should be required to clearly identify each plaintiff any "Associated State Court Personal Injury Counsel" represents at the time that the attorney is identified to NPC, as well as any plaintiffs that attorney comes to represent in the future. NPC's concerns are especially acute in the light of ongoing disputes among plaintiffs' counsel regarding representation of specific plaintiff's and the dissolution of the law firm Beatie & Osborn.

Further, NPC objects to the language in paragraph 9(b) that states that the Court will be provided with settlement specific-information by the trustee of the escrow account. Unless there is some dispute that requires court intervention, there is no reason that the Court and its personnel need be made aware of the details described in paragraph 9(a) beyond the sums on deposit in the account. NPC therefore requests that the following language be deleted from paragraph 9(b): "together with the information supplied to the trustee by the Defendant at the time of deposit."

I am available to discuss these issues further with you, if necessary.

Sincerely,



Robert E. Johnston