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750 E. PRATT STREET SUITE 900 BALTIMORE, MD 21202
T 410.244.7400 F 410.244.7742 www.Venable.com

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Paul F. Strain

410-244-7717

pfstrain@venable.com

July 2, 2010

Via Email and Overnight Delivery

The Honorable John F. Keenan
United States District Court
Southern District of New York
500 Pearl Street, Room 1930
New York, New York 10007-1312

RECEIVED
JUL -6 2010
JUDGE KEENAN'S CHAMBERS

Re: July 7, 2010 Show Cause Hearing # 06 CIV 9455
06 MD 1789

Dear Judge Keenan:

I write this letter in advance of the Court's hearing on July 7th concerning Mr. Douglas, as I said I would on the record on June 25th. I do not believe in 37 years of practicing law that I have ever sent such a letter, or felt the need to send such a letter, but I do so now for two reasons.

First, Mr. Douglas' demeaning treatment of the witnesses presented by the defense and the deliberate mischaracterization of their testimony could, in other circumstances, create a serious impediment to the willingness of such witnesses to testify in the future. If that happened, such conduct would hinder the pursuit of justice in those cases. It will not happen here because of the dedication, convictions, and professional integrity of the Merck witnesses.¹ With other witnesses in other circumstances, such demeaning treatment could have that undesirable effect. I do not know whether that was a hoped for result. I do know that when highly trained professionals are treated with such disrespect and their testimony is deliberately distorted, it may make them react in repulsion toward the litigation process. The Court directed Mr. Douglas to "stop the sarcasm" (T.1394) and "don't be a wise guy" (T. 1394) and also commented in an off the record sidebar at the end of the day on June 23, immediately after Dr. Glickman's testimony had concluded and the day before the parties were to give their respective closings, that it was conduct such as this that brought lawyers and

¹ I am not commenting here on what effect Mr. Douglas' behavior had on the jury - that is for a separate motion and a separate hearing.



The Honorable John F. Keenan

July 2, 2010

Page 2

litigation into disrepute. The Court also clearly specified to Mr. Douglas that "it's clearly appropriate to attack the credibility of witnesses, but you didn't have to insult Dr. dePapp the way you did." (T.1715)

Your Honor goes out of your way to show courtesy toward all the witnesses called in your courtroom, certainly including those professionals who are called to testify and for whom courtroom testimony is a strange and uncomfortable occurrence. To have such witnesses leave disgusted by the process, the sarcasm, the demeaning comments, the mischaracterization of testimony, and the theatrics seriously distorts the pursuit of justice. I reiterate that Mr. Douglas' conduct will not have that effect on the witnesses Merck called. However, in other cases, in other circumstances, it could, and our litigation process would be seriously hurt if professionals were unwilling to participate.

Second, absent clear and direct consequences for Mr. Douglas' "outrageous" (T. 1756) summation and similar conduct, including his demeaning treatment of witnesses, mischaracterization of evidence, and complete disregard of pretrial rulings and admonitions during the trial itself, such conduct will be considered successful and worthy of emulation in the eyes of many onlookers, including other counsel with interests in the litigation. This is especially sensitive in the *Boles* case because the courtroom was filled during Mr. Douglas' close with young people who by all appearances came in to see the show. We gained the understanding that the large group of young people who attended the closing were associated with a law school and were there to see Mr. Douglas perform. We are not privy to the details of that, and Mr. Douglas can confirm or not whether they are in fact law students, which is our strong impression. I do know that they were brought in by those associated with Mr. Douglas and that they were seated in close proximity to the jury. I do know that their laughter throughout his summation indicates that they enjoyed the show. And I do know that their laughter continued after Your Honor had left the room immediately after admonishing Mr. Douglas, once again, concerning his behavior, when a young man who had been speaking in the hall with Mr. Douglas and Mr. O'Brien before the closing jovially called out "another Judge who is impressed by you Gary" or words to that effect. (The comment was after the Court had left the room and off the record. Mr. Ryan may have been close enough to hear it.) The bare transcript can give but a glimpse of

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The Honorable John F. Keenan
July 2, 2010
Page 3

the "sarcasm," the "insult(s)," the mocking of one's manner of speech, and the "outrageous summation" and direct violations of court orders (going all the way back to revealing to the jury the prior *Maley* trial). Now it appears Mr. Douglas is obfuscating the Court's criticism by telling the press that he merely commented on company emails, astoundingly claiming the emails "mocked African Americans." (Copy of article attached).

Mr. Douglas was teaching during this trial. But he was teaching those lawyers or law students exactly the wrong things, and his "success" has set a very bad example.

The manner in which the "outrageous summation" and other conduct affected the trial will be the subject of post-trial motions and I do not address it here. I mean this letter to set out only my views on the manner in which counsel's conduct has the potential to affect our system of justice. I am sorry to send such a letter. As I said, I do not believe I have ever done so before and I certainly hope never to do so again.

Respectfully,



Paul F. Strain

PFS/aj

cc: Timothy M. O'Brien, Esq.
Gary Douglas, Esq.
William J. Beausoleil, Esq.

BA2-395602

June 25, 2010

Merck, Hit With First Fosamax Verdict, Challenges Plaintiff's Closing Arguments

A New York jury issued an \$8 million verdict against Merck in a Fosamax product liability case, but the company contends that the plaintiff's counsel's closing arguments prejudiced the jury.

Merck is challenging the June 25 verdict in part because of the remarks made by attorney Gary Douglas, of Douglas & London. A primary issue is Douglas' comment that the jury should send a message to Merck. In addition, Merck says he mischaracterized the testimony of Merck scientist Ann de Papp, among other things.

"We believe the jury verdict was a result of plaintiff's counsel's inflammatory and prejudicial remarks," Merck's outside counsel Paul Strain, of Venable, said in a statement.

Strain said in an interview that the company will request a judgment in its favor, or at least a new trial in post-trial motions.

Judge Says Plaintiff's Counsel's Closing Was "Outrageous"

The company requested a mistrial, based on Douglas' remarks, before the jury issued its verdict but Judge John Keenan, of the U.S. District Court for the Southern District of New York, denied the request. However, Keenan found Douglas' comments objectionable.

"I have never heard a more outrageous summation in my life than his [Douglas'] yesterday," Keenan stated before the jury issued its verdict. "And I don't put statements like that on the record loosely. I'm 80 years old."

In a meeting with attorneys before the jury was given its instructions, he said Douglas' summation "was clearly improper." Keenan said he may impose sanctions against Douglas and will decide if his conduct should be referred to the court's disciplinary committee for possible action against him.

Douglas said in an interview that Merck's allegations are "sour grapes" and that all his remarks were "fair comments on the evidence." Douglas said that he had cited internal company emails, which he said mocked African Americans.

Strain said that is an "absolutely false statement." He said there were no comments belittling African Americans and noted those charges were not even part of Douglas' closing.

This is the second time a jury has heard the case, *Boles v. Merck*. The first time the jury was unable to reach a unanimous verdict, resulting in a mistrial. The company won the only other Fosamax case to go to trial, *Maley v. Merck*, last month, and the judge ruled in favor of Merck in another case, *Flemings v. Merck* before that case went to trial. In the *Flemings* case, Judge Keegan ruled that the plaintiff failed to present sufficient evidence that Fosamax caused her injury ('The Pink Sheet' DAILY, Nov. 24, 2009).

The next case is scheduled to go to trial on Nov. 1 before Judge Keenan. As of March 31, approximately 1,039 cases involving approximately 1,417 plaintiff groups were pending against Merck in federal or state court.

-Brenda Sandburg (b.sandburg@elsevier.com)