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May 30, 2017

VIA ECF

Honorable Freda L. Wolfson
United States District Judge
United States District Court
Clarkson S. Fisher Federal Bldg. & U.S. Courthouse
402 E. State Street
Trenton, New Jersey 08608

Honorable Lois H. Goodman
United States Magistrate Judge
United States District Court
Clarkson S. Fisher Federal Bldg. & U.S. Courthouse
402 E. State Street
Trenton, New Jersey 08608

Re: *In re: Fosamax (Alendronate Sodium) Products Liability Litigation (No. II)*
Master Docket No. 08-08 (FLW)(LHG); MDL No. 2243.

Dear Judge Wolfson and Judge Goodman:

This joint letter is submitted by Plaintiffs' Co-Liaison Counsel and counsel for Merck Sharp & Dohme Corp. in response to Your Honor's Order of May 16 requesting certain information regarding the above-referenced litigation.

Merck's Position

Merck Sharp & Dohme Corp. ("Merck") is presently evaluating whether it will seek a writ of certiorari from the United States Supreme Court. A final decision has not yet been made. The deadline for seeking a writ of certiorari is July 24th. Once a final decision has been made, Merck will inform this Court.

At the present time and in light of the present posture of the MDL, Merck does not intend to file any motions. If Merck decides not to seek a writ of certiorari or the Supreme Court denies Merck's request, there are certain motions that Merck likely will file. As an example, Merck believes that approximately 15% of the cases that may be in the MDL involve injuries that occurred well after a warning was included in the Prescribing Information regarding the

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alleged injuries at issue. The adequacy of that warning, Merck believes, can be determined as a matter of law, and such a finding could have a significant effect on the overall inventory. Other case specific motions would be likely.

As noted in Plaintiffs' position below, Plaintiffs seek a stay of all proceedings pending the outcome of an appeal to the Supreme Court. With one exception, Merck does not object to Plaintiffs' request. The one exception pertains to Plaintiffs' obligation to provide a Plaintiff Fact Sheet ("PFS") for each plaintiff, as many plaintiffs never provided a PFS. Plaintiffs previously agreed to provide such a PFS and the information required by the PFS is basic information that certainly should be readily available to each plaintiff, e.g., date of incident, identity of treating physicians, essential records and radiology. The burden on plaintiffs is minimal, and the information is critical to both evaluation for resolution and case selection for a bellwether process.

In regard to settlement discussions, Merck has been actively involved in discussions with several firms that have cases in the MDL and state courts. To date, those discussions have resulted in the resolution of more than 40 claims asserted by one firm. Merck has ongoing discussions with several other firms.

Plaintiffs' Position

In light of Merck's continuing evaluation of whether to seek a writ of *certiorari* from the United States Supreme Court to review the Third Circuit Court of Appeals' opinion and order reversing Judge Pisano's decisions, Plaintiffs respectfully submit that discovery, motion practice, and other proceedings in this litigation should be stayed pending Merck's decision to request Supreme Court review and, if a writ is filed, a decision from the Supreme Court either to accept or reject the *certiorari* petition and, if *certiorari* is granted, a decision from the Supreme Court. Assuming that Merck seeks review, the Supreme Court's decision – one way or the other – is likely to have significant impact upon the future course of this litigation, the need for additional discovery – including the production of PFS from those Plaintiffs whose cases were either conditionally dismissed or included in the Third Circuit appeals – and expert disclosures, any other decisions on the merits, and any trial schedules or parameters for bellwether selections.

The fact that it is unclear whether Merck will or will not seek a writ and, if review is requested, if the Supreme Court will or will not elect to consider the Third Circuit Court of Appeals' opinion and order weighs heavily in favor of staying these cases. After these decisions are made the parties and this Court may move forward efficiently and in accordance with the decision of the final appellate court. The alternative, to reinitiate discovery, prepare and exchange expert disclosures, decide upon parameters for a bellwether pool, to brief, argue, and decide dispositive motions would squander the resources of this Court and the parties, and could require the parties to relitigate dispositive motions in light of the decision. If review is not sought or the Supreme Court rejects Merck's writ, Plaintiffs respectfully submit that the parties should meet and confer to discuss a schedule for further discovery and case advancement with an eye toward jointly submitting for the Court's endorsement a Stipulation and [Proposed] Order, which reflects this agreement.

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Plaintiffs disagree that any further motion practice, including case specific motions or motions concerning cases where Merck believes that the injuries occurred after certain plaintiffs were provided prescribing information regarding the alleged injuries should occur before case specific discovery has been completed including, but not limited to, depositions of the plaintiffs and their treaters.

Finally, while Plaintiffs appreciate that Merck is discussing resolution with certain firms, no settlement discussions that could resolve the entire litigation in federal or state court are taking place. Plaintiffs are always amenable to engaging in productive settlement discussions that could resolve the claims pending in federal court.

For the reasons set forth above, Plaintiffs respectfully submit that this Court should stay further proceedings in this litigation pending Merck's decision to seek a writ and, if review is requested, the Supreme Court's decision(s). In the event that Merck does not seek a writ or the Supreme Court denies *certiorari*, Plaintiffs respectfully submit that the parties should confer and submit a Stipulation and [Proposed] Order or competing proposed schedules to the Court within 14 days of Merck's decision or the denial of *certiorari*.

Conclusion

Thank you for your attention to this matter. We look forward to discussing these issues and any others that the Court wishes to raise during our telephone conference.

Respectfully submitted,

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO

/s/ James E. Cecchi

JAMES E. CECCHI

cc: All Counsel of Record (via ECF)