

1 RAYMOND M. WILLIAMS (Bar No. 164068)
raymond.williams@dlapiper.com
2 DLA PIPER LLP (US)
1650 Market Street, Suite 4900
3 Philadelphia, PA 19103
Tel: 215.656.3300
4 Fax: 215.656.3301

5 LOREN H. BROWN
loren.brown@dlapiper.com
6 HEIDI LEVINE
heidi.levine@dlapiper.com
7 DLA PIPER LLP (US)
1251 Avenue of the Americas, 27th Floor
8 New York, NY 10020-1104
Tel: 212.335.4500
9 Fax: 212.335.4501

10 CHRISTOPHER M. YOUNG (Bar No. 163319)
christopher.young@dlapiper.com
11 DLA PIPER LLP (US)
401 B Street, Suite 1700
12 San Diego, CA 92101
Tel: 619.699.2700
13 Fax: 619.699.2701

14 Attorneys for Defendant
15 NOVO NORDISK INC.

16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 IN RE INCRETIN-BASED
19 THERAPIES PRODUCTS LIABILITY
20 LITIGATION

21 *As to All Related and Member Cases*
22
23
24
25
26

Case No. 13-md-2452-AJB-MDD

**DEFENDANT NOVO NORDISK
INC.'S NOTICE OF INTENT TO
RESPOND TO EX PARTE
MOTION FOR
DETERMINATION OF
DISCOVERY DISPUTE ON
INTERROGATORY
RESPONSES; DECLARATION**

Judge: Hon. Anthony J. Battaglia
Magistrate: Hon. Mitchell D. Dembin

1 Defendant Novo Nordisk Inc. (“Novo”) files this notice that it intends to
2 respond to the *ex parte* Motion For Determination of Discovery Dispute on
3 Defendant Novo Nordisk Inc.’s Interrogatory Responses (“*Ex Parte* Motion”) filed
4 by Plaintiffs on Friday, March 7. Plaintiffs’ motion is improper and violates this
5 Court’s rules on at least three grounds: (1) Novo agreed to participate in a Joint
6 Motion with a reasonable time to respond, which Plaintiffs did not afford to Novo;
7 (2) Plaintiffs failed to satisfy their meet-and-confer obligations; and (3) the *Ex*
8 *Parte* Motion is outdated and does not reflect Novo’s current discovery responses
9 to the interrogatories at issue.

10 Nonetheless, Novo intends to respond substantively to Plaintiffs’ motion,
11 pursuant to this Court’s rules, on or before Wednesday, March 12.

12 **I. Novo Agreed To Participate In A Joint Motion**

13 This Court’s Chambers Rules expressly state that “[a]n *ex parte* motion to
14 compel only is appropriate when the opposing party, after being provided a
15 reasonable opportunity to participate, refuses to participate in the joint motion.”
16 (Chambers Rules V.C.) However, as the Declaration of Michael Johnson
17 acknowledges, Novo expressly *agreed* to participate in a Joint Motion for this
18 discovery dispute. (*See* Decl. of Opportunity Offered to Opposing Counsel to
19 Participate in Joint Motion (“Johnson Decl.”) [Dkt. No. 350-2] ¶¶ 6-8, Ex. 1.) In
20 fact, Novo’s counsel wrote to Mr. Johnson the day after receiving Plaintiffs’ portion
21 of the Joint Motion, stating that “[o]ur plan is to jointly file by Friday, but will let
22 you know this week if we need additional time.” (Ex. 1 to the Johnson Decl.)

23 The Chamber Rules further state that “[a] minimum of 5 business days prior
24 to the anticipated filing date of the Joint Motion is reasonable for a party to
25 participate meaningfully in the preparation of the joint motion.” (*Id.*) For
26 electronically filed documents, the Federal Rules provide that a day ends at
27 midnight in the Court’s time zone. Fed. R. Civ. P. 6(a)(4).

28 //

1 Here (as reflected in the email correspondence attached to the Declaration of
2 attorney Johnson as Ex. 1), Plaintiffs served Novo with their portion of the Joint
3 Motion on Friday, February 28, and demanded a response by Friday, March 7. (*Id.*;
4 Ex. 1.) Pursuant to this Court's chambers rules and the federal rules, Novo should
5 have been provided a minimum of five business days, or at least until Monday,
6 March 10, to respond. While Novo agreed to participate in a Joint Motion, Novo
7 disagreed with Plaintiffs' position that the Joint Motion was due Friday, March 7
8 and not Monday, March 10. To avoid a dispute, Novo requested a one-day
9 extension to provide its input, until the date Novo believes the Joint Motion was
10 due – today, Monday, March 10. (*Id.*) This timing request was reasonable given
11 the complexity and extent of the issues involved, including: (1) Plaintiffs' 86-page
12 portion of the Joint Motion challenging the answers to all 48 interrogatories,
13 including multiple sub-parts to nearly every request; (2) Novo's document
14 productions served last week, which are responsive to more than half of the
15 challenged interrogatories; and (3) Novo's supplemental discovery responses
16 served last week, on Thursday, March 6, which addressed many of the
17 interrogatories at issue in Plaintiffs' *Ex Parte* Motion and should have been
18 incorporated into a revised Joint Motion.

19 Plaintiffs refused Novo's efforts to present this Court with a coherent Joint
20 Motion, pushed ahead, and filed their *Ex Parte* Motion on Friday, March 7 (before
21 the e-filing deadline had expired). Plaintiffs' decision to file *ex parte* on Friday
22 afternoon is not only inconsistent with the Chambers Rules and the computation of
23 days under Federal Rule 6, but also seems highly unreasonable under the
24 circumstances. There is no justification for departure from the Court's rules which
25 permit filing an *ex parte* motion only under limited circumstances, especially where
26 here, a one-day extension was requested and Plaintiffs filed *ex parte* before the
27 expiration of the fifth business day. If Plaintiffs had granted Novo's request, a Joint

28 //

1 Motion could have been filed by the parties today, in compliance with the Court's
2 rules.

3 **II. Plaintiffs Did Not Satisfy Their Meet-And-Confer Requirements**

4 Plaintiffs also failed to comply with their meet-and-confer obligations. As
5 this Court will see in Novo's substantive response to Plaintiffs' *Ex Parte* Motion,
6 Plaintiffs refused Novo's repeated offers to meet-and-confer about the
7 interrogatories at issue and Plaintiffs' obligation to tailor the scope of discovery to
8 general causation issues ordered by Judge Battaglia in his February 18, 2014
9 Order.¹ (Declaration of Heidi Levine ("Levine Decl.") ¶ 3; [Dkt. No. 325].)
10 Moreover, Plaintiffs have not met-and-conferred about any of Novo's recent
11 document productions and supplemental responses to the interrogatories at issue,
12 served on March 6. (Levine Decl. ¶ 3.)

13 **III. The *Ex Parte* Motion Does Not Incorporate Novo's Latest Responses**

14 Plaintiffs' *Ex Parte* Motion is also inappropriate because it does not
15 incorporate Novo's supplemental interrogatory responses. In their haste to file the
16 *Ex Parte* Motion instead of a Joint Motion, Plaintiffs ignored Novo's supplemental
17 interrogatory responses and incorporated only the original responses in the *Ex Parte*
18 Motion. (See Johnson Decl. ¶ 9 (declaring that the moving papers have not
19 changed since February 28, despite Novo's supplemental responses on March 6).)
20 Plaintiffs refused to amend their motion to reflect new facts at issue, and rejected
21 conferring with Novo to determine if the supplemental discovery responses might
22 have resolved even a single challenged interrogatory. Plaintiffs' rush to Court last
23 week without any meet-and-confer is consistent with their approach to the
24 underlying discovery dispute, which they chose to leave entirely to the Court rather
25 than engage in real efforts to go through a meet-and-confer process with Novo.

26
27 ¹ Plaintiffs have refused to and have not conferred with Novo regarding the scope of
28 Plaintiffs' discovery requests since February 18, 2014, at an in-person meeting
between Novo, Merck and Plaintiffs immediately after the hearing before Judge
Battaglia in which the Court ordered Plaintiffs to narrow their requests.

1 Since Plaintiffs attached Novo's supplemental responses to the Johnson
2 Declaration (Johnson Decl. Exs. 2-3), but did not revise their motion to incorporate
3 the supplemental responses, Plaintiffs' *Ex Parte* Motion was incomplete and
4 inaccurate when it was filed, and remains so now. In addition, Plaintiffs did not
5 provide this Court (or Novo) with any statement or reason as to why further
6 responses should be required beyond the supplemental responses already provided.
7 (*See* Chambers Rules V.C.3.)

8 **IV. Novo Will Respond To The *Ex Parte* Motion**

9 Pursuant to this Court's rules, Novo will promptly respond to Plaintiffs'
10 motion on or before Wednesday, March 12.

11 Dated: March 10, 2014

12 DLA PIPER LLP (US)

13
14 By: /s/ Heidi Levine
15 Heidi Levine
16 DLA PIPER LLP (US)
17 1251 Avenue of the Americas, 27th Floor
18 New York, NY 10020-1104
19 Tel: 212.335.4500
20 Fax: 212.335.4501
21 loren.brown@dlapiper.com
22 heidi.levine@dlapiper.com

23 *Attorneys for Defendant Novo Nordisk Inc.*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION

I, Heidi Levine, declare as follows:

1. I am a partner in the law firm of DLA Piper LLP (US) and counsel of record for Defendant Novo Nordisk Inc. (“Novo”) in this litigation. The facts stated in this Declaration are true to the best of my personal knowledge, and if called as a witness to testify, I could and would competently do so as to each fact stated herein.

2. As set forth in the email correspondence attached as Exhibit 1 to the Declaration of Opportunity Offered to Opposing Counsel to Participate in Joint Motion [Dkt. No. 350-2], Novo expressly agreed to participate in a Joint Motion to address the discovery dispute underlying Plaintiffs’ *Ex Parte* Motion.

3. Novo made repeated offers to Plaintiffs to meet-and-confer about each interrogatory at issue in the *Ex Parte* Motion. Plaintiffs refused Novo’s offers. Plaintiffs also failed to meet-and-confer regarding the scope of discovery, which Judge Battaglia ordered Plaintiffs to tailor to general causation issues in his February 18, 2014 Order. Nor have Plaintiffs met-and-conferred with Novo about any of Novo’s supplemental responses to the interrogatories at issue served on March 6, which may have resolved many of the disputes brought before the Court.

This declaration was executed on March 10, 2014, in New York, New York. I declare under penalty of perjury that the foregoing is true and correct.

/s/ Heidi Levine
HEIDI LEVINE

1
2 **CERTIFICATE OF SERVICE**

3 I, Sue Walls, declare:

4 I am a citizen of the United States and employed in San Diego County,
5 California. I am over the age of eighteen years and not a party to the within-entitled
6 action. My business address is DLA Piper LLP (US), 401 B Street, San Diego, CA
7 92101. On March 10, 2014, I served a copy of the within document:

8 **DEFENDANT NOVO NORDISK INC.'S NOTICE OF INTENT TO
9 RESPOND TO *EX PARTE* MOTION FOR DETERMINATION OF
10 DISCOVERY DISPUTE ON INTERROGATORY RESPONSES;
11 DECLARATION**

- 11 by placing the document listed above in a sealed envelope with
12 postage thereon fully prepaid, the United States mail at
13 Philadelphia, Pennsylvania addressed as set forth below.
- 14 by placing the document listed above in a sealed Delivery
15 Service envelope and affixing a pre-paid air bill, and causing the
16 envelope to be delivered to a Delivery Service agent for
17 delivery.
- 18 by personally delivering the document listed above to the
19 persons at the address set forth below.
- 20 I hereby certify that on the below date, I electronically filed the
21 foregoing with the Clerk of the Court using the CM/ECF system
22 which will send notification of such filing to the e-mail
23 addresses denoted on the Electronic Mail notice list, and I
24 hereby certify that I have mailed the foregoing document or
25 paper via the United States Postal Service to the non-CM/ECF
26 participants indicated on the Manual Notice list (if any).
- 27 by transmitting via e-mail or electronic transmission the
28 document listed above to the persons at the e-mail addresses set
forth below.

I am readily familiar with the firm's practice of collection and processing
correspondence for mailing. Under that practice it would be deposited with the

1 U.S. Postal Service on that same day with postage thereon fully prepaid in the
2 ordinary course of business. I am aware that on motion of the party served, service
3 is presumed invalid if postal cancellation date or postage meter date is more than
4 one day after date of deposit for mailing in affidavit.

5 I declare that I am employed in the office of a member of the bar of this court
6 at whose direction the service was made.

7 Executed on March 10, 2014, at San Diego, California.

8
9
10 By: Sue Walls
Sue Walls

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28