

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 IN RE: INCRETIN-BASED
4 THERAPIES PRODUCTS
5 LIABILITY LITIGATION

6 Relates to: ALL CASES
7
8

) MDL No. 13-md-2452-AJB(MDD)

) PLAINTIFFS' MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) SUPPORT OF MOTION FOR
) CLARIFICATION AND MODIFICATION
) OF DISCOVERY DISPUTE PROTOCOL

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10 This motion addresses the Court's Order Setting Discovery Dispute Protocol of
11 August 15, 2014 (Dkt. No. 568). Plaintiffs embrace the expedited dispute resolution
12 procedures crafted by the Court, but must formally raise three issues to avoid potential
13 waiver and prejudice.¹ Plaintiffs raised these issues with Defendants in a meet and confer
14 on August 20, where Defendants agreed with Plaintiffs' interpretation of the first two
15 issues below, but did not agree to a modification regarding the third.

16 **I. THE LIST OF "CURRENT" DISCOVERY DISPUTES**

17 The Court's Order says "all discovery issues must be resolved without delay," then
18 lists the "top ten" disputes raised by Plaintiffs on August 14, 2014. The list was intended
19 by Plaintiffs to be illustrative, but was not meant to be exhaustive of all pending disputes.
20

21 ¹ Although "broad discretion is vested in the trial court to permit or deny discovery," a
22 court errs if the "denial of discovery results in actual and substantial prejudice to the
23 complaining litigant." *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (quotation
24 omitted); see also *Allen v. Bayer Corp. (In re : Phenylpropanolamine (PPA) Prods. Liab.*
25 *Litig.)*, 460 F.3d 1217, 1250 (9th Cir. 2006) (explaining deference given to MDL court's
26 management of docket, but holding "when a party's conduct is not egregious or when a
27 party receives insufficient warning, the failure to consider any alternatives at all limits the
28 deference we give a MDL court."). Plaintiffs construe the foregoing precedent as
encouraging, and likely requiring, that they respond when faced with a court order that
could, at least in theory, preclude them from necessary discovery.

1 During the meet and confer, the Defendants agreed they interpreted the Court’s Order as
2 not being exhaustive, such that the parties should continue to meet and confer on other
3 pending issues (e.g., the defendants’ objections and responses to the “general causation”
4 written discovery) and timely file motions on those issues only when the meet and confer
5 process is complete. Plaintiffs seek clarification on this because the Order is clear that
6 Court approval is required even when the parties reach agreement (Dkt. No. 568, ¶ 4).

7 **II. TIME FOR REVIEW OF DOCUMENT PRODUCTIONS**

8 The Court’s imposition of strict time limits could be read to apply to issues relating
9 to document productions. Such a timeline would be virtually impossible to meet given the
10 extraordinary volume of documents, more than 10 million of which have been produced
11 in the past 90 days, with another 500,000+ in the past 10 days. Indeed, many issues may
12 become apparent only at custodial depositions, such as where the deponent testifies about
13 documents that do not appear to have been contained within the productions. At the meet
14 and confer, Defendants agreed they did not believe the 7/14-day deadlines required
15 Plaintiffs to review and object to Defendants’ document productions within that time.²
16 Plaintiffs again seek clarification from the Court for the reason stated above in Part I.

17 **III. REPLY BRIEFS**

18 The protocol provides “no reply papers will be accepted.” This would preclude
19 Plaintiffs from addressing Defendants’ “burden” arguments and any new citations or
20 facts raised by Defendants. Plaintiffs request the ability to file a reply not exceeding three
21 pages within three days of Defendants’ response, which reply shall be strictly limited to
22 matters raised by Defendants.

23 **CONCLUSION**

24 Plaintiffs respectfully request that the discovery dispute protocol be clarified and
25 modified in accordance with the above.

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28 ² Plaintiffs do not intend to let Defendants’ *objections* to document requests go unresolved
for long – many were discussed during the August 20 meet and confer – but issues that
can only be discovered by review will require longer.

1 DATED: August 22, 2014.
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