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IN RE: VIOXX® LITIGATION

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ATLANTIC COUNTY

CASE NO. 619

CIVIL ACTION  
*APPLICABLE TO ALL CASES*

**ORDER**

*ON Cases pending  
as of Nov 9, 2007*

**THIS MATTER** having been brought before the Court upon the application of Defendant Merck & Co., Inc. for an Order requiring all plaintiffs represented by counsel with personal injury claims pending in Case No. 619 ("Plaintiff" or "Plaintiffs") as of November 9, 2007 to produce specified information regarding their claims, unless the claim is eligible for, and has been submitted to the Resolution Program, and for good cause shown,

IT IS on this 9<sup>th</sup> day of November 2007,

**ORDERED** as follows:

## **I. PRESERVATION NOTICE REQUIREMENT**

- A. Within sixty (60) days of entry of this Order, counsel for a Plaintiff subject to this Order shall notify the following individuals or entities, by registered mail, that they may have records relevant to the Plaintiff's claim in this Coordinated Proceeding ("Claim") and that any records relating to the Plaintiff must be preserved pursuant to Case Management Order No. 1 entered by this Court on June 5, 2003 (the "Notice"), pending collection by the Plaintiff:
1. All Pharmacies that dispensed any medications to the Plaintiff for the period from January 1, 1995 to the present;
  2. All Physicians, Medical Facilities, other Healthcare Providers and/or other persons ("Other Providers") who Plaintiff claims provided any samples of Vioxx to the Plaintiff;
  3. All Physicians, Medical Facilities and/or other Healthcare Providers who prescribed Vioxx for the Plaintiff;
  4. All Physicians and/or other Healthcare Providers who treated Plaintiff for the period from January 1, 1995 to the present; and
  5. If Plaintiff is seeking lost wages, all of his employers for the period from three years prior to the date for which he is seeking lost wages through the last day for which Plaintiff is seeking lost wages.
- B. A copy of Case Management Order No. 1 shall be attached to the Notice and all copies of the Notice shall be preserved by Counsel for Plaintiff for so long as the claim remains pending in this Proceeding.
- C. By no later than March 15, 2008, Plaintiff shall serve a statement listing the names and addresses of all individuals or entities to which Notices were sent, along with copies of the Notices and a signed certification that the Notices were sent as required by this Order. Service by Plaintiffs shall be made in accordance with the service procedures of the January 13, 2005 Amended Order Regarding Electronic Service.
- D. Plaintiffs who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendant's Counsel and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted, except for good cause shown. If Plaintiff fails to cure the deficiency within the Cure Period, Defendant shall file a Motion to Show Cause why the claim should not be dismissed with prejudice. Plaintiff shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion within the required period of time shall lead to the dismissal of the claim with prejudice.

- E. Plaintiff may not seek to introduce into evidence at trial any document or information asserting that Vioxx was dispensed by a pharmacy or that Vioxx was provided to the Plaintiff as a sample if a Notice were not sent to the Plaintiff's pharmacy, physician, other healthcare provider and/or Other Provider as required by this Order, except upon leave of court for good cause shown. A Plaintiff who fails to comply with this Order may also be subject to other sanctions or orders.

## II. DISCOVERY REQUIREMENTS

- A. All Plaintiffs who claim to have suffered an injury as a result of taking Vioxx must produce all of the information described in this Section II unless (a) the injury alleged is a Myocardial Infarction ("MI"), Sudden Cardiac Death ("SCD"), or Stroke as those terms are defined, *infra.*, in Section III, *and* (b) the Plaintiff has submitted the claim to the Resolution Program:
1. All pharmacy records regarding the dispensing of drugs to the Plaintiff for the period from January 1, 1995 to the present, along with a signed certification from the respective pharmacy or pharmacies indicating that the production is complete.
  2. All medical records relating to the Plaintiff from all healthcare providers requested in the Amended and Supplemental Plaintiff Profile Form for the period from January 1, 1995 to the present, along with a signed certification from each Healthcare Provider who has records relating to the Plaintiff indicating that all records in the possession, custody or control of the Provider have been produced.
  3. If any death is claimed, a statement to that effect along with a copy of the death certificate and autopsy report, if one was performed.
  4. For Plaintiffs alleging a MI, SCD or Stroke Injury, an Amended and Supplemental Plaintiff Fact Sheet ("ASPFS") and authorizations in a form attached hereto as Exhibit A unless Plaintiff has as of the date of this Order submitted a Plaintiff Profile Form. Service by Plaintiffs shall be made in accordance with the service procedures of the January 13, 2005 Amended Order Regarding Electronic Service.
  5. For Plaintiffs not alleging a MI, SCD or Stroke Injury, an ASPFS and authorizations in the forms attached hereto as Exhibit A. Service by Plaintiffs shall be made in accordance with the service procedures of the January 13, 2005 Amended Order Regarding Electronic Service.
  6. Answers to the Interrogatories set out as Exhibit B. Service by Plaintiffs shall be made in accordance with the service procedures of the January 13, 2005 Amended Order Regarding Electronic Service.
  7. An affidavit signed by the Plaintiff (i) attesting that records have been collected from all pharmacies that dispensed drugs to, or for, the Plaintiff;

(ii) attesting that all medical records described in subparagraph (6) above have been collected; and (iii) attesting that all records collected pursuant to subparagraphs A (1), (2) and (3) have been produced pursuant to this Order, along with an index or list identifying the source of the records. Service by Plaintiffs shall be made in accordance with the service procedures of the January 13, 2005 Amended Order Regarding Electronic Service.

- B. Within ~~thirty (30)~~ <sup>ninety (90)</sup> days of the ~~filing of a new claim in this Litigation, the Court shall set a status conference at which time the Court shall set a prompt deadline for:~~ <sup>date of this Order, the Plaintiff shall serve on the Defendant</sup> A case specific expert report from a medical expert attesting (i) to a reasonable degree of medical probability that the Plaintiff suffered an injury and (ii) that Vioxx caused the injury. The case specific expert report must include (i) an explanation of the basis of the attestation that Vioxx caused the Plaintiff to suffer the injury, (ii) an identification of any other causes that were considered in formulating the opinion, (iii) a description of the specific injuries allegedly suffered; (iv) a description of the specific medical findings that support the diagnosis of those injuries; and (v) and identification of all documents relied on by the expert in forming his opinions.
- C. If any of the documents described in paragraphs (A) (1), (2) and (6) above do not exist, the Plaintiff shall state that fact in his or her affidavit and the reason why they do not exist and provide a certified "No Records Statement" from the pharmacy or healthcare provider.
- D. Plaintiffs shall produce the items set forth above in this Section II in accordance the following schedule:
1. For Plaintiffs whose last name begins with the letters A through L, on or before May 1, 2008;
  2. For Plaintiffs whose last name begins with the letters M through Z, on or before July 1, 2008.
  3. Service by Plaintiffs shall be made in accordance with the service procedures of the January 13, 2005 Amended Order Regarding Electronic Service.
  4. Plaintiffs whose cases are subsequently transferred to this Court shall produce the items set forth above within sixty (60) days of transfer (measured from the date of filing in this Court of the Transfer Order) of their case to this proceeding.
- E. Plaintiffs who fail to fully comply with the requirements of this Order shall be given notice by e-mail or fax from Defendant's counsel and shall be provided thirty (30) additional days to cure such deficiency ("Cure Period"). No other extensions will be granted, except for good cause shown. If Plaintiff fails to cure the deficiency within the Cure Period, Defendant's counsel shall file a Motion to Show

Cause why the claim should not be dismissed with prejudice. Plaintiff shall thereupon have thirty (30) days to respond to the Notice to Show Cause. Any failure to respond to the Motion within the required period of time shall lead to the dismissal of the claim with prejudice.

- F. Nothing in this Order abrogates or replaces each Plaintiff's obligation to submit the Plaintiff Fact Sheet, authorizations, and other materials required under the Order issued on March 28, 2005. The Plaintiff need not re-submit a Plaintiff Fact Sheet if one has already been submitted with respect to his or her claim.

### III. DEFINITIONS

- A. For purposes of this Order only, "Myocardial Infarction" ("MI") is defined as follows:
1. A final or discharge diagnosis in contemporaneous medical records of a myocardial infarction or heart attack; or
  2. A diagnosis or affirmative finding in the contemporaneous medical records (e.g., a report of consultation) by a cardiologist of a myocardial infarction or heart attack; or, within 14 days of discharge from the hospitalization related to the Event, an independent diagnosis by a treating cardiologist that the Event was a myocardial infarction or heart attack; provided that, in either instance, the final or discharge diagnosis does not rule out a myocardial infarction; or
  3. If the medical records are silent as to whether or not plaintiff had a myocardial infarction, new pathological Q waves in two or more contiguous leads; or
  4. If the medical records are silent as to whether or not plaintiff had a myocardial infarction, (i) Signs and symptoms described in medical records of a heart attack (including but not limited to chest pain, pressure, tightness or discomfort, pain or discomfort in the upper areas of the body including but not limited to one or both arms, the back, neck, jaw or stomach, or shoulders; shortness of breath, weakness, dizziness, cold sweat, or excessive sweating, nausea, weakness, fatigue, loss of consciousness or posture, lightheadedness, feeling of faintness, heart-burn or indigestion sensations, feelings of restlessness or anxiousness, a sense of impending doom, disorientation, lips, hands or feet turning slightly blue, abnormal heart rhythms (arrhythmias), or loss of consciousness, cardiac arrest, blood pressure fluctuations or drops requiring medical intervention) or new ischemic ST-T wave changes on an electrocardiogram in two or more contiguous leads; AND (ii) a rise and fall of cardiac enzymes that includes a rise in serum creatine kinase MB (CK-MB) to greater than two times the upper limit of normal (based on the individual's laboratory's normal range) or a rise in serum cardiac


troponin greater than two times the upper limit of normal that a given laboratory considers diagnostic for infarctions. (In the event that the laboratory records do not reflect the normal diagnostic range for troponin that is utilized by that specific laboratory, a rise in the troponin to greater than 1.5 ng/ml shall be deemed to indicate a myocardial infarction.)

5. An event is not a myocardial infarction under definition Nos. 3 or 4 above, if myocardial infarction is ruled out as a diagnosis in the discharge summary or by an in-house cardiology consult at the time of the event, or the final diagnosis is angina or unstable angina.
- B. For purposes of this Order only, "Sudden Cardiac Death" ("SCD") is defined as a witnessed instantaneous or near-instantaneous unexplained death that occurs without warning or within one hour of non-diagnostic symptoms, or, an unwitnessed, unexpected sudden death in which criteria for a fatal coronary, cerebrovascular event or other cause or event are not met.
- C. For purposes of this Order only, "Ischemic Stroke" ("Stroke") is defined as:
1. A final or discharge diagnosis in contemporaneous medical records of an ischemic stroke or ischemic cerebrovascular event or accident (*i.e.*, ischemic stroke, intracranial thrombosis, cerebral embolism, thrombotic stroke, embolic stroke, lacunar infarct, lacunar stroke, thrombotic occlusion, cerebrovascular event or accident that is not a primary hemorrhagic event, and cerebral infarction; or a hemorrhagic stroke that is secondary to the terms previously listed); or
  2. If the final or discharge diagnosis is silent as to whether or not plaintiff had an Ischemic Stroke, a diagnosis or affirmative finding in the contemporaneous medical records (*e.g.*, a report of consultation) by a neurologist of an Ischemic Stroke; or, within 14 days of discharge from the hospitalization related to the Event, an independent diagnosis by a treating neurologist that the Event was an Ischemic Stroke.
  3. For purposes of this Order only, an Event is **not** an Ischemic Stroke if:
    - a. stroke or cerebrovascular accident is ruled out as a diagnosis in the discharge summary or by a treating neurologist within 14 days of discharge from the hospitalization related to the Event;
    - b. hemorrhagic stroke or hemorrhagic cerebrovascular accident is the diagnosis in the discharge summary or by a treating neurologist within 14 days of discharge from the hospitalization related to the Event. This definition does not include a hemorrhagic stroke that is secondary to an Ischemic Stroke, or

- c. transient ischemic attack is the diagnosis in the discharge summary or is the diagnosis of a treating neurologist within 14 days of discharge from the hospitalization related to the Event.

#### **IV. PENALTIES FOR FRAUD AND DECEPTION**

Any Plaintiff (and his or her attorneys) who submits false or intentionally misleading information, or otherwise attempts to satisfy the documentation requirements of this Order through any form of deception, dishonesty or fraud shall be subject to appropriate sanctions (including monetary sanctions and costs) and dismissal with prejudice pursuant to N.J. Rule R. 4:23.

  
HON. CAROLE E. HIGBEE, P.J.Cv.