

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

In re: VIOXX	*	MDL Docket No. 1657
	*	
PRODUCTS LIABILITY LITIGATION	*	SECTION L
	*	
	*	JUDGE FALLON
This document relates to All Cases	*	
	*	MAGISTRATE JUDGE KNOWLES
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**JOINT REPORT NO. 28 OF
PLAINTIFFS' AND DEFENDANTS' LIAISON COUNSEL**

Plaintiffs' Liaison Counsel ("PLC") and Defendants' Liaison Counsel ("DLC") submit this Joint Report No. 28.

I. STATE COURT TRIAL SETTINGS

The following is the updated current listing provided by Merck of state court cases set for trial through March 31, 2008: The *Kozic* trial commenced on September 17, 2007 in Tampa, Florida. On October 5, 2007, the jury returned a verdict in favor of Merck. The *Record* case in the Florida Circuit Court, Palm Beach County, Florida, is currently set on a trial docket that runs from December 10, 2007 to January 18, 2008. In January, the *Turner* case is set for January 7, 2008 in the Alabama Circuit Court, Bullock County, Alabama; the *Appell/Arrigale* case is set for January 8, 2008 in the California Coordinated proceeding, in the California Superior Court, Los Angeles County; and a date of January 22, 2008 has been set in the New Jersey Coordinated proceeding, in the New Jersey Superior Court, Atlantic County, for four trials

with up to 2-3 plaintiffs each. In February, the *Zajicek* case is set for February 11, 2008 in the Texas District Court, Jackson County, Texas. Finally, the *Frederick* case is set for March 10, 2008 in the Alabama Circuit Court, Jefferson County, Alabama.

II. FURTHER PROCEEDINGS IN THE EARLY TRIAL CASES

On September 14, 2007, Merck filed a Notice of Appeal from the Judgment entered in the *Barnett* case. The parties will be prepared to discuss this further at the monthly status conference on October 11, 2007.

III. CLASS ACTIONS

The Court has under advisement Defendants' Rule 12 Motions to Dismiss the Master Complaints for Medical Monitoring and Purchase Claims. The matter has been briefed and submitted to the Court.

On January 29, 2007, the PSC filed a motion for leave to amend the Personal Injury and Wrongful Death Second Amended Master Class Action Complaint to add a plaintiff class representative from Iowa. Defendants filed their opposition and also filed a Motion to Strike Class Allegations in Plaintiffs' Medical Monitoring Master Class Action Complaint. The matter has been fully briefed and the parties await a hearing date to be set for oral argument. The parties will be prepared to discuss this further at the monthly status conference on October 11, 2007. The Court has indicated that this motion will be addressed at a later date.

IV. DISCOVERY DIRECTED TO MERCK

On August 14, 2007, the Court entered an Order and Reasons regarding Special Master Paul R. Rice's Report and Recommendations on a representative sampling of documents as to which Merck has asserted privilege and Merck's motion to adopt in part the Special

Master's Report and Recommendations and Merck's objections that were filed under seal. Documents that are discoverable are to be produced to plaintiffs in accordance with an agreed schedule, with the production concluding on or about November 30, 2007. Merck advises it has already produced documents relating to Dr. Reicin for which it withdrew or modified its privilege claims and further advises that it will produce on October 15, 2007 documents relating to Drs. Morrison or Barr for which Merck is withdrawing or modifying its privilege claims. Immediately upon receipt of the documents relating to Dr. Reicin, the PSC requested to move the discovery deposition of Dr. Reicin based upon the volume of the production. The PSC is communicating with counsel for Merck to reschedule the Reicin deposition at a mutually convenient time. The parties will be prepared to discuss this further at the monthly status conference on October 11, 2007.

V. DISCOVERY DIRECTED TO THIRD PARTIES

PLC has advised the Court and DLC that the PSC continues to issue third-party notices of depositions for the production of documents.

On July 31, 2007, the Court issued an Order regarding Special Master Rice's Second Report regarding the DDB and Ogilvy documents which were the subject of the letter from the PSC dated March 16, 2006 requesting intervention by the Court on whether Merck should have the right to review documents produced by Ogilvy and DDB in response to discovery requests by the PSC. On August 17, 2007, Merck filed objections to the Court's Order; the PSC filed a response; and Merck filed a reply. By Order dated September 21, 2007, the Court instructed Special Master Rice to issue rulings with respect to individual documents subject to Merck's objections to the Special Master's recommendations regarding the DDB/Ogilvy privileged documents. On September 27, 2007 the parties participated in a

conference call with Special Master Rice and Special Counsel Barriere and agreed on a procedure and schedule for the review. Pursuant to the schedule, Merck has submitted additional materials and briefing, the Special Master will issue tentative rulings on October 9, Merck will submit any materials in response to those tentative rulings by October 16, and the PSC will submit any response by October 23. The PSC will submit its response to Merck's supplemental brief on October 16. The parties will be prepared to discuss this further at the monthly status conference on October 11, 2007.

VI. DEPOSITION SCHEDULING

Merck has noticed the *de bene esse* depositions of the following current Merck employees on the below listed dates: Dr. Alise Reicin for November 14 and 15, 2007; Dr. Briggs Morrison for November 29 and 30, 2007; and Dr. Eliav Barr for November 29 and 30, 2007. The PSC has noticed the discovery deposition of Dr. Reicin for October 16, 2007; however, upon receipt of the Reicin production (see Section IV herein), the PSC requested that this deposition date be reset. Furthermore, the PSC has communicated with Merck regarding the scheduling of Dr. Barr's discovery deposition. The parties continue to discuss scheduling of depositions. The parties will be prepared to address this further at the monthly status conference on October 11, 2007.

VII. PLAINTIFF PROFILE FORM AND MERCK PROFILE FORM

Following the September 6, 2007 monthly status conference, Merck filed three additional Rules to Show Cause Why Cases Should Not Be Dismissed for failure to submit PPFs in contravention of Pre-Trial Order 18C. The Rules are set for hearing following the monthly status conference on October 11, 2007. Additionally, certain matters that were the subject of the

Rules heard on July 27, 2007 and September 6, 2007 were continued and also will be heard following the monthly status conference.

Issues relating to the completeness of PPFs and the requirement of specific authorizations by certain providers were discussed at the September 6, 2007 status conference. In accordance with the Court's instructions, the parties have attempted to address these issues in a proposed new Pre-Trial Order. Although the parties have exchanged drafts and revisions, they have been unable to agree on the language of the proposed order. On October 9, 2007, Merck submitted the parties competing drafts to the Court and will be prepared answer any questions the Court may have at the monthly status conference on October 11, 2007.

VIII. STATE/FEDERAL COORDINATION -- STATE LIAISON COMMITTEE

Representatives of the PSC and the State Liaison Committee have had several communications. The parties will be prepared to discuss this further at the monthly status conference on October 11, 2007.

IX. PRO SE CLAIMANTS

From time to time, as the Court issues additional Orders directing PLC to take appropriate action regarding filings made by various *pro se* individuals, PLC will continue to communicate with the various *pro se* claimants and advise them of attorneys in their respective states and other pertinent information regarding the MDL. DLC will continue to discuss with PLC Merck's obligation to respond to complaints filed by *pro se* individuals in those instances where the complaints have not been served.

On July 5, 2007, the Court entered Pre-Trial Order No. 25 which sets forth the terms of *pro se* plaintiffs' access to the PSC document depository. Since the entry of the Order,

the PSC has received a number of communications from various *pro se* claimants. The Pre-Trial Order is located at <http://vioxx.laed.uscourts.gov>.

X. IMS DATA

Counsel for IMS and the PLC continue to discuss further production of IMS data. The PSC has been advised that Orders were issued in New Jersey State Court regarding IMS data and the PSC is reviewing the Orders further. The parties will be prepared to discuss this further at the monthly status conference on October 11, 2007.

XI. MERCK'S MOTION FOR SUMMARY JUDGMENT

On July 3, 2006, the Court denied Merck's Motion for Summary Judgment in the *Lene Arnold* and *Alicia Gomez* in which Merck asserted that plaintiffs' claims were preempted by federal law. On July 12, 2007, Merck filed a Motion to Alter or Amend the Court's July 3, 2007 Order Denying Merck's Motion for Summary Judgment to Include Certification for Interlocutory Review Pursuant to 28 U.S.C § 1292(b). Oral argument was held on August 9, 2007, and the Court took the matter under advisement. The parties will advise the Court and will be prepared to discuss this matter further at the monthly status conference on October 11, 2007.

XII. TOLLING AGREEMENTS

On October 27, 2006, PLC communicated with DLC regarding Claimant Profile Forms submitted with Tolling Agreements and requested that a stipulation be worked out regarding Tolling Agreement claimants that have completed Claimant Profile Forms in filed cases so that re-filing a Plaintiff Profile Form can be accomplished by a mere addendum. On March 13, 2007, Merck provided a proposed Pre-Trial Order and Conversion Form. The PSC is

reviewing the information and will be providing a response to DLC. PLC and defense counsel have discussed this issue and continue to discuss it.

XIII. ISSUES RELATING TO PRE-TRIAL ORDER NO. 9

On February 9, 2007, the PSC received an Agreement letter with the State of Texas MDL PSC regarding the right of state court litigants to cross-notice expert depositions in Federal MDL 1657 proceedings or use MDL 1657 depositions in trial or in Motion practice. The PSC is attempting to secure agreements from other states similar to the agreement reached with the State of Texas MDL PSC. The PSC will be prepared to discuss this further at the monthly status conference on October 11, 2007.

XIV. VIOXX SUIT STATISTICS

As of June 30, 2007, Merck had been served or was aware that it had been named as a defendant in approximately 26,950 lawsuits, which include approximately 45,225 plaintiff groups alleging personal injuries resulting from the use of VIOXX, and in approximately 266 putative class actions alleging personal injuries and/or economic loss. Of these lawsuits, approximately 8,575 lawsuits representing approximately 23,450 plaintiff groups are or are slated to be in the federal MDL and approximately 16,400 lawsuits representing approximately 16,400 plaintiff groups are included in a coordinated proceeding in New Jersey Superior Court. In addition, as of June 30, approximately 14,450 claimants had entered into Tolling Agreements with the Company, which halt the running of applicable statutes of limitations for those claimants who seek to toll claims alleging injuries resulting from a thrombotic cardiovascular event that results in a myocardial infarction or ischemic stroke.

In addition to the VIOXX Product Liability Lawsuits discussed above, the claims of more than 4,620 plaintiff groups have been dismissed as of June 30. Of these, there have been

more than 1,170 plaintiff groups whose claims were dismissed with prejudice either by plaintiffs themselves or by the courts. More than 3,450 additional plaintiff groups have had their claims dismissed without prejudice.

Merck advises that it defines a “plaintiff group” as one user of the product and any derivative claims emanating from that user (such as an executor, spouse, or other party). Further, Merck advises that there are more Plaintiffs identified than lawsuits because many lawsuits include multiple Plaintiffs in the caption.

XV. MERCK INSURANCE

Since the 30(b)(6) Deposition took place on May 23, 2007, the PSC is further reviewing materials and will advise Merck regarding issues involving the PSC’s request for discovery concerning Merck insurance coverage and the arbitration/dispute resolution matters.

XVI. MOTION TO CONDUCT CASE SPECIFIC DISCOVERY

On May 29, 2007, the PSC filed a Motion to Conduct Case Specific Discovery in 250 cases to be designated by Plaintiffs to be completed within the next six (6) months. The matter is not yet set for hearing. Merck has advised that it will be filing responsive pleadings. The parties will be prepared to discuss this further at the monthly status conference on October 11, 2007.

XVII. OXFORD/VICTOR DATA

The PSC has requested that Merck and Oxford provide information relative to Protocol 203 and other items related to VICTOR. On July 3, 2007, Merck's counsel sent correspondence to PLC enclosing a comprehensive index memorializing these productions and copies of transmittal letters regarding same. On July 25, 2007, Oxford provided Merck with the

data that supported Oxford's publication on the VICTOR study. That data was promptly produced to the PSC. Merck has agreed to produce to the PSC any additional data received from Oxford when it is received by Merck. The parties will be prepared to discuss this further at the monthly status conference on October 11, 2007.

XVIII. PSC MDL TRIAL PACKAGE

On September 27, 2007, the Court issued PTO 27 regarding submission of the PSC's trial package. On October 3, 2007, the trial package was presented to the Court for review. The PSC will be prepared to discuss this further at the monthly status conference on October 11, 2007.

XIX. NEXT STATUS CONFERENCE

PLC and DLC will be prepared to schedule the next status conference, on a date to be selected by the Court.

Respectfully submitted,

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Defendants' Liaison Counsel

CERTIFICATE

I hereby certify that the above and foregoing Joint Status Report No. 28 of Plaintiffs' and Defendants' Liaison Counsel has been served upon all parties by electronically uploading the same to LexisNexis File & Serve Advanced in accordance with Pre-Trial Order No. 8B, and that the foregoing was electronically filed with the Clerk of Court of the United States District Court for the Eastern District of Louisiana by using the CM/ECF system which will send a Notice of Electronic Filing in accord with the procedures established in MDL 1657, on this 9th day of October, 2007.

/s/ Dorothy H. Wimberly

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

In re: VIOXX * **MDL Docket No. 1657**
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PRODUCTS LIABILITY LITIGATION * **SECTION L**
*
* **JUDGE FALLON**
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* **MAGISTRATE JUDGE KNOWLES**
* * * * *

**MONTHLY STATUS CONFERENCE
OCTOBER 11, 2007
SUGGESTED AGENDA**

- I. State Court Trial Settings
- II. Further Proceedings In The Early Trial Cases
- III. Class Actions
- IV. Discovery Directed to Merck
- V. Discovery Directed to Third Parties
- VI. Deposition Scheduling
- VII. Plaintiff Profile Form and Merck Profile Form
- VIII. State/Federal Coordination -- State Liaison Committee
- IX. *Pro Se* Claimants

- X. IMS Data
- XI. Merck's Motion for Summary Judgment
- XII. Tolling Agreements
- XIII. Issues Relating to Pre-Trial Order No. 9
- XIV. Vioxx Suit Statistics
- XV. Merck Insurance
- XVI. Motion to Conduct Case Specific Discovery
- XVII. Oxford/VICTOR Data
- XVIII. Next Status Conference