

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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: Index No. 560001/2005
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IN RE: NEW YORK BEXTRA AND CELEBREX : CASE MANAGEMENT
PRODUCT LIABILITY LITIGATION : ORDER NO. 2
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THIS DOCUMENT APPLIES TO ALL CASES :
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Coordination With Federal Multidistrict Litigation No. 1699

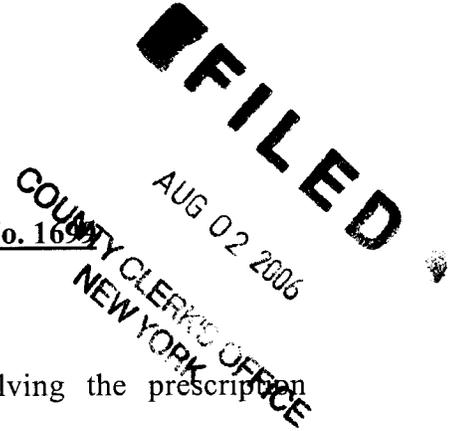
I. Applicability Of This Order

This Order applies to pretrial procedures for cases involving the prescription medications Bextra and Celebrex which are presently or hereafter assigned to this Court (“New York Coordinated Proceeding”).¹

II. The Parties’ Agreement Regarding MDL Coordination

Representatives of Plaintiffs and Defendants have met and conferred, and have jointly presented this Order setting forth the parties’ agreement with regard to coordination of discovery and other pretrial proceedings with the federal multidistrict litigation entitled In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation (MDL No. 1699) (the “MDL”). The terms of that agreement are set forth below and hereby ordered and shall be enforced by the authority of this Court:

¹ At the time of the parties’ submission of this Case Management Order, only the Bextra-only cases pending in New York state court have been ordered coordinated by the New York Litigation Coordinating Panel. Based upon instructions from this Court, however, the parties are treating this Coordinated Proceeding as to include also all product liability cases involving the prescription medication Celebrex as well as any cases involving both Bextra and Celebrex together. The parties agree and consent that this and all prior or future Case Management Orders reflect the parties’ agreements with respect to the coordinated treatment of Bextra-only cases, Celebrex-only cases, and Bextra-and-Celebrex cases (the “cases” herein) whether or not such cases are assigned to the Hon. Shirley W. Kornreich.



1. The agreement shall apply to all cases subject to this Coordinated Proceeding involving Plaintiffs who are citizens or legal residents of the fifty United States or the District of Columbia, and whose permanent residence is located in the fifty United States or the District of Columbia;

2. Defendant Pfizer Inc. and related entities (“Pfizer Defendants”) shall refrain from filing any motions to dismiss for *forum non conveniens*, except as may be further allowed under this (or any future) Case Management Order;

3. Plaintiffs consent to coordination of the New York Coordinated Proceeding discovery with the MDL discovery;

4. Representatives of the New York Coordinated Proceeding Plaintiffs’ Steering Committee shall be entitled to participate in the negotiation of future Pretrial Orders in the MDL so as to avoid duplicative negotiations in the New York Coordinating Proceeding and to promote efficiency and coordination between the MDL and the New York Coordinated Proceeding;

5. Plaintiffs shall be entitled to participate equally in the depositions of fact witnesses and witnesses designated pursuant to Fed. R. Civ. P. 30(b)(6) produced by Pfizer Defendants (“Company Witness Depositions”), which are contemplated and set forth in the MDL Pretrial Order No. 4. The terms governing Plaintiffs’ participation shall be set forth in a future Case Management Order, but shall include the following restrictions:

a. each Company Witness Deposition shall not exceed a total of two, seven-hour days of examination by Plaintiffs; and

b. the representative of the New York Coordinated Proceeding Plaintiffs’ counsel designated to ask questions at each Company Witness Deposition shall not ask

duplicative questions (i.e., questions already asked by the representative of the MDL Plaintiffs' Steering Committee), but shall be allowed to explore the same topics and areas.

6. The New York Coordinated Proceeding Plaintiffs' counsel shall discontinue with prejudice, except as to re-filing pursuant to this Order, all cases filed in the New York Unified Court System and subject to this Coordinated Proceeding involving Plaintiffs whose state of residence is west of the Mississippi River (excluding Minnesota and Louisiana), and shall re-file those cases, if at all, directly in the MDL or in the U.S. District Court where the Plaintiff alleges residence; similarly, all future cases involving Plaintiffs whose state of residence is west of the Mississippi River (excluding Minnesota and Louisiana), shall be filed directly in the MDL or in the U.S. District Court where the Plaintiff alleges residence;

7. The New York Coordinated Proceeding Plaintiffs' counsel shall discontinue those cases subject to dismissal pursuant to paragraph 6 above within forty-five days of the date of this Case Management Order and shall re-file those cases, if at all, within sixty days of this Case Management Order; all cases not discontinued voluntarily pursuant to the preceding paragraph within forty-five days and any future cases filed in the New York Unified Court System and subject to this Coordinated Proceeding involving Plaintiffs whose state of residence is west of the Mississippi River (excluding Minnesota and Louisiana) shall be dismissed upon grounds of *forum non conveniens* pursuant to CPLR 327(a), through the procedure set forth in paragraph 12 below;

8. With respect to all cases subject to dismissal and that are required to be re-filed pursuant to the provisions of paragraphs 6 and 7 above, the date of filing in the MDL or in the U.S. District Court where the Plaintiff alleges residence shall relate back to the date of filing in New York state court for all purposes;

9. The law firms whose attorneys are members of the New York Coordinated Proceeding Plaintiffs' Steering Committee or are designated Plaintiffs' Liaison Counsel as set forth in Case Management Order No. 1 shall discontinue with prejudice, except as to re-filing pursuant to this Order, all cases in which they serve as counsel filed in the New York Unified Court System involving Plaintiffs who are filing suit based upon alleged injuries from the prescription medication Vioxx (in addition to Bextra and/or Celebrex) (the "blended cases"), and shall re-file the blended cases, if at all, in either the MDL, the U.S. District Court where the Plaintiff alleges residence, or Superior Court, State of New Jersey; similarly, all future blended cases in which the law firms whose attorneys are members of the New York Coordinated Proceeding Plaintiffs' Steering Committee or are designated Plaintiffs' Liaison Counsel as set forth in Case Management Order No. 1 shall be filed directly in the MDL, the U.S. District Court where the Plaintiff alleges residence, or Superior Court, State of New Jersey; alternatively, the law firms whose attorneys are members of the New York Coordinated Proceeding Plaintiffs' Steering Committee or are designated Plaintiffs' Liaison Counsel as set forth in Case Management Order No. 1 may voluntarily dismiss without prejudice all causes of action concerning Vioxx and its manufacturer Merck & Co., Inc. (thereby leaving causes of action based upon Bextra and/or Celebrex) in one or more of their blended cases within forty-five days of the date of this Case Management Order, whereby those cases shall be subject to the provisions of paragraphs 6, 7, and 8 above;²

² The New York Coordinated Proceeding Plaintiffs' Steering Committee and Plaintiffs' Liaison Counsel acknowledge that they do not currently have the authority to consent to the dismissal of other Plaintiffs' counsel's blended cases because these cases have not yet been ordered part of this Coordinated Proceeding. Nevertheless, the New York Coordinated Proceeding Plaintiffs' Steering Committee and Plaintiffs' Liaison Counsel agree to abide by this agreement and apply it to all blended cases pending in the New York Unified Court System when and if they are granted the authority to do so.

10. The law firms whose attorneys are members of the New York Coordinated Proceeding Plaintiffs' Steering Committee or are designated Plaintiffs' Liaison Counsel as set forth in Case Management Order No. 1 shall discontinue with prejudice, except as to re-filing pursuant to this Order, all cases subject to dismissal pursuant to paragraph 9 above within forty-five days of the date of this Case Management Order, and shall re-file those cases, if at all, within sixty days of this Case Management Order; all cases not discontinued voluntarily pursuant to the preceding paragraph within forty-five days and any blended cases filed in the future in New York state court subject to dismissal under paragraph 9 above shall be dismissed through the procedure set forth in paragraph 12 below;

11. With respect to all cases subject to dismissal and that are required to be re-filed pursuant to the provisions of paragraphs 9 and 10 above, the date of filing in the MDL, the U.S. District Court where the Plaintiff alleges residence, or Superior Court, State of New Jersey shall relate back to the date of filing in the New York state court for all purposes;³

12. The procedure to effectuate dismissal of a case or blended case subject to dismissal under paragraphs 7 or 10 above shall not require formal motion practice or adjudication by the Court, so long as the following are satisfied:

a. Defendants shall serve Plaintiffs' counsel (or Plaintiffs in *pro se* cases) with a Notice of Motion to Dismiss pursuant to this Case Management Order, a copy of this Case Management Order with a Notice of Entry, and a proposed Short Form Order identifying the case or blended case by its specific caption and index number and stating: "In accordance with

³ The parties have conferred with counsel to Merck & Co., Inc. regarding these provisions and counsel to Merck has not objected to the inclusion of these provisions in this CMO. The provisions set forth in paragraphs 9-11 are contingent upon the respective plaintiff's counsel receipt of written confirmation that Merck & Co., Inc. consents to the discontinuance and re-filing of the relevant case pursuant to paragraphs 9-11.

Case Management Order No. 2, this case is hereby dismissed with prejudice, except as to re-filing as permitted by Case Management Order No. 2”;

b. in the event that Plaintiffs’ counsel (or Plaintiffs in *pro se* cases) do not voluntarily dismiss the case within twenty days of service of the items set forth in subparagraph (a) directly above, Defendants shall submit to the Court, with a copy to Plaintiffs’ counsel (or Plaintiffs’ in *pro se* cases), the proposed Short Form Order referenced above with a cover letter indicating that the case or blended case has been filed in violation of this Case Management Order; and

c. the Court will sign and enter the proposed Short Form Order and, thereby, dismiss the case with prejudice, except as to re-filing pursuant to this Order.

13. In further consideration for the Pfizer Defendants’ agreement to refrain from filing any motions to dismiss for *forum non conveniens*, except as may be further ordered by this Court (set forth in Paragraph 2 of this Case Management Order), the New York Coordinated Proceeding Plaintiffs consent and agree to the following pretrial procedures to be applied in the New York Coordinated Proceeding:

a. discovery conducted in groups of specific cases limited to a reasonable number of cases over a reasonable time period with the specific number of cases and time period to be negotiated among the parties and ordered by the Court in a future Case Management Order(s);

b. New York Coordinated Proceeding Plaintiffs and Defendants shall propose the specific cases to be included in each group, subject to a subsequent Case Management Order to be issued by the Court, but each group must contain the same ratio of cases involving Plaintiffs alleging residence in New York to cases involving Plaintiffs alleging

residence outside of New York as such ratio exists in the total number of cases subject to the Coordinated Proceeding, at the time the group selection is made;

c. consent to out-of-state commissions for the depositions of non-party witnesses, for which an expedited procedure shall be negotiated and ordered by the Court in a future Case Management Order(s);

d. consent to depositions of Plaintiffs' treating physicians and medical providers, the number and necessity of which shall be negotiated and ordered by the Court in a future Case Management Order(s);

e. disclosure of the parties' testifying expert witnesses pursuant to the requirements of CPLR 3101(d), prior to the close of discovery and at least 30 days in advance of the experts' depositions;

f. depositions of the parties' testifying expert witnesses as allowed under Federal Rule of Civil Procedure 26(b)(4)(A) and federal law, provided, however, that such depositions should be, to the extent reasonable and practical, non-cumulative and non-duplicative;

g. given the extraordinary nature of this litigation, a joint Daubert / Frye hearing of Plaintiffs' experts, as deemed appropriate by the Court and the Honorable Charles R. Breyer of the U.S. District Court for the Northern District of California; and

h. pretrial exchange of witness lists and exhibit lists at least 30 days prior to trial.

III. Appointment Of Joint Special Master

The Honorable Fern Smith shall serve as Special Master to oversee the coordination of discovery in the New York Coordinated Proceeding with discovery in the MDL, including

implementation of the terms of the parties' agreement as contained in this Case Management Order.

SO ORDERED.

Dated: 7/27, 2006



Hon. Shirley W. Kornreich, J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.

FILED
AUG 02 2006
COUNTY CLERKS OFFICE
NEW YORK