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**MASTER DOCKET NO. 2005-59499**

<b>In Re:</b>	§	<b>IN THE DISTRICT COURT OF</b>
<b>Texas State Vioxx Litigation</b>	§	<b>HARRIS COUNTY, TEXAS</b>
<b>This Document Relates to All Cases</b>	§	<b>157TH JUDICIAL DISTRICT</b>

**CASE MANAGEMENT ORDER NO. 2**

On September 6, 2005, the Multidistrict Litigation Panel ("The Panel") transferred fifty (50) Texas Vioxx-related cases to this Court pursuant to Rule 13 of the Texas Rules of Judicial Administration ("TRJA"). Since then, a significant number of cases have been transferred under TRJA § 13.5(e) as "tag-along" cases.

There currently exists a federal MDL action, In re Vioxx Products Liability Litigation, MDL Docket No. 1657 in the United States District Court for the Eastern District of Louisiana ("Federal MDL") as well as consolidated cases in other states.

Pursuant to TRJA § 13.6(a), this court has exclusive jurisdiction over each transferred case unless the case is retransferred by The Panel, is finally resolved, or is remanded to the Trial Court for trial. Under TRJA § 13.6(b), this court is authorized to decide, in place of the Trial Court, all pretrial matters in all transferred cases.

On September 16, 2005, this court conducted an initial case management hearing to discuss the parties' positions on matters set forth in TRJA § 13.6(c).

On September 19, 2005, this court issued a written order requiring all counsel to confer in an effort to reach an agreed case management order.

Pursuant to TRJA § 13.6, this court intends to apply sound judicial management methods early, continuously, and actively, based on its knowledge of each individual case and the entire litigation, in order to set fair and firm time limits tailored to ensure the expeditious resolution of each case and the just and efficient conduct of the litigation as a whole. Having considered these principles, the parties' proposals, and agreements and hearing arguments of all counsel, IT IS HEREBY ORDERED:

**1. DEFINITIONS**

As used in this Order:

- a. Pretrial Court means this Court, the district court to which related cases are transferred for consolidated or coordinated pretrial proceedings under TRJA § 13;

**RECORDER'S MEMORANDUM**  
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- b. Related Cases means cases that involve one or more common questions of fact;
- c. Tag-Along Case means a case related to cases in an MDL transfer order but not itself the subject of an initial MDL motion or order;
- d. Transferred Cases means all initially transferred cases and all tag-along cases previously transferred or to be transferred in the future;
- e. Trial Court means the court in which each case was originally filed.

**2. APPLICABILITY OF THIS ORDER; NOTICE OF TRANSFER**

The terms of this Case Management Order No. 2 shall apply automatically to all related cases later instituted in or transferred to this Court. Pursuant to TRJA § 13.5, a case is deemed transferred from the Trial Court to the Pretrial Court when a notice of transfer is filed with the Trial Court and the Pretrial Court. Such notice of transfer must:

- a. List all parties who have appeared and remain in the case, including the names, addresses, telephone numbers, and bar numbers of their respective counsel, or, if appearing pro se, the party's name, address, and telephone number;
- b. List those parties who have not yet appeared in the case;
- c. Attach a copy of the relevant MDL transfer order.

**3. TRIAL COURT ACTION AFTER TRANSFER**

Pursuant to TRJA § 13.5, after a notice of transfer is filed in the Trial Court, the Trial Court is not authorized to take any further action on the case except for good cause stated in the order in which such action is taken and after conferring with the Pretrial Court. However, any service of process previously issued by the Trial Court may be completed and the return may be filed in the Pretrial Court.

**4. TRANSFER OF FILES; MASTER FILE AND NEW FILES IN THE PRETRIAL COURT**

If the Trial Court and Pretrial Court are in Harris County, the Trial Court must transfer the case file to the Pretrial Court in accordance with local rules governing the courts of Harris County. If the Trial Court and Pretrial Court are in different counties, the Trial Court clerk shall transmit the case file to the Pretrial Court clerk. The Pretrial Court clerk

shall open new files for transferred case using the information provided in the notice of transfer.

**5. FILING OF PRETRIAL DOCUMENTS**

Pretrial documents may, but are not required to be, filed in accordance with the Harris County Local Rules of the District Courts concerning the Electronic Filing of Court Documents.<sup>1</sup>

**6. FILING FEES AND COSTS**

Unless The Panel assesses costs otherwise, the party moving for transfer must pay the cost of re-filing the transferred cases in the Pretrial Court, including filing fees and other reasonable costs.

**7. TRANSFER OF TAG-ALONG CASES**

A Tag-Along Case is deemed transferred to the Pretrial Court when a notice of transfer, in the form described in TRJA § 13.5(a) and as provided in Subsection 2 above, is filed in both the Trial Court and this Court. Within 30 days after service of such notice, a party to the case or to any of the Related Cases previously transferred to this Court may move this Court to remand the case to the Trial Court on the ground that the case is not a Tag-Along Case. If the motion to remand is granted, the case shall be remanded and returned to the Trial Court, and costs, including attorney fees, may be assessed by this Court in its remand order. An order of this Court remanding a case on the basis that it is not a Tag-Along Case may be appealed to The Panel by a motion for rehearing filed with the clerk of The Panel.

**8. MASTER DOCKET; CAPTION**

This Court has assigned a Master Docket Number 2005-59499 to the Texas State Vioxx Litigation. All orders in the Master Docket shall apply to all transferred cases. When filed papers relate to all cases, the Master Docket Number shall be used with the following style and caption:

MASTER FILE NO. 2005-59499

IN RE:

§

IN THE DISTRICT COURT OF

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<sup>1</sup> <http://www.justex.net/Local%20Rules%20of%20the%20District%20Courts%20concerning%20the%20Electronic%20Filing%20of%20Court%20Documents.pdf>

TEXAS STATE VIOXX LITIGATION	§	HARRIS COUNTY, TEXAS
	§	
This Document Applies to All Cases	§	157TH JUDICIAL DISTRICT
	§	

When filed papers relate to only a particular case, those papers shall only bear the caption for that case with the designation of the Trial Court, as for example:

	CAUSE NO. _____	
BRESHEARS, ET AL.	§	IN THE DISTRICT COURT OF
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
	§	157TH JUDICIAL DISTRICT
	§	(Trial Court: 288th Dist. Court of Bexar
	§	County, Cause No. 2005-CI-07184)
MERCK & CO., INC.	§	
	§	

**9. NOTICE COUNSEL**

Plaintiffs' Notice Counsel shall discharge the following duties:

- a. Maintain and distribute to all plaintiffs' counsel and to Defendants' Notice Counsel an up-to-date service list of all plaintiffs;
- b. Receive and, as appropriate, distribute to all plaintiffs' counsel orders and notices from the Pretrial Court and material served by Defendants' counsel;
- c. File and serve on behalf of all plaintiffs those filings relative to the master docket of the litigation;
- d. Maintain complete files, with copies of all documents served upon them, and to make those files available to all plaintiffs;
- e. Perform such other duties as may be incidental to the proper coordination of administrative activities with the Pretrial Court (such as ECF, file maintenance, distribution and such other activities as the Pretrial Court directs from time to time);
- f. Communicate information concerning the status of all developments in this proceeding with all plaintiffs' counsel;

- g. Call meetings of all plaintiffs' counsel and/or defense counsel to effectuate these provisions; and
- h. Perform other such duties as necessary.

Merck Defendants' Notice Counsel shall discharge the following duties:

- a. Maintain and distribute to all defendants' counsel and to Plaintiffs' Notice Counsel an up-to-date service list of all defendants;
- b. Receive orders and notices from the Pretrial Court on behalf of all Merck Defendants and prepare and transmit copies of such to all Merck Defendants;
- c. Receive material filed by plaintiffs and to distribute such material to all Merck Defendants;
- d. Maintain complete files, with copies of all documents served upon them, and to make those files available to all defendants;
- e. Serve as a coordinator and facilitator among the Merck Defendants' counsel for the formulation and presentation of the Merck Defendants' common positions on all matters arising during pretrial proceedings;
- f. Call meetings of Merck defense counsel as appropriate; and
- g. Perform other such duties as necessary.

Non-Merck Defendants' Notice Counsel shall discharge the following duties:

- a. Maintain and distribute to all non-Merck defendants' counsel and to Plaintiffs' Notice Counsel an up-to-date service list of all non-Merck defendants;
- b. Receive orders and notices from the Pretrial Court on behalf of all non-Merck Defendants and prepare and transmit copies of such to all non-Merck Defendants;
- c. Receive material filed by plaintiffs and to distribute such material to all non-Merck Defendants;
- d. Maintain complete files, with copies of all documents served upon them, and to make those files available to all non-Merck defendants;

- e. Serve as a coordinator and facilitator among the non-Merck Defendants' counsel for the formulation and presentation of the non-Merck Defendants' common positions on all matters arising during pretrial proceedings;
- f. Call meetings of other non-Merck defense counsel as appropriate; and
- g. Perform other such duties as necessary.

The persons who have accepted the appointment to serve as Notice Counsel agree to serve for the duration of the litigation or until such time as the Pretrial Court determines that a change needs be made. By agreement, the following individuals are Notice Counsel:

- a. For Plaintiffs: Tommy Fibich  
Fibich, Hampton & Leebron, L.L.P.  
1401 McKinney, Suite 1800  
Houston, Texas 77010  
Telephone: (713) 751-0025  
Fax: (713) 751-0030  
tfibich@fhl-law.com
- b. For Merck Defendants: Richard L. Josephson  
Baker & Botts, L.L.P.  
One Shell Plaza  
910 Louisiana  
Houston, Texas 77002  
Telephone: (713) 229-1234  
Fax: (713) 229-7760  
Richard.Josephson@BakerBotts.com
- c. For Non-Merck Defendants: Thomas Scott Allen  
Cruse, Scott, Henderson & Allen, L.L.P.  
2777 Allen Parkway, 7th Floor  
Houston, Texas 77057  
Telephone: (713) 650-6600  
Fax: (713) 650-1720  
SAllen@CruseScott.com

#### 10. STEERING COMMITTEES

The following attorneys are appointed to, and have agreed to serve on, the Plaintiffs' Steering Committee ("PSC"): Tommy Fibich, John E. Williams, Jr., Ed Blizzard, Michael Gallagher/John Kim, Kathryn Snapka, David Matthews, Mark Lanier, Les Weisbrod, Marynell Maloney, Jeff Embry, and Mike Davis.

The PSC shall organize itself and agree on a plan for conducting the litigation.

The liaison between the Pretrial Court and the PSC is:

Tommy Fibich  
1401 McKinney, Suite 1800  
Houston, Texas 77010  
Telephone: (713) 751-0025  
Fax: (713) 751-0030  
tfibich@fhl-law.com

Given the small number of Non-Merck Defendants, it is not necessary at this time to form a Non-Merck Defendants Steering Committee. If the number of filings against Non-Merck Defendants increases, this Court may consider forming such a steering committee in the future.

It is not necessary to create a steering committee on behalf of Merck.

#### 11. **ORDERS**

As to orders that apply to all related cases, the Clerk shall serve each order to all Notice Counsel. As to orders that apply only to particular cases, the Clerk shall serve each order to all counsel in those cases and Notice Counsel.

#### 12. **PLEADINGS; MOTIONS; OTHER DOCUMENTS**

Service upon Plaintiffs' Notice Counsel, by overnight delivery or by email, shall be deemed proper service on all plaintiffs' counsel of record in this proceeding and service upon both Merck and Non-Merck Defendants Notice Counsel, by overnight delivery or by email, shall be deemed proper service on all defense counsel in this proceeding, except as follows:

- a. Motions claiming default or seeking other penalties or sanctions against a party must be served on counsel of record for that party as well as on Notice Counsel; and
- b. Case specific filings (*i.e.*, papers that affect only a particular party or a particular case; *e.g.*, a motion seeking to dismiss a party in a case or remand a case to state court) must be served on counsel in that specific case as well as Notice Counsel.

#### 13. **FILING DISCOVERY MATERIAL**

Discovery requests and responses will not be filed with the Pretrial Court except when specifically ordered by the Pretrial Court or to the extent they are presented in connection with a motion.

**14. FORM OF SUBMISSION**

All submissions to the Pretrial Court shall be in the form of motions, captioned, formatted, filed, and served as set forth in this Order. No “letter briefs” or other non-conforming communications will be accepted.

**15. DISSEMINATION OF THIS ORDER**

All Notice Counsel shall, within five (5) days of the date of this Order, send by overnight delivery or electronic mail, where available, a copy of this Order to all counsel in their respective groups.

When an action that properly belongs as part of this proceeding is hereinafter filed before this Court or is transferred to this Court from another forum, Plaintiffs’ Notice Counsel and Merck Defendants’ Notice Counsel shall promptly send by overnight delivery or electronic mail, where available, a copy of this Order to plaintiffs’ and defendants’ counsel, respectively, in that action unless those attorneys are already counsel of record in this proceeding. Within twenty (20) days after receipt of this Order from Notice Counsel, any parties to the action may file written objections to the application of any or all terms of this Order to that action.

**16. SETTLING THE PLEADINGS**

As required by TRJA § 13.6(c)(1), this court has considered matters related to settling the pleadings.

The PSC shall file a Master Petition within thirty (30) days of the date of this Order. The Master Petition may be modified at any time so long as the modification does not violate the provisions contained in any case-specific scheduling orders entered by the Court.

Merck and all Non Merck Defendants shall each file answers to the Master Petition within twenty (20) days of service of the Master Petition. The Master Answer may be modified at any time so long as the modification does not violate the provisions contained in any case specific scheduling orders entered by the Court.

The PSC shall file any amended Master Petition in response to new allegations made in Defendants’ Master Answers within twenty (20) days of the filing of said answers.



The Master Petition, any amended Master Petition, and any Master Answer or Amended Master Answer shall govern all Transferred Cases unless a particular plaintiff affirmatively opts out of the Master Petition and files an individual petition.

**17. SEVERANCE, CONSOLIDATION, COORDINATION WITH OTHER ACTIONS**

As required by TRJA § 13.6(c)(2), this Court has considered whether severance, consolidation, or coordination with other actions is desirable and has concluded that no severance or consolidation of matters is desirable at this time but such decision is subject to modification by future order of this Court.

Coordination with other actions is desirable to effectuate the purposes of Rules 1 and 13 of the Texas Rules of Civil Procedure. Provisions relating to coordination with other actions are set forth throughout this Order.

**18. FACT SHEETS**

Counsel for each individual plaintiff and counsel for the Merck Defendants are responsible for and shall file the appropriate fact sheets for their respective clients in the form previously approved by the Federal MDL Court. The deadlines for filing the fact sheets are set forth in ¶ 32 herein.

Fact sheets shall be served on the individual parties in lieu of interrogatories and requests for production.

**19. PROTECTIVE ORDERS**

- a. Documents: Pursuant to TRJA § 13.6(c)(5) and by agreement of the parties, an order preserving the confidentiality of documents has previously entered.
- b. Physician Contact: Defendants may conduct *ex parte* communications with Plaintiffs' treating physicians. If those doctors chose to talk to the defendants *ex parte*, the doctors must be given before the start of any substantive conversation (1) the Notice to Treating Physicians, attached as Exhibit A, and (2) the name, address and telephone number of the attorney representing the plaintiff.

Defendants will not discuss plaintiffs' HIV status. Defendants will not contact plaintiffs' treating psychiatrists, if any. Defendants will not discuss with the treating doctors anything about the plaintiff's medical condition or history that is not in the medical records produced by the plaintiffs.

**20. ALTERNATIVE DISPUTE CONFERENCES**

As required by TRJA § 13.6(c)(6), this Court has considered the scheduling of alternative dispute resolution conferences and deems such conferences premature at this time.

**21. PRESERVATION OF DOCUMENTS**

All parties shall preserve evidence relevant to this action. This extends to documents, data, and tangible things in the possession, custody, or control of the parties and third parties who possess materials reasonably anticipated to be subject to discovery in this action. The terms “documents, data, and tangible things” are to be interpreted broadly, as provided by the Texas Rules of Civil Procedure. Information that may serve to locate or link materials, such as file inventories, file folders, indices, and metadata, is included in this definition. Counsel is ordered to exercise all reasonable efforts to identify and notify parties and non-parties, including employees of corporate or institutional parties of this obligation.

**22. GENERAL DISCOVERY RULES**

Except as otherwise provided in this Order or any other order of this Court, the Texas Rules of Civil Procedure pertaining to discovery will generally apply in this proceeding.

**23. WRITTEN DISCOVERY**

- a. All parties shall use their best efforts to coordinate discovery in the Texas VIOXX Litigation with the Federal MDL proceedings.
- b. Each plaintiff shall execute the following authorization forms, where applicable, as part of his or her fact sheet.
  - (1) HIPAA-compliant medical records;
  - (2) IRS records;
  - (3) Disability records;
  - (4) Employment records;
  - (5) Military records;
  - (6) Union records;

- (7) A Railroad Retirement Board records;
  - (8) A Social Security Administration records;
  - (9) Department of Veteran Affairs records; and
  - (10) Texas Employment Commission records.
- c. No subpoena shall be made by any party to another defendant. Any Defendant may be served with a request for records through their counsel.
  - d. All parties shall meet and confer and attempt to agree to other discovery issues, which will be addressed in a Master Discovery Order.

**24. THIRD PARTY SUBPOENAS**

Consistent with the scheduling otherwise specified by this Order, the parties in these cases may serve subpoenas on non-parties (including subpoenas for the production of documents without testimony) pursuant to the Texas Rules of Civil Procedure. The party serving the subpoena shall be responsible for supplying to the Depository any documents produced by non-parties in response to such subpoenas.

**25. IDENTIFICATION OF DOCUMENTS**

Documents produced during the course of this litigation shall be identified by a unique numbering system. Merck has already implemented such a system in the existing Vioxx litigation and shall use the same system in this proceeding so that federal and state plaintiffs can use the same documents with the same identifiers.

In the event documents are produced by persons or entities who are not parties to this action are not, when produced, identified by a unique numbering system, the party at whose request production was made shall be responsible for numbering the documents in a unique fashion.

**26. LEGIBILITY OF DOCUMENTS**

Each producing party shall take reasonable steps to assure that the copies of the documents it produced are legible. To the extent a producing party cannot or does not produce a legible copy, it shall make the original document(s) available for inspection and copying upon request.

**27. DOCUMENT DEPOSITORY**

Plaintiffs shall establish and maintain a document depository (the "Depository") for their exclusive use and at their own expense. The Depository shall store all materials

produced by the parties and third parties in this proceeding that may be needed in more than a single individual case, including documents, interrogatories, request for admissions, request for production, deposition transcripts, and similar materials, if such exist, from this proceeding. These materials will be made available to any counsel for any plaintiff in any individual case, subject to the confidentiality order entered by this court.

Counsel for plaintiffs have agreed, and the court hereby Orders, that David Matthews shall maintain and be responsible for the Depository. The Depository shall be available upon reasonable notice and will be maintained at:

800 Commerce Street  
Houston, Texas 77002  
(713) 222-7211

A defendant fully satisfies its obligation to produce documents to the parties in these cases by placing those documents in the Depository.

Any producing party shall be responsible for delivering to the Depository any documents it produced in this proceeding. Any requesting party shall be responsible for delivering to the Depository any document produced to it in this proceeding. The party requesting a deposition shall be responsible for delivering to the Depository any transcription (including videotape) of any deposition taken in this proceeding. The party serving any objections, answers, or responses to any discovery request in this proceeding shall be responsible for delivering a copy of the same to the Depository.

## **28. DEPOSITIONS**

### **a. Coordination with Federal and Other State Court Actions.**

- 1. Plaintiffs' counsel in the Texas MDL shall use their best efforts to coordinate the scheduling of depositions with federal and other state court plaintiffs in order to minimize the number of times that a witness appears for a deposition. In a coordinated deposition, the Court expects counsel for plaintiffs in the Texas MDL and plaintiffs' counsel in a federal or other state court proceeding to cooperate in selecting a primary examiner. Upon the conclusion of the examination by the primary examiner, other counsel may ask additional questions prior to the completion of the deposition, subject to Paragraph 28 c. below.**
- 2. It is the intent of this Order that counsel for the Texas MDL Plaintiffs shall be the primary examiner in depositions initiated in the Texas MDL and coordinated with other state or federal court proceedings. It is the intent of this Order that counsel for the Federal MDL Plaintiffs shall be the primary examiner in depositions initiated by the Federal MDL or other state court**

proceedings and coordinated with the Texas MDL. Federal MDL or other state court depositions may be used in the Texas MDL for all purposes except as limited herein.

3. Notwithstanding anything herein to the contrary, no deposition testimony may be admitted as evidence against any Non Merck Defendants who were not present and given the opportunity to ask questions at any “noticed” or “cross-noticed” Federal Vioxx MDL or Texas State Vioxx Litigation depositions; to the extent such deposition testimony is later introduced into evidence by Plaintiffs or Merck, the Non Merck Defendants shall be entitled to a limiting instruction, by which such testimony does not constitute evidence against the Non-Merck Defendants, *e.g.*, TEX. R. EVID. 105.

b. **Avoidance of Duplicative Depositions**

1. Depositions Taken in Other Proceedings. Merck shall advise the PSC and the Non Merck Defendants of all depositions that have been taken by plaintiffs in other Vioxx-related proceedings (other than depositions of case-specific witnesses) and shall assist in arranging for the PSC and the Non Merck Defendants to obtain copies of transcripts of those depositions. The plaintiffs in this Texas MDL proceeding shall not, without good cause, re-notice the depositions of witnesses who have already been deposed. In the event that a Plaintiff re-notices the deposition of a witness who has already been deposed, all objections must be made within 5 days of the notice to attempt to resolve the dispute. If no agreement can be reached, the matter shall be brought to the Pretrial Court for resolution at the earliest possible time and without undue delay to avoid postponement of the deposition.

If a Federal MDL or state court deposition has been taken in any Vioxx proceeding, a subsequent deposition of that witness may not be taken by Plaintiff except for good cause shown as determined by this Court or because documents, which may be relevant to the witness or lead to discoverable information, are produced or discovered after the date of the deposition and, in that case, any subsequent deposition shall be restricted to the additional inquiry permitted by the Court or to subsequently produced or discovered documents.

2. Successive Depositions in this Proceeding. As a general rule, no witness should be deposed on the same subject more than once in this proceeding.

c. **Cross-Noticing**

Any deposition noticed or cross-noticed in the Federal MDL or any other state court coordinated proceeding may be cross-noticed by any party in any Vioxx-related action pending in the Texas MDL on receipt of 14 days actual notice, absent agreement of the parties for a shorter time period. All Texas MDL Counsel will receive notice at the same time.

- a. If a Federal MDL deposition is cross-noticed in the Texas MDL, and no Texas lawyer has previously questioned the witness, the Texas PSC will identify one Texas lawyer who will be given a reasonable amount of time to ask non-duplicative questions of the witness. The Non-Merck Defendants shall also be allowed a reasonable opportunity to ask questions of the witness.
  - b. If a Texas lawyer has previously questioned a deponent, but the Court determines that good cause exists to allow additional questions by a Texas lawyer, those questions shall be restricted to the additional inquiry permitted by the Court or to subsequently produced or discovered documents.
- d. Deposition Noticed in the Texas MDL.

1. Examination

Subject to Paragraph 28 c. above, questioning should ordinarily be by only one attorney for all Plaintiffs and one attorney for all Merck Defendants and one attorney for the Non Merck Defendants. Once the witness has fully answered a question, that question or substantially the same question shall not be asked again. Three days before a deposition requested or noticed by Plaintiffs or Defendants, Counsel for the noticing party shall give other Counsel notice of the identity of the attorneys who may examine the deponent. Smoking by deponents or counsel during the deposition will not be permitted.

The attorney who conducts the primary examination for the noticing party is responsible for ensuring that a copy of the deposition transcript, a disk, and, where applicable, a videotape or video DVD, are provided to other counsel.

2. Duration

Counsel should consult prior to a deposition to agree upon the time required to depose a particular witness. Absent agreement of the parties or order of this Court based on a showing of good cause, the length of depositions shall be controlled by the Texas Rules of Civil Procedure. Counsel should cooperate so examinations by

multiple attorneys do not result in a deposition exceeding the allotted time.

**3. Scheduling**

Absent extraordinary circumstances, counsel should consult in advance with opposing counsel and counsel for proposed deponents in an effort to schedule depositions at mutually convenient times and locations. Absent leave of court or agreement by the parties, all parties shall provide 14 days actual notice for depositions. Counsel are expected to cooperate and coordinate the scheduling of depositions. There shall be no multi-tracking of depositions of former or current officers or management personnel of Merck & Co., Inc. Distributors, sales representatives, detail personnel, or other fact witnesses may be multi-tracked and the parties shall meet and confer on the establishment of a reasonable schedule for the multi-tracking of those depositions. To the extent that the parties cannot agree on a proposed schedule for such multi-tracking, the parties shall file with the Court separate proposed schedules.

**4. Postponements**

Once a deposition has been scheduled, it shall not be taken off the calendar, rescheduled or relocated less than 3 calendar days in advance of the date it is scheduled, except upon agreement between the primary examiner designated by the party noticing the deposition and Counsel for the opposing party witness (if the witness is a party or a current or former employee or an expert designated by a party) or counsel for the witness (if the witness is not a party or a current or former employee or an expert designated by a party) or by leave of Court for good cause.

**5. Objections and Directions Not to Answer**

Counsel shall comply with the Texas Rules of Civil Procedure. When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent, or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless that information is itself privileged. Any objection made at a deposition shall be deemed to have been made on behalf of all other parties. All objections, except those as to form and privilege, are reserved until trial or other use of the depositions.

- a. Counsel shall refrain from engaging in colloquy during deposition. The phrase “objection as to form” or similar language shall be sufficient to preserve all objections as to form until the deposition is sought to be used. If requested, the objecting party shall provide a sufficient explanation for the objection to allow the deposing party to rephrase the question.
  - b. Counsel shall not make objections or statements that might suggest an answer to a witness.
  - c. Counsel shall not direct or request that a witness refuse to answer a question, unless that counsel has objected to the question because the question seeks privileged information, information that the court has ordered may not be discovered, or a deponent seeks to present a motion to the court for termination of the depositions because it is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the party or deponent.
6. Disputes During Depositions

Disputes between the parties should be addressed to this Court (or the Federal MDL Court if noticed in that proceeding) rather than the trial District Court in the District in which the deposition is being conducted, or the Trial Court. Disputes arising during depositions that cannot be resolved by agreement and that, if not immediately resolved, will significantly disrupt the discovery schedule or require rescheduling of the deposition, or might result in the need to conduct a supplemental deposition, shall be presented to the Pretrial Court, or the Federal MDL Judge, Judge Fallon, depending on which jurisdiction initiated the deposition. If the MDL Judge is not available, the deposition shall continue with full reservation of rights of the examiner for a ruling at the earliest possible time. Nothing in this Order shall deny counsel the right to suspend a deposition pursuant to the Texas Rules of Civil Procedure, file an appropriate motion with the Court at the conclusion of the deposition, and appear personally before the Court.

7. Documents Used in Connection with Depositions
- Production of Documents. Third-party witnesses subpoenaed to produce documents shall, to the extent possible, be served with the document subpoena at least 30 calendar days before the deposition. Depending upon the quantity of documents to be produced, some time may be needed for inspection of the documents before the



examination commences. With respect to experts, arrangements should be made to permit inspection of documents, if possible, 7 calendar days before the deposition of expert witnesses.

- a. **Copies.** Extra copies of documents about which deposition counsel expects to examine a deponent should be provided to primary counsel for the parties and the deponent during the course of the deposition.
- b. **Marking of Deposition Exhibits.** All documents previously produced and used as deposition exhibits shall be referred to by the unique alpha-numeric identifiers appearing on the documents.
- c. **Objections to Documents.** Objections to the relevance or admissibility of documents used as deposition exhibits are not waived, and are reserved for later ruling by the Pretrial Court.

#### 8. Video Depositions

By indicating in its notice of a deposition, a party, at its expense, may record a deposition by videotape or digitally recorded video pursuant to the Texas Rules of Civil Procedure, subject to the following rules:

- (1) **Real-time Feed.** All video depositions will be stenographically recorded by a court reporter with “real-time feed” transcription capabilities.
- (2) **Attendance.** Each witness, attorney and other person attending the deposition shall be identified on the record when the deposition begins.
- (3) **Standards.** Unless physically incapacitated, the deponent shall be seated at a table except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting and field of view will be changed only as necessary to record accurately the natural body movements of the deponent. Only the deponent and any exhibits or demonstrative aids used in the examination will be video recorded. If the parties intend to video record exhibits or demonstrative aids, a second camera for doing so is

required. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. The witness shall appear in ordinary business attire (as opposed to, for instance, a lab coat) and without props.

- (4) Filing. The operator shall preserve custody of the original video medium (tape or DVD) in its original condition until further order of the Court. No part of the video or audio record of a video deposition shall be released or made available to any member of the public unless authorized by the Court.

### **30. USE OF DEPOSITIONS**

- a. Depositions taken in this MDL proceeding or in any federal or state action relating to Vioxx in which Merck is a party may be used by or against any person (including parties later added and parties in cases subsequently transferred to this Court as part of this litigation):
1. Who is a party to this litigation;
  2. Who was present or represented at the deposition;
  3. Who was served with prior notice of the deposition or otherwise had reasonable notice thereof, or
  4. Who, within 30 calendar days after the transcription of the deposition (or, if later, within 60 calendar days after becoming a party in this Court in any action that is a part of this MDL proceeding), fails to show just cause why such deposition should not be useable against such party.
- b. Notwithstanding anything herein to the contrary, no deposition testimony may be admitted as evidence against any Non Merck Defendants who were not present and given the opportunity to ask questions at any "noticed" or "cross-noticed" Federal Vioxx MDL or Texas State Vioxx Litigation depositions; to the extent such deposition testimony is later introduced into evidence by Plaintiffs or Merck, the Non Merck Defendants shall be entitled to a limiting instruction, by which such testimony does not constitute evidence against the Non Merck Defendants, e.g., Tex. R. Evid. 105.

### **30. ATTORNEY-CLIENT, WORK PRODUCT, AND OTHER PRIVILEGES**

A party who asserts the attorney-client, work product and/or other privileges provided by law must also provide the opposing party a privilege log within ten (10) days of the

production date containing the following information for each document not disclosed, to the extent that providing such information will not destroy the privilege asserted:

- a. The name and job title or capacity of the document author(s)/originator(s);
- b. The name of the person(s) who received the document or a copy of same and their affiliation (if any) with the producing party; and
- c. A brief statement as to the grounds for which the privilege is asserted.

**31. ATTENDANCE AT HEARINGS BY TELEPHONE**

The Court will allow counsel to appear at future hearings via teleconference, provided that all arrangements for calls are made by and through counsel. The Court will not originate any telephone conferences from the bench. The principle speakers for any hearings are strongly encouraged to appear in person.

**32. WEEKLY HEARINGS**

The Court has set aside each Friday afternoon for further conferences and hearings as necessary. Counsel must call the Vioxx clerk to schedule a hearing on motions. Routine matters for which no oral hearing is necessary should be set for written submission on Monday mornings.

**33. SCHEDULING ORDER FOR THESE PROCEEDINGS**

Subject to agreements by the parties with court approval and/or order of this court, the following is the scheduling order for these proceedings (unless otherwise specified, all dates are from the date this Order is entered):

- a. Fact Sheets: For cases transferred to this court as of the date of this Order, Plaintiffs' fact sheets shall be filed within thirty (30) days of the date of this Order. For cases transferred after the date of this Order, Plaintiffs' facts sheets shall be filed within thirty (30) days of the date of the transfer. Merck's Fact Sheets shall be filed thirty (30) days after receipt of the Plaintiffs' Fact Sheets.
- b. Plaintiffs' Expert Witnesses. With respect to cases already transferred to the Pretrial Court, Plaintiffs shall identify all expert witnesses within eight months of the date of this Order. With respect to cases transferred to the Pretrial Court, Plaintiffs shall identify all expert witnesses within eight months of the date of the Notice of Transfer.

- c. **Depositions of Plaintiffs' Experts.** Depositions of Plaintiffs' experts shall be conducted sixty days after designation. Requests for such depositions shall be served sufficiently far in advance of such deadline such that the depositions are taken on or before the deadline.
- d. **Defendants' Expert Witnesses.** Defendants shall identify all expert witnesses sixty (60) days after plaintiffs designate their experts.
- e. **Depositions of Defendants' Experts.** Depositions of Defendants' experts shall be conducted sixty days after designation. Requests for such depositions shall be served sufficiently far in advance of such deadline such that the depositions are taken on or before the deadline.
- f. **Expert Challenges.** Challenges to experts shall be filed no later than 60 days after the deposition of such expert.
- g. **Civil Practice & Remedies Code § 82.007.** Any motions regarding the provisions of Texas Civil Practice & Remedies Code § 82.007 shall be filed no later than 180 days after the date of this Order or, with respect to subsequently transferred actions, 180 days after Notice of Transfer.

#### **34. Trials and Remands to the Trial Court**

Before a case will be certified for trial and remanded to the Trial Court, the following will occur in the Pretrial Court:

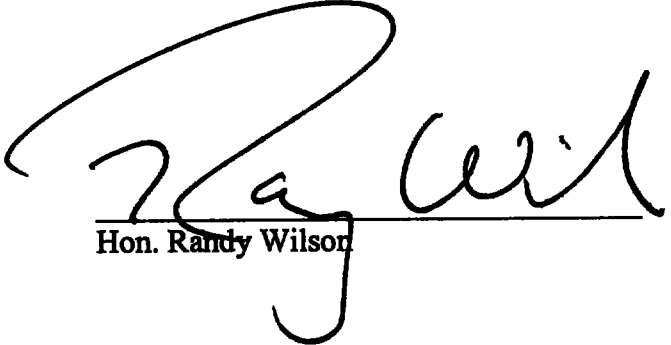
- a. Discovery;
- b. Dispositive motions;
- c. Daubert/Havner motions;
- d. Depositions designated and objections heard;
- e. Exhibits admitted; and
- f. Motion in limine.

It is anticipated that some cases may be selected to be tried sooner than others. As this Court becomes more familiar with this litigation, this Court and the parties will work to select the initial trial cases.

#### **35. Miscellaneous**

- a. Nothing in this Order is intended to limit any party's opportunity to seek amendment of this Order or other relief should this Order prove to be unworkable for any reason or fail manage effectively case preparation.
- b. Counsel must attempt to resolve motions before any matter is submitted to this Court and must certify to that attempt.
- c. The parties may alter the provisions of this order by a Texas Rule 11 agreement. All members of the PSC must sign the Rule 11 agreement if it is intended to bind all Plaintiffs.

Signed October 19, 2005.



Hon. Randy Wilson

MASTER DOCKET NO. 2005-59499

In Re:	§	IN THE DISTRICT COURT OF
Texas State Vioxx Litigation	§	HARRIS COUNTY, TEXAS
This Document Relates to All Cases	§	157TH JUDICIAL DISTRICT

**Notice to Treating Physicians**

Your patient is a plaintiff in a case involving the use of Vioxx. Defendants have requested the right to discuss the case with you. You are free to discuss the case with Defendants and their counsel; similarly, you are free to decline to discuss the case with them. If you wish to discuss the plaintiff's medical condition with counsel for the defendants, such discussions are limited to matters raised in the medical records that have already been produced to the defendants by the plaintiff.

Defendants may review and discuss with you those medical records in defendants' possession. You, the treating physician, should not provide defendants with any additional medical records in your possession, nor should you discuss HIV status, psychiatric conditions or other conditions beyond the scope of the records in defendants' possession.

Signed October 19, 2005.

\_\_\_\_\_  
/s/  
Hon. Randy Wilson

EX. A



I, Charles Bacarisse, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date  
Witness my official hand and seal of office  
this \_\_\_\_\_

Certified Document Number: \_\_\_\_\_

CHARLES BACARISSE, DISTRICT CLERK  
HARRIS COUNTY, TEXAS

**In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail [support@dco.co.harris.tx.us](mailto:support@dco.co.harris.tx.us)**