FILED
2013 Feb-28 PM 05:08
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: CHANTIX (VARENICLINE) PRODUCTS LIABILITY LITIGATION	Master File No.: 2:09-CV-2039-IPJ MDL No. 2092
This Document Relates To: ALL CASES	

PFIZER INC.'S MOTION FOR AN AMENDMENT TO PRETRIAL ORDER NO. 4 (REQUIRING SUPPLEMENTAL PLAINTIFF'S FACT SHEETS FROM NON-SETTLING PLAINTIFFS ALLEGING A NEUROPSYCHIATRIC INJURY)

Pretrial Order No. 4, entered in February 2010, required each plaintiff with a case pending in this MDL to complete under oath and serve on Pfizer an agreed-upon Plaintiff's Fact Sheet. Given the substantial number of cases in the MDL now being resolved, Pfizer respectfully moves for an Order amending Pretrial Order No. 4 and compelling each plaintiff (1) who alleges a neuropsychiatric injury, and (2) whose case is not subject to an agreement (or agreement in principle) with Pfizer for settlement, to complete a Supplemental Plaintiff's Fact Sheet in the form of Attachment A hereto.

As of this date, Pfizer has resolved or has agreed in principle to resolve approximately 80% of the cases filed in the MDL, including all cases that were included in the Trial Pool. In an effort to advance and streamline further proceedings

in this Court—whether for purposes of discovery, dispositive motions, requests for remand, or potential resolution—Pfizer requests that the Court require plaintiffs whose cases are not subject to a settlement agreement or agreement in principle with Pfizer to submit additional information, certified by such plaintiffs and their counsel, regarding each plaintiff's alleged Chantix use and alleged neuropsychiatric injury. Specifically, each plaintiff subject to the Order should be compelled to identify precisely: the date or dates on which the plaintiff (or the patient at issue in the lawsuit if not the plaintiff) started and stopped using Chantix; the injury allegedly suffered by the plaintiff and the date or dates of that injury;[1] and specific prescription records, medical records, or similar documents that support plaintiff's responses to these questions. *See* Attachment A. All non-settling plaintiffs should be required to submit this information—which should be readily accessible to them—no later than March 29, 2013. Any plaintiff who does not comply (or only partially complies) with the Order should be subject to having his or her complaint dismissed with prejudice upon motion by Pfizer.

[1] As the Court is aware, many Plaintiffs were being treated for a neuropsychiatric condition at the time of their alleged Chantix use or injury. To ensure that Plaintiffs subject to this Order appropriately distinguish between those pre-existing neuropsychiatric conditions and those neuropsychiatric conditions they attribute to Chantix, the Order should provide that any patient who was being treated for a pre-existing neuropsychiatric condition at the time of alleged Chantix use or injury may be deemed compliant with this Order only by submitting information regarding an alleged new-onset injury or the exacerbation of an allegedly pre-existing injury.

The Court's authority to enter a procedural order requiring the production of proof-of-use and proof-of-injury information unquestionably falls "under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Such orders are "designed to handle the complex issues and potential burdens on defendants and courts in mass tort litigation" and to "identify and cull potentially meritless claims and streamline litigation in complex cases." *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp 2d 741, 743 (E.D. La. 2008). As the Vioxx MDL court acknowledged when entering a similar order after the parties established a resolution plan, these "orders have been routinely used by courts to manage complex cases," *id.*; they are particularly appropriate where, as here, a litigation "is no longer in its embryonic stage" and has "existed . . . in this Court for over three years, and much discovery has taken place," *id. See also In re Fosamax Prods. Liab. Litig.*, 2012 WL 5877418, at *2 (S.D.N.Y. 2012) (noting that "[w]ith increasing frequency, courts overseeing complex pharmaceutical MDLs are using" similar case management orders "to streamline the docket").[2]

[2] *See In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, 2010 WL 4720335 (E.D. Pa. 2010); *In re Bextra and Celebrex Mktg. Sales Practices and Prods. Liab. Litig.*, MDL No. 1699 (N.D. Cal. Aug. 1, 2008); *In re Baycol Prods. Liab. Litig.*, 2004 WL 626866 (D. Minn. 2004); *In re Rezulin Prods. Liab. Litig.*, 2005 WL 1105067 (S.D.N.Y. 2005) (all requiring, *inter alia*, proof of use and proof of injury).

Nor is it burdensome to require Plaintiffs to provide this basic proof of use and proof of injury information.[3] As the Fifth Circuit stated in affirming the entry of a similar order, the Federal Rules of Civil Procedure obligate a plaintiff to have this information even before filing suit:

> The scheduling orders issued below essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3). Each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries.

Acuna, 200 F. 3d at 340; *see also In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, 2010 WL 4720335, at * 1 ("The Order issued below merely requires information which plaintiffs and their counsel should have possessed before filing their claims: proof of Avandia usage, proof of injury, information about the nature of the injury, and the relation in time of the injury to the Avandia usage."). This information already should be in Plaintiffs' possession or readily accessible to them, particularly given the numerous years that many of these claims have been pending. "[A]t this advanced stage of the litigation, it is not too much to ask a Plaintiff to

[3] As the Court is aware, issues regarding proof of Chantix use and injury arose in a number of cases previously selected for the Discovery Pool and, later, for the Trial Pool. Indeed, the law firm that represents the vast majority of plaintiffs whose cases have not yet been resolved dismissed every single case filed by the law firm (5 in all) that Pfizer selected for inclusion the Discovery Pool. By requiring non-settling Plaintiffs to come forward with this basic information now, the Court and parties can weed out from the litigation potentially meritless or dubious claims.

provide some kind of evidence to support their claim that [Chantix] caused them personal injury." *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d at 744.

For these reasons, Pfizer respectfully moves for an Order amending Pretrial Order No. 4 and compelling each plaintiff (1) who alleges a neuropsychiatric injury, and (2) whose case is not subject to an agreement (or agreement in principle) with Pfizer for settlement, to provide to counsel for Pfizer by March 29, 2013, a completed Supplemental Plaintiff's Fact Sheet in the form set forth in Attachment A. Pfizer requests that the Court's Order provide explicit notice to the affected Plaintiffs that failure to comply with the Order will result in dismissal with prejudice of any non-complying plaintiff's complaint. A proposed Order and Attachment A are filed herewith as Exhibit 1.

Dated: February 28, 2013

Respectfully submitted,

/s/ Andrew B. Johnson
Andrew B. Johnson
Attorney for Pfizer Inc. and
Defendant's Liaison Counsel

OF COUNSEL

F.M. ("Tripp") Haston, III
Bradley Arant Boult Cummings LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35206
Phone: (205) 521-8303
Email: thaston@babc.com

Joseph G. Petrosinelli
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
Phone: (202) 434-5000
Email: jpetrosinelli@wc.com

Loren H. Brown
DLA Piper LLP (US)
1251 Avenue of the Americas
New York, NY 10020-1104
Phone: (212) 835-6000
Email: loren.brown@dlapiper.com

Lead Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification to the attorneys of record.

s/ Andrew B. Johnson
OF COUNSEL