

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
	)	
v.	)	
	)	
MERCK SHARP & DOHME CORP.	)	VIOLATION:
	)	
Defendant	)	21 U.S.C. §§ 331(a), 333(a)(1), 352(f)(1)
	)	(misbranding)

INFORMATION

The United States Attorney charges that:

PRELIMINARY ALLEGATIONS

At all times material hereto, unless otherwise alleged:

The Defendant

1. Between May 1999 and September 2004, Merck & Co., Inc. was a New Jersey corporation headquartered in Whitehouse Station, New Jersey, and was the operating company for Merck's pharmaceutical business in the United States. As a result of a reverse merger with another pharmaceutical company in 2009, Merck & Co., Inc. became a wholly-owned subsidiary of the acquiring company and was renamed **MERCK SHARP & DOHME CORP.** The acquiring company was renamed Merck & Co., Inc. The new Merck & Co., Inc. is a holding company for **MERCK SHARP & DOHME CORP.** and other corporate entities. Currently, **MERCK SHARP & DOHME CORP.** ("MERCK") is the operating company in the United States for the pharmaceutical business formerly conducted by Merck & Co. Inc. **MERCK** was publicly traded (NYSE ticker symbol MRK).

2. **MERCK** was engaged in, among other things, the development, manufacture, promotion, sale and distribution of prescription drugs intended for human use nationwide and in the District of Massachusetts. **MERCK** sold billions of dollars of pharmaceutical products each year.

3. One prescription drug that was developed, manufactured, promoted, and sold by **MERCK** was Vioxx, a pain relief medication. Vioxx was distributed by **MERCK** into interstate commerce in the United States, including specifically into Massachusetts, from in or about May 1999 through in or about September 2004, when **MERCK** withdrew Vioxx from the market.

#### **The FDA and the FDCA**

4. The United States Food & Drug Administration (“FDA”) was the federal agency of the United States responsible for protecting the health and safety of the public by enforcing the Federal Food, Drug & Cosmetic Act (“FDCA”) and ensuring, among other things, that drugs intended for use in humans were safe and effective for their intended uses and that the labeling of such drugs bore true and accurate information.

5. The FDCA and its implementing regulations required that before a new drug was legally distributed in interstate commerce, the sponsor of a new drug was required to submit a New Drug Application (“NDA”) to the FDA.

6. The FDCA required that the NDA include proposed labeling for the proposed intended uses of the drug which included, among other things, the conditions for therapeutic use. The NDA was required to provide, to the satisfaction of FDA, data generated in adequate and well-controlled clinical investigations that demonstrated that the drug was safe and effective when used in accordance with the proposed labeling.

7. An NDA sponsor was not permitted to promote or market the drug until the FDA had approved an NDA, including approval of the proposed labeling. Moreover, if approved by the FDA, the sponsor of the NDA was permitted to promote and market the drug only for the medical conditions of use specified in the approved labeling. Uses not approved by the FDA were known as “unapproved” or “off-label” uses.

8. The FDCA, and its implementing regulations, required the sponsor to file a new NDA, or amend the existing NDA, in order to label or promote a drug for uses different from the conditions for use specified in the approved labeling. The new or amended NDA was required to include a description of the newly proposed indications for use and evidence, in adequate and well-controlled clinical investigations, sufficient to demonstrate that the drug was safe and effective for the newly proposed therapeutic use or uses. Only upon approval of the new NDA, or supplement, could the sponsor promote the drug for the new intended use.

9. Under the FDCA, a drug was “misbranded” if its labeling did not contain “adequate directions for use.” 21 U.S.C. § 352(f)(1). “Adequate directions for use” meant directions under which a layperson could use a drug safely and effectively for the purposes for which it was intended. 21 C.F.R. § 201.5. A prescription drug, by definition, could not bear adequate directions for use by a layperson, but an FDA-approved prescription drug, bearing the FDA-approved labeling, could be exempt from the adequate directions for use requirement if it was sold for an FDA-approved use. A prescription drug that was marketed for non-approved, off-label uses, did not qualify for this exemption and therefore was misbranded. 21 C.F.R. § 201.100.

10. The FDCA prohibited, among other things, the distribution in interstate commerce of a misbranded drug.

### The Vioxx Approval Process

11. On or about November 23, 1998, **MERCK** submitted an NDA for approval of a drug called Vioxx (chemical name: rofecoxib), which was a new drug within the meaning of 21 U.S.C. §321(p) and 21 C.F.R. §310.3(h)(4) and (5). In that application, **MERCK** sought to demonstrate the drug's safety and efficacy for, and sought approval for, use for relief of the signs and symptoms of osteoarthritis, management of pain, and treatment of primary dysmenorrhea (the "Approved Uses"). On or about May 20, 1999, the FDA approved Vioxx for those uses and approved a label on that same date. Vioxx was not then approved for any use or condition other than the Approved Uses.

12. From at least May of 1999 through in or about April 2002, unapproved or off-label uses for Vioxx included the treatment of the signs and symptoms of rheumatoid arthritis.

13. In 1999, **MERCK** initiated a clinical trial, known as Vioxx Gastrointestinal Outcomes Research ("VIGOR"), designed to determine whether Vioxx was safer for the gastrointestinal tract than traditional pain relievers. The VIGOR trial was a prospective, randomized, double blind comparison of 50 mg of Vioxx and 1000 mg of naproxen in over 8,000 patients with rheumatoid arthritis. The VIGOR results were made public by **MERCK** and provided to the FDA in March 2000.

14. In February 2001, **MERCK** submitted a supplemental NDA seeking FDA approval of rheumatoid arthritis as an indication for use for Vioxx.

15. On or about April 11, 2002, the FDA approved Vioxx for the treatment of rheumatoid arthritis.

16. Between May 1999 and April 11, 2002, **MERCK** promoted Vioxx to physicians for the treatment of rheumatoid arthritis, an unapproved use, before there was an FDA approved indication for rheumatoid arthritis.

17. On September 17, 2001, the FDA sent **MERCK** a Warning Letter regarding **MERCK's** improper promotional practices in connection with its marketing of Vioxx. In that Warning Letter, among other things, the FDA stated that **MERCK** was promoting Vioxx for unapproved uses, including rheumatoid arthritis. In particular, the FDA's Warning Letter stated:

Your [**MERCK's**] audio conferences are misleading because they promote Vioxx for unapproved uses. For example, in your June 21, 2000, conference, you claim that in the VIGOR study “. . . the Vioxx 50 milligrams a day and the Naprosyn, a gram a day, were absolutely equally effective in terms of treating the patients with rheumatoid arthritis.” Your claim is misleading because it suggests that Vioxx is effective for the treatment of rheumatoid arthritis when this has not been demonstrated.

18. Both before and after receipt of the Warning Letter, **MERCK** through its representatives promoted Vioxx for rheumatoid arthritis without any FDA approved indication for rheumatoid arthritis. For example, various **MERCK** sales representatives recorded in their call notes instances of promoting Vioxx for rheumatoid arthritis, including the following:

- March 20, 2000 – Representative A recorded as an “accomplishment” that he was able to “gain agreement on use of Vioxx for Ra [rheumatoid arthritis]” with Physician 1.
- March 24, 2000 – Representative B noted as a “strategy” with Physician 2 that he would “Continue to push Vioxx past Celebrex. Build on story of RA pat[ient]

given 12.5 mg Vioxx.”

- September 5, 2000 - Representative C noted as a “next call strategy” that she urged that Physician 3 “use [Vioxx] first line in OA and RA pts.”
- September 15, 2000 – Representative D noted as an accomplishment in his interaction with Physician 4 that he had an “in depth talk on RA and OA and how Vioxx helps during a lunch tutorial.”
- October 16, 2000 – Representative E noted as a “strategy” with Physician 5 that he would “reinforce efficacy of Vioxx vs Celebrex for RA and pain.”
- June 27, 2001 – Representative F noted as an “accomplishment” that “v[ioxx] is eff[ective] in ra” in conversation with Physician 6.
- June 28, 2001 – Representative G noted as an “accomplishment” that she had “discussed” with Physician 7 “additional uses/benefits of V[ioxx]” which included rheumatoid arthritis.
- September 25, 2001 – Representative H noted as an “accomplishment” in a conversation with Physician 8 that he had “discussed Vioxx excellent efficacy and off-label use in RA.”
- November 15, 2001 – Representative I noted as a “strategy” for his interaction with Physician 9 that he would “gain agreement that Vioxx can be used for RA.”

COUNT ONE

**(Distribution of a Misbranded Drug: Inadequate Directions for Use  
21 U.S.C. §§331(a), 333(a)(1) & 352(f)(1))**

19. The allegations in paragraphs 1 through 18 are realleged and incorporated by reference herein.

20. Beginning as early as May 1999, and continuing thereafter until on or about April 11, 2002, in the District of Massachusetts and elsewhere, the defendant,

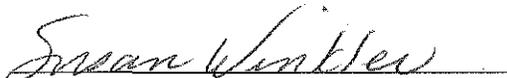
**MERCK SHARP & DOHME CORP.**

did introduce and cause the introduction, and did deliver for introduction and cause for delivery for introduction into interstate commerce, quantities of Vioxx, a drug within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §321(g), for an unapproved use, namely the treatment of rheumatoid arthritis, which drug was misbranded within the meaning of 21 U.S.C. §352(f)(1), in that Vioxx's labeling lacked adequate direction for such use.

All in violation of 21 U.S.C. §§331(a), 333(a)(1), and 352(f)(1).

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