

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

In re: VIOXX	*	MDL Docket No. 1657
	*	
PRODUCTS LIABILITY LITIGATION	*	SECTION L
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This document relates to All Cases	*	JUDGE FALLON
	*	
	*	MAGISTRATE JUDGE KNOWLES
	*	
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**JOINT REPORT NO. 78 OF PLAINTIFFS'
AND DEFENDANTS' LIAISON COUNSEL**

Plaintiffs' Liaison Counsel ("PLC") and Defendants' Liaison Counsel ("DLC") submit this Joint Report No. 78.

I. CLASS ACTIONS

The only remaining, pending class actions involve Purchase Claims¹ and Consumer Claims. On June 30, 2010, Merck filed its Motion for Judgment on the Pleadings or to Strike the Class Allegations in Purchase Claims Master Complaint [Rec. Doc. 46086]. The motion has been fully briefed, and the Court has heard oral argument and taken the matter under submission. Both plaintiffs and Merck have filed notices of supplemental authority with the Court. [Rec. Docs. 63966, 63993, 64022].

On February 6, 2012, Merck filed a Motion for Judgment on the Pleadings [Rec. Doc. 63656] on plaintiff Kenneth Walker's claim under the D.C. Consumer Protection and Procedures Act ("CPPA"). By Order & Reasons entered June 13, 2012, the Court granted

¹ Counsel in *Deckowitz v. Merck*, No. 2:05-cv-02102, has noted that the complaint in that action contains not only purchaser claims, but also securities claims brought on behalf of owners of Merck stock. Merck's counsel will be prepared to discuss this situation at the status conference on August 14, 2013.

Merck's motion for judgment on the pleadings. [Rec. Doc. 63924]. On July 9, 2012, Plaintiff moved for an extension of time to file an appeal from the Court's ruling [Rec. Doc. 63970], which was granted by the Court [Rec. Doc. 63975]. On September 12, 2012, the Court entered a judgment of dismissal [Rec. Doc. 64101]. Plaintiff has filed a motion to alter judgment [Rec. Doc. 63980], which Merck opposed [Rec. Doc. 64020]. Plaintiff filed a reply [Rec. Doc. 64052], and the Court has the matter under submission.

On July 17, 2013, plaintiffs file a Motion for Preliminary Approval of Class Settlement of the pending economic loss claims (consumer claims) [Rec. Doc. 64487]. Merck filed a Statement in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement [Rec. Doc. 64488]. By Order entered July 18, 2013, the Court scheduled the motion for hearing on July 24, 2013 and set briefing deadlines [Rec. Doc. 64491]. Plaintiff James Ratliff filed an objection to the motion [Rec. Doc. 64289]; the PSC and Merck filed responses [Rec. Docs. 64497, 64500]. The motion came on for hearing on July 24, 2013. Following the hearing, the Court entered an Order indicating its intent to preliminarily approve the settlement and instructing counsel to confer regarding date issues [Rec. Doc. 64511]. On July 26, 2013, plaintiff Ratliff filed proposed changes to the proposed class notice [Rec. Doc. 64513]. On August 1, 2013, the PSC and Merck filed responses in opposition [Rec. Docs. 64518, 64519]. Also on August 1, 2013, plaintiff Ratliff filed motions to intervene and to stay dissemination of notice and modify dates contained in the proposed class notice [Rec. Docs. 64520, 64521]. On August 2, 2013, the PSC and Merck filed oppositions to plaintiff's motions to intervene and to stay [Rec. Docs. 64522-24]. By Orders entered August 2, 2013 [Rec. Docs. 64525-26], the Court denied plaintiff Ratliff's motions and granted preliminary approval to the Class with an authorized notice plan. BrownGreer, the claims administrator's website concerning the

settlement is now available at www.VioxxSettlement.com for public viewing. The class notice program will commence shortly.

On August 12, 2013 Merck filed a Motion to Stay Vioxx-Related Consumer Protection Claims in Kentucky State Court and Enjoin further Prosecution of Such Claims [Rec. Doc. 64537]. The motion is noticed for submission on August 21st at 9:00am. The parties will be prepared to discuss this matter further at the monthly status conference on August 14, 2013.

II. GOVERNMENT ACTIONS

On June 5, 2012, the Court entered Pre-Trial Order No. 39B [Rec. Doc. 63895] relating to Amendment of Pleadings, Discovery, and Remand/Transfer Scheduling Order for Remaining Government Action Cases; the time period for completion of discovery and timing of remands was extended by joint motion in Pre-Trial Order No. 39C [Rec. Doc. 64223] on January 17, 2013. The parties are engaged in ongoing discovery.

On December 19, 2012 the Plaintiffs' Steering Committee and Government Action Liaison Counsel filed a Motion for an Order Imposing a Common Benefit Obligation Upon the Recovery of the Commonwealth of Pennsylvania Attorney General's Claims Asserted Against Merck, Sharp & Dohme Corp., in this MDL [Rec. Doc. 64205]. On January 9, 2013, the Commonwealth of Pennsylvania filed an Opposition [Rec. Doc. 64216]. On February 25, 2013, the Plaintiffs' Steering Committee and Government Action Liaison Counsel filed a reply, and the Court scheduled a hearing date on the motion [Rec. Docs. 64270, 64271]. The motion was heard on March 20, 2013 and was taken under submission [Rec. Doc. 64309]. On April 29, 2013, the Court issued Order & Reasons [Rec. Doc. 64364]. On July 22, 2013, the PSC and Government Action Liaison Counsel served a First Set of Document Requests to the Attorney General of the Commonwealth of Pennsylvania, as well as on counsel, Cohen, Placitella & Roth, P.C.

On April 29, 2013, Merck filed a Motion for Protective Order and Entry for Order for Production in the *State of Utah* case. [Rec. Doc. 64362]. The motion was noticed for submission on May 15, 2013. Plaintiff filed its response [Rec. Doc. 64393]. By Order entered May 22, 2103, the Court granted the motion in part [Rec. Doc. 64417], and entered a separate Order for Production and Protective Order [Rec. Doc. 64418].

On April 29, 2013, the State of Mississippi filed a Motion for Protective Order [Rec. Doc. 64365]. The motion was noticed for submission on June 12, 2013.

On May 3, 2013, Merck filed Motions for Judgment on the Pleadings in the Alaska, Mississippi, Montana, and Utah actions [Rec. Docs. 64372, 64373, 64374, and 64375]. Thereafter, the State of Utah filed a Motion to Remand and a Motion to Stay [Rec. Docs. 64382 and 64383], and, on May 16, 2013, filed a Motion for Summary Judgment on Judicial Estoppel [Rec. Doc. 64399].

On May 31, 2013, the State of Mississippi filed a Supplemental Motion to Remand [Rec. Doc. 64430]. The motion is noticed for submission on October 2, 2013. Also on May 31, 2013, the Court conducted a telephonic status conference to discuss Merck's motions for judgment on the pleadings [Rec. Docs. 64372, 64373, 64374, and 64375]. The Court ordered that the submission dates on Merck's motions be continued, with dates to be reset following the resolution of plaintiffs' motions to remand in accordance with Pre-Trial Order 39C [Rec. Doc. 64432].

On June 5, 2013, Merck filed a Motion for Protective Order in the Alaska, Mississippi, and Montana cases [Rec. Doc. 64436]. On June 24, 2013, Mississippi filed an opposition memorandum [Rec. Doc. 64460]. On June 14, 2013, the State of Alaska and the State of Montana filed motions for protective order [Rec. Docs. 64441 and 64442]. On June 21, 2013,

Merck filed a memorandum in further support of its Motion to Compel 30(b)(6) Depositions (originally filed on May 17, 2013 [Rec. Doc. 64407]) and in opposition to the state's motions for protective order [Rec. Doc. 64457]. These motions were noticed for submission on June 25, 2013, immediately following the monthly status conference. Because Merck's Motion to Compel 30(b)(6) Depositions in the Alaska, Mississippi, and Montana cases [Rec. Doc. 64407] and the state's Motions for Protective Order [Rec. Docs. 64441 and 64442] addressed similar issues, the parties agreed to treat the state's Motions for Protective Order as oppositions to Merck's Motion to Compel. The motions were heard on June 25, 2013, immediately following the monthly status conference. By Order entered June 25, 2013, the Court granted Merck's Motion to Compel 30(b)(6) Depositions in the Alaska, Mississippi, and Montana cases [Rec. Doc. 64462]. By Order entered June 28, 2013, the Court denied as moot the motions for protective order filed by Alaska, Mississippi, and Montana [Rec. Doc. 64470].

On July 17, 2013, the Government Action plaintiffs submitted expert reports. Discovery continues in these cases.

The parties will be prepared to discuss these issues further at the monthly status conference on August 14, 2013.

III. THIRD PARTY PAYORS

On August 17, 2011, the Court issued Pre-Trial Order No. 57 [Rec. Doc. 63267], which establishes procedures and deadlines for private third party payor common benefit fees. On November 17, 2011, the Fee Allocation Committee filed its recommendation pursuant to Pre-Trial Order No. 57. [Rec. Doc. 63555]. The recommendation was supplemented on November 28, 2011. [Rec. Doc. 63582]. On June 13, 2012, the TPP Fee Allocation Committee filed its final Recommendation [Rec. Doc. 63928]. On August 10, 2012, Eric H. Weinberg filed an Objection [Rec. Doc. 64044] and a Joint Objection of Audet & Partners, LLP; Hovde Dassow

& Deets, LLC; The Lanier Law Firm, P.C.; Ewing, McMillin & Willis, PLLC; and Gary Franke Co., LPA, was filed [Rec. Doc. 64046]. On February 1, 2013, the TPP Fee Allocation Committee filed a Response to General Statements made by the Weinberg Objectors [Rec. Doc. 64235 and 64238]. On February 7, 2013, the Weinberg Objectors filed a Reply to the TPP FAC's Response [Rec. Doc. 64242 and 64246]. On February 12, 2013, W. Mark Lanier of The Lanier Law Firm, P.C. forwarded correspondence to Judge Fallon withdrawing its objection. On February 14, 2013, Robert T. Dassow forwarded correspondence to Judge Fallon withdrawing the objections of Hovde Dassow & Deets, LLC.; Ewing, McMillin & Willis, PLLC; and Gary Franke Co., LPA, but requesting additional review of their proposed allocations. The parties discussed these matters further at the February 26, 2013 status conference. Thereafter, the Court appointed Patrick A. Juneau to serve as Special Master under the terms of Section 4.1.6 of the TTP Common Benefit Attorneys Fee agreement [Rec. Doc. 64304]. On May 15, 2013, Eric Weinberg filed a Memorandum for the Special Master Regarding Allocation of TPP Common Benefits [Rec. Doc. 64396]; the Central States Law Firms filed a Memorandum and Joint Objection to the TPP Fee Allocation Committee's Recommendation [Rec. Doc. 64397]; and the TPP Fee Allocation Committee filed its Pre-Trial Memorandum [Rec. Doc. 64398]. On May 17, 2013, Eric Weinberg filed a Witness List [Rec. Doc. 64406]; the TPP Fee Allocation Committee filed a Witness List [Rec. Doc. 64405]; and the TPP Fee Allocation Committee filed a Supplemental Witness List [Rec. Doc. 64408]. On May 28, 2013, Eric Weinberg filed a Reply to Memorandum by the TPP FAC [Rec. Doc. 64422]; and the TPP FAC filed a Reply to Eric Weinberg's Memorandum for the Special Master Regarding Allocation of TPP Common Benefit Fees [Rec. Doc. 64424]. A Revised Scheduling Protocol for Third Party Payor Common Benefit Fees [Rec. Doc. 64439] was filed on June 10, 2013, setting a hearing before the Special Master

on June 20, 2013 at 9:00 a.m. at Courtroom C468 at the Federal Courthouse in New Orleans, Louisiana. On June 19, 2013, the TPP FAC filed a Motion for Contempt, or Alternatively to Strike against the Law Offices of Eric Weinberg [Rec. Doc. 64448] and the Law Offices of Eric Weinberg filed an Opposition [Rec. Doc. 64452]. On June 19, 2013, the Court issued an Order granting the motion in part and directing that the Law Office of Eric Weinberg produce the subpoenaed documents at the hearing before the Special Master on June 20, 2013. The Special Master conducted his hearing on June 20, 2013. On June 20, 2013, the TPP FAC filed a Motion to Set Hearing to Find the Law Firm of Eric Weinberg in Contempt, or Alternatively to Strike [Rec. Doc. 64454]. By Order entered June 21, 2013, the Court ordered Eric Weinberg to show cause on July 1, 2013 why he should not be held in contempt and set briefing deadlines [Rec. Doc. 64459]. On June 27, 2013, Mr. Weinberg filed an opposition to the show cause order [Rec. Doc. 64466] and filed a motion for reconsideration of the Court's prior orders [Rec. Doc. 64467]. The PSC filed a response to Mr. Weinberg's motion [Rec. Doc. 64471]. The motion for contempt was heard and denied by the Court on July 1, 2013 [Rec. Doc. 64474].

The TPP Fee Allocation Committee will be prepared to discuss these matters further at the status conference on June 25, 2013.

IV. PENDING PERSONAL INJURY CASES SUBJECT TO PTOS 28, 29 AND 43

A. General Matters Relating to Remaining Personal Injury Cases & Pending Motions

On April 25, 2012, the Court issued its Order & Reasons addressing the PSC's Motion to Amend Pre-Trial Order No. 19 [Rec. Doc. 63585] and Ms. Oldfather's Motion for Order Requiring Escrow and Disclosures of Common Benefit Fee and Cost Withholdings from Settlement of Ineligible and Non-Enrolled Cases [Rec. Doc. 63154]. The Order required certain

further steps by the PSC and directed the parties to meet and confer, after which Ms. Oldfather's Motion could be revisited if appropriate.

On December 24, 2012, the VTE plaintiffs filed a Motion to Preclude Testimony of Mark A. Crowther, M.D., and the Testimony of John P. Kress, M.D. [Rec. Doc. 64210], and Merck filed a Consolidated Motion to Exclude Opinion Testimony on General Causation and Renewed Motion for Summary Judgment in VTE Cases [Rec. Doc. 64211]². On January 31, 2013, opposition memoranda were filed by the VTE plaintiffs [Rec. Doc. 64232] and Merck [Rec. Doc. 64234]. On February 15, 2013, reply memoranda were filed by the VTE plaintiffs [Rec. Doc. 62450] and Merck [Rec. Doc. 64233]. On January 31, 2013, the VTE plaintiffs also filed a Motion for Continued Remand of Merck's Renewed Motion for Summary Judgment in VTE Cases [Rec. Doc. 64233]. Merck filed an opposition to that motion on February 22, 2013 [Rec. Doc. 64263]. The matters were heard by the Court on March 8, 2013 and were taken under submission. By Order and Reasons entered April 9, 2013 [Rec. Doc. 64341], the Court denied Merck's motion to exclude [Rec. Doc. 64211] and continued the submission date on Merck's motion for summary judgment with dates to be reset; the Court denied plaintiffs' motion to exclude [Rec. Doc. 64210]; and the Court granted plaintiff's motion [Rec. Doc. 64233] to continue the submission date of Merck's motion for summary judgment. On June 3, 2013, Merck filed a Motion for Reconsideration of the Court's April 9, 2013 Order and Reasons [Rec. Doc. 64435]. On July 16, 2013, the VTE plaintiffs filed an opposition memorandum [Rec. Doc. 64483]. Merck filed a reply on August 6, 2013 [Rec. Doc. 64528]. The motion is under advisement by the Court.

² Merck had previously filed Merck filed a Motion for Summary Judgment in VTE Cases [Rec. Doc. 63539].

Following the April 23, 2013, status conference, the Court and counsel for Merck and Liaison/Lead Counsel for Ineligible or Non-Enrolled Cases and Certain Other Remaining PI Claims met to informally discuss management of the VTE cases.

Liaison and Lead counsel for Certain Claims will be prepared to discuss these issues further at the status conference on August 14, 2013.

B. Matters Noticed for Submission on August 14, 2013

None.

C. Other Motions Involving Remaining Personal Injury Cases

On July 17, 2013, Merck filed a Motion for Summary Judgment in the *Larry Smith* case [Rec. Doc. 64490]. The following day, plaintiff filed a Motion for Extension of Deadlines [Rec. Docs. 64492, 64493]. Merck filed a response to plaintiff's motion [Rec. Doc. 64503]. Thereafter, on July 23, 2013, plaintiff filed a motion for extension of time to reply to Merck's motion for summary judgment [Rec. Doc. 64507]. By Order entered July 26, 2013, the Court granted plaintiff's motion for extension of deadlines, denied without prejudice Merck's motion for summary judgment, and denied as moot plaintiff's motion for extension of time to plead [Rec. Doc. 64512].

On July 25, 2013, Merck filed a Motion for Summary Judgment in the *Dennis Harrison* case [Rec. Doc. 64510]. Although the motion was originally submitted under seal, it was unsealed at plaintiff's request [Rec. Doc. 64509]. The motion is noticed for submission on September 18, 2013.

On July 29, 2013, Merck filed a Motion for Summary Judgment in the *Mannino* case [Rec. Doc. 64514]. The motion is noticed for submission on September 4, 2013.

V. OTHER PENDING MOTIONS/MATTERS

On September 15, 2011, Ms. Oldfather filed a Motion and Supporting Memorandum to Require Court Approval of Liaison Counsel's Fee of Michael A. Stratton [Rec. Doc. 63389]. That matter was argued on September 21, 2011. No response had been filed by Mr. Stratton. On June 6, 2012, the Court entered an Order [Rec. Doc. 63900] adding this matter to the agenda of the status conference on June 14, 2012, where it was further discussed. On August 15, 2012, Mr. Stratton filed a "Status Conference Memorandum regarding the Liaison Counsel Objection Heard on September 21, 2011" [Rec. Doc. 64064]. The parties will be prepared to discuss this matter further at the status conference on June 25, 2013.

On May 17, 2013, Merck filed under seal a Motion for Summary Judgment in the *Wodowski* case [Rec. Doc. 64402]. Plaintiff did not file any opposition. The motion was noticed for submission on July 10, 2013 and is under advisement by the Court.

The parties will be prepared to discuss these matters further at the status conference on August 14, 2013.

VI. APPEALS

Several appeals have been filed by *pro se* plaintiffs and are pending before the United States Court of Appeals, Fifth Circuit.

On August 31 and September 19, 2012, Plaintiff Joanne Roach filed a Notice of Appeal and an Amended Notice of Appeal [Rec. Docs. 64089 and 64115] of the court's dismissal of her case. On June 18, 2013, the Fifth Circuit issued a *per curiam* opinion affirming this Court's order granting summary judgment.

On February 27, 2013, the appeal record in the *Strujan* case, 07-906, was transmitted to the Clerk of the Fifth Circuit Court of Appeals [Rec. Doc. 64282]. On June 25, 2013, the Fifth Circuit Court of Appeals entered judgment dismissing the appeal as frivolous.

On July 10, 2013, Ms. Strujan filed a petition for panel rehearing. Thereafter, Ms. Strujan filed a Notice of Motion for Trial De Novo and for Leave to Recreate the Brief and Exhibits which was denied by the Fifth Circuit by Order entered July 24, 2013.

The parties will be prepared to discuss these matters further at the status conference on August 14, 2013.

VII. NEXT STATUS CONFERENCE

Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel 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. 78 of Plaintiffs' and Defendants' Liaison Counsel and Ann Oldfather, Liaison Counsel for certain pending personal injury cases, has been served upon all parties by electronically uploading the same to LexisNexis File & Serve Advanced in accordance with Pre-Trial Order No. 8C, 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 12th day of August, 2013.

/s/ Dorothy H. Wimberly _____

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