

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX : MDL NO. 1657  
PRODUCTS LIABILITY LITIGATION :  
 : SECTION: L  
 :  
 : JUDGE FALLON  
 : MAG. JUDGE KNOWLES

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**REPORT AND RECOMMENDATION OF SPECIAL MASTER  
ON ALLOCATION OF COMMON BENEFIT ATTORNEY FEES**

**PROCEDURAL AND FACTUAL HISTORY**

A global settlement of \$4.85 billion was reached in this matter, and the settlement agreement was executed on November 9, 2007. The Master Settlement Agreement (MSA) provided for the appointment of a Fee Allocation Committee (FAC) to be responsible for recommending to the Court the allocation of awards of attorneys’ fees from the Settlement Fee and Cost Account as per Section 9.2.4 of the MSA. On November 20, 2007, the Court issued Pre-Trial Order No. 32, appointing the members of the FAC. The Court thereafter entered Pre-Trial Order 6D which stated that the “Allocation Committee shall evaluate common benefit counsel’s contributions, using objective measures and the committee’s subjective understanding of the relevant contributions of counsel toward generating the Settlement Fund in accordance with established fee jurisprudence, and make a recommendation to the Court for consideration in consultation with Judges Chaney, Higbee and Wilson.” Pre-Trial Order 6D further stated that the Johnson factors are applicable to this litigation and should be considered in addition to other matters considered by the Courts to evaluate fee allocations. Pre-Trial Order 6D also provided guidelines and criteria to be considered by the Allocation Committee. Pre-Trial Order 6D further

stated that on or before October 31, 2008, any attorney who wanted his time to be considered for an allocation of any common benefit award had to submit an affidavit describing the firm's common benefit contribution. It also provided a procedure for submitting attorneys to give an oral presentation to the FAC in various cities.

The FAC thereafter received and reviewed affidavits from a majority of the common benefit fee applications. The FAC also received and reviewed time submissions (Deposition of Andy Birchfield on May 6, 2011 at p. 89) and reports prepared by Philip Garrett, the Court-Appointed CPA (Deposition of Andy Birchfield on May 6, 2011 at p. 93).

The Court received a monthly report from the Court-Appointed CPA as to time submissions that were being made (Transcript of Monthly Status Conference on January 6, 2011 at p. 13). The Court also suggested to the FAC that it come up with categories of work so that there would be more objectivity in the process. The Court further suggested to the FAC that it prioritize the categories and assign points to the various categories (Transcript of Monthly Status Conference on January 6, 2011 at pp. 15-16). The FAC came up with a point system as suggested by the Court and, that point system was utilized by the FAC in the allocation process (Deposition of Andy Birchfield on May 6, 2011 at pp. 82-86).

The FAC conducted hearings in Atlantic City, New Orleans, Houston and Los Angeles where common benefit applicants were given the opportunity to make oral presentations in support of their applications. Thereafter, the FAC produced a preliminary allocation recommendation which was presented to Judge Fallon for his review. Pursuant with the terms of Article 9 of the MSA, the FAC also consulted with Judge Higbee, Judge Chaney and Judge

Wilson regarding the preliminary allocation recommendations (Deposition of Andy Birchfield on May 6, 2011 at pp. 110-111).

The FAC communicated the amount of its preliminary recommendations to each firm. The applicants were then afforded 14 days to object to the preliminary recommendations and to set forth in writing the basis for their objection. In addition, the applicants who had objections were afforded the opportunity to meet with the FAC. Many of the objectors did meet with the FAC and expressed their views. The FAC thereafter made some adjustments in its recommendations and presented its final recommendations to the Court (FAC Exhibit I). The Court posted these recommendations on its website on January 20, 2011. The Court then ordered that any objections to the recommendations should be filed on or before February 4, 2011. Of the 108 applicants for common benefit attorney fees, 18 firms filed objections.

In an Order dated February 28, 2011, the Court expanded the duties of the Special Master to perform services in connection with allocating common benefit attorneys' fees. In that Order, the Court stated "The Court now refers the recommended allocations and objections to the Special Master, who will consider the materials and the objections in accordance with the Court's procedures and prepare an impartial second recommended allocation to the Court." In that same Order, Judge Fallon directed the Special Master to make recommendations to the Court as to the allocation of the common benefit award of \$315,250,000<sup>1</sup>.

The Special Master scheduled and held an in-person conference with counsel to discuss a procedure to be instituted in the Special Master proceedings. At that conference, liaison counsel

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<sup>1</sup> An issue has been raised as to a deduction from the \$315,250,000. This issue is not before the Special Master and is to be considered by the Court.

for the objectors requested permission to meet with the Court-Appointed CPA. The Special Master granted the requested permission and the liaison counsel subsequently met with Mr. Garrett. At that same conference, the Special Master was advised that the FAC had already produced or given access to the following documents:

- a) MDL trial package;
- b) Depositions as reflected in trial package;
- c) Accountings of Court-Appointed CPA, including the compilation by category and time keeper prepared by Court-Appointed CPA Philip Garrett, of the hours reviewed by Mr. Garrett for the time period of January 1, 2009 through July 31, 2009.
- d) Written presentations of common benefit fee applicants;
- e) Transcripts of oral presentations of common benefit fee applicants;
- f) Court filings and order, including pre-trial order 6(D);
- g) Transcript of January 6, 2011 Status Conference;
- h) Grid and point system utilized by Fee Committee;
- i) Affidavits of Phil Garrett, Court-Appointed CPA;
- j) Transcription of private proceedings on July 27, 2010 between counsel;
- k) Preliminary List of Recommended common benefit fee allocations;
- l) FAC Recommendations on common benefit fee allocations to the Court which was posted on the Court's website on January 20, 2011;
- m) FAC Recommended Modification on common benefit fee allocations; and
- n) Acceptance and objection forms to common benefit fee applicants.

On March 31, 2011, the Special Master issued a Report and Scheduling Order (See attached Exhibit SM 1) on jurisdictional, process, and discovery issues. In that same report, the

Special Master set out a scheduling order and established hearing dates of May 9-13, 2011. The report permitted the objectors to depose a designated member of the FAC. The Order further provided that post-hearing the Special Master would determine if additional testimony or production of documents was necessary. Pursuant to the requests of the parties, the Special Master issued a Hearing Protocol (Exhibit SM 2).

On May 6, 2011, a nine hour deposition of Andy Birchfield, the FAC designee, was taken by the objectors. The actual hearings were commenced on May 9, 2011 and continued each day thereafter until completed on May 13, 2011. At the conclusion of the hearings, there were only 4 objections, out of the 18 objections filed, left to be considered by the Special Master. At that time, it was the conclusion of the Special Master that based on the record, additional testimony and production of documents was not necessary.

#### **ROLE AND INVOLVEMENT OF COURT-APPOINTED CPA**

In Pre-Trial Order No. 6, the Court approved the retention of Philip Garrett, CPA of the accounting firm of Wegmann-Dazet to assist and provide accounting services to Plaintiffs' Liaison Counsel, the Plaintiffs' Steering Committee, and the Court. The Plaintiffs' Steering Committee and other attorneys were to submit their time and expenses on a monthly basis to the Wegmann Firm in accordance with the requirements of that Order. On April 10, 2008, the Court entered Pre-Trial Order No. 6(C). That Order was directed to the law firm members of the Negotiating Plaintiffs' Counsel (NPC) and common benefit counsel representing plaintiffs in state court Vioxx matters who were seeking an award of common benefit fees from the proceeds of the MSA, other than those attorneys who were already subject to Pre-Trial Order No. 6.

Those attorneys covered by the Order were also to report their time and expenses to the Wegmann Firm in accordance with the requirements of Pre-Trial Order No. 6. Mr. Garrett made no subjective judgment regarding the value of any submitted time (Transcript of Hearing on May 12, 2011 at pp. 176-177).

As part of his duties, Mr. Garrett calculated and provided the FAC with a firm by firm lodestar calculation (Transcript of Hearing on May 12, 2011 at pp. 159, 163). The FAC confirmed that they considered these calculations (Deposition of Andy Birchfield on May 6, 2011 at pp. 91-94) and the Special Master confirms that he has reviewed these calculations.

The reports of Mr. Garrett were given to Judge Fallon on a monthly basis and the Court was continuously kept abreast of the submissions during the entire course of the proceedings.

### **GOVERNING LAW AND PRINCIPLES**

In a class action settlement, the District Court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to assure that attorneys' fees are reasonable and divided fairly among plaintiffs' counsel. Strong v. Bellsouth Telecommunications, Inc., 137 F.3d 844 (5<sup>th</sup> Cir. 1998). The Court must distribute the fee award among the various plaintiffs' attorneys, which may include class counsel, court designated lead and liaison counsel, and individual plaintiffs' counsel (Manual for Complex Litigation, Sec. 14.211 [4<sup>th</sup> ed.2004]). The Court's duty to review attorney fees is no less compelling in common fund cases. In Re: General Motor Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 820N. 39 (3d.Cir. 1995) and In Re: High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220 (5<sup>th</sup> Cir. 2008, 17N9).

The Fifth Circuit utilizes the “lodestar method” to calculate attorneys’ fees. Cooper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1092 (5<sup>th</sup> Cir. 1982). The lodestar is then computed by multiplying the number of hours reasonably expended by the reasonable hourly rate. The Court may then adjust the lodestar upward or downward depending on the respective weights of the 12 factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5<sup>th</sup> Cir. 1974).

Also instructive is the following reasoning of the Court in Turner v. Murphy Oil USA, Inc., 472 F.Supp.2d 830 (ED La. 2007):

“In recognition of the noted disadvantages of the lodestar method as the principle means for determining attorneys’ fees, such as the taxing of judicial resources by examining every time entry and billing rate for each attorney, a lodestar analysis is rough and more abbreviated is appropriate for a cross-check.

The lodestar cross-check calculation need entail neither mathematical precision nor bean counting. For example, a lodestar cross-check need not scrutinize each time entry; reliance on representation by class counsel as to class counsel may be sufficient...Furthermore, the lodestar cross-check can be simplified by use of a blended hourly rate...”

It is clearly within the Court’s discretion to appoint a committee of attorneys to propose a fee allocation to the Court for its consideration. In Re: Copley Pharmaceutical, Inc., 50 F.Supp

2d 1141 CD.Wyo. 199, aff'd 232 F.3d 906 (10<sup>th</sup> Cir. 2000) and In Re: High Sulfur, supra. It is also clear that the Court must maintain judicial standards of transparency, impartiality, procedural fairness, and ultimate judicial oversight. In Re: High Sulfur, supra.

### **IMPLEMENTATION OF LAW AND PRINCIPLES**

In Pre-Trial Order No. 6(D) (See attached Exhibit SM 3), the Court provided a very detailed procedure that was to be followed with regard to the allocation of common benefit attorneys' fees. In that Order, the Court specifically noted that existing fee jurisprudence and in particular the Johnson factors were to be considered. The Order also stated "The above guidelines provided direction, but do not create entitlements and do not override the independent judgment and discretion of the Allocation Committee and the Court."

At the Monthly Status Conference held by the Court on January 6, 2011, Judge Fallon laid out the procedure that had been instituted and the guidance he had given to the FAC in an effort to provide as much objectivity as possible (Transcript of Monthly Status Conference on January 6, 2011 at pp. 12-20). In that same conference, he noted that he had suggested to the FAC that it try to come up with categories of work, prioritize them and assign points for the categories. The result of his input and suggestion was the point system that was created and used by the FAC (Deposition of Andy Birchfield on May 6, 2011 at pp. 82-86). At that same conference, Judge Fallon stated that he would appoint a Special Master to make a separate recommendation to the Court on the fee allocation (Transcript of Monthly Status Conference on January 6, 2011 at p. 17). He further stated "I will then have the insiders recommendation, meaning the Fee Allocation Committee, the people who know who did what and what the

significance is, and their suggestion based on objective criteria, I will then have a Special Master who has no dog in that hunt to give me his recommendation and I will look at that material and I'll make my own judgment and I'll express myself" (Transcript of Monthly Status Conference on January 6, 2011 at pp. 17-18).

The Court expanded the duties of the Special Master on February 28, 2011 and directed the Special Master to make recommendations to the Court as to the allocation of the common benefit award of \$315,250,000. The Special Master thereafter instituted and proceeded with the process that is set forth in the above Procedural and Factual History.

#### **FACTORS CONSIDERED BY THE FAC**

All of the time submissions of those attorneys who sought common benefit attorney fees were maintained and are part of the record in this matter (FAC Exhibit 4). In making those submissions, the submitting attorney certified "I certify that the time documented is accurate and correct and was incurred for the common benefit of claimants in MDL 1657" (Transcript of Hearing on May 13, 2011 at pp. 10-11). In evaluating these hours, the FAC found that there was a wide gap as to what it considered as common benefit hours and what was certified as common benefit hours (Transcript of Hearing on May 13, 2011 at p. 11). As a result of this difference, the FAC concluded that it could rely on the records to get an idea of what the firm was working on, but it was not a reliable document alone to make an allocation (Transcript of Hearing on May 13, 2011 at p. 12).

Pursuant to the suggestion of Judge Fallon, the FAC developed and implemented a Point System Grid, categories of work, prioritized those categories and established a points system

(Deposition of Andy Birchfield on May 6, 2011 at pp. 82-86). In applying this points system, consideration was given to submitted hours, Pre-Trial Order No. 6 criteria and the Johnson factors (Deposition of Andy Birchfield on May 6, 2011 at pp. 114-119).

The FAC also received CPA Garrett's report that contained a firm by firm lodestar calculation and it utilized these calculations as a lodestar cross-check (Deposition of Andy Birchfield on May 6, 2011 at pp. 90-97).

The FAC also considered the affidavits and conferences with the common benefit applicants in making its recommendations (Transcript of Hearing on May 13, 2011 at p. 14).

#### **FACTORS CONSIDERED BY THE SPECIAL MASTER**

The Special Master has reviewed the court record in this case, including the numerous pre-trial orders that have been entered by the Court. The Special Master also reviewed the voluminous time records that were introduced into evidence, along with affidavits of common benefit applicants, transcripts of conferences with applicants and the transcripts of monthly status conferences held by the Court. In addition, the Special Master has reviewed the deposition of Andy Birchfield taken on May 6, 2011, the transcripts of the Special Master hearings held May 9-13, 2011 and the exhibits that were admitted into evidence.

The Special Master has also reviewed and considered the briefs and arguments that have been submitted.

In submitting recommendations to the Court, the Special Master has considered and evaluated all of the above, the Johnson factors and the lodestar calculations as they relate to all applicants, the acceptance of the recommended final awards of the FAC by each of the 104 of the

108 common benefit applicants (See attached Exhibit SM 4), the governing law and principles, and his extensive knowledge of the legal work that was done in this case.

### **ALLOCATION PROCESS**

As reflected in the Special Master's Report of March 31, 2011, I concluded that the fee allocation process was fully transparent and proper. The testimony and evidence at the Special Master hearings confirms that initial finding and report. As indicated in my earlier report, the issue is whether or not the process was fairly and properly applied.

### **ESCOBEDO, TIPPIT & CARDENAS AND KATHRYN SNAPKA OBJECTIONS**

Since both submissions rely very heavily on their work in the Garza case that was tried in a Texas State Court and which resulted in a verdict of \$32,000,000 that was reduced to \$7,000,000, the Escobedo and Snapka objections were considered together. Escobedo submitted 14,866.75 hours in support of his common benefit submission. Snapka submitted 2,926.5 hours in support of her common benefit submission<sup>2</sup>. The FAC initially recommended an award of \$1,164,918 to Escobedo and \$582,458.99 to Snapka. Escobedo and Snapka claimed that they were entitled to an award of \$31,000,000. After further consideration, the FAC recommended an award of \$0 to Escobedo and \$75,000 to Snapka. The FAC had rejected the work that was done on the Garza case.

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<sup>2</sup> Snapka testified that a pure lodestar analysis is not appropriate for attorneys who tried and won cases (Transcript of Hearing on May 11, 2011 at p. 191).

Escobedo claimed no common benefit contribution apart from his work in the Garza case (Deposition of Andy Birchfield on May 6, 2011 at p. 199). Escobedo claims his firm is entitled to \$20,000,000 for the work his firm did in the Garza case (Transcript of Hearing on May 9, 2011 at p. 64). Snapka claims she is entitled to \$12,000,000 for her work which included the Garza case (Transcript of Hearing on May 11, 2011 at p. 221).

One contention of the FAC was that Escobedo and Snapka had opted the Garza case out of the settlement program and, therefore, there should be no credit given for their work in that case. The testimony at the hearing does not support the FAC's contention that Escobedo and Snapka opted the Garza case out of the settlement with Merck. On the other hand, the settlement agreement clearly provides that the Garza case is not part of the settlement program. The end result is that the Garza attorneys would be entitled to whatever attorney fees are generated in the Garza case and they would not be obligated to pay any common benefit assessment in the present action. At the Special Master hearing, Escobedo testified that if they were ultimately successful and were paid in the Garza case, they were willing to pay the common benefit assessment (Transcript of the Hearing on May 11, 2011 at p. 46). Since the Garza case is excluded from the settlement agreement, the assessment is not an obligation they would owe. This circumstance must also be considered with the fact that the Garza attorneys elected to remand the case to state court and that Snapka had sought exemption from the common benefit assessment (Transcript of Hearing on May 11, 2011 at pp. 180-182). With these set of facts, the issue before the Special Master is what credit, if any, should be given to the work performed in the Garza case.

A review of the record, exhibits and transcripts of meetings with the FAC reveals that two other law firms who actually tried cases in state courts that were excluded from the

settlement agreement received recommended awards. The Locks Firm received a recommended award of \$1,700,000 and the Heninger, Garrison & Davis Firm received a recommended award of \$1,300,000 (See attached Exhibit SM 4). It is the finding and recommendation of the Special Master that these two firms represent comparable situations and serve as a reasonable and just basis for a recommended award to Escobedo and Snapka for their work in the Garza case.

It is the finding and recommendation of the Special Master that a total of \$1,450,000 should be awarded for the work performed by Escobedo and Snapka in the Garza case. As between Escobedo and Snapka, an analysis of the testimony demonstrates that a division of the recommended award between the attorneys for work in the Garza case is required.

Snapka prepared and handled the direct testimony of Dr. Simonini in the Garza trial. Mr. Hockema did the general voir dire and Snapka did the specific voir dire. Snapka also did the direct examination of two sons. She also cross-examined Dr. Wheeler and prepared for the anticipated testimony of Dr. Alise Reicin. Snapka was also involved in the remand proceedings of the Garza case (Transcript of Hearing on May 11, 2011 at p. 110). In describing her involvement in the case as compared to Hockema and Escobedo, Snapka said they “were leaps and bounds ahead of me” (Transcript of Hearing on May 11, 2011 at p. 118). Hockema stated that Snapka had a limited role in the case (Deposition of Andy Birchfield on May 6, 2011 at p. 183). Without question, the bulk of the work in the Garza case was done by the Escobedo interest.

It is the finding and recommendation of the Special Master that an appropriate and just division of the \$1,450,000 recommended award for work in the Garza case is \$1,087,500 to Escobedo<sup>3</sup> and \$362,500 to Snapka.

Snapka performed common benefit work that was beyond the work she did in the Garza case. This work included her efforts for a period of time in her role as Notice Counsel in Texas, appearances and input at MDL status conferences, her efforts on use of retained blood and limited briefing and participation in the preemption-related issues. For her work on these matters Snapka should receive an additional compensation. It is the finding and recommendation of the Special Master that an appropriate and just award for this additional common benefit work is \$150,000 for a total award of \$512,500.

It should also be noted that under the Order and Reasons of Judge Fallon dated August 27, 2008, Escobedo and Snapka received the benefit of the 80% set-aside of attorney fees for the work they performed in advocating the claims of their individual clients who were part of the settlement program.

### **BRANCH OBJECTION**

The Branch Firm submitted 7,087.5 hours in common benefit time (Transcript of Hearing on May 11, 2011 at p. 32). The Firm contends that since a total of 562,943.55 common benefit hours was submitted and its submission amounted to 1.2523% of the total hours, the Firm should be awarded 1.2523% (\$1,394,875.75) of the common benefit fund (Transcript of Hearing on

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<sup>3</sup> Evaluation was made of Escobedo's submitted time of 250 hours for reviewing the transcript in the Ernest case (Transcript of Hearing on May 9, 2011 at pp. 60-61, 77) and multiple entries for review of same documents by multiple attorneys (Transcript of Hearing on May 9, 2011 at pp. 68-73).

May 11, 2011 at p. 32). The FAC initially recommended an award of \$281,251.84 to the Branch Firm and after a subsequent presentation to the FAC, the recommended award to Branch was reduced to \$0.

On May 16, 2005, Branch was appointed in the MDL as a member of the MDL State Liaison Committee to facilitate the coordination of MDL 1657 with State Vioxx cases (Pre-Trial Order No. 10 dated May 16, 2005). In October of 2005, Branch resigned his position as a member of the MDL State Liaison Committee (Transcript of Hearing on May 11, 2011 at p. 16). During the interim period of April 2005 to October 2005, the Branch Firm time submissions reflect that Branch attended some status conferences and reviewed pre-trial orders (FAC Exhibit 4 and Transcript of Hearing on May 11, 2011 at p. 46). In the fall of 2005, the Branch Firm worked on the 11 individual cases that the firm filed in New Jersey. The Branch Firm participated in depositions of the plaintiffs and family members of plaintiffs. There were no corporate, expert or marketing depositions taken and the Branch Firm did not try a case (Transcript of Hearing on May 11, 2011 at pp. 46, 72). The time entries clearly demonstrate that the bulk of the time that was submitted was for work expended on the firm's individual cases in New Jersey. Examples of such entries are "Pleadings – draft and review 9 N.J. complaints;" "Analysis/Strategy – Attend Vioxx litigation team meeting re: status of N.J. litigation;" "Research pro hac vice rules in N.J.;" and "Analysis/Strategy – Attend Vioxx Litigation team meeting re: status of N.J. Litigation" (FAC Exhibit 4).

In his Order and Reasons of August 27, 2008, Judge Fallon set the overall attorney fee at \$1,552,000,000. In his Order and Reasons of October 19, 2010, he set the common benefit fee at \$315,250,000, the result being that 80% of the total attorney fee was for handling individual

client matters and 20% was for common benefit work. It is precisely this set-aside of 80% that compensates the Branch Firm for the work it performed in the New Jersey litigation.

It is the finding of the Special Master that the Branch Firm did do some common benefit work and for the amount and type of common benefit work the Branch Firm performed, it is the finding and recommendation of the Special Master that an appropriate and just award for the Branch Firm is \$190,000.

### **BECNEL OBJECTION**

Becnel submitted 16,167 hours in common benefit time. Of those hours, there were approximately 404 hours that are attributable to Becnel personally and 15,763 hours for other attorneys. For this work, he advised the Fee Allocation Committee (FAC) that he should be awarded \$4,041,875. The FAC initially recommended an award of \$97,076.50. Subsequently, the Becnel recommended award was increased to \$455,000.

A review of his time submissions, the transcript of the meetings with the FAC, the testimony at the hearing before the Special Master and consideration of the briefs that were filed reveal many undisputed facts and questionable time entries.

Becnel filed the first Vioxx case in a Louisiana Federal Court. He also appeared before the Judicial Panel and argued for the assignment of the Multidistrict Litigation to Judge Fallon in the Eastern District of Louisiana. He also on his own initiative and direction contacted and retained some experts. He also organized a dinner at Antoine's Restaurant in New Orleans and invited attorneys who had expressed an interest in the Vioxx litigation. Becnel also served as a judge for a mock jury trial in New Orleans. Becnel also attended numerous status conferences.

Becnel also assigned attorney Rebecca Todd to work with Mark Robinson in California. Mr. Robinson was a very active and effective participant in the Vioxx proceedings. Becnel also was part of a group of attorneys who made arrangements to have contract attorneys perform document reviews in Alabama and New York. Becnel took no depositions, tried no cases and was not involved in any leadership or trial role in this litigation.

An analysis of the Becnel time submissions, Pre-Trial Order 6D, and the testimony at Special Master hearing on May 12, 2011 result in the following conclusions:

- 1) Pre-Trial Order 6D states: “Where work was performed by contract lawyers, those counsel are required to disclose the salary/wage of such contract lawyers to avoid paying windfall profits to such counsel.”
- 2) The submission of Becnel did not disclose that the attorneys whose time he submitted were actually contract lawyers. At the Special Master hearings Becnel testified that those attorneys were paid monthly ranging from \$3,000 to \$3,750 per month. Assuming an average work week, \$3,750 monthly would convert to \$22.50 per hour (Transcript of Hearing on May 12, 2011 at p. 103).
- 3) There were 3,054.75 duplicate hours that there were submitted by Becnel and another attorney for the same work. Compare FAC Exhibit 4 (Becnel time submissions for period January 2005 until May 2005) and FAC Exhibit 4 (Neblett, Beard and Arsenault time submission for the same time period) and see also (Transcript of Hearing on May 12, 2011 at pp. 104-111). The other submitting attorney did make the disclosures required by Pre-Trial Order 6D and those hours were considered in recommending an award for common benefit

compensation. Becnel claims that a mistake was made in two different submissions being made for the same work. It is the finding of the Special Master that a mistake was made, but the fact remains that errors were made and that Becnel did not make the disclosures as required by Pre-Trial Order 6.

- 4) Becnel submitted over 500 hours for time expended by Margaret Parker (FAC Exhibit 4). At the Special Master hearing, Becnel admitted that he did not know Margaret Parker (Transcript of Hearing on May 12, 2011 at pp. 111-112, 127).
- 5) At the Special Master hearing, Becnel admitted that there were numerous entries that were submitted as common benefit time that were actually for work on individual cases and that this work should not be given common benefit consideration (Transcript of Hearing on May 12, 2011 at pp. 113-116, 123).

Based on the actual amount and type of common benefit work performed by Becnel, it is the finding and recommendation of the Special Master that an appropriate and just award for the Becnel Firm is \$270,000.

### **RECOMMENDATION**

After due consideration of the above, I submit the following separate and independent recommendation to the Court, as set forth in the attached Exhibit SM 5, for the allocation of the common benefit attorney fees in the total amount of \$315,250,000.

Lafayette, Louisiana, this 27<sup>th</sup> day of June, 2011.

/s/ PATRICK A. JUNEAU

PATRICK A. JUNEAU

Special Master

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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 27, 2011, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all known counsel of record who are participants. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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Lafayette, Louisiana, this 27<sup>th</sup> day of June, 2011.

/s/ PATRICK A. JUNEAU  
PATRICK A. JUNEAU  
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX : MDL NO. 1657  
PRODUCTS LIABILITY : SECTION: L  
LITIGATION : JUDGE FALLON  
 : MAG. JUDGE KNOWLES  
\*\*\*\*\*

REPORT AND SCHEDULING ORDER OF SPECIAL MASTER

Comes now, the Special Master, Patrick A. Juneau, who submits the following Report and Scheduling Order relative to fee allocation issues in this matter.

**I. Jurisdiction**

Certain objectors have taken the position that the Court lacks jurisdiction to address issues pertaining to the fee allocation process to the extent that it involves the allocation of fees earned in connection with state court cases. However, as this Court explained in its October 19, 2010 Order & Reasons, this Court has equitable authority to oversee the administration of the global settlement and inherent authority to exercise ethical supervision over the parties.<sup>1</sup> Moreover, each of the objectors accepted the terms of the Master Settlement Agreement (“MSA”), and Sections 9.2.3 and 9.2.4 of the MSA clearly prescribed that common benefit fees would be allocated subject to the approval of this Court, and in consultation with Judges Chaney, Higbee, and Wilson. Thus, this Court clearly has jurisdiction to oversee the allocation of the common benefit fees.

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<sup>1</sup> A copy of the Court’s October 19, 2010 Order & Reasons is attached as Exhibit “A.”



**II. Whether Fee Allocation Process Is Fundamentally Flawed**

**A. Objector's Position of Allocation Process**

After reviewing the submission pleadings filed with the Court, it appears that the objectors have no problem with the allocation process but do have a problem with the application of that process by the FAC. In essence, the objectors are contending that a lodestar analysis was not made by the FAC in the allocation process.<sup>2</sup>

**B. Overview of Fee Allocation Process**

This Court has been uniquely transparent in publicly describing the preferred process to be utilized in equitably allocating common benefit fees in this matter.

On November 9, 2007, the parties executed and announced the terms of the MSA, which provided that this Court would be asked to appoint a committee to be responsible for recommending the allocation of common benefit fees. The MSA further provided that the allocation committee would be guided by objective measures of common benefit counsel's contributions, in addition to their subjective understanding of the relative contributions of counsel towards generating the settlement fund.

On November 20, 2007, this Court appointed members to the Fee Allocation Committee ("FAC"), in accordance with Section 9.2.4 of the MSA. The members of the FAC had a long history with this litigation and were obviously in a unique position to provide recommendations to the Court.

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<sup>2</sup> In a recent filing, Co-Lead Counsel for objectors clarified that the objectors agree that the process itself is open and transparent and complies with procedural due process. The criticism voiced by the objectors relates to the recommended allocation (i.e., how the process was applied). (See Reply Memorandum in Support of Motion for Partial Summary Judgment or Alternatively, Motion to Strike, and Motion for Additional Discovery, attached as Exhibit "B.")

On September 8, 2008, this Court entered Pre-Trial Order No. 6 (D)<sup>3</sup>, which set forth the general procedures to be followed by the FAC. Pre-Trial Order 6 (D) also provided guidelines for the FAC to consider in evaluating the submissions made by the applicants.

Further instructive insight was provided by this Court when it stated in its Order and Reasons of October 9, 2010:

While the United States Supreme Court has approved the percentage method in common fund cases, it has never formally adopted the lodestar method in common fund cases. *See Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 773-74 (11<sup>th</sup> Cir. 1991) (reading *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), as the Supreme Court's "acknowledgment" of the percentage method in common fund cases); *In re Prudential-Bache Energy Income P'ships Sec. Litig.*, MDL No. 888, 1994 WL 150742, (E.D. La. Apr. 13, 1994) (tracing the history of the various methods). Conversely, the Fifth Circuit appears to be the only Court of Appeals that has not explicitly endorsed the percentage method. Manual for Complex Litigation (Fourth) § 14.121 (2004). However, neither has the Fifth Circuit "explicitly *disapproved* of the percentage method of calculating fees in common fund cases." *In re OCA, Inc. Sec. & Derivative Litig.*, No. 05-2165, 2009 WL 512081, at \*18 (E.D. La. Mar. 2, 2009) (emphasis added). Therefore, the Fifth Circuit appears to tolerate the percentage method, so long as the *Johnson* framework is utilized to ensure that the fee awarded is reasonable. *See id.*; *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 851-52 & n.5 (5<sup>th</sup> Cir. 1998); *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 823-25 (5<sup>th</sup> Cir. 1996).

Accordingly, numerous district courts in this Circuit have applied a "blended" percentage method to determine a reasonable fee award, while staying within the *Johnson* framework. *See, e.g., In re OCA*, 2009 WL 512081, at \*19; *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 766, 778 (S.D. Tex. 2008); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 859-61 (E.D. La. 2007); *In re Bayou Sorrel Class Action*, No. 04-1101, 2006 WL 3230771, at \*3 (W.D. La. Oct. 31, 2006); *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 447

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<sup>3</sup> A copy of the Court's Pre-Trial Order 6 (D) is attached as Exhibit "C."

F. Supp. 2d 612, 628-29 (E.D. La. 2006); *Batchelder v. Kerr-McGee Corp.*, 246 F. Supp. 2d 525, 531 (N.D. Miss. 2003); *In re Combustion, Inc.*, 968 F. Supp. at 1135-36; *In re Catfish Antitrust Litig.*, 939 F. Supp. 493, 499-501 (N.D. Miss. 1996).

Keeping in line with Fifth Circuit precedent and this Court's prior experience, the Court finds that the blended percentage approach is an appropriate method for calculating reasonable common benefit attorneys' fees in this case. Accordingly, the Court will first determine the valuation of the benefit received by the claimants and then select an initial benchmark percentage. The Court will then determine whether the benchmark should be adjusted based on the application of the *Johnson* factors to the particular circumstances of this case. Finally, the Court will conduct a rough lodestar analysis to cross-check the reasonableness of the percentage fee award. The lodestar analysis is not undertaken to calculate a specific fee, but only to provide a broad cross check on the reasonableness of the fee arrived at by the percentage method.

The FAC developed a points system which was intended to utilize a *Johnson* factor analysis and to weigh the applicant's contributions to the overall success of the litigation. The points system established the following nine categories: (1) Key Leadership; (2) Trials; (3) Settlement Negotiations; (4) Law and Briefing; (5) Settlement Implementation and Post-Settlement Issues; (6) Discovery, Science and Experts; (7) Committee Leadership and Participation; (8) Funding; and (9) Case Management.<sup>4</sup> Within each category, the level of activity dictated the points assigned. All applicants for common benefits fees were subject to the application of this point analysis.

A point value grid was also prepared in connection with the points system.<sup>5</sup> A lodestar analysis was used in completing the grid.<sup>6</sup> A lodestar analysis was also subsequently used as an

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<sup>4</sup> The Point System Guide is attached as Exhibit "D."

<sup>5</sup> An example of a page from the point value grid is attached as Exhibit "E."

<sup>6</sup> See, for example, the voluminous June 10, 2010 compilation by category and timekeeper prepared by the court-appointed CPA, Philip Garrett, of the hours reviewed by Mr. Garrett for the time

overall cross check. In that regard, after the initial recommended award was calculated based on the points system, the FAC considered the claimed lodestar for each attorney/firm and determined whether an adjustment was warranted.

Submissions were made by various attorneys seeking common benefit allocation. The FAC reviewed the submissions, including affidavits and time records, as well as reports prepared by the court-appointed CPA, Philip Garrett. The FAC also conducted hearings in California, Louisiana, New Jersey, and Texas. At each hearing, applicants were given the opportunity to present additional testimony in support of their applications.

On December 2, 2010, the FAC advised each applicant of the amount of its preliminary recommendation. Each applicant was given 15 days to object and was given an opportunity to be heard by the FAC. Many applicants took advantage of this opportunity and met with the members of the FAC to explain the basis of their objections. Some adjustments were subsequently made by the FAC.<sup>7</sup>

On January 20, 2011, the FAC then presented its final recommendation to the Court. On that same date, the Court posted the final recommendation on its web site and also ordered objections to be filed before February 4, 2011.

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period of January 1, 2001 through July 31, 2009. The compilation totals 1,115 pages and has been made available to all interested parties. Because the records are so voluminous, only the first and last pages are attached as Exhibit "F." Also see the following Affidavits of Mr. Garrett which were previously filed into the court record: Affidavit dated January 19, 2009, attached as Exhibit "G-1"; Affidavit dated June 10, 2010, attached as Exhibit "G-2"; and Affidavit dated August 4, 2010, attached as Exhibit "G-3".

<sup>7</sup> See Fee Allocation Committee Recommendation Modifications, attached as Exhibit "H."

**C. Jurisprudence**

The Fifth Circuit has addressed the difficult issue of dividing fees and costs between attorneys involved in class action lawsuits. In that context, the Fifth Circuit recently explained that “[t]he record must clearly indicate that the district court has utilized the *Johnson* framework as the basis of its analysis, has not proceeded in a summary fashion, and has arrived at an amount that can be said to be just compensation.”<sup>8</sup>

**D. The Fee Allocation Process Was Proper**

In analyzing the fee allocation issues raised in this case, I have researched the pertinent jurisprudence and reviewed extensive memoranda and voluminous file materials. I have also interviewed representatives of the FAC and the objectors, as well as the court-appointed CPA, Philip Garrett.

It is my finding that the fee allocation process was proper and afforded full due process. The issue as I see it is whether or not the process was fairly and properly applied. I should be able to make this determination at the conclusion of the hearing that will be held in this matter.

Implicit in the evaluation of the categories established by the Point system as it applies to individual applicants is a consideration of the *Johnson* factors. The designated categories cover the full gambit of effort, risk, and skill that is required in complex litigation and an evaluation of each of these categories by their very definition require consideration of the *Johnson* factors. The process utilized by the PAC also included a lodestar analysis – both initially and later as a cross check.

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<sup>8</sup> *High Sulfur II*, not selected for publication in the Federal Reporter, 2010 WL 2710773, 384 Fed. Appx. 299, (5th Cir. 2010) (citing *High Sulphur I*, 517 F.3d at 220, 227) (5th Cir. 2008) (quoting *Forbush v. J.C. Penney Co.*, 98 F.3d at 817, 823 (5th Cir. 1996).

With regard to the requirement that such proceedings not be handled in a summary fashion, the procedural history of this case should set the standard for transparency and due process. Frankly, it is difficult to imagine how more transparency on due process could be afforded.

### **III. Discovery Issues**

With regard to the requested discovery, it should be noted that the objectors have already received or have access to the following documents:

- a) MDL trial package;
- b) Depositions as reflected in trial package;
- c) Accountings of court-appointed CPA, including the compilation by category and time keeper prepared by court-appointed CPA Philip Garrett, of the hours reviewed by Mr. Garrett for the time period of January 1, 2009 through July 31, 2009.
- d) Written presentations of common benefit fee applicants;
- e) Transcripts of oral presentations of common benefit fee applicants;
- f) Court filings and orders, including pre-trial order 6(D);
- g) Transcript of January 6, 2011 Status Conference;
- h) Grid and point system utilized by Fee Committee;
- I) Affidavits of Phil Garrett, court-appointed CPA;
- j) Transcription of private proceedings on July 27, 2010 between counsel;
- k) Preliminary List of Recommended common benefit fee allocations;
- l) FAC Recommendations on common benefit fee allocations to the Court which was posted on the Court's website on January 20, 2011;
- m) FAC Recommended Modification on common benefit fee allocations; and
- n) Acceptance and objection forms to common benefit fee applicants.

In addition to these documents, the Special Master has allowed counsel for the objectors to meet with the court-appointed CPA to discuss the work performed and to obtain reports that were generated by the CPA firm.

In its order of February 28, 2011,<sup>9</sup> the Court directed the Special Master to make recommendations to the Court as to the allocation of the common benefit fee award of \$315,250,000.<sup>10</sup> In light of that instruction and considering the relevant documents and discovery that is allowed by this Report, the requests for additional discovery and production of documents are denied, except insofar as is permitted and is consistent with the following Scheduling Order.

#### Scheduling Order

Hearing Dates:

9:00 a.m. on May 9, 2011 through May 13, 2011 in New Orleans before Special Master Patrick A. Juneau

- the only witnesses needed and allowed to testify at the hearing will be the objectors, the court appointed CPA, and the designated member of the PAC

Pre-Hearing Deadlines:

Between April 4, 2011 and April 18, 2011

Deposition of one FAC member, if deemed necessary by objectors (member to be designated by FAC)

Depositions of objectors, if deemed necessary by FAC

April 25, 2011

Objectors and FAC shall file exhibit lists

Post-Hearing:

At conclusion of hearing

Determination by Special Master if additional testimony or production of documents is necessary

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<sup>9</sup> A copy of the Court's February 28, 2011 Order is attached as Exhibit "I."

<sup>10</sup> An issue has been raised as to the deduction from the \$315,250,000. This issue is not before the Special Master and is to be considered by the Court.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on March 31, 2011, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all known counsel of record who are participants. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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Lafayette, Louisiana, this 31<sup>st</sup> day of March, 2011.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE: VIOXX : MDL NO. 1657  
PRODUCTS LIABILITY LITIGATION :  
 : SECTION: L  
 :  
 : JUDGE FALLON  
 : MAG. JUDGE KNOWLES

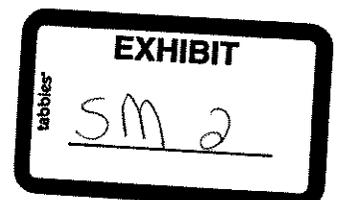
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HEARING PROTOCOL

The following is the protocol to be followed at the hearing before the Special Master set to commence on May 9, 2011:

- 1) The Objectors (collectively) will be able to call the FAC designee, Andy Birchfield, and question him for a maximum period of 1 hour.
- 2) Each Objector will be allowed a maximum period of 1 ½ hours to present their individual positions.
- 3) The Objectors (collectively) and the FAC will each be allowed to call an expert and question that expert for a maximum period of 1 hour, if deemed necessary. If an expert is called, the opposing side will be given a maximum period of 30 minutes to question the expert.
- 4) The FAC, through its designated counsel, will be allowed a maximum period of 30 minutes to examine each Objector.
- 5) The FAC will be allowed a maximum period of 2 hours to present its position.
- 6) The FAC and the Objectors (collectively) will each be allowed to call and question Philip Garrett for a maximum period of 1 hour.

The parties are reminded that extensive briefs and attachments were already submitted and will be part of the record.



Lafayette, Louisiana, this 29<sup>th</sup> day of April, 2011.

/s/ PATRICK A. JUNEAU

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Special Master

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**CERTIFICATE OF SERVICE**

I hereby certify that, on April 29, 2011, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all known counsel of record who are participants. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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Lafayette, Louisiana, this 29<sup>th</sup> day of April, 2011.

/s/ PATRICK A. JUNEAU

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Special Master

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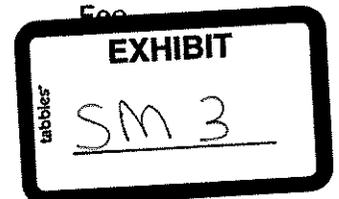
UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

	*	
	*	
In re: VIOXX	*	MDL Docket No. 1657
	*	
PRODUCTS LIABILITY LITIGATION	*	SECTION L
	*	
	*	JUDGE FALLON
	*	
	*	MAGISTRATE JUDGE KNOWLES
	*	
	*	

**PRE-TRIAL ORDER NO. 6(D)**  
**(FEE ALLOCATION GUIDELINES)**

The Settlement Agreement between Merck & Co., Inc. and the Negotiating Plaintiffs' Counsel ("NPC") provides for the appointment of an Allocation Committee to be responsible for recommending to the Court the allocation of awards of attorneys' fees from the Settlement Fee and Cost Account. See Settlement Agreement Section 9.2.4. On November 20, 2007, the Court issued Pretrial Order No. 32, appointing the members of the Allocation Committee. The Settlement Agreement contemplates that the Allocation Committee will review the contemporaneous time records or properly reconstructed time records and expense reports of all plaintiffs' counsel that submitted or request compensation for common benefit work and to take into consideration the time and common benefit work of counsel in the MDL and of counsel in the state consolidated litigations in Texas, California, New Jersey, as well as other applicable state courts.<sup>1</sup> The Settlement Agreement also provides that the Allocation Committee shall

<sup>1</sup>These guidelines are addressed specifically to allocations of attorneys' fees. Expenses, if incurred for common benefit work, shall be evaluated by the Allocation Committee in a



evaluate common benefit counsel's contributions, using objective measures and the committee's subjective understanding of the relevant contributions of counsel toward generating the Settlement Fund in accordance with established fee jurisprudence, and make a Recommendation to the Court for consideration in consultation with Judges Chaney, Higbee, and Wilson.

As the Allocation Committee implements PTO No. 32 and Section 9.2.4 of the Settlement Agreement and makes a Recommendation to the Court regarding allocation of attorneys' fees, the committee's considerations should be governed and guided by this comprehensive statement of general principles. The over-arching guideline that the Allocation Committee is to consider is the contributions of each common benefit attorney to the outcome of the litigation.

In addition, under existing fee jurisprudence, certain procedural as well as substantive factors should be considered in making an allocation recommendation. The committee shall take into account Pretrial Order No. 6's directives regarding the procedural aspects of the presentations and mechanisms whereby petitioning attorneys may submit written and oral presentations for the committee's consideration. Substantively, the committee should look to general fee jurisprudence to identify the factors that should be applied in making appropriate allocations. The *Johnson* factors are applicable to this litigation and should be considered in addition to other matters considered by the courts to evaluate fee allocations. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5<sup>th</sup> Cir. 1974) ((1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case;

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manner consistent with the standards already employed by the accounting firm of Wegmann-Dazet pursuant to PTO No. 6 and PTO 6C.

(5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstances; (8) The amount involved and the results obtained; (9) The experience, reputation, and ability of the attorneys; (10) The “undesirability” of the case; (11) The nature and length of the professional relationship with the client; and (12) Awards in similar cases.).<sup>2</sup>

In Pretrial Order No. 6 and Pretrial Order No. 6C, the Court provided further guidance for the consideration of common benefit work. These guidelines shall be considered by the Allocation Committee when reaching its Recommendation., including:

- (1) Submitted time must be either accurately and contemporaneously maintained or properly reconstructed;
- (2) The time should be recorded in quarter-of-an-hour increments and shall indicate with specificity the hours, location and particular activity;
- (3) The time records with a form summarizing the total of member firm time broken down by each separate name of time keeper and Litigation Task Definition the time spent during the preceding month and the accumulated total of all time incurred by the firm during the particular reporting period; and
- (4) The summary report form shall be certified by a senior partner each month attesting to the accuracy and correctness of the monthly submission.

The Allocation Committee will implement additional processes to provide appropriate deliberative fairness to those participating attorneys. The process outlined below will afford

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<sup>2</sup>See *In re High Sulfur Gulf Content Gasoline Prods. Liab. Lit.*, 517 F.3d 220 (5<sup>th</sup> Cir. 2008); *Strong v. Bell South Telecommunications, Inc.*, 137 F.3d 844, 850 (5<sup>th</sup> Cir. 1998); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.* 487 F.2d 161, 165 (3d Cir. 1973); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 821 (3d Cir.), cert. denied, 516 U.S. 824 (1995); *In re Diet Drugs Products Liability Litig.*, 401 F.3d 143, 169 (3d Cir. 2005); see also *Turner v. Murphy Oil USA, Inc.*, 472 F.Supp.2d 830 (E.D. La. 2007) (and other related orders entered in the *Murphy Oil* litigation).

participating attorneys opportunities to advocate their positions in a variety of ways in addition to providing time record submissions:

(1) On or before October 31, 2008, any attorney wishing to have their time considered for an allocation of any common benefit award may submit to the Allocation Committee an affidavit not to exceed 3 pages describing those aspects of that counsel's work that they believe best describes their firm's common benefit contributions. In preparing such an affidavit, the following factors should be addressed:

- The extent to which each common benefit firm made a substantial contribution to the outcome of the litigation;
- The quality of each firm's work;
- The consistency quantum, duration, and intensity of each firm's commitment to the litigation;<sup>3</sup>
- The level of partner participation by each firm;
- Membership in the Plaintiffs' Executive Committee ("PEC"), Plaintiffs' Steering Committee ("PSC"), or the NPC;
- The jurisdiction in which non-MDL common benefit work occurred;
- Activities surrounding trials of individual Vioxx claimants, including bellwether trials and non-MDL trials that impacted proceedings on a common benefit level;
- Leadership positions on regular committees engaged in common benefit work;<sup>4</sup>

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<sup>3</sup>The committee should consider the extent that counsel devoted themselves to participating exclusively in Vioxx litigation and concomitantly turned away or reduced their case-load in other areas.

<sup>4</sup>Major committee efforts include: Discovery (motions, depositions); Law & Briefing; Science and experts; Document review and selection; Trial; Trial package; and Settlement.

- Participation in ongoing activities, such as the Allocation Committee and the Gates Committee, that are intended to provide common benefits;
- Whether counsel was already involved in the Vioxx litigation prior to the withdrawal of Vioxx from the market on September 30, 2004;
- Whether counsel was involved in the Vioxx litigation prior to the JPMDL, and the time and expense incurred during such time that was for common benefit.<sup>5</sup>
- Whether counsel made significant contributions to the funding of the litigation;
- When a number of verdicts were adverse to plaintiffs, those PSC members or committee members whose commitment to the litigation did not ebb; and
- Any other relevant factors.

(2) The Allocation Committee, or a three-member panel of the Committee, shall conduct at least one (1) meeting (or as many as necessary) between December 1-5, 2008, during which any participating attorney that has submitted a memorandum for common benefit compensation may at their discretion and on their own volition separately appear and present the reasons, grounds and explanations for their entitlement to common benefit fees and reimbursement of expenses. Meetings will be held in the following locations: New Orleans, LA; Atlantic City, NJ; Houston, TX; and Los Angeles, CA. The presentation should not last over 30 minutes (although this time may be extended at the discretion of the Allocation Committee). Counsel should be prepared to respond to any

questions or concerns raised by the Allocation Committee during their presentation. Each presentation shall be conducted in the presence of a court reporter.

- (3) The Allocation Committee may request that any common participating attorney that has submitted an affidavit for common benefit compensation appear separately before the Committee, or a three-member panel of the Committee, between December 1 - 5, 2008, to answer questions or concerns addressing the reasons, grounds and explanations of that participating attorney's entitlement to common benefit fees and reimbursement of expenses. Each requested appearance shall be conducted in the presence of a court reporter.
- (4) By January 31, 2009, the Allocation Committee shall make Recommendations of Fee Allocations and Cost Reimbursement for all participating attorneys. The Allocation Committee shall provide to each participating attorney notice of the Committee's Recommendation as it pertains to the participating attorney.
- (5) In the event a participating attorney objects to the Committee's Recommendation, a written objection setting forth the basis of the objection shall be submitted to the Allocation Committee within 14 days for consideration by the full Allocation Committee.
- (6) The Court will enter a separate order setting forth procedures for petitions regarding attorneys' fees and reimbursement of expenses, including the Allocation Committee's filing of a joint petition for the award of common benefit

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<sup>5</sup> Since PTO 6 only authorized reporting time and expenses after the JPMDL transfer, time and expenses prior to the transfer may be separately reported to Wegmann Dazet.

fees and reimbursement of expenses and objectors' responses to the same. The Court may also schedule hearings concerning the matter.

In addition to the procedural guidelines provided by Pretrial Order Nos. 6 and 6C, the Allocation Committee shall also take into consideration substantive fee allocation jurisprudence. Numerous factors are pertinent for consideration to derive the appropriate allocation of fees among participating attorneys.

Other special considerations include:

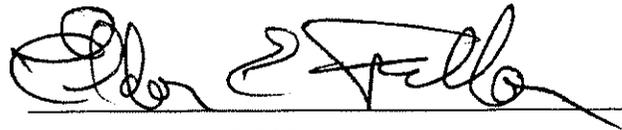
- Participating attorneys will not be compensated for work performed without authorization by a member of the PEC, PSC or NPC, or similarly situated leaders in state consolidated litigation.
- Review work not related to ongoing assignments is not compensable.
- Where work was performed by contract lawyers, those counsel are required to disclose the salary/wage of such contract lawyers to avoid paying windfall profits to such counsel.
- Where work which was performed in related litigation such as Celebrex, Bextra, where much of the Science, Expert, Journal Research and Discovery is shared among or with cases other than Vioxx, counsel shall be refused compensation should overlapping time or expense entries occur.

Wegmann-Dazet shall prioritize the calculation of the separate percentage applicable to common benefit costs so that the proper deduction can be made from each claimant's share of the settlement. It is understood that time is of the essence so that distributions can be expedited. Wegmann-Dazet shall promptly conduct its calculations. *See Settlement Agreement §§ 9.2.1 & 9.2.2.*

Any notices or submissions to be made to the Allocation Committee pursuant to this Pre-Trial Order or Fee Allocation Guidelines shall be made to Plaintiffs' Liaison Counsel, Russ M.

Herman, c/o Herman, Herman, Katz & Cotlar, LLP, 820 O'Keefe Avenue, New Orleans, LA 70113; PH: (504) 581-4892; FAX: (504) 561-6024; E-Mail: [VioxxMDL@hhkc.com](mailto:VioxxMDL@hhkc.com).

In making its Recommendation to the Court, the Allocation Committee shall exercise its discretion, as previously ordered by the Court, in evaluating what work and expenses furthered the common benefit of the litigation. The above guidelines provide direction, but do not create entitlements and do not override the independent judgment and discretion of the Allocation Committee and the Court.

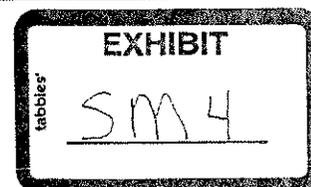
A handwritten signature in black ink, appearing to read 'E. Fallon', written over a horizontal line.

ELDON E. FALLON

UNITED STATES DISTRICT JUDGE

## FAC Adjusted Recommendation 6-1-11

Firm	Formal Response	FAC Adjusted Recommendation (6-1-11)	Special Master's Recommendation
Alley, Clark, Greiwe & Fulmer	Accepted	\$365,000	
Alvarez Law Firm	Accepted	\$15,000	
Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, P.C.	Accepted	\$4,000,000	
Anastopoulos & Clore, LLC	Accepted	\$15,000	
Andrews & Thornton	Accepted	\$600,000	
Ashcraft & Gerel LLP	Accepted	\$9,000,000	
Audet & Partners, LLP	Accepted	\$1,415,000	
Aylstock, Witkin, Kreis & Overholtz, LLC	Accepted	\$225,000	
Balkin & Eisbrouch	Accepted	\$15,000	
Balser, Brian K., Co., LPA	Accepted	\$130,000	
Barnow	Accepted	\$15,000	
Barrios, Kingsdorf & Casteix, LLP	Accepted	\$1,700,000	
Bartimus, Frickleton, Robertson & Gorny	Accepted	\$15,000	
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.	Accepted	\$37,111,166	
Becnel Law Firm, LLC	Objection	\$455,000	
Bencomo	Accepted	\$327,500	



## FAC Adjusted Recommendation 6-1-11

Blizzard, McCarthy & Nabers, LLP	Accepted	\$10,525,416	
Bossier & Associates, PLLC	Accepted	\$20,000	
Branch Law Firm	Objection	\$0	
Brandi Law Firm	Accepted	\$970,000	
Brown & Crouppen, PC	Accepted	\$73,000	
Bruce C. Dean	Accepted	\$0	
Bruno	Accepted	\$75,000	
Burg, Simpson, Eldredge, Hersh & Jardine, PC	Accepted	\$500,000	
Cafferty Faucher	Accepted	\$30,000	
Capshaw Goss	Accepted	\$0	
Carey & Danis, LLC	Accepted	\$350,000	
Charfoos	Accepted	\$0	
Childers, Buck & Schlueter	Accepted	\$0	
Cohen Milstein	Accepted	\$750,000	
Cohen, Placitella & Roth, PC	Accepted	\$3,500,000	
Cunard Law Firm	Accepted	\$375,000	
Cuneo, Gilbert & LaDuca LLP	Accepted	\$0	

## FAC Adjusted Recommendation 6-1-11

Dugan & Browne	Accepted	\$0	
Engstrom, Lipscomb & Lack	Accepted	\$390,000	
Escobedo Tippet	Objector	\$0	
Fayard & Honeycutt	Accepted	\$15,000	
Fibich, Hampton & Leebron, LLP	Accepted	\$610,000	
Freese & Goss, PLLC	Accepted	\$25,000	
Friedman Law Offices	Accepted	\$6,500	
Gainsburgh, Benjamin, Davis, Meunier & Warshauer, LLC	Accepted	\$2,690,000	
Gallagher Law Firm (TX)	Accepted	\$40,000	
Gancedo & Nieves LLP	Accepted	\$700,000	
Gianni-Petoyan, Attorneys at Law	Accepted	\$30,000	
Girardi & Keese	Accepted	\$18,238,006	
Goldenberg Heller	Accepted	\$0	
Goza & Honnold	Accepted	\$70,000	
Hagens Berman	Accepted	\$0	
Heins Mills	Accepted	\$4,000	
Heninger Garrison Davis, LLC	Accepted	\$1,300,000	

## FAC Adjusted Recommendation 6-1-11

Herman, Herman, Katz & Cotler, LLP	Accepted	\$29,489,313	
Hovde Dassow & Deets, LLC	Accepted	\$1,415,000	
Irpino	Accepted	\$877,000	
Jacobs Burns	Accepted	\$0	
John Hornbeck	Accepted	\$300,000	
Johnson & Perkinson	Accepted	\$15,000	
Jones Verras	Accepted	\$350,000	
Kasowitz, Benson, Torres & Friedman LLP	Accepted	\$1,100,000	
Keller Rhorback	Accepted	\$0	
Kerpsack	Accepted	\$10,000	
Khorrami	Accepted	\$30,000	
Kline & Specter, PC	Accepted	\$15,000,000	
Labaton Sucharow	Accepted	\$0	
Langston Law Firm	Accepted	\$0	
Lanier Law Firm, PC	Accepted	\$24,498,814	
Levin Fishbein Sedran & Berman	Accepted	\$19,417,579	
Levin Simes Kaiser & Gornick, LLP	Accepted	\$15,000	

## FAC Adjusted Recommendation 6-1-11

Levin, Papantonio, Thomas, Mitchell, Eshner & Proctor P.A.	Accepted	\$14,154,870	
Lewis & Roberts, PLLC	Accepted	\$225,000	
Lieff, Cabraser, Heimann & Bernstein, LLP	Accepted	\$6,000,000	
Lockridge, Grindal, Nauen PLLP	Accepted	\$1,100,000	
Locks Law Firm, LLC	Accepted	\$1,700,000	
Lopez, Hodes, Restaino, Milman & Skikos	Accepted	\$1,500,000	
Lundy & Davis	Accepted	\$100,000	
Martin & Jones	Accepted	\$150,000	
Matthews & Associates	Accepted	\$1,750,000	
Mithoff Law Firm	Accepted	\$15,000	
Morelli Ratner PC	Accepted	\$2,250,000	
Motley, Rice LLC	Accepted	\$1,250,000	
Murray Law Firm	Accepted	\$850,000	
Neblett, Beard & Arsenault	Accepted	\$1,450,000	
Panish & Shea	Accepted	\$1,640,000	
Price Waicukauski & Riley, LLC	Accepted	\$15,000	
Richardson, Patrick, Westbrook & Brickman	Accepted	\$15,000	

## FAC Adjusted Recommendation 6-1-11

Robert J. DeBry	Accepted	\$15,000	
Robert M. Becnel	Accepted	\$30,000	
Robins, Kaplan, Miller & Ciresi L.L.P.	Accepted	\$850,000	
Robinson, Calcagnie & Robinson	Accepted	\$6,000,000	
Roda Nast, P.C.	Accepted	\$300,000	
Sanders Viener Grossman, LLP	Accepted	\$15,000	
Sanford, Shelly A., PLLC	Accepted	\$6,800,000	
Seeger Weiss LLP	Accepted	\$37,111,166	
Sheller, P.C.	Accepted	\$325,000	
Silverman & Fodera	Accepted	\$73,000	
Singleton Law Firm	Accepted	\$180,000	
Snapka, Turman & Waterhouse, L.L.P.	Objected to	\$75,000	
Ted Kanner	Accepted	\$1,350	
Texas Consortium (Ranier, Gayle & Elliot, L.L.C.; Williams Kherkher; Provost Umphrey; Watts Law Firm; Grant Kaiser)	Accepted	\$18,233,469	
The Holman Law Firm	Accepted	\$0	
Ury & Moskow LLC	Accepted	\$0	
Weinberg, Eric H., Law Firm of	Accepted	\$3,500,000	

FAC Adjusted Recommendation 6-1-11

Weitz & Luxenberg, P.C.	Accepted	\$18,147,270	
White Meany & Wetherall	Accepted	\$160,000	
Whitehead Law Firm	Accepted	\$45,000	
Williamson & Williams	Accepted	\$15,000	
Wold	Accepted	\$580	
Zimmerman, Reed PLLP	Accepted	\$0	
Zink, Diane K.	Accepted	\$0	
		\$315,250,000	

Agreement reached since 4-28-11

Current Object

**SPECIAL MASTER'S RECOMMENDED AWARDS**

<b>FIRM</b>	<b>SPECIAL MASTER RECOMMENDED AWARDS</b>
Alley, Clark, Greiwe & Fulmer	\$365,000
Alvarez Law Firm	\$15,000
Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, P.C.	\$4,000,000
Anastopoulo & Clore, LLC	\$15,000
Andrews & Thornton	\$600,000
Ashcraft & Gerel, LLP	\$9,000,000
Audet & Partners, LLP	\$1,415,000
Aylstock, Witkin, Kreis & Overholtz, LLC	\$225,000
Balkin & Eisbrouch	\$15,000
Balser, Brian K., Co., LLP	\$130,000
Barnow	\$15,000
Barrios, Kingsdorf & Casteix, LLP	\$1,700,000
Bartimus, Frickleton, Robertson & Gorny	\$15,000
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.	\$36,860,953
Becnel Law Firm, LLC	\$270,000
Bencomo	\$327,500
Blizzard, McCarthy & Nabers, LLP	\$10,454,451
Bossier & Associates, PLLC	\$20,000
Branch Law Firm	\$190,000
Brandi Law Firm	\$970,000
Brown & Crouppen, PC	\$73,000



Bruce C. Dean	\$0
Bruno	\$75,000
Burg, Simpson, Eldredge, Hersh & Jardine, PC	\$500,000
Cafferty Faucher	\$30,000
Capshaw Goss	\$0
Carey & Danis, LLC	\$350,000
Charfoos	\$0
Childers, Buck & Schlueter	\$0
Cohen Milstein	\$750,000
Cohen, Placitella & Roth, PC	\$3,500,000
Cunard Law Firm	\$375,000
Cuneo, Gilbert & LaDuca, LLP	\$0
Dugan & Browne	\$0
Engstrom, Lipscomb & Lack	\$390,000
Escobedo Tippet	\$1,087,500
Fayard & Honeycutt	\$15,000
Fibich, Hampton & Leebron, LLP	\$610,000
Freese & Goss, PLLC	\$25,000
Friedman Law Offices	\$6,500
Gainsburgh, Benjamin, Davis, Meunier & Warshauer, LLC	\$2,690,000
Gallagher Law Firm (TX)	\$40,000
Gancedo & Nieves, LLP	\$700,000
Gianni-Petoyan, Attorneys at Law	\$30,000
Girardi & Keese	\$18,115,041
Goldenberg Heller	\$0
Goza & Honnold	\$70,000

Hagens Berman	\$0
Heins Mills	\$4,000
Heninger Garrison Davis, LLC	\$1,300,000
Herman, Herman, Katz & Cotler, LLP	\$29,290,489
Hovde Dassow & Deets, LLC	\$1,415,000
Irpino	\$877,000
Jacobs Burns	\$0
John Hornbeck	\$300,000
Johnson & Perkinson	\$15,000
Jones Verras	\$350,000
Kasowitz, Benson, Torres & Friedman, LLP	\$1,100,000
Keller Rhorback	\$0
Kerpsack	\$10,000
Khorrami	\$30,000
Kline & Specter, PC	\$15,000,000
Labaton Sucharow	\$0
Langston Law Firm	\$0
Lanier Law Firm, PC	\$24,333,637
Levin Fishbein Sedran & Berman	\$19,286,660
Levin Simes Kaiser & Gornick, LLP	\$15,000
Levin, Papantonio, Thomas, Mitchell, Eshner & Proctor, P.A.	\$14,059,435
Lewis & Roberts, PLLC	\$225,000
Lieff, Cabraser, Heimann & Bernstein, LLP	\$6,000,000
Lockridge, Grindal, Nauen, PLLP	\$1,100,000
Locks Law Firm, LLC	\$1,700,000
Lopez, Hodes, Restaino, Milman & Skikos	\$1,500,000

Lundy & Davis	\$100,000
Martin & Jones	\$150,000
Matthews & Associates	\$1,750,000
Mithoff Law Firm	\$15,000
Morelli Ratner, PC	\$2,250,000
Motley, Rice, LLC	\$1,250,000
Murray Law Firm	\$850,000
Neblett, Beard & Arsenault	\$1,450,000
Panish & Shea	\$1,640,000
Price Waicukauski & Riley, LLC	\$15,000
Richardson, Patrick, Westbrook & Brickman	\$15,000
Robert J. DeBry	\$15,000
Robert M. Becnel	\$30,000
Robins, Kaplan, Miller & Ciresi, L.L.P.	\$850,000
Robinson, Calcagnie & Robinson	\$6,000,000
Roda Nast, P.C.	\$300,000
Sanders Viener Grossman, LLP	\$15,000
Sanford, Shelly A., PLLC	\$6,800,000
Seeger Weiss, LLP	\$36,860,953
Sheller, P.C.	\$325,000
Silverman & Fodera	\$73,000
Singleton Law Firm	\$180,000
Snapka, Turman & Waterhouse, L.L.P.	\$512,500
Ted Kanner	\$1,350
Texas Consortium (Ranier, Gayle & Elliot, L.L.C.; Williams Kherkher; Provost Umphrey; Watts Law Firm; Grant Kaiser)	\$18,110,535

The Holman Law Firm	\$0
Ury & Moskow, LLC	\$0
Weinberg, Eric H., Law Firm of	\$3,500,000
Weitz & Luxenberg, P.C.	\$18,024,916
White Meany & Wetherall	\$160,000
Whitehead Law Firm	\$45,000
Williamson & Williams	\$15,000
Wold	\$580
Zimmerman, Reed, PLLP	\$0
Zink, Diane K.	\$0

TOTAL: \$315,250,000