

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

<b>In re: VIOXX</b>	*	<b>MDL Docket No. 1657</b>
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<b>PRODUCTS LIABILITY LITIGATION</b>	*	<b>SECTION L</b>
	*	
<b>This document relates to All Cases</b>	*	<b>JUDGE FALLON</b>
	*	
	*	<b>MAGISTRATE JUDGE KNOWLES</b>
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**JOINT REPORT NO. 76 OF PLAINTIFFS'  
AND DEFENDANTS' LIAISON COUNSEL**

Plaintiffs' Liaison Counsel ("PLC") and Defendants' Liaison Counsel ("DLC") submit this Joint Report No. 76.

**I. CLASS ACTIONS**

The only remaining, pending class actions involve Purchase Claims<sup>1</sup> 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

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<sup>1</sup> 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 December 11, 2012.

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.

At the February 26, 2013 status conference, Plaintiffs' Liaison Counsel announced a consumer settlement, which should resolve all pending consumer claims. The Court indicated that it would conduct a hearing on the parties' forthcoming motion for preliminary approval of the settlement on March 14, 2013. *See* Rec. Doc. 64275 at p. 2. On March 4, 2013, plaintiff James Ratliff filed a Preliminary Notice of Objection to the referenced settlement [Rec. Doc. 64289]. Merck filed an initial response to the preliminary notice of objection [Rec. Doc. 64290], and the Court held a status conference on the pending consumer settlement on March 14, 2013 [Rec. Docs. 64299, 64312]. An additional conference was held on April 15, 2013. The parties will be prepared to discuss this matter further at the monthly status conference on April 23, 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 November 30, 2012, Merck filed a motion to compel in the *Jim Hood (State of Mississippi)* proceeding regarding responses to certain interrogatories and document requests. [Rec. Doc. 64181]. The Court heard argument on the motion by phone on February 14, 2013

and reconvened the parties for further consultation on the issues on February 19, 2013. By Order entered February 28, 2013, the Court granted the motion with respect to Interrogatories 2, 3, 4, 5 and Requests to Admit 11, 13, and 14; the Court denied the motion with respect to Interrogatories 1 and 6 [Rec. Doc. 64279].

On January 30, 2013, counsel for the Government Action Plaintiffs submitted a letter brief seeking to compel additional productions by Merck of custodial files and data from the FACTs database. Merck submitted a letter brief opposing this additional discovery on February 12, 2013, and counsel for the Government Action Plaintiffs replied on February 14, 2013. The Court heard argument on these issues on February 20, 2013, and a Minute Entry was entered [Rec. Doc. 64261].

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].

The parties will be prepared to discuss these issues further at the monthly status conference on April 23, 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], and the parties are awaiting further instructions from the Special Master.

The TPP Fee Allocation Committee will be prepared to discuss these matters further at the status conference on April 23, 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]<sup>2</sup>. 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. The parties will be prepared to discuss the remaining VTE issues at the monthly status conference.

On February 5, 2013, Merck filed a Motion, Rule, and Incorporated Memorandum to Show Cause Why Case Should Not Be Dismissed With Prejudice for Failure to Prosecute as to the claims of plaintiffs Ann Marie Mannino and Joseph Mannino [Rec. Doc.

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

64240]. The matter was heard following the monthly status conference on February 26, 2013. At that time, the Court entered an order dismissing the claims, but giving the Manninos two weeks to protest the dismissal and request that it be vacated [Rec. Doc. 64277]. By letter dated March 5, 2013, the Manninos opposed the dismissal and asked to move forward. By Order entered March 27, 2013, the Court granted plaintiffs' request, withdrew its prior Order, and ordered that plaintiffs' depositions be rescheduled within 30 days [Rec. Doc. 64323]. The depositions have been rescheduled for April 22, 2013.

On February 19, 2013, *pro se* plaintiff Dennis Harrison filed a Motion to Compel Defendant Merck to Provide Initial Disclosure to Plaintiff [Rec. Doc. 64257]. Merck filed its opposition on February 22, 2013 [Rec. Doc. 64259]. The matter was heard on February 28, 2013 and the Court took plaintiff's motion under submission [Rec. Doc. 64293]. The Court also instructed plaintiff to send to Merck specific interrogatories and request for documents, and to await a response from Merck. *Id.* Plaintiff served the discovery on Merck on March 28, 2013. Pursuant to PTO 17, Merck's responses are due May 13, 2013. Plaintiff has advised the Court that he intends to file a motion to compel responses to that discovery and also to extend the scheduling order. Mr. Harrison has been in communication with Plaintiffs' Liaison Counsel who has cooperated and provided access to materials requested by Mr. Harrison.

The number of pending personal injury claims continues to decrease.. Liaison and Lead counsel for Certain Cases will be prepared to discuss these issues further at the status conference on April 23, 2013.

**B. Matters Noticed for Submission on April 23, 2013**

None.

**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 April 23, 2013.

On March 20, 2013, Merck filed a Motion for Appointment of Janis L. Ferguson *Nunc Pro Tunc* Pursuant to Rule 28(a)(1)(B) [Rec. Doc. 64310]. The motion was originally submitted as an *ex parte* motion. When Merck's counsel learned that the motion was opposed by plaintiff, Merck notified the Court and requested that it be noticed for submission following the April 23, 2013 status conference. Plaintiff's counsel advised the Court that it would request a different hearing date and notify all counsel, but to date no action has been taken. Accordingly, Merck will request at the April 23 status conference that the Court schedule a submission date within the next 10 days.

The parties will be prepared to discuss these matters further at the status conference on April 23, 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. Briefing has been completed.

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].

The parties will be prepared to discuss these matters further at the status conference on April 23, 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,

/s/ Leonard A. Davis

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**Liaison and Lead Counsel for Ineligible or  
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Remaining PI Claims**

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**Defendants' Liaison Counsel**

**CERTIFICATE**

I hereby certify that the above and foregoing Joint Status Report No. 76 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 18th day of April, 2013.

*/s/ Dorothy H. Wimberly* \_\_\_\_\_

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

**In re: VIOXX** \* **MDL Docket No. 1657**  
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**PRODUCTS LIABILITY LITIGATION** \* **SECTION L**  
\*  
\* **JUDGE FALLON**  
**This document relates to All Cases** \*  
\* **MAGISTRATE JUDGE KNOWLES**  
\* \* \* \* \*

**MONTHLY STATUS CONFERENCE  
APRIL 23, 2013  
SUGGESTED AGENDA**

- I. Class Actions
- II. Government Actions
- III. Third Party Payor
- IV. Pending Personal Injury Cases Subject to PTOs 28, 29 and 43
- V. Other Pending Motions/Matters
- VI. Appeals
- VII. Next Status Conference