

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: VIOXX®

PRODUCTS LIABILITY LITIGATION

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MDL Docket No. 1657

SECTION L

JUDGE FALLON

MAG. JUDGE KNOWLES

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**PLAINTIFFS' LIAISON COUNSEL'S MOTION FOR PARTIAL AWARD OF
COMMON BENEFIT REIMBURSEMENT OF EXPENSES**

Ann B. Oldfather, Plaintiffs' Lead Counsel and Liaison Counsel for the PSC for Ineligible and Not Enrolled Claims, hereby moves the Court for partial reimbursement of common benefit expenses incurred for the retention of services of certain expert witnesses. A Memorandum in Support of this Motion and accompanying Order is filed herewith.

NOTICE OF SUBMISSION

Please take notice that the undersigned's Motion for Partial Award of Common Benefit Reimbursement of Expenses will be brought for hearing on December 4, 2013, at 9:00 a.m., before the Honorable Eldon E. Fallon, Judge, United States District Court, Eastern District of Louisiana, 500 Poydras Street, New Orleans, Louisiana.

Respectfully submitted,

/s/ Ann B. Oldfather

Ann B. Oldfather
KBA Bar #52553
Liaison Counsel/Lead Counsel
OLDFATHER LAW FIRM
1330 S. Third Street
Louisville, KY 40208
502.637.7200
502.637.3999 (fax)
aoldfather@oldfather.com
Counsel for Certain Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Plaintiffs' Liaison Counsel's Motion for Partial Award of Reimbursement of Common Benefit Expenses has been served upon Liaison Counsel, Phillip Wittmann and Russ Herman, by U.S. Mail, and upon all parties by electronically uploading the same to LexisNexis File & Serve Advanced in accordance with Pre-Trial Order No. 8(C), 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 14th day of November, 2013.

/s/ Ann B. Oldfather

Ann B. Oldfather

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: VIOXX®

PRODUCTS LIABILITY LITIGATION

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MDL Docket No. 1657

SECTION L

JUDGE FALLON

MAG. JUDGE KNOWLES

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**PLAINTIFFS' LIAISON COUNSEL'S MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL AWARD OF COMMON BENEFIT
REIMBURSEMENT OF EXPENSES**

This memorandum is being submitted on behalf of Ann B. Oldfather and the Oldfather Law Firm, Plaintiffs' Lead Counsel and Liaison Counsel for the PSC for Ineligible and Not Enrolled Claims ("PSC II"), in support of her Motion for Partial Award of Plaintiffs' Common Benefit Reimbursement of Expenses.

On July 13, 2009, the Court issued PTO 45, appointing the undersigned to the Plaintiffs' Steering Committee for the Ineligible or Not Enrolled Claims [Rec. Doc. 20888]. Since that time, the undersigned has provided liaison and lead counsel duties for these cases.¹

PTO 6 (and later PTO 42) charges a PSC with myriad responsibilities: to initiate, coordinate, and conduct all pretrial discovery on behalf of all plaintiffs in all actions; to conduct all discovery in a coordinated and consolidated manner on behalf and for the benefit of all plaintiffs; to initiate proposals, schedules or other pretrial proceedings; to submit and argue motions before this Court; to explore, develop, and pursue all

¹ Although PTO 45 appointed Shawn Foster, Grant Davis, and Thomas Pruess to this PSC, those members have since resigned. *See* the Court's Order dated October 11, 2012, granting relief from responsibilities under PTO 45 and 45A [Rec. Doc. 64144].

settlement options pertaining to any claim or portion thereof of any case filed in this litigation; to maintain a document depository; and other duties. *See* PTO 6 and PTO 42.

Pursuant to her appointment under PTO 45 and in her role as liaison and lead counsel for PSC II, the undersigned has expended considerable time and expense in furtherance of her Court appointed responsibilities, including initiating, coordinating, and conducting pretrial discovery on behalf of the VTE plaintiffs in the MDL; working with counsel to establish a scheduling order for all remaining cases in this MDL; developing expert proof, procuring experts, submitting expert reports, attending expert depositions on the general causation issues for the VTE plaintiffs; attending status conferences and hearings; submitting and arguing motions before this Court; submitting monthly update reports to all remaining plaintiffs; and performing others duties as authorized by this Court. Expenditures in pursuit of these responsibilities are in line with the duties of liaison counsel as outlined in PTO 6.

PTO 19 established a Plaintiffs' Litigation Expense Fund to compensate and reimburse attorneys for services performed and for expenses incurred for the MDL administration and common benefit. PTO 19 was entered to "provide for the fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for the MDL administration and common benefit of all plaintiffs," and provides that by Court order, "payments may be made from the fund to attorneys who provide services or incur expenses for the joint and common benefit of plaintiffs in addition to their own client or clients." PTO 19 at 2, 5. The agreements signed and returned by participating attorneys stipulated that funds deposited into the Expense Fund "shall be available for distribution to attorneys who have performed

professional services or incurred expenses for the benefit of the plaintiffs in MDL 1657 and the coordinated state court litigation pursuant to written authorization from the Liaison counsel of the PSC.” *See* PTO 19, Full Participation Option and Traditional Assessment Option.

On September 23, 2009, the Court issued PTO 51 with respect to disbursement of costs which established a 1% holdback on all claimants for reimbursement of common benefit expenses. That Order addressed reimbursement of common benefit expenses relating to the personal injury aspect of the litigation. Since that time, a number of additional expenses have been incurred. Numerous counsel that participated in this litigation have previously been reimbursed for their expenses for similar work. *See* PTO 51(A). The undersigned has continued the cause for many claimants who did not have the benefit of having their matters resolved earlier in the litigation. Pursuant to PTO 45, the undersigned has continued to advocate for these claimants and a number of cases have been resolved by attorneys other than the undersigned.

Pursuant to the Court’s directives, the undersigned has submitted all expenses to date to Philip Garrett, CPA. These expenses have been reviewed and vetted by Philip Garrett, CPA. Some of the expenses incurred in connection with the retention and services of certain experts totaling \$257,204.90 have received final approval by Mr. Garrett. Mr. Garrett’s affidavit regarding this matter is attached to this Motion as TAB 1.² Another motion for reimbursement will follow once Mr. Garrett approves the remaining

² As a result of the Court’s monthly meetings with Mr. Garrett, the Court may already be aware of the specific charges that comprise the total for which reimbursement is sought by this motion. In the event further detail of the expenses comprising the total is required, counsel requests that the same be submitted under seal due to the on-going litigation with Merck.

expenses incurred by the undersigned in furtherance of her liaison and lead counsel duties.

CONCLUSION

For the reasons set forth herein, Liaison Counsel respectfully submits that this Motion for Partial Award of Reimbursement of Common Benefit Expenses should be granted.

Respectfully submitted,

/s/ Ann B. Oldfather

Ann B. Oldfather
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Counsel for Certain Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Partial Award of Reimbursement of Common Benefit Expenses has been served upon Liaison Counsel, Phillip Wittmann and Russ Herman, by U.S. Mail, and upon all parties by electronically uploading the same to LexisNexis File & Serve Advanced in accordance with Pre-Trial Order No. 8(C), 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 14th day of November, 2013.

/s/ Ann B. Oldfather

Ann B. Oldfather

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

In re: **VIOXX®**

PRODUCTS LIABILITY LITIGATION

**** MDL Docket No. 1657**

**** SECTION L**

**** JUDGE FALLON**

**** MAG. JUDGE KNOWLES**

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AFFIDAVIT OF PHILIP A. GARRETT, C.P.A.

STATE OF LOUISIANA :
: SS
PARISH OF ORLEANS :

Philip A. Garrett, being duly sworn according to law, deposes and says:

1. I am a certified public accountant. For over 35 years I was associated with the public accounting firm of Wegmann Dazet & Company (WDC) and I am now associated with the firm of Philip A. Garrett, CPA.

2. Pretrial Order No. 6 required that members of the Plaintiffs' Steering Committee (PSC) in MDL 1657, and other attorneys working at their direction, report their time and expenses on a monthly periodic basis in accordance with the requirements of that order.

3. Pretrial Order No. 6 approved my retention and the retention of WDC to assist and provide accounting services to the Plaintiffs' Liaison Counsel, the PSC and the Court in MDL No. 1657, as follows:

Plaintiffs' Liaison Counsel has retained and the Court approves the retention of Philip Garrett, CPA, of the accounting firm of Wegmann-Dazet to assist and provide services to Plaintiffs' Liaison Counsel, the Plaintiffs' Steering Committee, and the Court in the MDL 1657. Wegmann-Dazet will be assisting in compiling submissions and will

provide reports to Plaintiffs' Liaison Counsel who shall file them with the Court on a monthly basis. These reports will include both time and expenses and will summarize, with back-up details, the submissions of all firms. Submission of time and expense records to Wegmann-Dzetz and the Court shall be considered as if filed under seal.

4. In connection with this assignment WDC, under my supervision, reviewed the expense records of those counsel in MDL 1657 who submitted such records for costs for "common benefit" in the Vioxx Litigation.

5. I have recently been asked to include the expenses and time submissions of the second PSC, the PSC for In-Eligible and Non-Eligible Claimants and its Liaison Counsel ("PSC II").

6. I have reviewed the financial records submitted by PSC II in connection with my work as the Court-appointed "accountant." This primarily involved a review of the expense submissions and reports to determine whether they complied with the dictates of PTO No. 6. I have kept the Court advised of my ongoing activities.

7. Any items of time and expense that were disallowed are or will be reported to the Court in the regular monthly reports provided by WDC. Under PTO Nos. 6 and 6C, my determination as to whether to disallow any item of time and expense from inclusion in allowed time or expenses was a matter of procedural convenience for the Court and not a determination on the merits. Both orders made it clear that a disallowance by me was without prejudice to determination by the Court of the merits of any submission at a time and manner determined by the Court.

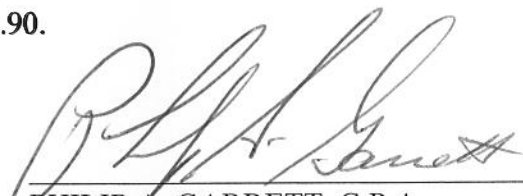
8. The protocol which I observed in reviewing the time and expense submissions of PSC III consisted of three segments.

- a. Initially, we reviewed each submission to determine if it complied with the form requirements of PTO No. 6. Among other things, this

examination focused on whether the Fee Applicant reported time according to the guidelines of PTO No. 6, whether appropriate time records were included with the submission, whether the positions (e.g., partner, associate, paraprofessional or investigator) of each timekeeper were disclosed, whether the reported time was properly categorized in accordance with the requirements of PTO No. 6, and whether the Fee Applicant attached records documenting its claimed expenses. If we discovered deficiencies in compliance with the procedural requirements of PTO No. 6, they were brought to the attention of the common benefit counsel by means of a notification through the Case Cost Management System (CCMS).

- b. Once we received a time or expense records that was in proper form we examined the submission substantively to determine if there were circumstances present which would require us to disallow items of time and expense from inclusion under the terms of PTO No. 6. If we determined that there were such items, we notified the common benefit counsel through the CCMS of our conclusions. We clearly advised the applicant of each type of item contained in the submission which was disallowed. Typically, we provided illustrations of each item from the counsel's time and expense records. We ultimately approve or reject the counsel's submission of time and expense.
- c. Throughout the outlined process, we check the arithmetic accuracy of the summaries of time and expense submitted by each counsel based on the underlying details records that were supplied to us. This procedure was limited to items of time and expense.

9. WDC, under my supervision, has reviewed and approved the expense submissions by Oldfather Law Firm in connection with the retention and services of certain expert witnesses, totaling \$257,204.90.



PHILIP A. GARRETT, C.P.A.

Sworn & Subscribed
Before me this 7th
Day of November, 2013.



NOTARY PUBLIC
Attested to Signature only



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

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PRODUCTS LIABILITY LITIGATION

* **MDL Docket No. 1657**
*
* **SECTION L**
*
* **JUDGE FALLON**
*
* **MAG. JUDGE KNOWLES**

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ORDER

The Court has before it a Motion for Partial Award of Plaintiff's Common Benefit Reimbursement of Expenses.

IT IS ORDERED BY THE COURT that the sum of \$257,204.90 is hereby awarded to Ann B. Oldfather, Oldfather Law Firm, for expenses incurred for retention and services of certain expert witnesses, to be paid from the Common Benefit Expense Fund.

This Order is without prejudice to such other expenses as may be submitted hereafter.

New Orleans, Louisiana, this ____ day of _____, 2013.

Eldon E. Fallon
United States District Judge