ORIGINATING NOTICE (ACTION)
2004

S.H. No. 236098

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

**HUGH F. CARD**

PLAINTIFFS

- AND -

**MERCK FROSST CANADA LTD., MERCK FROSST CANADA & CO. and MERCK & CO. INC.**

DEFENDANTS



TO THE DEFENDANTS:

**TAKE NOTICE** that this proceeding has been brought by the Plaintiff against you, the Defendants, in respect of the claim set out in the Statement of Claim annexed to this notice.

**AND TAKE NOTICE** that the Plaintiff may enter judgment against you on the claim, without further notice to you, unless within TWENTY days after the service of this Originating Notice upon you, excluding the day of service, you or your solicitor cause your Defence to be delivered by mail or personal delivery to,

(a) the office of the Prothonotary at 1815 Upper Water Street in Halifax, Nova Scotia, and

(b) to the address given below for service of documents on the Plaintiff:

provided that if the claim is for a debt or other liquidated demand and you pay the amount claimed in the Statement of Claim and the sum of $ (or such sum as may be allowed on taxation) for costs to the plaintiff or her solicitor within six days from the service of this notice on you, then this proceeding will be stayed.

**ISSUED** the 26 day of November, A.D., 2004.

Raymond F. Wagner
Solicitor for the Plaintiff
whose address for service
is 1869 Upper Water Street
Halifax NS B3J 1S9
Telephone: (902) 425-7330
Telefax: (902) 422-1233

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**Proposed Common Law Class Proceeding**

# STATEMENT OF CLAIM

## THE PARTIES

1. The Plaintiff, Hugh F. Card**,** is retired and resides in Digby, in the Province of Nova Scotia.

2. The Defendant, **MERCK FROSST CANADA & CO.** ("Merck & Co.") is a corporation duly incorporated pursuant to the laws of Nova Scotia with its registered office located in Halifax, Nova Scotia and a principal place of business in Mississauga, Ontario. At all times Merck & Co. was involved in and/or responsible for the research, development and manufacturing of VIOXX. At all material times, Merck & Co. was an affiliate of **MERCK & CO. INC.**

3. The Defendant, **MERCK FROSST CANADA LTD.** (“Merck Ltd.”), is a federal corporation duly incorporated pursuant to the laws of Canada with its registered office located in Kirkland, Quebec. Merck Ltd. At all material times Merck Ltd. was involved in and/or responsible for, the sales, distribution and marketing of VIOXX in Nova Scotia, Canada. At all material times, Merck Ltd. was an affiliate of Merck & Co. Inc.

4. The Defendant, **MERCK & CO. INC.** (hereinafter referred to as "Merck USA"), is a U.S. company with its headquarters in Whitehouse Station, New Jersey. At all materials times, Merck USA was involved in and/or responsible for the research, development, manufacturing, sales, distribution and/or marketing of VIOXX in Canada. At all material times, Merck USA manufactured, marketed, sold and/or distributed VIOXX in Canada directly or indirectly through an agent, affiliate or subsidiary.

5. The business of each of Merck Ltd., Merck & Co., and Merck USA is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of VIOXX in Canada.

6. At all material times, the Defendants, all or any one of them, were carrying on business as, inter alia, the manufacturers and distributors of VIOXX in Canada.

**7.** The Plaintiff seeks to certify this action as a class proceeding on behalf of a class of people in Nova Scotia who were prescribed VIOXX, and pleads the Supreme Court of Canada's decision in Western Canadian Shopping Centers Inc. v. Dutton, [2001] 2 S.C.R. 534, and Rule 5.09 of Nova Scotia's Civil Procedure Rules, as providing the basis for such certification. The proposed class will be further defined in the application for certification. The Plaintiff states that there is an identifiable class that would be fairly and adequately represented by the Plaintiff; that the Plaintiff’s claims raise common issues; and a class proceeding would be the preferable procedure for the resolution of such common issues.

## THE DRUG

8. VIOXX is a nonsteroidal, anti-inflammatory drug, specifically a COX-2 inhibitor, which is prescribed to relieve pain and swelling. It is typically used to treat arthritis, acute pain, acute migraine headaches, and menstrual pain and discomfort.

9. VIOXX was first approved for marketing and sale in Canada in or about October, 1999. The Defendants immediately and heavily promoted VIOXX as a better option than other arthritis drugs on the premise that it was easier on the stomach.

10. Since its introduction into the Canadian market, sales of VIOXX in Canada have been strong. In 2002, VIOXX was the 10th most prescribed drug in Canada with more than 3 million VIOXX prescriptions written in Canada that year. In 2003, total sales of VIOXX in Canada were valued at $200 million, over $2.5 billion worldwide.

## THE RISKS

11. VIOXX has been associated with an increased risk of serious, adverse cardiovascular complications, including but not limited to, heart attack, stroke, angina pectoris, atrial fibrillation, bradycardia, hematoma, irregular heartbeat, palpitation, premature ventricular contraction, tachycardia, venous insufficiency, cerebrovascular accident, congestive heart failure, deep venous thrombosis, pulmonary embolism, transient ischemic attack, and unstable angina.

12. The Defendants knew or ought to have known at least as early as 2000 that there was a significant risk of serious adverse cardiovascular complications from ingesting VIOXX. The Defendants failed to apprise the Plaintiff or his physicians of that risk.

13. Neither the patient information pamphlet or the prescribing information provided to physicians and pharmacists in Canada, warned of the serious adverse cardiovascular risks associated with ingesting VIOXX. Unlike the information provided to Canadian consumers, the patient information pamphlet available to consumers in the U.S. contained, *inter alia,* the following warning:

**What are the possible side effects of VIOXX?**

* Heart attacks and other serious cardiovascular events, such as blood clots in your body have been reported in patients taking VIOXX.

## THE EVENT

14. The Plaintiff was prescribed VIOXX by his physician in June 2000 for arthritis in his hip. The Plaintiff began taking VIOXX on or about June 29, 2000 and continued taking Vioxx until about July 2001.

15. The Plaintiff used VIOXX in accordance with the package label and consumer information pamphlet, and in the manner that it was intended to be used.

16. In the time period before and during the Plaintiff's ingestion of VIOXX he received no warnings about the risk of adverse cardiovascular complications.

17. Prior to taking VIOXX, the Plaintiff was a healthy person who had never experienced hospitalization or major surgery in his lifetime. After taking VIOXX for eleven months it was determined that the Plaintiff required cardiac surgery. In May 2001 the Plaintiff underwent triple coronary bypass surgery. The Plaintiff continues to experience severe angina, severe chest pain, panic attacks, sleep disturbance, depression and mood swings.

18. In or about July 2001 the Plaintiff received a warning from his pharmacist about adverse reactions to VIOXX. After receiving this warning the Plaintiff stopped taking VIOXX.

19. Had the Plaintiff been aware of the serious adverse cardiovascular complications he might experience from ingesting VIOXX, he would not have taken the drug.

## CAUSE OF ACTION

20. The Defendants at all material times owed a duty of care to the Plaintiff to:

(a) ensure that VIOXX was fit for its intended or reasonably foreseeable use;

(b) conduct appropriate testing to determine whether and to what extent ingestion of VIOXX posed serious health risks, including the risk of serious adverse cardiovascular complications; and

(c) warn the Plaintiff and his physicians that ingestion of VIOXX carries the risk of serious adverse cardiovascular complications.

21. The Defendants negligently breached their duty of care.

22. The Plaintiff states that his damages were caused by the negligence of the Defendants. Such negligence includes but is not limited to the following:

(a.) the Defendants failed to ensure that VIOXX was not dangerous to recipients during the course of its use and that the drug was fit for its intended or reasonably foreseeable use;

(b.) the Defendants failed to adequately test VIOXX in a manner that would fully disclose the magnitude of the risks associated with its use, including but not limited to the risk of serious adverse cardiovascular complications;

(c.) the Defendants failed to give Health Canada complete and accurate information;

(d.) the Defendants failed to conduct any or any adequate follow-up studies on the efficacy and safety of VIOXX;

(e.) the Defendants failed to provide the Plaintiff and his physicians with any adequate warning of the risks associated with ingesting VIOXX, including but not limited to the risk of serious adverse cardiovascular complications;

(f.) the Defendants failed to provide the Plaintiff and his physicians with any or any adequate information and warnings respecting the correct usage of VIOXX;

(g.) the Defendants failed to provide any or any adequate updated and current information to the Plaintiff and his physicians respecting the risks and efficacy of VIOXX as it came available from time to time;

(h.) the Defendants failed to provide warnings of the potential hazards of ingesting VIOXX on package labels;

(i.) The Defendants failed to provide warnings of the risks associated with VIOXX, including the risk of serious adverse cardiovascular complications, on the customer information pamphlets in Canada despite the inclusion of such warnings in the customer information pamphlets available to U.S. consumers;

(j.) the Defendants failed to warn the Plaintiff and his physicians about the need for comprehensive regular medical monitoring to ensure early discovery of potentially fatal adverse cardiovascular complications from the use of VIOXX;

(k.) the Defendants, after noticing problems with VIOXX as early as 2000, failed to issue adequate warnings, timely recall the drug, publicize the problem and otherwise act properly and in a timely manner to alert the public, including warning the Plaintiff and his physicians of the drug's inherent dangers, including but not limited to the danger of serious adverse cardiovascular complications;

(l.) the Defendants failed to establish any adequate procedures to educate their sales representatives and prescribing physicians respecting the correct usage of VIOXX and the risks associated with the drug;

(m.) the Defendants represented that VIOXX was safe and fit for its intended purpose and of merchantable quality when they knew or ought to have known that these representations were false;

(n.) the Defendants misrepresented the state of research, opinion and medical literature pertaining to the purported benefits of VIOXX and its associated risks, including the risk of serious adverse cardiovascular complications;

(o.) the misrepresentations made by the Defendants were unreasonable in the face of the risks that were known or ought to have been known to the Defendants;

(p.) the Defendants failed to timely cease the manufacture and/or distribution of VIOXX when they knew or ought to have known that this drug caused or could cause serious adverse cardiovascular complications;

(q.) the Defendants actively encouraged and/or affirmatively failed to take effective steps to discourage aggressive dispensation of VIOXX;

(r.) the Defendants breached other duties of care to the Plaintiff and the class of Plaintiffs, details of which breaches are known only to the Defendants.

23. The risks associated with the ingestion of VIOXX, including the risk of serious adverse cardiovascular complications, were in the exclusive knowledge and control of the Defendants. The extent of the risks was not known and could not have been known to the Plaintiff. The likelihood that the Plaintiff has or will sustain an adverse cardiovascular complication would not have occurred but for the negligence of the Defendants in failing to ensure that VIOXX was safe for use or, in the alternative, for failing to

provide an adequate warning of the risks associated with VIOXX to the Plaintiff and to the Plaintiff's physicians.

24. The Plaintiff states that the Defendants are responsible, jointly and severally for the injuries and damages suffered by the Plaintiff and other class members.

25. The Plaintiff pleads the doctrine of *respondeat superior* and states that the Defendants are vicariously liable to the Plaintiff and other class members for the acts, omissions, deeds, misdeeds and liabilities of their contractors, sub-contractors, agents servants, employees, assigns, appointees and partners.

## BUSINESS PRACTICES AND CONSUMER PROTECTION ACT

26. In its sales brochures, advertisements and other forms of representations to the public, the Defendants made statements that had the capability, tendency or effect of deceiving or misleading consumers which constituted deceptive and unconscionable acts and the Plaintiff pleads and relies upon the provisions of the Nova Scotia *Consumer Protection Act,* R.S., c. 92.

## DAMAGES

27. The Plaintiff's and other class members' injuries and damages were caused by the negligence of the Defendants, their servants and agents.

28. As a result of the conduct of the Defendants as hereinbefore set out, the Plaintiff and other proposed class members have been placed in a position where they have sustained or will sustain serious personal injuries and pain including but not limited to adverse cardiovascular complications.

29. As a result of the conduct of the Defendants, the Plaintiff and other class members suffered and continue to suffer expenses and special damages of a nature and an amount to be particularized prior to trial.

30. Some of the expenses related to the medical treatment that the Plaintiff and class members have undergone, and will continue to undergo have been borne by provincial health insurers including the Nova Scotia Medical Services Insurance Plan. As a result of the negligence of the Defendants, the provincial health insurers have suffered and will continue to suffer damages.

## AGGRAVATED, PUNITIVE AND EXEMPLARY DAMAGES

31. The conduct of the Defendants as hereinbefore set out showed reckless disregard for the well being of the public, the Plaintiff and members of the potential class. The Defendants' negligence was callous and arrogant and offends the ordinary community standards of moral and decent conduct. The actions, omissions, or both, of the Defendants involved such want of care as could only have resulted from actual conscious indifference to the rights, safety or welfare of the Plaintiff and all other members of the proposed class.

32. Consequently, the Plaintiff and proposed class members are entitled to aggravated damages and an award of punitive and exemplary damages commensurate with the defendant's outrageous behaviour.

**WHEREFORE** the Plaintiff claims on his own behalf and on behalf of members of the proposed class as follows:

(a) General damages;

(b) Aggravated damages;

(c) Punitive and exemplary damages;

(d) Special damages;

(e) Costs;

(f) Interest pursuant to the *Judicature Act*;

(g) Nova Scotia Department of Health subrogated health care costs; and

(h) Such further and other relief as this Honourable Court deems just.

**PLACE OF TRIAL: HALIFAX, NOVA SCOTIA**

**DATED** at Halifax, in the County of Halifax, Province of Nova Scotia, this day of November, 2004.

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RAYMOND F. WAGNER

Solicitor for the Plaintiff
Whose address for service is

1869 Upper Water Street

HALIFAX, NOVA SCOTIA

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