

1 NORMAN J. BLEARS (Bar No. 95600)  
2 MICHAEL L. CHARLSON (Bar No. 122125)  
3 HOGAN LOVELLS US LLP  
4 525 University Avenue, 4th Floor  
5 Palo Alto, California 94301  
Telephone: (650) 463-4000  
Facsimile: (650) 463-4199  
norman.blears@hoganlovells.com  
michael.charlson@hoganlovells.com

6 BENJAMIN T. DIGGS (Bar No. 245904)  
7 HOGAN LOVELLS US LLP  
8 Four Embarcadero Center, 22<sup>nd</sup> Floor  
9 San Francisco, California 94111  
Telephone: (415) 374-2300  
Facsimile: (415) 374-2499  
benjamin.diggs@hoganlovells.com

10 Attorneys for Nominal Defendant  
VIVUS, INC. and for Defendants  
11 MARK B. LOGAN; LELAND F. WILSON;  
LINDA M. DAIRIKI SHORTLIFFE, M.D.;  
12 PETER Y. TAM, and CHARLES J. CASAMENTO

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

**ELEANOR TURBERG, Derivatively on  
Behalf of Nominal Defendant VIVUS,  
INC..**

Case No. 4:10-cv-05271 PJH

**STIPULATION AND [PROPOSED]  
ORDER TO CONTINUE CASE  
SCHEDULE**

Plaintiff,

V.

MARK B. LOGAN, LELAND F.  
WILSON, LINDA M. DAIRIKI  
SHORTLIFFE, M.D., PETER Y. TAM,  
and CHARLES J. CASAMENTO

Judge: Honorable Phyllis J. Hamilton  
Courtroom: 3, 3<sup>rd</sup> Floor  
Date Action Filed: November 19, 2010

## Defendants.

-and-

VIVUS, INC., a Delaware Corporation,  
Nominal Defendant.

1 Plaintiff Eleanor Turberg (“Plaintiff”) and Defendants Vivus, Inc., Leland F. Wilson,  
2 Mark B. Logan, Linda M. Dairiki Shortliffe, Peter Y. Tam, and Charles J. Casamento  
3 (collectively, the “Parties”), through their respective attorneys of record, hereby stipulate to and  
4 seek the Court’s approval of an order revising and continuing the case schedule:

5 **RECITALS**

6 WHEREAS, on November 19, 2010, Plaintiff filed her shareholder derivative action (the  
7 “Derivative Action”) purportedly on behalf of Nominal Defendant VIVUS, Inc. (“VIVUS” or the  
8 “Company”) in this Court, naming certain officers and directors of the Company as Defendants;

9 WHEREAS, also pending before this Court is a related case styled *Kovtun v. VIVUS, Inc.*,  
10 *et al.*, Case No. 4:10-cv-04957 PJH, a purported securities class action originally filed November  
11 2, 2010 against VIVUS and many of the same individuals named as defendants in the Derivative  
12 Action (the “Securities Action”);

13 WHEREAS, the Securities Action and the Derivative Action also concern substantially  
14 the same events;

15 WHEREAS, the Court on January 12, 2011 issued a Related Case Order, in which it  
16 found the Securities Action and the Derivative Action (together, the “Related Actions”) are  
17 related:

18 WHEREAS, the Court entered a stipulated order on February 7, 2011, that established a  
19 schedule for Plaintiff’s filing of an amended complaint in this Derivative Action, and deferring  
20 Defendants’ and Nominal Defendant’s response to the amended complaint and staying discovery  
21 until after the Court resolved a then-anticipated motion to dismiss the Securities Action;

22 WHEREAS, on June 3, 2011, Plaintiff filed her Verified Amended Shareholder  
23 Derivative Complaint (the “Amended Complaint”), which is the operative pleading in the  
24 Derivative Action;

25 WHEREAS, Defendants and Nominal Defendant in this Derivative Action believe they  
26 have legal challenges to Plaintiff’s standing to assert her purported derivative claims;

27 WHEREAS, defendants in the Securities Action filed a motion to dismiss the complaint in  
28 the Securities Action, which motion was heard by the Court on October 12, 2011;

WHEREAS, by order entered October 13, 2011, the Court granted defendants' motion to dismiss the complaint in the Securities Action with 28 days leave to amend;

WHEREAS, plaintiff in the Securities Action filed his Second Amended Complaint on November 9, 2011 (the “Second Amended Complaint”); and defendants in the Securities Action anticipate bringing a further motion to dismiss that Second Amended Complaint;

WHEREAS, the Parties have met and conferred and believe that the new allegations in the Second Amended Complaint in the Securities Action may well affect the allegations that Plaintiff wishes to put forward in this Derivative Action;

WHEREAS, the Parties believe that the interests of conserving judicial resources and maximizing the coordination and efficient resolution of the Related Actions will be served by continuing the schedule and extending the stay of proceedings in place by virtue of the Court's February 7, 2011 stipulated order until after the anticipated motions to dismiss the Second Amended Complaint in the Securities Action are resolved;

WHEREAS, three now-consolidated purported shareholder derivative actions concerning the same parties and substantially the same events are pending in the Superior Court of California, County of Santa Clara, in a consolidated proceeding styled *In re VIVUS, Inc. Derivative Litigation*, Master File No. 110 CV 188439, with the initial case filed November 24, 2010 (the “State Derivative Action”); and

WHEREAS, the parties to the State Derivative Action have agreed upon a stipulation continuing the schedule in the State Derivative Action in a manner consistent with the schedule provided for in this Stipulation and [Proposed] Order:

## **STIPULATION**

IT IS HEREBY STIPULATED AND AGREED, by and between undersigned counsel,  
subject to approval of this Court, that:

1. Defendants and Nominal Defendant shall not be required to answer, move or otherwise respond to the Amended Complaint;
2. Plaintiff shall have 45 days after the entry of an Order by this Court ruling

1 on defendants' anticipated motion to dismiss plaintiff's Second Amended Complaint in the  
2 Securities Action to either file and serve a first amended complaint (the "First Amended  
3 Complaint") or to inform Defendants and Nominal Defendant in writing that she is not going to  
4 do so;

5       3. Following either the filing of a First Amended Complaint, or Plaintiffs' written  
6 notice that no such First Amended Complaint will be filed, Defendants and/or Nominal  
7 Defendant shall have 60 days to answer, move, or otherwise respond to the First Amended  
8 Complaint (or the Amended Complaint in the event that a First Amended Complaint is not filed)  
9 in the Derivative Action. In the event that Defendants and/or Nominal Defendant files and serves  
10 any motions with respect to the First Amended Complaint, Plaintiff shall have 60 days to oppose  
11 such motions. Defendants and/or Nominal Defendants shall have 45 days to reply to any such  
12 oppositions. The hearing on any such motion will be set on the first available date on the Court's  
13 calendar two weeks or more after the deadline by which the reply must be filed and served.

14                   4. In the event Nominal Defendant files a motion challenging Plaintiff's standing to  
15 prosecute the Derivative Action, other defense motions (including without limitation motions  
16 under Fed. R. Civ. P. 12) directed to the First Amended Complaint (or the Amended Complaint in  
17 the event that a First Amended Complaint is not filed) may be deferred without prejudice until  
18 after the Court resolves any motion concerning Plaintiff's standing.

20 Dated: November 16, 2011

HOGAN LOVELLS US LLP

21

By: \_\_\_\_\_ /s/

---

Michael L. Charlson

23

HOGAN LOVELLS US LLP

24

25

26

27

HOGAN LOVELLS US LLP  
Norman J. Blears (Bar No. 95600)  
Michael L. Charlson (Bar No. 122125)  
525 University Avenue, 4th Floor  
Palo Alto, California 94301  
Telephone: (650) 463-4000  
Facsimile: (650) 463-4199  
[norman.blears@hoganlovells.com](mailto:norman.blears@hoganlovells.com)  
[michael.charlson@hoganlovells.com](mailto:michael.charlson@hoganlovells.com)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

-and-

HOGAN LOVELLS US LLP  
Benjamin T. Diggs (Bar No. 245904)  
4 Embarcadero Center, 22nd floor  
San Francisco, California 94111  
benjamin.diggs@hoganlovells.com

Attorneys for Nominal Defendant  
VIVUS, Inc. and for Defendants

Dated: November 16, 2011

FARUQI & FARUQI, LLP

By: /s/  
Vahn Alexander

FARUQI & FARUQI, LLP  
Vahn Alexander (Bar No. 167373)  
1901 Avenue of the Stars, 2nd Floor  
Los Angeles, CA 90067  
Telephone: (310) 461-1426  
Facsimile: (310) 461-1427  
valexander@faruqilaw.com

-and-

FARUQI & FARUQI, LLP  
Nadeem Faruqi  
Beth A. Keller  
369 Lexington Avenue, 10th floor  
nfaruqi@faruqilaw.com  
bkeller@faruqilaw.com

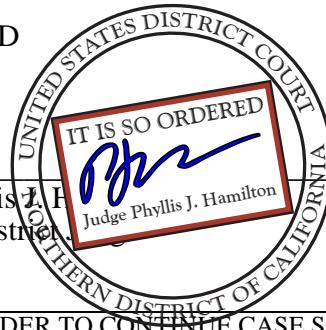
Attorneys for Plaintiff

**ORDER**

Pursuant to the above Stipulation, IT IS SO ORDERED

Dated: November 17, 2011

Honorable Phyllis J. Hamilton  
United States District Court



1           I, Michael L. Charlson, attest that Vahn Alexander has read and approved the  
2           STIPULATION AND [PROPOSED] ORDER TO CONTINUE CASE SCHEDULE and consents  
3           to its filing in this action.  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28