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E.D. Pennsylvania.

In re AVANDIA MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION.
This Document Applies to: All Actions.

MDL No. 1871. | No. 07–md–01871. | Oct. 19, 2012.

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PRETRIAL ORDER NO. 175 FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO THE AVANDIA FEE COMMITTEE'S PETITION FOR AN AWARD OF COMMON BENEFIT ATTORNEYS' FEES

CYNTHIA M. RUFE, District Judge.

***1** Upon consideration of the Avandia Fee Committee's Petition for an Award of Attorneys' Fees, supporting memorandum, and exhibits, and the evidence and testimony presented at the hearing of September 19, 2012, the Court hereby makes the following findings of fact and conclusions of law:

1. The settlements in this case resulted from the efforts of a core group of counsel ("Common Benefit Counsel"), whose work for the common benefit of all Avandia claimants included an extensive investigation of the facts, complete discovery, the retention of expert witnesses who provided in-depth analyses and reports, motion practice, and the preparation of cases for bellwether trials.

2. Pretrial Order No. 70 ("PTO 70") requires that 7% of each individual settlement be paid into a common benefit fund to be used for payment of court-approved attorneys' fees incurred for the common benefit of Avandia claimants and reimbursement of common expenses. *See* Doc. No. 495.

3. The collective amount of the individual settlements that have been or will be reached in this case has been conservatively estimated—based on an analysis of publicly available data, including published reports and press releases—to a reasonable degree of scientific certainty by Glenda Glover, Ph.D., J.D., C.P.A., in her confidential report dated June 7, 2012. The Court takes notice of Dr. Glover's report and adopts as reasonable her conclusions.

4. On behalf of Common Benefit Counsel, the Fee Committee seeks an award of 6.25% of the estimated value of the gross, aggregate settlements, as determined by Dr. Glover (an award of up to $143,750,000) to be paid from the PTO 70 fund. The Committee also asks that an additional $10,050,000 from the PTO 70 fund be awarded and held in reserve for payment of future administrative fees and expenses. This does not include expenses previously approved by the Court and paid from the PTO 70 fund.

5. The work that Common Benefit Counsel performed, and on which the Fee Committee's request is based, is described in great detail in the Memorandum in Support of the Avandia Fee Committee's Petition for an Award of Common Benefit Attorneys' Fees, which discussion is incorporated by reference herein. By way of summary, Common Benefit Counsel's

contributions to this litigation, which inured to the benefit of all Avandia claimants included, without limitation, the following:

a. analyzing and cataloging more than 30 million pages of documents;

b. taking or defending 220 depositions;

c. finding, retaining, and working with more than 20 expert witnesses, from numerous fields of discipline;

d. becoming educated on, and adept at addressing, complex medical and scientific issues;

e. researching and defending against motions on a variety of legal issues, including without limitation, privilege, *Daubert, Lone Pine,* statute of limitations and tolling, and numerous discovery disputes, involving scope, extent, method, and applicability;

***2** f. preparing for and participating in monthly Status Conferences before the Court;

g. preparing for and participating in more than 30 discovery hearings before the Special Master;

h. negotiating with GSK on issues leading to the Court's issuance of dozens of pretrial orders;

i. drafting and lodging written discovery requests;

j. preparing several bellwether cases for trial; and

k. negotiating settlement concepts that would provide a foundation for settlements across the litigation.

6. Having presided over this case since its transfer to this district by the Judicial Panel on Multidistrict Litigation, this Court is intimately familiar with the case and the work that has been performed for the common benefit of all Avandia claimants. *See Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (recognizing that district courts commonly have a more intimate understanding of the cases over which they preside than reviewing courts and are well-suited to assess pertinent factual matters).

7. Petitions for attorneys' fees most commonly arise in two types of cases: the common fund case and the statutory fee-shifting case. *See Sullivan v. DB Invs., Inc.,* 667 F.3d 273, 330 (3d Cir.2011). This case, while neither of those, is akin to a common fund case in that the efforts of a core group of counsel have conferred benefits on many.

8. In common fund cases, attorneys' fees typically are awarded as a percentage of the fund, and an abbreviated lodestar cross-check is used to assess the reasonableness of the proposed fee. *See In re Diet Drugs Prods. Liab. Litig.,* 553 F.Supp.2d 442, 466 (E.D.Pa.2008) (Bartle, J.) (citing *In re Prudential Ins. Co. of Am. Sales Practice Litig.,* 148 F.3d 283, 333 (3d Cir.1998); *In re Rite Aid Corp. Sec. Litig.,* 396 F.3d 294, 300 (3d Cir.2005); *In re AT & T Corp. Sec. Litig.,* 455 F.3d 160, 164 (3d Cir. 2006)).

9. The common fund doctrine rests upon the inherent equitable powers of the Federal Courts to "prevent ... inequity," and to spread fees proportionately among those who have benefited from the suit. *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980).

10. Fees are awarded from the fund to avoid "the unjust enrichment of those who otherwise would benefit from the fund without sharing in the expenses incurred by the successful litigant." *Flickering v. C.I. Planning Corp.,* 646 F.Supp. 622, 632 (E.D.Pa.1986) (Shapiro, J.) (citation and internal quotation omitted).

11. In determining how much to award in a common fund case, the Court of Appeals for the Third Circuit has historically instructed courts to consider the factors set forth in *Gunter u. Ridgewood Energy Corp.,* 223 F.3d 190 (3d Cir.2000), which include:

(1) the size of the fund created and the number of persons benefited; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time

devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

***3** *Id.* at 195 n. 1.

12. In addition, the Third Circuit has held that courts applying the percentage-of-the-fund analysis should consider, where pertinent, the factors set forth in *Prudential,* which include: (1) the value of benefits accruing to class members attributable to the efforts of class counsel, as opposed to the efforts of other groups, such as government agencies conducting investigations; (2) the percentage fee that would have been negotiated had the case been subject to a private contingent fee agreement at the time counsel was retained; and (3) any "innovative" terms of settlement. *See AT & T Corp.,* 455 F.3d at 165–66 (citing *Prudential,* 148 F.3d at 338–40).

13. If there are additional factors relevant under the particular circumstances of a case, those also should be considered. *See AT & T Corp.,* 455 F.3d at 166.

14. The standard to be applied when awarding common benefit attorneys' fees from assessments collected in accordance with a common benefit assessment order rather than from a traditional common fund, are not well-defined in this jurisdiction. After observing this point in *Diet Drugs,* the district court employed a "modified" *Gunter/Prudential* analysis, reasoning that several of the factors applicable in the traditional common fund context are similarly pertinent where fees for common benefit work are to be awarded from a fund created through litigation assessments. *Diet Drugs,* 553 F.Supp.2d at 492. Specifically, the district court's modified *Gunter / Prudential* analysis considered the following factors:

> the benefits conferred by the PMC, including the risks faced at the inception of the litigation and the skill of the attorneys involved; the size of the fund created; and assessments in similar cases.

Id.

15. On appeal, the Third Circuit affirmed the district court's fee opinion. *In re Diet Drugs Prod. Liab. Litig.,* 582 F.3d 524, 529 (3d Cir.2009). Without expressly endorsing the district court's use of the "modified" *Gunter / Prudential* analysis, the Third Circuit discussed the considerations utilized by the district court when applying that analysis, and then explained that the authority for awarding common benefit attorneys' fees may be drawn from either the "common benefit doctrine" (a derivative of the common fund doctrine, *see id.* at 546 n. 44) or the "docket management powers of the federal judiciary" and their corollary "power to fashion some way of compensating the attorneys who provide class-wide services." *Id.* at 546–47.

16. Ultimately, the Third Circuit held that the "label" placed on the analysis was of no real consequence—the important considerations being whether a "substantial benefit" was conferred upon the claimants and whether the assessments were spread proportionately among those to whom they applied. *Id.* at 547.

17. Regardless of which analysis is used to consider the Fee Committee's request for common benefit attorneys' fees in this case—the common benefit analysis used by the Third Circuit in *Diet Drugs,* the "managerial powers" doctrine discussed by the Third Circuit in *Diet Drugs,* the traditional *Gunter / Prudential* common fund analysis, or the modified version of the latter analysis used by the district court in *Diet Drugs*—each demonstrates the reasonableness of the Fee Committee's fee request in this case.

***4** 18. Specifically, considering all of these factors, the Court concludes as follows:

Common Benefit Doctrine

a. *Substantial Benefit.* Common Benefit Counsel conferred substantial benefits on every claimant in this litigation through the work described above and detailed in the discussion contained in the Memorandum in Support of the Avandia Fee Committee's Petition for an Award of Common Benefit Attorneys' Fees and as reflected in the evidence presented at the September 19, 2012 hearing. *See Diet Drugs,* 582 F.3d at 548 (finding counsel conferred a substantial common benefit on every claimant where they helped to administer the MDL by tracking individual cases, distributing court orders, and serving as a repository of information on litigation and settlements; obtained numerous favorable discovery and evidentiary rulings that applied across the litigation; enforced uniform procedures for document production, deposition testimony, and expert disclosures; and undertook efforts that resulted in the defendant's loss of bargaining power and brought about settlement).

Common Benefit Counsel's work was not duplicative of efforts by the federal government or any other groups investigating the safety of Avandia. Although the FDA independently conducted its own investigation, the FDA's actions did not secure the payment of damages by GSK to injured claimants. Rather, payment was secured by the independent efforts of Common Benefit Counsel, and only after a hard-fought battle with a well-represented opponent. *See AT & T Corp.,* 455 F.3d at 173 (where class counsel was not aided by the efforts of any governmental group, this strengthened the district court's conclusion that the fee award was fair and reasonable).

b. *Proportionality:* The proportionality issue discussed by the Third Circuit in *Diet Drugs, see* 582 F.3d at 546, is not a concern in this case, because every claimant with a Covered Case as defined in PTO 70 has had (or will have) the same percentage—7%—deducted from his or her settlement.

Managerial Powers Doctrine

c. As the Third Circuit observed in *Diet Drugs,* the managerial powers doctrine reduces itself to the same concerns (substantial benefit and proportionality) as the common benefit doctrine. *See id.* at 547. The managerial powers doctrine is thus satisfied here for the same reasons, discussed above, that the common benefit doctrine is satisfied.

The District Court's "Modified" Gunter/ Prudential Analysis in Diet Druss

d. *Benefits Conferred:* This factor has already been addressed above: the benefits conferred by Common Benefit Counsel have been substantial.

e. *Risks Faced:* The risks in this case were also substantial. Common Benefit Counsel built their case, at least initially, on one medical article; were challenged by a formidable opponent with vast resources and well-qualified counsel; faced the possibility that the United State Supreme Court's decision in *Wyeth v. Levine,* 555 U.S. 555, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009), could ultimately have foreclosed the case; and confronted a variety of other difficult legal issues, a number of which could have ended the case if decided in GSK's favor.

***5** f. *Skill of Counsel:* Common Benefit Counsel were skilled and efficient, as established by the results they achieved—aggregate settlements totaling a substantial amount; the difficulties they faced; the speed and efficiency through which recoveries were effected; the standing, experience and expertise of Common Benefit Counsel in handling pharmaceutical product liability cases, as well as multidistrict cases; the skill and professionalism with which Common Benefit Counsel prosecuted the case; and the performance and quality of opposing counsel. *See Meijer, Inc. v. 3M,* Civ. A. 04–5871, 2006 WL 2382718, at *21 (E.D.Pa. Aug.14, 2006) (Padova, J .) (citing *In re Ikon Office Solutions, Inc. Sec. Litig.,* 194 F.R.D. 166, 194 (E.D.Pa.2000) (Katz, J.) and discussing similar factors); *see also McDonough v. Toys "R" Us, Inc.,* 834 F.Supp.2d 329, 342 (E.D.Pa.2011) (Brody, J.) ("[T]he fact that plaintiffs' counsel obtained this settlement in the face of formidable legal opposition further evidences the quality of ... [counsel's] work."); *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.,* 263 F.R.D. 226, 244 (E.D.Pa.2009) (McLaughlin, J.) (where plaintiffs' counsel were highly skilled in litigating class actions against insurance companies, the defendants were represented by a leading law firm, and the case was vigorously litigated by both sides, this supported plaintiffs' counsel's fee request); *Bradburn Parent Teacher Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.),* 513 F.Supp.2d 322, 338 (E.D.Pa.2007) (Padova, J.) (where counsel were experienced in complex class litigation and obtained a significant settlement for the class, despite the complexity and challenges of the case, this supported their fee request); *In re Linerboard Antitrust Litig.,* MDL 1261, 2004 WL 1221350, at *5 (E.D.Pa. June 2, 2004) (DuBois, J.) ("The result achieved is the clearest reflection of petitioners' skill and expertise."); *In re Corel Corp. Inc. Sec. Litig.,* 293 F.Supp.2d 484, 496 (E.D.Pa.2003) (Brody, J.) (where counsel primarily practiced in the field of shareholder securities litigation, had considerable experience, and faced formidable legal opposition, this supported awarding the requested fees).

g. *Size of the Fund Created:* While this case does not involve a distinct "fund" that Common Benefit Counsel's efforts have created, *see Diet Drugs,* 553 F.Supp.2d at 493–94, it involves the practical equivalent: the aggregate number comprised of the individual settlements of all Avandia claimants. Just as in *Diet Drugs,* "individual litigants in the MDL have ... received considerable payments" in settlement of their claims, *see id.* at 493, and those payments would not have come about but for Common Benefit Counsel's work. The aggregate amount of the individual settlements is substantial. The claims of many thousands of individuals have been settled, and it is estimated that thousands of additional claimants stand to benefit once all the settlements have been finalized. Both the collective amount of the settlements and the total number of claimants who will

ultimately benefit are thus significant. Although Avandia cases are continuing to settle, and the aggregate amount of all settlements (past and future) is not presently known with exact certitude, the estimate prepared by Dr. Glover, as discussed above, is based on both sound reasoning and the established record of those settlements that have occurred thus far. Further, Dr. Glover's report has been provided to GSK and to all Common Benefit Counsel, and there have been no objections to Dr. Glover's conclusions. In other contexts, the Third Circuit has permitted district courts discretion to employ innovative methods of assessing and awarding attorneys' fees where uncertainties exist. *See Prudential,* 148 F.3d at 334.

***6** h. *Assessments in Similar Cases:* The 7% assessment in this case is substantially similar to assessments that have been made in other cases. As reflected in the chart below, assessments in recent years have ranged between 3% and 12%, and the 7% assessment here thus falls comfortably in the middle of this range.

In re Vioxx Prods. Liab. Litig., MDL 1657, 2012 U.S. Dist. LEXIS 58262 (E.D.La. Apr. 25, 2012); PTO 19 ¶ 2, (E.D.La. Aug. 8, 2005)	**8%** maximum assessment for plaintiffs registering under the terms of the master settlement agreement, which settled Vioxx personal injury claims. (Previously, PTO 19 called for a 3% to 6% assessment in Federal and State cases, depending on the date the case was filed or the date of the coordination agreement.)
In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on April 20, 2010, MDL 2179, 2011 WL 6817982 (E.D.La. Dec.28, 2011), amended 2012 WL 37373 (E.D.La. Jan.4, 2012), and *amended and superseded on reconsideration,* 2012 WL 161194 (E.D.La. Jan.18, 2012)	**6%** in MDL cases for private claimants and **4%** in MDL cases for State or local government claimants
In re DePuy Orthopaedics, Inc. ASR Hip Implant Prods. Liab. Litig., MDL 2197, CMO 13, II(B)(2) (N.D.Ohio, Nov. 28, 2011)	3% for common benefit attorneys' fees and 1% for costs for MDL cases and State Court cases using MDL work product (subject to an increase to 6%—with 5% being allocated for fees and 1% for expenses—for counsel entering the Participation Agreement after sixty (60) days of the entry of the Order or ninety (90) days of their first case being docketed in any jurisdiction, whichever is later)

In re Fosamax Prods. Liab. Litig., MDL 1789, CMO 17 ¶ 3(f)(3), (S.D.N.Y. Apr. 28, 2011)	**9%** assessment for non-MDL cases utilizing MDL common benefit work product or participating in a PSC-coordinated resolution and in which an Assessment Option agreement was not signed
In re Oral Sodium Phosphate Solution–Based Prods. Liab. Action, MDL 2066, Order Regarding Common Benefit Fees and Expenses, at 3 (N.D.Ohio, Aug. 2, 2010)	**4%** assessment for MDL cases
In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., MDL 2011, 2010 U.S. Dist. LEXIS 22361, 9–10 (S.D.Ill. Mar. 8, 2010)	**6% to 10%** assessments for MDL cases, depending on timing of participation
In re Genetically Modified Rice Litig., MDL 06–1811, 2010 WL 716190, at *6 (E.D.Mo. Feb.24, 2010)	**6% to 8%** fee assessments (plus an additional 3% for costs), depending on the plaintiff's claims, in Federal cases, as well as State cases in which the parties agreed to such assessments or the State Court having jurisdiction ordered them
In re Phenylpropanolamine Prods. Liab. Litig., MDL 1407, 2009 U.S. Dist. LEXIS 126729 (W.D.Wash. Sept. 18, 2009)	**4%** assessment for Federal MDL cases and **3%** assessment for State cases using common benefit work product
In re Bextra and Celebrex Marketing Sales Practices and Prods. Liab. Litig., MDL 1699, PTO No. 8A (Amended), at 4–5 (July 7, 2008)	**8% to 12%** assessments for MDL cases, depending on participation level
In re Diet Drugs Prods. Liab. Litig., 553 F.Supp.2d 442, 458, 491 (E.D.Pa.2008)	**6%** in Federal cases and **4%** in State cases

In re Latex Gloves Prods. Liab. Litig., MDL 1148, 2003 U.S. Dist. LEXIS 18118 (E.D.Pa. Sept. 5, 2003) (Ludwig, J.)	**3% to 5%** assessments, depending on the stage of the proceedings
In re St. Jude Med., Inc., MDL 1396, 2002 WL 1774232, at *2 (D.Minn. Aug.1, 2002)	**6%** assessment both for Federal and State cases
In re Baycol Prods. Litig., MDL 1431, 2002 WL 32155266, at *4 (D.Minn. June 14, 2002)	**6%** assessment for Federal cases and qualifying State cases
In re Protegen Sling and Vesica System Prods. Liab. Litig., MDL 1387, 2002 WL 31834446, at *1, 3 (D.Md. Apr.12, 2002)	**9%** assessment for Federal cases and **6%** assessment for State cases
In re Rezulin Prods. Liab. Litig., No. 00 CIV. 2843(LAK), 2002 WL 441342, at *1 (S.D.N.Y. March 20, 2002)	**6%** assessment for Federal cases and **4%** assessment for State cases
In re Propulsid Prods. Liab. Litig., MDL 1355, PTO 16, at 3–4 (E.D.La. Dec. 26, 2001)	**6%** assessment for Federal cases and **4%** assessment for State cases

The Remaining Gunter Factors

***7** i. *Complexity and Duration of the Litigation:* This case, which began in late 2007, is approaching its fifth year of litigation, and continues to be litigated. It thus compares in duration to, or exceeds in length, many other cases involving settlements in the super-mega-fund range. *See Diet Drugs,* 553 F.Supp.2d at 478 (citing *In re Visa Check/Mastermoney Antitrust Litig.,* 297 F.Supp.2d 503, 523–24 (E.D.N.Y.2003) (7 years); *In re NASDAQ Market–Makers Antitrust Litig.,* 187 F.R.D. 465, 489 (S.D.N.Y.1998) (4 years); *Shaw v. Toshiba Am. Info. Sys., Inc.,* 91 F.Supp.2d 942, 945 (E.D.Tex.2000) (approximately 1 year); *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.,* 268 F.Supp.2d 907, 915–18 (N.D.Ohio 2003) (2 years); *Deloach u. Philip Morris Cos.,* No. 1:00CV01235, 2003 WL 23094907, at *11 (M.D.N.C. Dec.19, 2003) (3 years); *In re WorldCom, Inc. Sec. Litig.,* 388 F.Supp.2d 319, 353–54 (S.D.N.Y.2005) (3 years); *In re AOL Time Warner, Inc. Sec. Litig.,* MDL 1500, 2006 WL 3057232, at *1, *18–19 (S.D.N.Y. Oct.25, 2006) (4 years)).

j. *Time Devoted by Common Benefit Counsel:* Between October 16, 2007, when this MDL was formed, and February 14, 2012, when the PSC was not renewed, Common Benefit Counsel and other members of their firms spent more than 134,000 hours preparing and litigating this case for the common benefit of all claimants. The time that Common Benefit Counsel devoted to this case supports the reasonableness of the requested attorneys' fees, as shown by a comparison with the hours

spent in other super-mega-fund cases in which requests for attorneys' fees have been approved. *See, e.g., NASDAQ,* 187 F.R.D. at 489–89 (awarding fees of 14% of $1.027 billion in a case in which counsel and paralegals spent 129,629 hours); *Sulzer,* 268 F.Supp.2d at 919 n. 19, 936 (awarding fees of 4.80% of $1.045 billion where more than 50,000 hours were spent litigating the case); *AOL Time Warner,* 2006 WL 3057232, at *l–2, 14 (awarding fees of 5.90% of $2.65 billion where 135,186 hours were spent by counsel); *In re Royal Ahold N.V. Sec. & ERISA Litig.,* 461 F.Supp.2d 383, 384–86 (D.Md.2006) (approving fee award of 12% of $1.1 billion where counsel devoted 147,896 hours to the case).

k. *Fee Awards in Similar Cases:* As reflected in the chart below, the fee award in this case of 6.25% of the estimated collective value of the settlements (or an award of up to $143,750,000), is squarely in line with awards that have been approved in the context of other super-mega-fund settlements. In fact, the requested percentage is lower than the percent awarded in multiple cases.

Case	**Fund Valued**	**Percent Award**	**Total Award**
Shaw v. Toshiba Am. Info. Sys., Inc., 91 F.Supp.2d 942 (E.D.Tex.2000)	$1 to $1.1 billion	15%	$147,500,000
In re Tyco Int'l, Ltd., 535 F.Supp.2d 249 (D.N.H. 2007)	$3.2 billion	14.50%	$464,000,000
In re NASDAQ Market–Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y.1998)	$1.027 billion	14%	$143,780,000
In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F.Supp. 2d 383 (D.Md.2006)	$1.1 billion	12%	$130,647,869
In re Diet Drugs Prods. Liab. Litig., 553 F.Supp.2d 442 (E.D.Pa.2008)	$6.44 billion	6.75%	$434,511,777
In re Vioxx Products Liab. Litig., 760 F.Supp.2d 640 (E.D.La.2010)	$4.85 billion	6.50%	$315,250,000

In re Visa Check/ Mastermoney Antitrust Litig., 297 F.Supp.2d 503 (E.D.N.Y.2003)	$3.383 billion	6.50%	$220,290,160
In re AOL Time Warner, Inc. Sec. & ERISA Litig, MDL 1500, 2006 WL 3057232 (S.D.N.Y. Oct.25, 2006)	$2.65 billion	5.90%	$156,350,000
In re WorldCom, Inc. Sec. Litig., 388 F.Supp.2d 319 (S.D.N.Y.2005)	$6.133 billion	5.50%	$336,100,000
In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig., 268 F.Supp.2d 907 (N.D.Ohio 2003)	$1.045 billion	4.80%	$50,000,000

***8** 1. *The Presence or Absence of Substantial Objections:* There have been no objections to the Fee Committee's request for common benefit attorneys' fees. This absence of objections weighs in favor of awarding the requested fees. *See In re Sterling Fin. Corp. Sec. Class Action,* MDL 1879, 2009 WL 2914363, at *2 (E.D.Pa. Sept.10, 2009) (Stengel, J.) (where there were only two objections to the fee request, this factor weighed strongly in favor of approving the requested fee award); *Boone v. City of Philadelphia,* 668 F.Supp.2d 693, 713 (E.D.Pa.2009) (McLaughlin, J.) (where there was just one objection to the proposed attorneys' fees, this weighed in favor of approving the requested fees); *In re Auto. Refinishing Paint Antitrust Litig.,* MDL No. 1426, 2008 WL 63269, at *4 (E.D.Pa. Jan.3, 2008) (Surrick, J.) ("A lack of objections demonstrates that the Class views the settlement as a success and finds the request for counsel fees to be reasonable."); *Linerboard,* 2004 WL 1221350, at *5 ("The absence of objections supports approval of the Fee Petition.").

The Remaining Prudential Factors

m. *Innovative Settlement Terms:* Counsel, here, have not identified any particularly "innovative" settlement terms. "In the absence of any innovative terms, this factor neither weighs in favor [n]or against the proposed fee request." *McDonough,* 834 F.Supp.2d at 345.

n. *Percentage Fee that Would Have Been Negotiated Under a Private Contingency Agreement:* Courts recognize that in private contingency fee tort cases, "plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery." *Ikon Office Solutions,* 194 F.R.D. at 194. While the Third Circuit has recognized that normal contingency percentages may not apply in super-mega-fund cases, and that a lower percentage may be appropriate in such cases, *see Prudential,* 148 F.3d at 340, this case easily complies, as the 6.25% fee requested here is far below the percentage typically negotiated in private contingency fee cases.

19. The district court in *Diet Drugs* found that it was not necessary to perform a lodestar cross-check to assess the reasonableness of the common benefit fees it awarded from the assessments that had been collected under the common benefit order, *see Diet Drugs, see* 553 F.Supp.2d at 496 n. 90 ("[W]e do not believe a lodestar cross-check is necessary"), and the Third Circuit did not conduct such a cross-check in affirming the district court's common benefit fee award. This suggests that a lodestar cross-check may not be necessary in this type of case in this jurisdiction.

20. In a traditional common fund case, by contrast, an abbreviated lodestar analysis is typically encouraged as a cross-check on the reasonableness of the percentage-based fee. *See Rite Aid,* 396 F.3d at 305–06; *Boone,* 668 F.Supp.2d at 713. When used as a cross-check, the lodestar analysis may be abridged, requires "neither mathematical precision nor bean counting," and need not involve a review by the district court of actual billing records. *Rite Aid,* 396 F.3d at 305–06.

***9** 21. The lodestar is calculated by multiplying the number of hours reasonably worked on a case by the reasonable hourly billing rates for those services. *See Rite Aid,* 396 F.3d at 305. The billing rates to be used in calculating the lodestar should be "blended" ones, of all who worked on the case—i.e., not just the billing rates of the most senior attorneys. *Id.* at 306. "After a court determines the lodestar amount, it may increase or decrease that amount by applying a lodestar multiplier." *Diet Drugs,* 582 F.3d at 540 n. 33. "Multipliers may reflect the risks of non[-]recovery facing counsel, may serve as an incentive for counsel to undertake socially beneficial litigation, or may reward counsel for an extraordinary result. By nature they are discretionary and not susceptible to objective calculation." *Prudential,* 148 F.3d at 340.

22. While an abridged lodestar cross-check might not be mandatory in this case, the Court has conducted such a cross-check, and it further supports the reasonableness of the requested fee award.

23. The Fee Committee received from common benefit fee applicants submissions totaling 144,000 hours of time. Of that amount, Alan B. Winikur, CPA/ABV/CFF, the Court-appointed independent auditor, in consultation with the Fee Committee, approved just over 134,000 hours as compensable common benefit time. The Fee Committee categorized each applicant timekeeper into one of six groups, in accordance with the timekeeper's role and contributions to the case, and assigned to each of those categories an hourly rate: $185 for paralegals and staggered rates—of $225, $285, $380, $475, and $595—for attorneys, based on their varying levels of experience and contributions to the case.

24. The hourly rates applied are reasonable in this forum, *see Interfaith Cmty. Org. v. Honeywell Int'l, Inc.,* 426 F.3d 694, 705 (3d Cir.2005) (discussing use of the forum rate), as demonstrated by the rates that have been approved by the Third Circuit and district courts in this jurisdiction. *See, e.g., Jama v. Esmor Corr. Services, Inc.,* 577 F.3d 169, 181 (3d Cir.2009) (holding that the district court did not err in approving rates of $600 for a partner, $205 for a first-year associate, and $400 for a law school clinic attorney); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 195 Fed. Appx. 93, 97 (3d Cir.2006) (holding, in 2006, that hourly rates up to $550 were reasonable for attorneys); *In re Budeprion XL Mktg. & Sales Litig.,* MDL 2107, 2012 WL 2527021, at *22 (E.D.Pa. July 2, 2012) (Schiller, J.) (approving hourly rates of $225 to $700 for lead counsel and partners and $200 to $400 per hour for associates); *Ripley v. Sunoco, Inc.,* CIV.A. 10–1194, 2012 WL 2402632, at *12 (E.D.Pa. June 26, 2012) (Robreno, J.) (approving hourly rates of $600 per hour for partners and $300 per hour for associates); *Chakejian v. Equifax Info. Serus., LLC,* 275 F.R.D. 201, 216 (E.D.Pa.2011) (Brody, J.) (approving hourly rates of $485 to $700 for partners and $125 to $175 for paralegals); *Serrano v. Sterling Testing Sys., Inc.,* 711 F.Supp.2d 402, 422 & n. 13 (E.D.Pa. 2010) (Pratter, J.) (holding that hourly rates of $290 to $650 for attorneys and $125 to $225 for paralegals were reasonable); *In re Diet Drugs Prods Liab. Litig.,* MDL 1203, 2003 WL 21641958, at *5 (E.D.Pa. May 15, 2003) (Bartle, J.) (discussing fee committee's application, in 2003, of a maximum hourly rate of $525, before application of multipliers).

***10** 25. Considering the billing rates charged by Philadelphia firms, the approved rates are also reasonable. *See E. Aaron Enters., Inc. u. Carolina Classified.com,* CIV. A 10–1087, 2010 WL 2991739, at *3 (E.D.Pa. July 27, 2010) (O'Neill, J.) ("The prevailing market rate is ordinarily reflected in a law firm's normal billing rate."). According to a 2011 sampling of nationwide billing rates submitted by the Fee Committee, of which this Court takes judicial notice, partners at GSK's Philadelphia-based firm (Pepper Hamilton) bill up to $825 per hour, and partners at other Philadelphia law firms have similar top hourly rates ($900 at Cozen O'Connor, $875 at Duane Morris, $750 at Saul Ewing, and $725 at Fox Rothschild). The highest billing rate applied here, $595, is thus particularly reasonable in comparison. According to the same information submitted by the Fee Committee, the lowest associate hourly billing rates charged by Philadelphia firms in 2011 were $245 at Saul Ewing, $235 at Pepper Hamilton, $225 at Cozen O'Connor and Duane Morris, and $190 at Fox Rothschild. The lowest associate hourly billing rate applied here, $225, is thus on par with associate rates charged by Philadelphia firms.

26. Applying the above billing rates to the number of approved common benefit hours (just over 134,000) results in a lodestar of $55,279,440 for work up to February 14, 2012, when the PSC was not renewed. The requested fee of $143,750,000 would represent a lodestar multiplier of 2.6, which is consistent with Third Circuit jurisprudence, and lower than multipliers that have been approved in other cases. The Third Circuit has recognized that "[m]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." *Prudential,* 148 F.3d at 341 (quoting Herbert Newberg & Alba Conte, 3 *Newberg on Class Actions* § 14.03, at 14–5 (3d ed.1992)). It has also concluded that a multiplier of roughly 3.4 is "either below or near the average multiplier in ... 'super-mega-fund' cases," *Diet Drugs,* 582 F.3d at 545 n. 42, as demonstrated by the cases in the following chart.

Case	**Lodestar Multiplier**
Deloach u. Philip Morris Cos., No. 1:00CV01235, 2003 WL 23094907 (M.D.N.C. Dec.19, 2003)	4.45
In re WorldCom, Inc. Sec. Litig., 388 F.Supp. 2d 319 (S.D.N.Y.2005)	4
In re NASDAQ Market–Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y.1998)	3.97
In re AOL Time Warner, Inc. Sec. Litig., MDL 1500, 2006 WL 3057232 (S.D.N.Y. Oct.25, 2006)	3.69
In re Visa Check/Mastermoney Antitrust Litig., 297 F.Supp.2d 503 (E.D.N.Y.2003)	3.5
In re Tyco Int'l, Ltd., 535 F.Supp.2d 249 (D.N.H.2007)	2.697
In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F.Supp.2d 383 (D.Md.2006)	2.57

In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig., 268 F.Supp.2d 907 (N.D.Ohio 2003)	2.4

27. The Court has also considered the Declaration of Dianne M. Nast, which details the work performed by Mr. Winikur, in consultation with the Fee Committee, the criteria and processes used for evaluating fee submissions to ensure that only appropriate common benefit work was recommended for compensation, and the safeguards that were implemented to ensure fairness and consistency, including the independent auditing work performed Mr. Winikur. Mr. Winikur's testimony and Ms. Nast's declaration further support the reasonableness of the Fee Committee's petition.

***11** 28. At the September 19, 2012 hearing, the Court also received detailed evidence concerning the history of the litigation, the methodology that the Avandia Fee Committee employed to collect time and expense records on a monthly basis, and the extensive independent auditing work performed by Mr. Winikur. This evidence also supports the reasonableness of the Fee Committee's petition.

29. For all of the foregoing reasons, the Court approves as reasonable the Fee Committee's requests:

a. for an award of 6.25% of the estimated collective value of the settlements in this case (or an award of up to $143,750,000) from the fund created by the assessments collected in accordance with PTO 70.

b. and further, that an additional amount of $10,050,000 from the PTO 70 fund be awarded and held in reserve for payment of future administrative fees and expenses.

It is so **ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2012 WL 6923367