in other forms of consolidated proceedings that yield a single settlement fund, class counsel's fee is taken as a percentage of the fund. In such cases, class counsel generally do not have contingent fee arrangements with clients to pay their fees since they are representing a class of plaintiffs, most of whom are absent and many of whom might have quite small stakes in the matter. In place of a normal fee arrangement, then, the law permits the attorney who produces a fund for an absent class to petition the court for an award from that fund.[12] The common fund fee award functions as an incentive for counsel to pursue class action lawsuits where contracting for a fee with each individual plaintiff is impossible. Common fund fee awards vary, often decreasing as the size of the fund produced increases, but they tend to be in the 20-30% range *as they represent the whole fee to be extracted from all of the plaintiffs' recoveries collectively.*

c. In short, the *common benefit assessment* is an allocation mechanism for dividing a pre-existing contingent fee between local and central counsel, while a *common fund fee* is a total percentage fee paid to counsel who create a common fund (or benefit) for a class of absent plaintiffs.

d. In some cases the two concepts may seem to merge: specifically in mass tort MDL situations that begin with common benefit assessments but end with one aggregated common fund settlement (whether in class form or not), PSC counsel may seek a percentage of that aggregate fund at the end of the case to pay for the work that they did, replacing the earlier assessed common benefit assessment with this later fund percentage. In such situations, courts might also cap local counsel's contingent fee to ensure that the combination of the fund percentage taken by the PSC and the contingent fee taken by local counsel do not take an unethically large amount of the plaintiffs'

[12]In some common fund cases, the class action attorneys generate a common non-pecuniary benefit for the class (e.g., injunctive relief, coupons, etc.); in the absence of a literal common "fund," fees in such class action cases may be referred to as a common "benefit" fee. Despite the confusion created by that phrase's resemblance to the issue in the case, the common benefit fee in a class suit is the equivalent of a common fund percentage fee in that it is taken from the client's recovery; it is not similar to the common benefit assessment on local counsel's fee that is at issue here.

recovery.

18. The PSC's Proposed Order provides that common benefit work will be funded by a common benefit assessment, a common fund attorney fee award, or some combination of the two.[13] Yet while the Proposed Order recognizes that these fee arrangements are distinct, the PSC Motion does not distinguish between the two lines of cases supporting each type of fee arrangement; instead, the Memorandum cites both types of cases seemingly interchangeably. For example, the first two cases of the string cite on page 6 of the PSC Motion are cases involving common benefit assessments, while the rest are cases establishing common fund attorney fee awards.[14]

19. When evaluating the PSC's Proposed Order, it is important to recognize that each type of fee arrangement proposed by the PSC is supported by its own independent line of case law. Thus, in analyzing the appropriateness of the 12% common benefit assessment, this Court should look only to cases in which courts imposed common benefit assessments; the Court should *not* rely on cases awarding common fund attorney fees, as those cases represent a wholly different (and generally much larger) type of fee arrangement pursuant to a global settlement. To be sure, if this case does in fact end in a global settlement, it might *at that time*, be appropriate to look at common fund fees (and their relevant percentages) as an approach to paying the PSC. But this case is only now at an assessment stage, not a fee award stage; and it is not clear that a single aggregate settlement will even be produced. Thus, even if the common fund cases might later become relevant, there is no doubt they are not relevant to the rate of withholding for a common benefit assessment.

20. In sum, common benefit assessments and common fund attorney fee awards are two

[13] *See* Proposed Order at § 1(A) ("The Common Benefit Fund will be created in one or more of the following ways: (1) assessments on plaintiffs who obtain a monetary recovery with or without trial . . . ; (2) a separately negotiated payment from defendants, or on their behalf, separate from and in addition to any payment made to any plaintiff, which separate payment(s) is intended to be for common benefit attorneys fees and expenses; or (3) a combination of (1) and (2) or some derivation thereof.").

[14] *See* PSC Motion at 6.

distinct types of fee arrangements used to fund the work of common benefit attorneys in multidistrict litigation. As such, two distinct lines of case law have evolved. This Court should ensure that it relies on the appropriate authorities when evaluating the PSC's proposed order. In particular, this Court should look only to common benefit assessment cases when evaluating the PSC's proposed 12% withholding, as those cases represent the appropriate frame of reference.

IV
THE PSC'S REQUESTED 12% COMMON BENEFIT ASSESSMENT IS TWO TO THREE TIMES HIGHER THAN THE NORMAL COMMON BENEFIT ASSESSMENT

21. The PSC has proposed a 12% assessment, consisting of an 8% assessment for fees and a 4% assessment for costs. There are a variety of reasons why this Court should not adopt the PSC's proposed assessment figure.

22. *First*, the 12% figure, as an absolute number, is much higher than the assessments that courts generally award in these types of cases. Indeed, the PSC's proposed assessment is two to three times as large as the fees that courts normally impose in these cases. I have provided the Court with two illustrations to support this point:

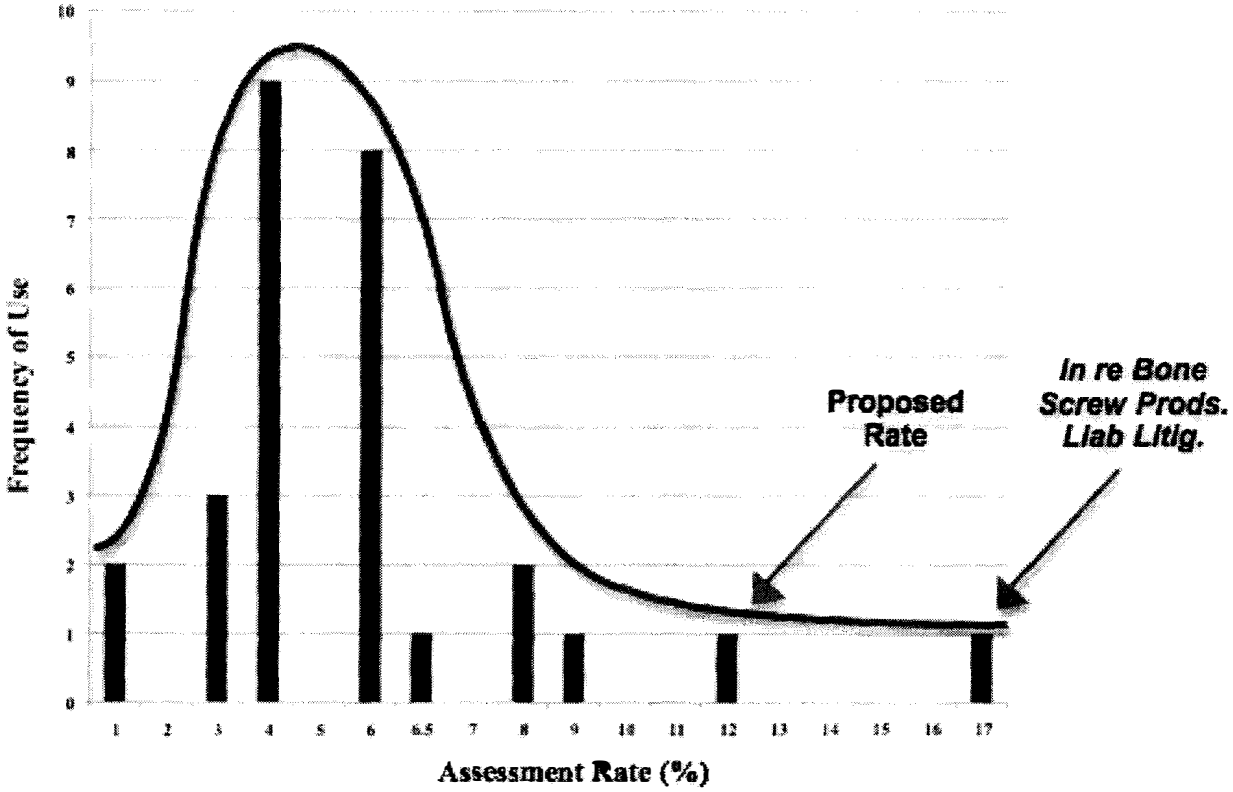
a. The Appendix attached to this declaration collects information on the common benefit assessments that federal MDL courts imposed in 21 cases.[15] The cases are arranged from those

[15]I compiled the data in Appendix A in an attempt to be as comprehensive as possible. Specifically, I began with an initial Westlaw search that yielded a number of reported and unreported court documents establishing common benefit assessment rates. From there, I searched journals and law reviews articles to find any other evidence I could in these secondary sources of common benefit assessment rates in MDL cases. Finally, I attempted to track down other cases from references found in these initial materials that I reviewed. In every instance in which a common benefit rate was identified, I examined the original pretrial orders or decisions establishing the withholding to verify the rate. I have presented all the data my research assistants and I identified using these search methods. Additionally, these data were presented in a similar format in the state court proceeding herein and, in responding to my Declaration there, the PSC neither challenged the accuracy of any of the data I presented nor offered any data that I had missed and with which I could have updated my study. In (continued . . .)

in which courts established the highest assessments to cases in which courts established the lowest assessments. This Appendix illustrates that were the court to award the PSC's proposed withholding in this case,[16] *it would be the second-highest assessment rate in this sample*.

b. The chart below plots the frequency with which courts rely on specific assessment rates, based on the sample of cases listed in the Appendix. The x-axis lists the assessment rates that courts have utilized in these cases; the y-axis represents the frequency with which courts have relied on those specific rates when establishing common benefit assessments.

COMMON BENEFIT ASSESSMENT RATES



(. . . continued)

short, based on my research and the absence of objection to it, I believe this chart to be the single most comprehensive compilation of common benefit fee assessments ever undertaken. As such, I surmise that any unpublished data I have not been able to find would be minimal and would therefore be unlikely to upset the strong 4-6% consensus I demonstrate with my data.

[16]The proposed assessment is represented in the Appendix by a black band.

As the figure makes clear, courts most frequently utilize 4% and 6% as withholding rates. Indeed, in the *Diet Drugs* litigation, Judge Bartle recognized this trend, noting that 4% and 6% assessment rates were the norm in multidistrict litigation.[17] The PSC's proposed figure, however, *represents two to three times that amount*, appearing as a dramatic outlier at the far right tail of the curve.

c. The PSC's supporting motion omits this context, which is necessary in evaluating the reasonableness of the Proposed Order. While the PSC Motion cites to a number of common benefit fee cases included in the Appendix,[18] it identifies the percentages that were actually withheld in just two cases.[19] Indeed, the PSC chooses to cite the percentage withheld for the only case in the sample that established a higher withholding rate than the one proposed here: *In re Orthopedic Bone Screw Products Liability Litigation.*[20] As the figure above illustrates, the 17% assessment rate in the *Bone Screw* case is an outlier; it is not representative of what courts generally impose as a common benefit assessment in multidistrict litigation.

23. *Second*, not only is the 12% figure remarkably high, courts also routinely scrutinize the figures proposed by PSCs and, in many cases, they award a lower amount than was initially requested.[21] In these cases, courts undertake their own analysis of lead counsel's work before crafting a system for withholding common benefit fees.[22] Accordingly, this Court should not adopt the PSC's

[17] *In re Diet Drugs*, 2002 WL 32154197, at *20 (E.D. Pa. Oct. 3, 2002) (reducing the initial assessments rates that had been imposed because "6% and 4% assessments [were] more in keeping with those currently being levied in other MDL's").

[18] *See, e.g.*, PSC Motion at 1, 7 n.4.

[19] PSC Motion at 5.

[20] *See In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1996 WL 900349 (PTO 402) (E.D. Pa. June 17, 1996).

[21] *See, e.g., In re Air Crash Disaster at Florida Everglades*, 549 F. 2d 1006, 1010 (5th Cir. 1977) (PSC requested 10% set-aside; court allowed 8%); *In re Clearsky Shipping Corp.*, 2003 WL 1563820, at *4 n.3 (E.D. La. Feb. 26, 2003) (counsel requested 10% set aside; court awarded 4%, which "reached a reasonable, middle-ground solution").

[22] *See Turner v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d 676, 682 (E.D. La. 2006) (noting that the court "[could not] accept the percentages requested by the PSC" and that it would "set common-benefit attorneys' fees that [were] reasonable in [the] matter")

proposed rate as a matter of course, but should scrutinize these figures based on the relevant case law.

24. *Third*, several courts have adjusted their initial withholding rates downward in the course of the litigation. For example, in the *Diet Drugs* litigation, the court reduced its initial 9% and 6% assessments on federal and state litigation to 6% and 4%, respectively. In doing so, the court noted that its initial "figures seemed reasonable at the time."[23] However, the court found "that 6% and 4% assessments [were] more in keeping with those currently being levied in other MDL's."[24] Additionally, courts have revoked assessment orders altogether after determining that such an arrangement was not originally justified.[25] These cases suggest not only that courts often overestimate the proper amount of withholding or misgauge the need for such an arrangement; they make clear that establishing such rates is a significant decision, so much so as to have warranted later adjustment.

25. Because the proposed 12% assessment is significantly outside of the normal range of assessments in cases such as the one before this Court, and because the PSC has not presented sufficient evidence that would warrant such a high assessment based on the factors relevant to setting this rate, this Court should not adopt the proposed assessment rate.

[23] *In re Diet Drugs*, 2002 WL 32154197, at *18.

[24] *Id.* at *20 (citing cases); *see also In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL 926, Pretrial Order 13A (court later adjusted rate downward from 6% to 4%). To be sure, a court may reserve the discretion to adjust a fee upwards as well. In the *MGM Grand* multidistrict litigation, the judge ultimately raised the fee portion of the withholding from 5% to 7%; in doing so, the court emphasized the unique qualifications of the PLC, noting that "the results of the PLC's efforts [had] never been equaled in any other mass disaster litigation." *In re MGM Grand*, 660 F. Supp. at 529. Even there, though, the total assessment was 8.5%.

[25] *See, e.g.*, *In re Aredia & Zometa Prods. Liab. Litig.*, MDL 1760, Docket Entry 815 (M.D. Tenn. Nov. 29, 2007). In revoking his original order, the Magistrate Judge noted that he would "reconsider the matter when notified there [was] an actual need." *Id.*

V
THE PSC HAS NOT MET ITS BURDEN OF DEMONSTRATING THAT THERE IS ANYTHING ABOUT THE INSTANT LITIGATION THAT WOULD WARRANT IMPOSING A COMMON BENEFIT ASSESSMENT OUTSIDE OF THE NORMAL RANGE OF 4-6%

26. As discussed in Part IV, courts almost always impose common benefit assessments of 4-6%. Although this standard is well-established in the case law, it is not impossible that particular extreme circumstances might warrant a deviation from that norm. For example, if a case involved a very small number of claims, lead counsel could argue that a higher withholding rate is necessary to ensure the existence of sufficient funds to compensate common benefit attorneys for their work. Second, lead counsel could argue more generally that a higher withholding rate is necessary to hedge against the risk of under-compensation at the conclusion of the litigation. Neither argument would be viable here.

27. An argument that this case warrants a higher withholding rate because it involves fewer claims than other MDLs is unpersuasive for two main reasons.

a. *First*, this case does not involve a particularly small number of claims relative to other MDLs. In the Appendix, I have listed the approximate number of claims that existed at the time those courts established common benefit fee assessments, based on the information available in court documents around that time. My research reveals that 15 of the 21 cases in the sample – almost two thirds of the cases – involved fewer than 2,000 consolidated actions at the time the fee was set.[26] Comparing this litigation to the sample of cases in the Appendix makes it clear that the instant case is far from an outlier in terms of number of claims; if anything, this data suggest that it is typical of these types of cases.

b. *Second*, there is no discernable correlation between the number of claims or actions in a multidistrict case and the percentage withheld as a common benefit fee. Indeed, within the

[26]These cases are shaded in gray in the Appendix.

15 cases mentioned above, courts ordered a range of different assessment rates. In fact, *courts in these cases most frequently relied on a 4% figure for a withholding rate.* This research not only defeats the argument that common benefit fee withholding rates increase as the number of claims in the consolidated litigation decrease; it confirms that *even among cases of a similar size*, courts most frequently withhold at far lower rates than the PSC proposes here.

c. If anything, a lower number of cases involved should lead not to greater withholding rates, but rather smaller withholding rates that reflect the reduced amount of common benefit work that would need to be performed. In cases involving fewer claims, the PSC will ultimately perform *less* common benefit work than the PSCs in cases involving many thousands of claims. For example, in the *Diet Drugs* litigation, Judge Bartle described the common benefit attorneys as having engaged in a "herculean effort."[27] In that case, which involved claims of over 100,000 plaintiffs, the court noted that the PSC had, among other things:

> [O]pened and operated an office in Philadelphia which at the height of the litigation had a staff of 17 attorneys, 7 legal assistants, and 9 clerical employees. The staff's duties included maintaining a database on the status of each MDL 1203 action, sending copies of over 2,500 pretrial orders and over 100 Special Master Decisions and Recommendations to the individual litigants, and explaining applicable practice and procedures to attorneys who were unfamiliar with multidistrict litigation or the federal system . . . Ultimately, the PMC Discovery Committee received approximately 9 million pages of documents from defendants and third parties. These were winnowed down to a set of approximately 5,000 documents that were imaged and entered into a database which was employed to prepare for depositions. After deposition discovery was completed, during which the PMC Discovery Committee completed nearly 100 depositions of general fact witnesses, an exhibit list was created and made available to other plaintiffs' attorneys on CD ROM.[28]

d. Because of the sheer number of claims at issue, the common benefit work that was required in the *Diet Drugs* litigation was extensive. Given the smaller number of potential claims

[27] *In re Diet Drugs Prods. Liab. Litig.*, 2002 WL 32154197, at *12 (E.D. Pa. Oct. 3, 2002).
[28] *Id.* at *18.

involved in this litigation, it follows that the PSC's burden in this case will not approach that of other larger MDLs, such as the *Diet Drugs* litigation, because the PSC will not be required to engage in the same level of common benefit work. In such a situation, a larger withholding rate is simply unwarranted.

28. Additionally, there are three main reasons why a risk of undercompensation would not justify a higher withholding rate in the instant litigation.

a. *First*, in cases such as this one, there are undoubtedly some claimants whose individual damage claims *alone* would result in a recovery significant enough to fund a large portion of common benefit work. Indeed, the potential value of each individual claim is precisely why local attorneys have made the decision that their representation is worthwhile: they have concluded that they would be able to litigate the claim independently – and make a profit doing so. In mass tort cases like the one before this Court, the potential value of each individual claim tempers any concern that common benefit work will not be compensated.

b. *Second*, in cases where individual claims are potentially independently viable, fee law's concern is less one of funding the litigation (as with small claims class actions) than one of ensuring that costs get shared equitably among attorneys who rely on the PSC's common benefit work. To be sure, courts have used common benefit fee assessments to compensate lead counsel. In cases such as this one, though, the greater concern is that the claimants and attorneys who rely on common benefit work share the burden of producing that work equally. Doing so does not require any magic number, however, such as the 12% that the PSC proposes here.

c. *Third*, in cases such as this one, the PSC often explicitly reserves another mechanism for ensuring that lead counsel are fairly compensated for their work at the conclusion of the litigation. For example, in the instant case, the PSC notes that it has the option to negotiate a separate

payment from the Defendant for its common benefit work at a later point in time.[29] It is my expert opinion that this opportunity should not be available to the PSC as it enables lead counsel to negotiate a fee award without the presence of the many local counsel who would be affected by that negotiation. Barring the PSC from negotiating separately for its own fee from an aggregate settlement does not mean, however, that they are foreclosed from coming back to the Court and seeking a common fund award if and when they establish a common fund. Thus, assuming that the PSC achieves a favorable resolution of the matter on behalf of a class of consolidated plaintiffs, lead counsel have yet another mechanism – to argue for a common fund award – to ensure that they are fairly compensated.

d. Here, because plaintiffs' claims are potentially individually economically viable and because the PSC has multiple mechanisms to ensure that its work is compensated, a risk of undercompensation would not justify a higher withholding rate in this case.

29. In sum, there is nothing remarkable about the instant litigation that warrants a higher withholding rate than that which courts typically impose, let alone a rate that is two to three times higher than the norm.

* * *

30. It is my opinion that:

a. common benefit assessments and common fund attorney fee awards are distinct types of fee arrangements supported by their own lines of precedent; this Court should only look to common benefit assessment cases when evaluating the reasonableness of the PSC's proposed withholding and should bar the PSC from separately negotiating with the Defendants for a common fund attorney fee award if it negotiates a global settlement;

b. rather than set a common benefit assessment at the 12% level the PSC has

[29] *See* PSC Motion, at 2 (footnote omitted) ("The Order proposes the establishment of the Common Benefit Fund in one or more of three ways: assessments on plaintiffs who obtain monetary recovery; *a separately negotiated payment*; or a combination of the two.") (emphasis added).