

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed

11-30-01
LORETTA G. WHYTE
CLERK

COPY IN CHAMBERS

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

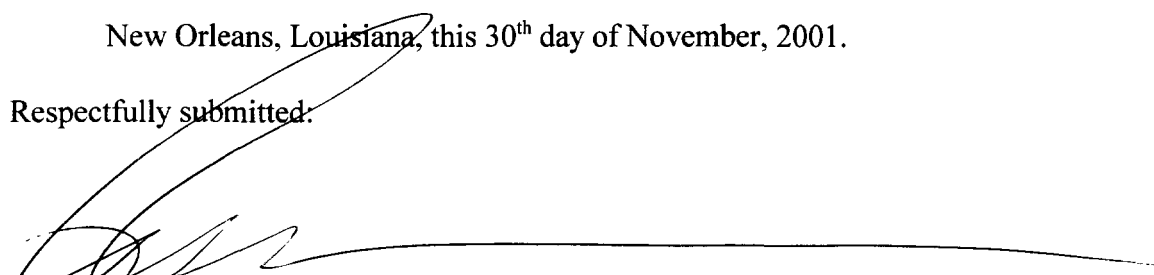
IN RE: PROPULSID	:	MDL NO. 1355
PRODUCTS LIABILITY LITIGATION	:	SECTION: L
	:	JUDGE FALLON
	:	MAG. JUDGE AFRICK
THIS DOCUMENT RELATES TO ALL CASES	:	
	:	

NOTICE OF HEARING

Please take note that on the 19th day of December, 2001 at 9:00 a.m. or as soon thereafter as counsel can be heard, United States District Court, Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, the undersigned will bring the PSC Petition for An Order Securing An Equitable Allocation of Counsel Fees and Costs for Common Benefit Work

New Orleans, Louisiana, this 30th day of November, 2001.

Respectfully submitted:


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LEONARD A. DAVIS, #14190

JAMES C. KLICK, #7451

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PLAINTIFFS' STEERING COMMITTEE

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

**IN RE: PROPULSID PRODUCTS
LIABILITY LITIGATION**

**MDL NO.: 1355
SECTION L
JUDGE FALLON
MAG. JUDGE AFRICK**

**PSC'S PETITION FOR AN ORDER SECURING AN EQUITABLE ALLOCATION OF
COUNSEL FEES AND COSTS FOR COMMON BENEFIT WORK**

The Plaintiffs' Steering Committee ("PSC") respectfully moves this Court for an Order in the form appended hereto, securing an equitable allocation of counsel fees and costs for common benefit work.

In support of this Petition, the PSC relies upon the attached Memorandum of Law and exhibits thereto.

Respectfully submitted,

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PLAINTIFFS' STEERING COMMITTEE

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served on defendants liaison counsel, James Irwin by hand delivery or electronically and upon all plaintiffs counsel of record electronically or by electronically being uploaded to Verilaw in accordance with Pre-Trial Order No. 4 this 30th day of November, 2001.

LEONARD A. DAVIS

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

**IN RE: PROPULSID PRODUCTS
LIABILITY LITIGATION**

**MDL NO.: 1355
SECTION L
JUDGE FALLON
MAG. JUDGE AFRICK**

**MEMORANDUM OF LAW IN SUPPORT OF THE PSC'S PETITION FOR AN ORDER
SECURING AN EQUITABLE ALLOCATION OF COUNSEL FEES AND COSTS FOR
COMMON BENEFIT WORK**

I. PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

To date, this multi-district litigation involves thousands of individual lawsuits brought in multiple federal district courts by men and women who were injured by the prescription drug

Cisapride, more commonly known by its brand name Propulsid. Propulsid has been associated with cardiac arrhythmia, loss of consciousness and/or unexpected sudden death. Propulsid is a prescription drug designed to treat nocturnal heartburn by individuals with gastroesophageal reflux disease. Physicians began to prescribe Propulsid which became so popular that in 1999, it was the 63rd most commonly prescribed drug in the United States. However, since the drug's approval in 1993, it has been associated with at least 341 reports of heart rhythm abnormalities and 103 reports of death. The serious health risks and cardiotoxicity posed by Propulsid has resulted in the FDA requesting the withdrawal of the drug from the marketplace effective July 14, 2000. The filing of numerous lawsuits against the defendants followed.

On August 21, 2000, the Judicial Panel for Multi-district Litigation entered an Order transferring all federal cases involving such claims to the United States District Court for the Eastern District of Louisiana for coordinated discovery and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

On October 23, 2000, this Court, as the transferee court, entered Pretrial Order No. 3, which created the Plaintiffs' Steering Committee ("PSC") consisting of nine persons.¹ Russ M. Herman, Daniel E. Becnel, Jr., and Bob E. Wright were selected as members of the Executive Committee with Russ M. Herman serving as Plaintiffs' Liaison Counsel. *See* Pretrial Order No. 2 at 5. The Court set forth certain duties and responsibilities of the PSC, including the preparation and completion of pleadings; the filing of motions; responding to motions; discovery; pretrial preparation; settlement; docket management; the establishment and administration of a document depository; communication

¹ The members of the PSC are: Daniel E. Becnel, Jr., Wendell H. Gauthier, Russell M. Herman, Arnold Levin, Stephen B. Murray, J. Michael Papantonio, Christopher A. Seeger, Robert F. Wright, and Charles S. Zimmerman.

with individual plaintiffs and their counsel; liaison with defendants; and court appearances. PTO 2 at 6-10.

In recognition of the fact that the PSC would perform these services on behalf of all plaintiffs in the litigation, the Court entered Pretrial Order No. 3, setting forth a mechanism by which attorneys working for the PSC would report the amount of time expended for such activities, in the expectation of being compensation for their time and reimbursed for expenses incurred on behalf of plaintiffs.

Since the entry of PTO Nos. 2 and 3, the PSC has set up the plaintiffs' document depository. The PSC has represented the plaintiffs at the most recent Court's status conferences. The PSC has actively participated in document and electronic discovery as well as depositions. Further, the PSC has conducted pre-trial procedures in this litigation and participated in motion filings and oral argument of motions. This Court is familiar with the efforts put forth thus far by plaintiff's counsel in pursuing this case. Throughout the course of the litigation the PSC has submitted under seal time and expense reports to the Court.

In the next several months, the PSC plans to complete the review of the millions of pages of documents produced or to be produced by the defendants, take the depositions of the key witnesses including employees and agents of the defendants, third parties, and officials of the United States Food and Drug Administration, with respect to the issues of liability. It is anticipated that substantially in excess of 100 such depositions will be taken by the PSC for the benefit of all plaintiffs. In addition, the PSC has retained leading physicians and scientists with knowledge in fields such as pharmacology, epidemiology, cardiology and the like to provide "generic" expert testimony regarding the causal relationship between exposure to Propulsid and the development of injuries claimed by the plaintiffs which will be preserved in the form of videotaped depositions.

Accordingly, the purpose of this motion is to seek an Order creating a “fund” consisting of the recoveries in the federal court cases and claim payments to plaintiffs in state courts which agree to coordination, from which the PSC and other attorneys performing “common benefit work” for plaintiffs may obtain compensation for the benefits which they confer on plaintiffs,² to provide that the benefits of the PSC arrangement will be available to litigants in other state courts who elect to avail themselves of the opportunity for state and federal coordination, and to provide a mechanism to protect against the misappropriation of the work product created by the PSC and coordinating state counsel. Further, the PSC believes that settlement of some claims regarding Cisapride has taken place and that additional settlements may take place and therefore a method to escrow and place a portion of such settlement funds should be established.

For the reasons which follow, such relief is appropriate.

II. ARGUMENT

A. **Securing an Equitable Allocation of Fees and Costs for the PSC and the Attorneys it Designates to Perform Common Benefit Work is Necessary and Appropriate at This Time**

The common fund doctrine is a principle of equity designed to prevent unjust enrichment by providing that “a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Sprague v. Ticonic National Bank*, 307 U.S.

² It is not intended that the Court’s order apply to any global or class action settlement reached in the litigation. In the event there is a recovery in any action certified as a class action under Fed. R. Civ. P. 23, plaintiffs intend to apply for an award of attorneys’ fees and costs in accordance with governing law, which does not place a 6% limit on the award of fees and costs. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974); *Strong v. Bell South Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir. 1998); *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.* 487 F.2d 161, 165 (3d Cir. 1973); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 821 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995); *Gunter v. Ridgewood Energy Corporation*, 233 F.3d 190 (3d Cir. 2000); *In re Cendent Corp. Litigation*, 264 F.3d 201 (3d Cir. 2001); *In re Cendent Corp. Prides Litigation*, 243 F.3d 722 (3d Cir. 2001); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000); *In re Synthroid Marketing Litigation*, 264 F.3d 712 (7th Cir. 2001)

161, 166 (1939); *Trustees v. Greenough*, 105 U.S. 527, 534-536 (1881); *In re SmithKline Beckman Corp. Securities Litigation*, 751 F. Supp. 525, 530 (E.D. Pa. 1990). As the Third Circuit stated in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir. 1973):

These equitable powers, may, under the equitable fund doctrine, be used to compensate individuals whose actions in commencing, pursuing or settling litigation, even if taken solely in their own name and for their own interest, benefit a class of persons not participating in the litigation. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S. Ct. 777, 83 L.Ed. 1184 (1939).

* * *

The award of fees under the equitable doctrine fund is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefitted another and seeks payment for the value of the service performed.

See also Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); *Strong v. Bell South Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir. 1998).

In order for the common fund doctrine to apply, the beneficiaries of the fund need not be members of a class and the benefit need not have been conferred in the context of a class action because the common fund principle is a long-standing principle of equity which predates modern class actions. *See Trustees v. Greenough*, 105 U.S. 527 (1881). As the court stated in *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977):

The common fund doctrine provides that a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees. The doctrine is "employed to realize the broadly defined purpose of recapturing unjust enrichment." I Dawson 1597. That is, the doctrine is designed to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the "stranger" beneficiaries do not receive their benefits at no cost to themselves.

Id. at 769. *See also In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977) (court awarded fees to lead counsel by ordering each other attorney representing a plaintiff to pay to lead counsel part of his fee from his client); *City of Klawock v. Gustafson*, 585 F.2d 428, 431 (9th Cir. 1978) (court held that attorneys whose litigation efforts benefitted their client as well as other native towns may be entitled to attorneys' fees under the common benefit theory); *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987) (court awarded legal committee seven percent of gross recovery of "global settlement" funds to reasonably compensate committee for professional labors and for bearing considerable long-standing risks).

Apart from application of the common fund doctrine as an equitable principle governing the payment of counsel fees and litigation expenses, it has consistently been recognized that federal courts possess the inherent power to appoint counsel to coordinate and manage complex multiparty litigation and to require that such counsel be paid for discharging these duties out of the proceeds of the litigation generally. *See, e.g., In re Diet Drugs Products Liability Litigation*, 1999 WL 124414 (E.D. Pa. Feb. 10, 1999) (PTO No. 467) (court set aside 9% of any recovery for cases in MDL to create fund for PMC members to be compensated); *In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014, 1996 WL 900349 (PTO 402) (E.D. Pa. June 17, 1996) (parties ordered to sequester 12% of recoveries for fees and 5% of recoveries for costs in order to create fund from which Court-appointed Plaintiffs' Legal Committee could seek reimbursement for the work performed on behalf of all plaintiffs); *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 606-07 (1st Cir. 1992); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d at 1011-17; *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. at 522, 524-26. The Third Circuit adopted the rationale of *Air Crash Disaster* in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 821 (3d Cir.

1995)(“courts have relied on ‘common fund’ principles and the inherent management powers of the court to award fees to lead counsel in cases that do not actually generate a common fund).

Thus, in mass tort cases involving consolidated MDL proceedings, counsel who have been appointed by the Court to manage the litigation for the benefit of all plaintiffs should receive reimbursement for the costs expended in that effort and compensation for their services from all of the plaintiffs on a ratable basis. *In re Diet Drugs Products Liability Litigation*, *supra*; *In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014; *In re Nineteen Appeals*, 982 F.2d at 606-07; *Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir. 1992); *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296, 1317 (E.D.N.Y. 1985); *aff’d in part, rev’d in part*, 818 F.2d 226 (2d Cir. 1987); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d at 1019-21.

These principles were articulated in *Nineteen Appeals* as follows:

Under standard American rule practice, each litigant pays his or her own attorneys’ fees. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 245, 95 S. Ct. 1612, 1615, 44 L.Ed.2d 141 (1975). Yet, there are times when the rule must give way. For example, when a court consolidates a large number of cases, stony adherence to the American rule invites a serious free-rider problem. *See generally* Mancus Olson, *The Logic of Collective Action* (1971). If a court hews woodenly to the American rule under such circumstances, each attorney, rather than toiling for the common good and bearing the cost alone, will have an incentive to rely on others to do the needed work, letting those others bear all the costs of attaining the parties’ congruent goals.

A court supervising mass disaster litigation may intervene to prevent or minimize an incipient fee-rider problem and to that end, may employ measures reasonably calculated to avoid “unjust enrichment of persons who benefit from a lawsuit without shouldering its costs.” *Catullo v. Metzner*, 834 F.2d 1075, 1083 (1st Cir. 1987). Such courts will most often address the problem by specially compensating those who work for the collective good, chiefly through invocation of the so-called common fund doctrine.

* * *

Here, [the District Court's] decision to use a steering committee [to manage consolidated mass tort litigation on behalf of all plaintiffs] created an occasion for departure from the American rule. In apparent recognition of the free-rider problem, the judge served notice from the beginning that he would eventually make what he, relying in part on appellees' counsel, *see Fees Op.*, 768 F. Supp. at 924 n. 42, later termed a "common fund fee award" to remunerate PSC members for their efforts on behalf of communal interests. This was a proper exercise of judicial power. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 90 S. Ct. 616, 625, 24 L.Ed.2d 563 (1970); *see also In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 240 (2d Cir. 1987) (upholding a fee award to a plaintiffs' steering committee under the equitable fund doctrine); *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402 (D.C. Cir. 1986) (collecting cases); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 526 (D. Nev. 1987).

In re Nineteen Appeals, 982 F.2d at 606-07.

In order to protect the right of common benefit attorneys to receive a fee from the proceeds of the litigation in which they have participated and diligently worked on behalf of plaintiffs, courts have consistently ruled that it is appropriate to direct that all or part of the counsel fees which may become payable in each action which was the subject of coordinated or consolidated proceedings be deposited in an escrow account for allocation by the Court in accordance with appropriate legal standards. *In re Diet Drugs Products Liability Litigation*, *supra*; *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 300 (1st Cir. 1995); *Smiley v. Sincoff*, 958 F.2d 498, 499 (2d Cir. 1992); *In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014, *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296, 1317 (E.D.N.Y. 1985); *In re Silicone Gel Breast Implant Product Liability Litigation*, MDL 926, Pretrial Order Nos. 13 & 23 (N.D. Ala. July 23, 1993 and July 28, 1995) (Exhibit "1"). Thus, this Court should properly enter an Order requiring that some portion of the fees earned in each individual action which is the subject of these consolidated MDL 1355 proceedings be withheld for distribution to counsel acting for the benefit of all litigants.

A question then remains as to the proportion of plaintiffs' recoveries which should be subject to such sequestration. Ultimately, the amount of the fee to be awarded must be determined either under the lodestar approach recognized by the Fifth Circuit or under the percentage of the fund approach based upon a judicial assessment of the amount and quality of work performed by the common benefit lawyers in relation to the size of the recoveries which have been generated. *See, e.g., In re Diet Drugs Products Liability Litigation, supra; In re Orthopedic Bone Screw Product Liability Litigation*, MDL 1014, PTO 402 (12% for fees and 5% for costs sequestered); *Johnson*, 488 F.2d at 717-19; *In re Thirteen Appeals*, 56 F.3d at 304-07; *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1295 (9th Cir. 1994), *aff'd in part*, 19 F.3d 1306 (9th Cir. 1994); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988).

Because the instant action is ongoing, it is impossible to ascertain the total amount of time which will have been expended by the PSC and associated counsel for the common benefit or to ascertain the amounts which will be generated for the plaintiffs as a whole. Thus, it is impossible to determine the precise percentage of plaintiffs' recoveries which should be subject to an Order requiring payment to the Common Benefit Attorneys under the equitable principles set forth above. However, there are good precedents to guide the Court's determination in this regard. In particular, the same situation was presented to the Court in *In re Diet Drugs Products Liability Litigation*, MDL 1203.³ There, the Court directed the sequestration of a total of 9 percent of the case recoveries for

³ It is important to determine the methodology of compensating steering committee member early in the litigation. *See e.g., In re Cendant Corp. Litigation*, 264 F.3d 201, 257 (3d Cir. 2001)(courts are recommended to "attempt to establish a percentage fee arrangement agreeable to the Bench and to plaintiff's counsel . . . at the earliest practicable moment."), quoting, Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 255 (1985). The instant proposal will cap fees at a reasonable know percentage.

those actions in transferred in the MDL in order to create a fund from which the Plaintiffs' Management Committee could later seek payment of fees and reimbursement of costs. *Id.*, 1999 WL at *124414. There is every reason to believe that the PSC and its associated counsel will perform at least as much work as the PMC in the Diet Drug Litigation. Moreover, at present, there are substantially fewer cases proceeding in federal court and the state courts in the Propulsid Litigation than was the case in the Diet Drug Litigation. Accordingly, the present proposal to create a fund for payment of both fees and costs by sequestering only six percent of plaintiffs' recoveries in federal court (and four percent of the plaintiffs' recoveries in cases pending in state courts which consent to coordination under such terms) seems more than fair, particularly when viewed in light of the *Diet Drugs* experience. The 2% differential between federal and state litigants accommodates the MDL tasks performed by the PEC, PSC and common benefit activities in the federal forum.

Therefore, we respectfully submit that the Court should enter the form of Order which we have proposed providing for an assessment of six percent of the gross amount awarded to plaintiffs in federal cases and four percent of the gross amount awarded to plaintiffs in any state-court proceedings where the state court has agreed to coordination subject to the terms of this Order for distribution pursuant to a subsequent Order by the Court in accordance with applicable principles of law governing fee awards.⁴ These assessments would also apply to all counsel appointed by this Court to serve on committees, thus, committee members would be subject to a 6% assessment for all of their cases in the MDL and a 4% assessment for any of their state court cases to maintain their appointment.

⁴ The proposed Agreement for state court attorneys who voluntarily agree to the use of the MDL work product is attached hereto as Exhibit "2".

III. CONCLUSION

For the foregoing reasons, the PSC requests that its Petition be granted and the proposed Order entered by the Court.

Respectfully submitted,

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PLAINTIFFS' STEERING COMMITTEE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

93 JUL 23 PM 4:06

In re:

SILICONE GEL BREAST IMPLANTS
PRODUCTS LIABILITY LITIGATION
(MDL-926)

Master File No. CV 92-10000-3

This Document Relates To:
All Cases

ORDER NO. 11

(Establishing Plaintiffs' Litigation Expense Fund
to Compensate and Reimburse Attorneys
for Services Performed and Expenses
Incurred for Common Benefit)

This order is entered in order 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 common benefit of all plaintiffs in this complex litigation.

1. Plaintiffs' Litigation Expense Fund to be Established. Plaintiffs' National Liaison Counsel -- Francis H. Hare, Jr., and J. Michael Rediker -- are directed to establish an interest-bearing account to receive and disburse funds as provided in this order. They may designate an escrow agent for this purpose. These funds will be held as funds subject to the direction of the court. No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person under this order. ~~These funds will not constitute the separate property of any party or attorney or -- except when and as~~ directed to be disbursed as provided in this order to a specific person -- be subject to garnishment or attachment for the debts of any party or attorney. These limitations do not preclude a party or attorney from transferring, assigning, or creating a security interest in potential disbursements from the fund if permitted by applicable state laws and if subject to the conditions and contingencies of this order.

2. Assessment.

(a) All plaintiffs and their attorneys who, after this date, either agree -- for a monetary consideration -- to settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief, ~~including such compensatory and punitive damages,~~ with respect to a breast implant claim are hereby assessed:

(1) 5% of the "gross monetary recovery," if the agreement is made or the judgment is entered after this date and before November 1, 1993, or

EXHIBIT

1

WAB-71 1002 177 APR

No. 0190

is made or the judgment is entered after October 31, 1993.

Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the fund as a credit against the settlement or judgment. If for any reason the assessment is not so withheld, the plaintiff and her counsel are jointly responsible for paying the assessment into the fund promptly upon receipt.

(b) In measuring the "gross monetary recovery":

(1) Exclude any amounts taxed, or potentially subject to be taxed, as court costs that are to be paid by the defendant.

(2) Exclude any payments to be made by the defendant directly to unrelated third-parties, such as to physicians, hospitals, and other health-care providers.

(3) Exclude the value of any services or products that are to be provided by the defendant without charge, or at reduced charges, such those relating to removal or replacement of implants.

(4) Include the present value of any fixed and certain payments to be made in the future (except that, in lieu thereof, a plaintiff may agree to be assessed the appropriate percentage when and as future payments are received).

(c) This obligation:

(1) Applies to all cases now pending, or later filed in, transferred to, or removed to, this court and created as part of the coordinated proceeding known as the Silicone Gel Breast Implants Products Liability Litigation, including cases later remanded to a state court as a result of permitting an amendment adding a non-diverse party (but not including, however, those cases remanded to a state court on the basis that removal was improper).

(2) Applies to other federal breast-implant cases which are not transferred to this court under MDL-926 but in which plaintiff's counsel agrees to this obligation. (It is expected that, in due course, after coordinated MDL pretrial proceedings have been completed in this court and cases are being remanded back to transferor courts for further proceedings, counsel in newly filed and removed cases may agree to the terms of certain orders in this court in lieu of transfer under § 1407.)

(3) Applies to cases in a state court to the extent so ordered by the presiding judge of that court.

(d) If the plaintiff's attorney has a contingent fee agreement with the client, the amount to be paid to the fund shall be charged

against, and paid from, the attorney's share of the recovery, except that, if the agreement contains special provisions regarding reimbursement for litigation expenses, one-half of that amount -- unless a different portion is stated in the court's approval of disbursement -- may be treated in like manner as for other litigation expenses.

(e) Plaintiffs and defendants, and their counsel, are jointly responsible for promptly reporting to Plaintiffs' National Liaison Counsel -- or to the escrow agent designated by them -- the terms of any settlement or judgment that may be subject to this order. This report is to enable monitoring of compliance with this order. If so provided in a settlement agreement, the terms shall -- unless and until so ordered by this court -- be kept confidential and not be communicated by them to other litigants and their attorneys.

(f) Relief from obligation. The court reserves the right to relieve, wholly or partly, a plaintiff from the obligations of this order upon a showing of exceptional circumstances.

3. Disbursements.

(a) 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. Attorneys eligible are not limited to Plaintiffs' National Liaison Counsel and members of Plaintiffs' National Steering Committee, but include, for example, other attorneys called upon by them to assist in performing their responsibilities, State Liaison Counsel, and other attorneys performing similar responsibilities in state court actions in which the presiding state court judge has imposed similar obligations upon plaintiffs to contribute to the fund.

(b) Payments will be allowed only to compensate for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all plaintiffs.

(1) Payment may, for example, be made for services and expenses related to the obtaining, reviewing, indexing, and paying for hard-copies or computerized images of documents from the defendants; to conducting "national" or "state" depositions; and to activities connected with the coordination of federal and state litigation, such as assessments to pay for the services of the special master appointed by the court for that purpose. The fund will not, however, be used to pay for services and expenses primarily related to a particular case, such as the deposition of a treating physician, even if such activity results in some incidental and consequential benefit to other plaintiffs.

(2) Payments will not exceed the fair value of the services performed or the reasonable amount of the expenses incurred, and, depending upon the amount of the fund, may be limited to a part of the value of such services and expenses. No "bonus"

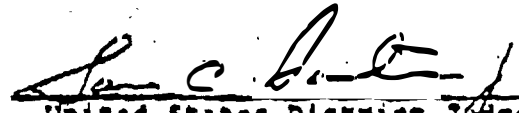
~~undertaken from merely because the service or expense is~~
undertaken for the common benefit of other litigants.

(c) No amounts will be disbursed without review and approval by a committee of federal and state judicial officers to be designated by the court. The committee may, however, utilize the services of a special master to assist in this review, and may authorize one or more of its members to act for the committee in approving particular types of applications for disbursement.

(d) If the fund exceeds the amount needed to make payments as provided in this order, the court will order an refund to those who have contributed to the fund. Any such refund will be made in proportion to the amount of the contributions.

4. Modification. The court reserves the power to modify the terms of this order, but no changes imposing any additional burden or obligation on plaintiffs in actions in a state court that has imposed this obligation on such parties will be made without the approval of the presiding state court judge.

This the 23rd day of July, 1993.


United States District Judge

MAY 22 2001 12:50PM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re:

SILICONE GEL BREAST IMPLANTS
PRODUCTS LIABILITY LITIGATION
(MDL 928)

Master File No.
CV 92-P-10000-S

AUG 0

ENTERED

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ORDER NO. 23
(Suggestion of Remand)

The undersigned transferee district judge, has, after conferring with counsel, concluded that, under Rule 14 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, it is appropriate that certain transferred actions (or separable claims in transferred actions) be remanded to the transferor district court, and accordingly -

1. With respect to the actions listed in Table I attached to this order, the undersigned recommends that these actions be remanded as they relate to the claims of the indicated plaintiffs (and named spouses and children) against the indicated defendants; and

2. With respect to the claims listed in Table II attached to this order, the undersigned recommends that these claims, which are hereby severed from other remaining claims in the case, be remanded as they relate to the claims of the indicated plaintiffs (and named spouses and children) against the indicated defendants.

In requesting remand at this time, the listed plaintiffs are not requesting that the

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against all other defendants be dismissed with prejudice, and such motions will, if remand is ordered by the Judicial Panel on Multidistrict Litigation, be deemed granted at such time. The parties have also been advised that various orders of this court, including Order No. 13, will apply in such cases upon remand.

This the 28th day of July, 1996.


United States District Judge

cc: Plaintiffs' Liaison Counsel
Defendants' Liaison Counsel

AGREEMENT

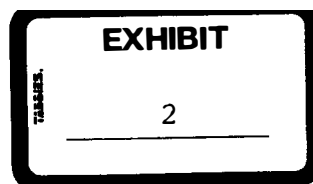
This Agreement is made this _____ day of _____, 2001, by and between the Plaintiffs' Steering Committee ("PSC") appointed by the United States District Court for the Eastern District of Louisiana in MDL Docket No. 1355 and _____ (hereinafter "the State Attorneys").

WHEREAS, the United States District Court for the Eastern District of Louisiana has appointed Daniel E. Becnel, Jr., Wendell H. Gauthier, Russ M. Herman, Arnold Levin, Stephen B. Murray, J. Michael Papantonio, Christopher A. Seeger, Robert F. Wright, and Charles S. Zimmerman to serve as members of the PSC to facilitate the conduct of pretrial proceedings in the federal actions relating to the use of Propulsid.

WHEREAS, the PSC in association with other attorneys working for the common benefit of plaintiffs have developed or are in the process of developing work product which will be valuable in the litigation of state court proceedings involving Propulsid induced injuries which includes:

- a. CD-ROMs and a depository reflecting images of the key documents selected by the PSC from the document productions of the defendants and third-parties in MDL 1355;
- b. a bibliographic database providing a "coded" index of such key documents;
- c. the depositions of each generally applicable fact witness taken in MDL 1355 and in any coordinated state-court actions in the form of paper transcripts, text searchable computer disks and CD-ROMs and videotapes of videotaped depositions;
- d. timeliness, "casts of characters" and other work product relating to the facts at issue in MDL 1355; and
- e. the testimony of generic experts developed by the PSC in connection with MDL 1355 as reflected in videotaped depositions of such experts taken to preserve their testimony for trial.

which will collectively be referred to as the "PSC Work Product" and



WHEREAS, the State Attorneys are desirous of acquiring the PSC Work Product and establishing an amicable, working relationship with the PSC for the mutual benefit of their clients;

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. With respect to each client who they represent in connection with a Propulsid related claim, other than clients with claims filed or pending in any Federal court, each of the State Attorneys shall deposit or cause to be deposited in an MDL 1355 Fee and Cost Account established by the District Court in the MDL 4% of the gross amount recovered by each such client. For purposes of this Agreement, the gross amount of recovery shall include the present value of any fixed and certain payments to be made to the plaintiff or claimant in the future.

2. The State Attorneys, on behalf of themselves, their affiliated and co-counsel, and their clients, hereby grant and convey to the PSC a lien upon and/or a security interest in any recovery by any client who they represent in connection with any Propulsid induced injury, to the full extent permitted by law, in order to secure payment in accordance with the provisions of paragraphs 1 and 2 of this Agreement. The State Attorneys will undertake all actions and execute all documents which are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

3. The State Attorneys, on behalf of themselves, their affiliated and co-counsel, and their clients, hereby agree to maintain the confidentiality of the PSC work product and in order to secure the intent of this Confidentiality Agreement agree not to copy, distribute, duplicate or divulge the PSC work product to others. The State Attorneys will execute all documents which are reasonably necessary to effectuate and/or carry out this Confidentiality Agreement including but not limited to the agreement to maintain confidentiality as set forth in PTO5.

4. This Agreement shall apply to each and every claim or action arising from the use of Propulsid in which the State Attorneys have a right to a fee recovery.

PLAINTIFFS' STEERING COMMITTEE

By: _____

Russ M. Herman, Esquire
820 O'Keefe Avenue
New Orleans, LA 70113
504-581-4892

**LIAISON COUNSEL TO THE
PLAINTIFFS' STEERING COMMITTEE**

[state court attorney]

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

	:	MDL NO. 1355
IN RE: PROPULSID	:	
PRODUCTS LIABILITY LITIGATION :		SECTION: L
	:	
	:	JUDGE FALLON
	:	MAG. JUDGE AFRICK
	:	
	:	
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THIS DOCUMENT RELATES TO ALL CASES

**PRE TRIAL ORDER NO. ____
(ESTABLISHING PLAINTIFFS' LITIGATION EXPENSE FUND
TO COMPENSATE AND REIMBURSE ATTORNEYS FOR
SERVICES PERFORMED AND EXPENSES INCURRED FOR COMMON BENEFIT)**

This order is entered in order 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 common benefit of all plaintiffs in this complex litigation.

1. Plaintiffs Litigation Expense Fund to be Established.

Plaintiffs Liaison Counsel - Russ M. Herman – is directed to establish an interest-bearing account to receive and disburse funds as provided in this order. He may designate an escrow

agent for this purpose. These funds will be held as funds subject to the direction of the court. No party or attorney has any individual right to any of these funds except to the extent of amounts directed to be disbursed to such person by order of the Court. These funds will not constitute the separate property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed to be disbursed as provided by court order to a specific person. These limitations do not preclude a party or attorney from transferring, assigning, or creating a security interest in potential disbursements from the fund if permitted by applicable state laws and if subject to the conditions and contingencies of this order.

2. Assessment.

- (a) All plaintiffs and their attorneys who, either agree or have agreed – for a monetary consideration – to settle, compromise, dismiss, or reduce the amount of a claim or, with or without a trial, recover a judgment for monetary damages or other monetary relief, including such compensatory and punitive damages, with respect to a Cisapride (Propulsid) claim are hereby assessed 6% of the “gross monetary recovery,”

Defendants are directed to withhold this assessment from amounts paid to plaintiffs and their counsel, and to pay the assessment directly into the fund as a credit against the settlement or judgment. If for any reason the assessment is not or has not been so withheld, the plaintiff and his counsel are jointly responsible for paying the assessment into the fund promptly. No orders of dismissal of any plaintiffs claim shall be filed unless accompanied by a certificate of plaintiffs and defendants counsel that the assessment has been withheld and deposited into the fund.

- (b) In measuring the “gross monetary recovery”:

- (1) Exclude any amounts taxed, or potentially subject to be taxed, as court

costs that are to be paid by the defendant.

- (2) Exclude any payments to be made by the defendant on account of subrogation assisted by third-parties, such as to physicians, hospitals, and other health-care providers.
 - (3) Include the present value of any fixed and certain payments to be made in the future (except that, in lieu thereof, a plaintiff may agree to be assessed the appropriate percentage when and as future payments are received).
- (c) This obligation:
- (1) Applies to all cases now pending, or later filed in, transferred to, or removed to, this court and treated as part of the coordinated proceeding known as *In re: Propulsid Products Liability Litigation* including cases later remanded to a state court.
 - (2) Applies to other federal Cisapride (Propulsid) cases which are not transferred to this court under MDL-1355
 - (3) Applies to cases in a state court to the extent so ordered by the presiding judge of that court ~~or~~ in the event a state court plaintiff, through counsel, consents to be coordinated with the MDL, then such contribution specified in paragraph 2 is limited to 4%.
- (d) If the plaintiff's attorney has a contingent fee agreement with the client, the amount to be paid to the fund shall be charged against, and paid from the attorney's share of the recovery, except that, if the agreement contains special provisions regarding reimbursement for litigation expenses, one-half of that amount – unless a different portion is stated in the court's approval of

disbursement – may be treated in like manner as for other litigation expenses.

- (e) Plaintiffs and defendants, and their counsel, are jointly responsible for promptly reporting to Plaintiffs' Liaison Counsel and the Court the terms of any settlement or judgment that may be subject to this order. This report is to enable monitoring and compliance with this order. If so provided in a settlement agreement, the terms shall – unless and until so ordered by this court – be kept confidential and not be communicated by them to other litigants and their attorneys.
- (f) Relief from obligation. The court reserves the right to relieve, wholly or partly, a plaintiff from the obligation of this order upon a showing of exceptional circumstances.

3. Disbursements.

- (a) 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. Attorneys eligible are not limited to Plaintiffs' Liaison Counsel and members of the Plaintiffs' Steering Committee, but include, for example, other attorneys called upon by them to assist in performing their responsibilities. State Liaison Counsel, and other attorneys performing similar responsibilities in state court actions in which the presiding state court judge has imposed similar obligations upon plaintiffs to contribute to the fund. All time and expenses are subject to proper submission of records of expenditures.
- (b) Payments will be allowed only to companies for special services performed, and to reimburse for special expenses incurred, for the joint and common benefit of all

plaintiffs.

- (1) Payment may, for example, be made for services and expenses related to the obtaining, reviewing, indexing and paying for hard copies or computerized images of documents from the defendants; to conducting “national” or “state” depositions; and to activities connected with the coordination of federal and state litigation. The fund will not, however, be used to pay for services and expenses primarily related to a particular case, such as the deposition of a treating physician, even if such activity results in some incidental and consequential benefit to other plaintiffs.
 - (2) Payments will not exceed the fair value of the services performed or the reasonable amount of the expenses incurred, and, depending upon the amount of the fund, may be limited to a part of the value of such services and expenses.
 - (c) No amounts will be disbursed without review and approval by the PSC and a mechanism designed and ordered by the Federal Court. The Court may utilize the services of a special master or magistrate to assist in this review.
 - (d) If the fund exceeds the amount needed to make payments as provided in this order, the court will order a refund to those who have contributed to the fund. Any such refund will be made in proportion to the amount of the contributions.
4. Modification.

The court reserves the power to modify the terms of this order, but no changes imposing any additional burden or obligation on plaintiffs in actions in a state court that has imposed this

obligation on such parties will be made without the approval of the presiding state court judge.

This ____ day of _____, 2001.

ELDON E. FALLON
UNITED STATES DISTRICT JUDGE