UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	:	**MDL NO. 1355**
IN RE: PROPULSID PRODUCTS LIABILITY LITIGATION	:	
	:	**SECTION: L**
	:	**JUDGE FALLON**

THE PLAINTIFFS' STEERING COMMITTEE'S MOTION FOR AWARD OF ATTORNEY'S FEES AND REIMBURSEMENT OF COSTS

The Plaintiffs' Steering Committee ("PSC") hereby submit this motion for an award of attorneys' fees and reimbursement of costs derived from the Settlement Program and the PTO No. 16 Litigation Fund. The Settlement Program was developed and created by the PSC along with the defendants, Johnson & Johnson and Janssen Pharmaceutica, Inc. under the guidance and supervision of the Court. This remarkable settlement is the culmination of years of adversarial litigation throughout the course of this multi-district litigation.

For the reasons set forth in the accompanying memorandum in support of this motion, the PSC respectfully requests that this Court award them fees and costs in the amount of $22,500,000.00

for their efforts in connection with the creation and development of the Settlement Program as well as any further deposits that are made into the PTO NO. 16 Litigation Fund.

Respectfully submitted:

RUSS M. HERMAN, T.A. (La. Bar #6819)
LEONARD A. DAVIS, #14190
JAMES C. KLICK, #7451
HERMAN, MATHIS, CASEY, KITCHENS & GEREL, LLP
820 O'Keefe Avenue
New Orleans, Louisiana 70113
Phone: (504) 581-4892; Fax: (504) 561-6024
LIAISON COUNSEL FOR PLAINTIFFS

DANIEL E. BECNEL, JR.
106 W. Seventh Street
Reserve, LA 70084-0508
Phone: (504) 536-1186
Fax: (504) 536-6445

JAMES DUGAN
650 Poydras Street, Suite 2150
New Orleans, LA 70130
Phone: (504) 648-0180
Fax: (504) 648-0181

ARNOLD LEVIN
FRED S. LONGER (on the brief)
510 Walnut Street, Suite 500
Philadelphia, PA 19106-3875
Phone: (215) 592-1500
Fax: (215) 592-4663

STEPHEN B. MURRAY
909 Poydras Street, Suite 2550
New Orleans, LA 70112
Phone: (504) 525-8100
Fax: (504) 584-5249

J. MICHAEL PAPANTONIO
316 S. Baylen Street, Suite 600
P.O. Box 12308
Pensacola, FL 32581
Phone: (850) 435-7000
Fax: (850) 435-7020

CHRISTOPHER A. SEEGER
One William Street
New York, NY 10004
Phone: (212) 584-0700
Fax: (212) 584-0799

BOB F. WRIGHT
556 Jefferson Street, Suite 500
Lafayette, LA 70502-3668
Phone: (337) 233-3033
Fax: (337) 232-8213

CHARLES S. ZIMMERMAN
651 Nicollet Mall, Suite 501
Minneapolis, MN 55402
Phone: (612) 341-0400
Fax: (612) 341-0844

PLAINTIFFS' STEERING COMMITTEE

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served on Liaison Counsel, James Irwin, by U. S. Mail and e-mail or by hand delivery and e-mail and upon all parties electronically by uploading the same to Lexis-Nexis File and Serve in accordance with Pre-Trial Order No. 4, on this 3rd day of May 2005.

LEONARD A. DAVIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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IN RE: PROPULSID PRODUCTS LIABILITY LITIGATION	:	
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MEMORANDUM IN SUPPORT OF PLAINTIFFS' STEERING COMMITTEE'S MOTION FOR AWARD OF ATTORNEY'S FEES AND REIMBURSEMENT OF COSTS

I. INTRODUCTION

The Settlement Program developed and created by the Plaintiffs' Steering Committee ("PSC") is both new and novel in its scope and reach.[1] Never before in the history of multidistrict litigation, have counsel achieved a global resolution of this proportion in the unique manner by which this Settlement Program resolves the litigation without resort to complex joinder devices or Class Certification. This remarkable approach to resolution of "mass tort" litigation promises to become the template for similar resolution of future litigations of this kind.

Thanks to the devotion and resourcefulness of the PSC and counsel for defendants and the court's guidance this MDL will be successfully concluded. Among the numerous achievements of the PSC the foremost includes the result obtained by the Settlement Program, in which thousands of persons that took Propulsid will be entitled to a speedy determination of their claims and prompt disbursement of compensatory awards for their legal claims where appropriate. This private

[1]The PSC is currently comprised by Russ Herman, Arnold Levin, Charles S. Zimmerman, Bob F. Wright, Daniel E. Becnel, Jr., Stephen B. Murray, James Dugan, Christopher A. Seeger and J. Michael Papantonio.

settlement avoids many of the pratfalls and legal obstacles to class-wide mass tort resolution while still providing participants appropriate individual attention to their claims.

The efforts of the PSC was clearly instrumental in achieving the substantial benefit that the Settlement Program confers. The PSC's efforts to develop the liability of Johnson & Johnson and Janssen Pharmaceutica, Inc. (hereafter "J&J", "Janssen" or "the defendants") in connection with their gastrointestinal drug, Propulsid, was a driving force behind the defendants' interest in universally resolving this litigation.

During the past five years, the court appointed PSC has vigorously litigated Propulsid cases and have arduously labored to achieve this multi-million dollar settlement with the defendants which was presented to this Court on January 30, 2004. Now that the enrollment criteria of the Settlement Program have been realized and the settlement is operational, with initial funding having already occurred[2], the PSC submits that the time to petition for an award of attorney's fees has arrived.

The PSC, who undertook the prosecution of this MDL on a wholly contingent basis more than five years ago, seek an award of attorneys's fees and reimbursement of expenses subject to court approval of $22,500,000[3], which amount the Defendants have contractually agreed to pay separate and apart from the resources earmarked for funding the Settlement Program. The Settlement Program is in excess of minimum enrollment and funded in excess of the minimum amount of $72,300,000.00. The PSC's fee request represents the total amount that the defendants contractually agreed to pay for same in the settlement. Another highlight of the PSC's negotiating prowess was

[2]The settlement fund of $72,300,000.00 million was placed in escrow on April 25, 2005 . The administrative fund of $15,000,000.00 was placed in escrow previously. The total fund deposited to date is $87,300,000.00.

[3]In addition, PTO No.16 provides for an award to the PSC.

the ability to obtain separate funding of counsel fees so as not to diminish in any way the monies available to compensate injured propulsid victims. Viewed either as a percentage of the fund or based upon a lodestar analysis, the PSC submits that the fee requested is reasonable given the remarkable benefits conferred upon participants in the Settlement Program.

The PSC also seeks recognition from this Court of the PSC's entitlement to a future award of fees and costs created by PTO No. 16. This "downstream fund" will receive future deposits given the numerous past administrative efforts and those yet to be conducted attending to the settlement program. The Propulsid depository is required by the terms of the settlement to remain open and operational for a minimum of 18 months from funding, *i.e.*, April 25, 2005. In addition, PSC members have substantial held costs which will be ongoing. This award is appropriate given the significant efforts performed for the MDL by counsel that tirelessly labored to achieve all of the successes known to this MDL.

II. FACTUAL BACKGROUND

A. A BRIEF HISTORICAL BACKGROUND OF PROPULSID

From August 1993 until July 2000, Johnson & Johnson and Jansen Pharmaceuticals marketed the gastrointestinal drug Cisapride under the tradename "Propulsid". Propulsid tablets, suspension and "quick solv" tablets were manufactured, labelled, marketed, advertised and distributed throughout the United States by these defendants.

Propulsid was launched in the United States marketplace in August 1993 with the limited indication of "symptomatic treatment of [adult] patients with nocturnal heartburn due to gastroespohageal reflux disease." When the defendants launched Propulsid it had only been approved by the Food & Drug Administration ("FDA") on the basis of three pivotal studies of only

315 patients. Once approved for marketing, the defendants aggressively marketed Propulsid as a new "pro-kinetic" or "pro-motility" agent that was a "highly effective" treatment for a variety of GI symptoms and "well tolerated" by patients.

Because the market for pharmaceuticals in the gastrointestinal drug class, which included Propulsid, is significant, the defendants quickly realized large dollar sales of the drug in the United States. From 1993 through July 2000, Propulsid was prescribed more than 38 million times, much of which was prescribed outside of the limited indication for nighttime heartburn associated with GERD. In 1998, Propulsid's peak year in the United States, the defendants sold more than $500 million worth of Propulsid. In 1999, Propulsid was ranked 63rd among the most prescribed drugs in the United States. Over the course of its product life, Propulsid generated nearly $2.5 billion in gross revenues for the defendants in the United States alone.

The Defendants' sales of Propulsid were not without controversy. Janssen's internal studies and those published in the medical literature demonstrated that the effectiveness of Propulsid for the treatment, cure or prevention of the conditions and symptoms for which it was promoted was negligible–Propulsid was no better, nor worse than many of the GI drugs in the vast majority of patients.[4] To preserve the market for Propulsid and maintain the defendants' place in the competitive GI drug market, the defendants kept secret that Propulsid was a drug that worked no better than placebo.

[4] *See, e.g.*, Saye, Z., et al., *Effects of Cisapride on Gastroesophageal Reflux in Children with Chronic Bronchopulmonary Disease*, Pediatric Pulmonology 1987; 3: 8-12; Enriquez, A, *Randomized Controlled Trial of Cisapride in Food Intolerance in Preterm Infants*, Arch Dis Child Fetal Neonatal Ed. 1998; Halabi, I., *Cisapride in Management of Chronic Pediatric Constipation*, Journal of Pediatric Gastro & Nutrition Feb. 1999 Vol. 28, No. 2 pp. 199 - 202. Few published clinical studies directly address the effectiveness of Propulsid in adults. *See, e.g.*, Maleev, A.; *Cisapride and Cimetidine in the Treatment of Erosive Esophagitis*, Hepato-gastroenterol 37 (1990) 403-407.

Coupled with questionable efficacy data, as the sales of Propulsid increased so too did post-marketing surveillance conducted by the defendants reveal rising numbers of cardiac-related adverse drug experiences (ADE's) among Propulsid users. Knowledge of Cisapride's adverse effects on cardiac rhythm was becoming widespread.[5] The FDA began questioning the safety profile and risk benefit ratio of the drug given its minimal efficacy and the number of serious adverse events that were transpiring as early as March 1998. By the time the drug was taken off the market in July 2000, the FDA had received post-marketing reports of 399 serious arrhythmias among U.S. patients taking propulsid. The number of adverse events that actually occurred (as compared to those reported) is unknown. However, pressure brought by the FDA upon the defendants lead them to withdraw the drug from marketing in July 2000.

B. MDL NO. 1355 WAS ORGANIZED WITHIN MONTHS OF PROPULSID'S WITHDRAWAL FROM MARKETING

Following news of the withdrawal of the drug from the market, a wave of litigation against the defendants for cardiac related disturbance ensued in both state and federal courts. On August 7, 2000, the Judicial Panel on Multidistrict Litigation entered a transfer order initiating MDL No. 1355. The thousands of litigants in federal litigation had their actions transferred to the Eastern District of Louisiana for coordinated proceedings before the Court.

[5]*See* Lupoglazoff J.M., et al., *Long QT Syndrome Under Cisapride in Neonates and Infants*, Arch Pediatr 1997 June; 4(6): 509 - 514 (high Propulsid dosage in preterm infants, newborns and full-term infants altered the children's heart rhythms); Bernardini, S., *Effects of Cisapride on QT Intervals in Neonates*, Archives of Disease in Childhood Fetal & Neonatal Edition, Nov. 1997, 77(3): 241-243 (Propulsid significantly increased the QT interval in neonates as a result of an accumulation of Propulsid in these young children's bloodstream); Hill, S., *Proarrhythmia Associated with Cisapride in Children*, Pediatrics June 1998 and Khongphattbanayothin A., et al., *Effects of Cisapride on QT interval in Children*, Journal of Pediatrics, Vol 133, No. 1 1998 pp. 51 - 56 (significant QT interval prolongation in children using Propulsid).

On October 23, 2000, by means of Pretrial Order No. 3, the PSC was appointed. The PSC promptly engaged in organizing and conducting extensive litigation with the defendants.

Several initial matters of necessity were immediately addressed. Issues like confidentiality, document production protocols, deposition guidelines, plaintiffs fact sheets, and the like, had to be negotiated and determined between the PSC and the defendants and presented to the Court. From these presentations, within short order, Pretrial Order Nos. 5 through 10 issued that set basic corner-posts that guided counsel in the efficient conduct of this litigation.

Over the course of this MDL the PSC engaged in a wide variety of discovery: 7 Sets of Interrogatories were served upon the defendants; 5 Sets of Requests for Production of Documents were served; and 2 sets of Requests for Admission were served. In response, the PSC was deluged with documents purportedly responsive to the PSC's discovery. In all, the PSC received 939 CD roms, containing approximately 1.8 million electronically imaged documents exceeding 7 million pages. Another 20,000 additional hard copies of documents were separately produced by the defendants. In addition, the PSC subpoenaed and received thousands of documents from other third-party entities, including the FDA and other entities, related to sale and marketing of Propulsid.

The PSC created a depository for these documents and engaged attorneys and other legal staff to begin the arduous task of reviewing these mountains of paper. After months of effort, the document review process was sufficiently complete to permit preparation for taking depositions of key employees to develop the liability claims for all of the participants in the MDL. In sum, 44 depositions of factual witnesses were performed both within and outside of the United States.

PSC attorneys' discovery activities were reviewed as well as trial transcripts of two trials, demonstrative evidence and expert testimony and selected portions were prepared for entry into a

"trial package" to enable counsel to conduct a trial without the need for any duplicative discovery. As integral to the settlement, the trial package is available to all counsel that opted not to participate in the Program. The trial package consists of the vast extent of the PSC's work product. Included in the package is electronic images of the select documents culled from the millions of documents produced, indexed and analyzed; deposition transcripts (with summaries and trial designations); pleadings with exhibits; timelines; critical analyses and summaries, and more. Presumably, the trial package which will be available on external hard drives, should provide any counsel the complete arsenal of material needed to competently try any Propulsid case.

In addition, the PSC engaged in extensive motion practice over the entire course of this MDL. Members of the PSC were routinely present at each of the 40 pre-trial status conferences, numerous motions hearings and other meetings conducted by the Court.

As the MDL matured, efforts to resolve the litigation germinated slowly. While certain individual actions were being settled, a global settlement remained far-off. On several occasions reports were made to the Court providing information of the status of settlement discussions. Following court directed mediations and the appointment of Special Master Juneau, and court ordered mediations which were monitored by the PSC, a select group, including members of the PSC, were designated by Liaison counsel to participate in what was referred to as the "End Game Committee".[6] The End Game Committee began its efforts in earnest beginning in the fall of 2003. The committee members met together and in various formations with counsel for the defendants over the next several months. After more than 12 months of serious, sober and secretive negotiations, the

[6]The End Game Committee was comprised of Russ Herman, Arnold Levin, Charles Zimerman, and Leonard Davis. Fred Longer also assisted the End Game Committee.

committee was able to report to the PSC that their negotiations had resulted in an agreement in principle. After a unanimous vote by the PSC in favor of the agreement, on January 30, 2004, the PSC and defendants endorsed the settlement program set forth in the MDL-1355 Term Sheet.

C. AN OVERVIEW OF THE MDL 1355 SETTLEMENT PROGRAM

The Program is designed to resolve all of the federal litigation currently taking place in the federal judiciary. The structure of the Program is unique and noteworthy. The Program establishes a recovery system, subject to the Court's jurisdiction, that remains a private settlement of all participating federal claimants. The Program was contingent upon a minimum participation rate. Once that milestone was satisfied, the Program's funding contains escalation terms that rise according to enrollment levels. Initial funding began at $69,500,000 assuming 85% of death cases and 75% of non-death and tolling cases participate. Complete participation results in full funding which was negotiated to be $90 million. Separate and apart from the settlement funds, Defendants agreed to pay $15 million to address administrative expenses, which include costs for the Special Master and the reviewing physicians.

The program sets forth a mechanism by which individual claims are promptly resolved. Persons that used Propulsid agree to enter the Program knowing only they must submit sufficient medical records to support their claim, that their claims will be reviewed by a panel of two physicians (with a third doctor selected as a tie-breaker, if necessary) and that after their review, the court appointed special master, Mr. Patrick Juneu, will determine the amount to be paid without reference to the available settlement funds.[7] While there is no certainty of recovery or the amount

[7]In the event that the settlement fund is exceeded by the Special Master's payment determinations, the Term Sheet provides that "the awards shall be reduced and paid on a pro rata (continued...)

of any recovery, participants in the Program, however, are informed of the process and the detailed evaluative criteria that will be employed by the physicians to categorize claimants.

These criteria required extensive consultation with medical doctors to appropriately describe the settlement categories envisioned by the Program. For example, Tier I cases describe the proofs required to establish death cases causally associated with Propulsid use; Tier II cases describe nonfatal cardiac arrest cases, and Tier III describe primary tachycardic ventricular arrhythmia cases. The Program envisions that both the Plaintiffs and the defendants will submit medical records along with their claim forms. Tier I and Tier II claimants may also submit brief confidential memorandum to support their claims. These records will be presented to a panel of two doctors who will be informed of the evaluative criteria described by the Program and the standards of proof including a "But for" test and concurrent cause and substantial factors.

Half of the physician panel was selected by the PSC and the other half selected by the Defendants. Each is a licensed doctor in the state of Louisiana with board certification in either cardiology, electrophysiology or internal medicine and has substantial experience treating cardiovascular disease. After consideration of the eligible claims by a panel of physicians, that panel's qualification of a participant into a particular category becomes final. Thereafter, the Special Master is to determine the amount of payment, which will become conclusive and non-appealable once a final determination of all claims occurs.

The Program also addresses attorneys fees and costs.[8] The Defendants have agreed that the

[7](...continued)
basis" proportionate to his awards. Term Sheet ¶6(C).

[8]Consistent with *Prandini v. National Tea Co.*, 557 F.2d 101, 1017 (3d Cir.1977), the (continued...)

efforts of the PSC were responsible for developing and creating the Settlement Program. Because the Program conferred a common benefit upon all the participants in the MDL and the Program, they agreed that the Court may employ its equitable powers to award the PSC attorneys fees (and costs) up to and including $22,500,000. Term Sheet ¶19.

III THE AWARD OF FEES AND COSTS FROM THE SETTLEMENT PROGRAM ARE SEPARATE FROM THOSE AWARDED PURSUANT TO PTO NO. 16

This Court recognized the importance of providing a means to assure that the committee it appointed to administer the MDL on behalf of the plaintiffs had a mechanism by which it could be compensated. In PTO No. 16 (entered 12/26/01), this Court determined that counsel in the MDL that recover funds for their clients, or those state court counsel that voluntarily submit to the plan proposed by the PSC, shall be subject to an assessment of fees against the award obtained in the amount of 6% for those cases in the federal system and 4% for those cases in the state judiciaries that have agreed to coordinate with the MDL.

[8](...continued)
End Game Committee negotiated all of the substantive provisions of the Term Sheet prior to discussing any matters regarding attorneys fees. Even then, counsel left the ultimate determination of the award of fees to the discretion of the Court with the assistance of the Special Master. Term Sheet ¶19. Also in line with Fifth Circuit jurisprudence, the PSC contemplates that the Special Master will determine the allocation and apportionment from the fee awarded taking into consideration such matters as lead counsel's opinions, the quality of the work performed, the benefits of the work performed, etc. *See Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992)(district court acted within its discretion leaving apportionment up to the attorneys involved); *In re Combustion, Inc.*, 968 F.Supp. 1116, 1129 (W.D.La. 1997)(Recognizing Special Master's recommendation of 36% of the fund as fee award); *In re Silicone Gel Breast Implant Products Liability Litig.*, MDL No. 926, Order No. 32 (N.D.Ala. June 16, 1996)(appointing special master to advise on procedure and actual disbursements of common benefit attorney fees). *See also In re Cendant Corp. Sec. Litig.*, 2005 WL 820592 (3d Cir. Apr. 11, 2005)(analyzing role of lead counsel in context of allocation of attorney fees). The PSC contemplates that an amendment to the June 24, 2004 order appointing Mr. Juneau as Special Master will be necessary to accomplish this task.

Under the terms of PTO No. 16, the defendants were ordered to withhold from the settlement amounts paid to plaintiffs and their counsel the appropriate percentage amount from the recoveries obtained in each respective litigation. The money withheld was deposited into an interest bearing account entitled, the "Plaintiffs' Litigation Expense Fund." The order specifically provides that "payments may be made from the fund to attorneys that provide services or incur expenses for the joint and common benefit . . . " PTO No. 16 ¶3(a). The Plaintiffs' Litigation Expense Fund is entirely separate from the money attributable to the Settlement Program.[9]

The mechanism for the award of attorneys fees and expenses obtained through the Settlement Program are determined by the Term Sheet.[10] The Term Sheet provides that Defendants agree to pay the PSC for its work product and efforts for developing and creating the Settlement Program and the PSC's future involvement in the administration of the Settlement Program. Term Sheet ¶19. The Defendants' agreement permits an additional sum of monies up to $22.5 million in fees and costs which they will not contest. Defendants have limited their obligation to pay any additional amounts. *Id.* The PSC has agreed that to obtain any award a petition such as this pleading must be submitted so that the Special Master may make a recommendation to the Court for its final approval. *Id.*

[9]Under the terms of the Settlement Program all of the participants acknowledged as a condition of their participation that "the use of this Program for settlement purposes constitutes consent by the plaintiff or a claimant under a tolling agreement to pay 6% of the gross amount of any award issued by the Special Master" into the Plaintiffs' Litigation Expense Fund created by PTO No. 16. Term Sheet ¶9.

[10]The PSC's motion is supported by contemporaneously maintained time and expense records submitted by counsel for examination by Wegmann Dazet & Company, the retained certified public accountant. Law firms' time records and expenses are reported to Wegmann Dazet. Pursuant to the Court's directive, these records are summarized and the summaries are provided to the Court. Should the Court request the supporting records, the PSC should immediately supply them.

At an appropriate time after the Plaintiffs' Litigation Expense Fund receives the additional monies from the PTO No. 16 assessment on awards from the Settlement Program, the PSC contemplates a subsequent petition for attorneys fees for efforts administering the Settlement Program and other tasks.

Accordingly, the PSC hereby petitions for an award of attorneys fees and reimbursement of costs of $22,500,000 arising out of the Settlement Program and future funding of the PTO No. 16 Litigation Fund.[11]

IV. ARGUMENT

A. THE PSC IS ENTITLED TO A RECOVER A REASONABLE FEE FOR CONFERRING A COMMON BENEFIT FOR THE PROGRAM PARTICIPANTS AND THE MDL AS A WHOLE FOR WHICH A RECOVERY FROM THE LITIGATION FUND ESTABLISHED BY PTO NO. 16 IS APPROPRIATE

Over one century ago, in *Trustees v. Greenough*, 105 U.S. 527 (1881), the United States Supreme Court made it clear that the federal trial courts possess equity power to reach beyond the confines of formal joinder, case captions and attorney fee contracts, to ensure that all who are the beneficiaries of litigation efforts undertaken for the common good would contribute proportionately to those services. This doctrine was further articulated and applied in a series of landmark Supreme Court decisions, including *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123-27 (1885); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-66 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 393 (1970); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) and *Blum v. Stenson*, 465

[11]The Court has already approved certain cost distributions from this fund. The PSC reserves the right to file future pleadings to obtain additional funds as a consequence of further contributions to the Litigation Fund.

U.S. 886 (1984).

In essence, the common benefit doctrine acknowledges "the original authority" of the courts "to do equity in a particular situation" to prevent unjust enrichment. *Sprague v. Ticonic*, 307 U.S. at 166. As the Supreme Court has observed, "[t]o allow the others to obtain full benefit from the plaintiffs' efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiffs' expense." *Mills v. Electric Auto-Lite*, 396 U.S. at 392.

While the common benefit doctrine is routinely invoked as the basis for the award of attorneys' fees from common funds or benefits generated in class actions, it is clear that its application is not limited to the class context. The Supreme Court's opinion in *Sprague* illuminates this point. *Sprague* involved a trust fund that was jeopardized when a bank went into receivership. After the plaintiff successfully sued for a lien establishing her right to recover from the trust, she sought reimbursement of attorneys' fees from the trust. Although the suit was not a class action, had only indirectly established the rights of others, and had not created a fund, the Court held that the plaintiff was entitled to compensation from those benefitted by her efforts:

> That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation.
>
> Whether one sues representatively or formally makes a fund available for others may, of course, be relevant circumstances in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation - the absence of an avowed class suit or the creation

> of a fund, as it were, through stare decisis rather than through a decree - hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

Sprague, 307 U.S. at 166. *See also Awarding Attorneys' Fees and Managing Fee Litigation* at 51 Fed. Jud. Ctr. 1994)("[a]lthough many common fund cases are class actions, . . . the doctrine is not limited to class actions"); MANUAL FOR COMPLEX LITIGATION, THIRD, § 20.223 at p. 29 (Fed. Jud. Ctr. 1995)("Expenses incurred and fees earned by [members of court appointed MDL management committee] in that capacity should not be borne solely by their clients, but rather shared equitably by all benefitting from their services").

Consistent with this, the *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977) opinion affirmed a common benefit assessment by an MDL transferee court with respect to litigants who were not part of a class and who settled their claims separately as a proper exercise of the courts' equity power under the common benefit doctrine. *See Florida Everglades*, 549 F.2d at 1019 ("The power of the court to order compensation, ...is reinforced by the body of law concerning the inherent equitable power of a trial court to allow counsel fees and litigation expenses out of the proceeds of a fund that has been created, increased or protected by successful litigation.").[12] The Third Circuit Court of Appeals has also expressly recognized the propriety of a common benefit fee award in mass tort MDLs that are not class actions and "which do not actually generate a common fund." *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 821 (3rd Cir.), *cert. denied*, 516 U.S. 824 (1995).

[12] *See also Vincent v. Hughes Air West, Inc.*, 557 F.2d 759,769 (9th Cir. 1977); *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606-07 (1st Cir. 1992); *Smiley v. Sincoff*, 958 F.2d 498, 501 (2nd Cir. 1992); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522 (D. Nev. 1987); *Orthopedic Bone Screw*, 1996 WL 900349 (E.D. Pa. Jun.17, 1996).

Consistent with the reasoning of these courts, ample grounds support the award of attorneys fees to the PSC for its negotiation, participation and creation of a non-class settlement program as well as from the litigation fund created by PTO No. 16. Recognizing this jurisprudence, the Defendants agreed that this Court may grant an award based upon its inherent powers of equity and that such an award shall be paid separate from the funds designated to pay for claimants' recoveries within the Settlement Program. Term Sheet ¶19. Pursuant to the terms agreed upon, "the defendants have agreed to pay and not contest any award for attorneys' fees and costs in the amount up to and including, $22,500,000, but defendants will not pay any sum in excess of that amount." *Id.*

Corresponding to the prevailing judicial philosophy in the Fifth Circuit an award of $22,500,000 is reasonable under either the "percentage of the fund" method ("POF") of determining fees affirmed in *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992) or the traditional "lodestar"[13] method first described in the context of a statutory fee shifting litigation. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

B. A REASONABLE FEE MAY BE DETERMINED AS A PERCENTAGE OF THE FUND OR VIA A LODESTAR ANALYSIS

From the time the Supreme Court decided *Pettus* in 1885 until 1973, courts typically based fee awards in common benefit cases on a "reasonable percentage of the fund." *See Pettus*, 113 U.S. at 127; *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 942, 962 (E.D.Tex. 2000); *In re Prudential-Bache Energy Income Partnerships Securities Litigation*, 1994 WL 150742, *2-3 (E.D.La. 1994); *In re Combustion, Inc.*, 968 F.Supp. 1116, 1132 (W.D.La. 1997); Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 242 (1985) ("*Task Force*

[13]The "lodestar" is the result of multiplying the number of hours reasonably expended on the litigation by counsel's prevailing hourly rate. *See Longden*, 979 F.2d at 1099.

Report"). *See also* Herman, *Percentage-of-Benefit Fee Awards in Common Fund Cases*, 74 Tulane L.Rev. 2033 (June 2000); Newberg, H., ATTORNEY FEE AWARDS, §2.02 at 31 (1986). Although courts relied on a number of factors to set the reasonable percentage, "the most heavily emphasized was the size of the fund or the amount of benefit produced for the class." *Task Force Report*, 108 F.R.D. at 242.

Use of the percentage-of-the-fund ("POF") method to award attorneys' fees in class actions abruptly came to an end in 1973 with the Third Circuit's decision in *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp. ("Lindy I")*, 487 F.2d 161, 165 (3rd Cir. 1973). The view has been expressed that *Lindy's* abandonment of the POF approach was a judicial response to a perceived adverse public reaction to "strikingly large fee awards...disproportionate to the actual efforts expended by the attorneys," which sometimes resulted from the percentage-of-the-fund methodology. *Task Force Report*, 108 F.R.D. at 242.

In *Lindy* I, the district court's fee award represented a percentage of the funds created by the settlement of an antitrust class action. The percentage amount of the award had been determined by undifferentiated reference to four factors – "the percentage of a claimant's recovery awarded as attorneys' fees in other cases, the amount of the recovery from which fees were being awarded, the amount the attorneys received from their clients under private agreements, and the time spent by [class counsel] 'in connection with th[e] litigation.'" *Lindy I*, 487 F.2d at 166, *quoting the district court's decision*, 341 F. Supp. 1077, 1089-90 (E.D. Pa. 1972). Chief Judge Seitz' opinion for the Court of Appeals rejected this approach because it lacked a rule of decision to cabin the otherwise unfettered discretion of the trial court as well as undermining the important value of predictability in judicial fee awards. As the Court said, "[t]he mere listing of four factors for consideration by

the court makes meaningful review difficult and gives little guidance to attorneys and claimants." *Lindy I*, 487 F.2d at 166-67. The Court then articulated the "standard[] that should guide the award of fees to attorneys successfully concluding class suits...." *Id.* at 167. That standard, fully set forth in the pair of *Lindy* decisions, uniformly became known as the "lodestar" method for awarding counsel fees.

Fresh on the heels of the *Lindy I* decision was the Fifth Circuit's version of the lodestar analysis that developed in the civil rights arena. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[14] While similar to *Lindy*, the *Johnson* case provided a more extensive 12 factor analysis for evaluating and determining attorneys fees in a statutory fee shifting setting. Under *Johnson*, the twelve factors are:

1) the time and labor required,
2) the novelty and difficulty of the issues,
3) the skill required to perform the legal services properly,
4) the preclusion of other employment,
5) the customary fee,
6) whether the fee is fixed or contingent,
7) time limitations imposed by the client or the circumstances,
8) the amount involved and the results obtained,
9) the experience, reputation, and ability of the attorneys,
10) the undesirability of the case,
11) the nature and length of the professional relationship with the client, and
12) awards in similar cases.

Id. The *Johnson* analysis was later expanded to common fund cases. *See Combustion*, 968 F.Supp.

[14]The "lodestar" approach was rapidly adopted by virtually all of the circuit courts of appeals as the appropriate legal standard to guide the exercise of the district courts' equitable power to award attorneys' fees in "common fund" cases. *See Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980); *City of Detroit v. Grinnell Corp. ("Grinnell II")*, 560 F.2d 1093, 1095 (2nd Cir. 1977); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 128 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

at 1134, *citing, Hoffert v. General Motors Corp.*, 656 F.2d 161 (5th Cir. 1981).

Following this approach, "the district court must first determine [a "lodestar"] the reasonable number of hours expended on litigation and the reasonable hourly rates for the participating attorneys." *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir.1998). As in *Lindy* the lodestar amount is the "logical beginning" in valuing the services provided by the attorneys requesting an award of fees. *Lindy I*, 487 F.2d at 167-68. *See also Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)("The calculation of attorneys' fees involves a well established process. First, the court calculates a 'lodestar' fee ... ").

The hourly rate to be used in this computation is the "market rate" – the rate normally charged by counsel of comparable standing, reputation, experience and ability in the community where counsel practices. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("reasonable fees... are to be calculated according to the prevailing market rates in the relevant community," *i.e.*, where counsel maintains his office); *United States v. City of Jackson, Miss.*, 359 F.3d 727, 733 (5th Cir. 2004); *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 638 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 787 (7th Cir. 1979); *See also Grinnell II*, 560 F.2d at 1098.

Under *Johnson* however, the computation of a lodestar amount is only the beginning of the fee determination process. *Johnson* and its progeny recognize that there is a fundamental difference between the economic value of services performed on a non-contingent, hourly billed basis and compensation that is subject to delay and contingent on success. *See, e.g., Foster v. Boise-Cascade,*

Inc., 577 F.2d 335, 337 (5th Cir. 1978)(Vance, J., concurring and dissenting in part).[15] Therefore, once a lodestar has been determined by multiplying the number of hours of service which qualify for payment times an appropriate hourly rate, *Johnson* requires that the lodestar be increased or decreased by a "multiplier." The multiplier is intended to provide compensation for the economic risks that counsel took in prosecuting the litigation without any guarantee of payment, for delay in payment, and for the quality of counsel's work. *See, e.g., Copper Liquor, Inc. v Adolph Coors Co.*, 684 F.2d 1087, 1093 (5th Cir. 1982)("The lodestar is then adjusted to reflect other factors such as the

[15] As the Judge Vance said:

> The most significant flaw in the trial court's award, however is not its failure to compensate an impressive result appropriately but its apparent failure to give meaningful consideration to the contingent aspect of counsel's compensation.

This reasoning follows directly from *Lindy I*, where the court held:

> "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.
>
> ***
>
> While the amount thus found to constitute reasonable compensation should be the lodestar of the court's fee determination, there are at least two other factors that must be taken into account in computing the value of attorney's services. The first of these is the contingent nature of success; this factor is of special significance where, as here, the attorney has no private agreement that guarantees payment even if no recovery is obtained.

Lindy I, 487 F.2d at 168; *see also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 735-36 (1987) (Blackmun, J., dissenting on other grounds) ("lawyers charge a premium when their entire fee is contingent on winning....the premium added for contingency compensates for the risk of nonpayment if the suit does not succeed").

contingent nature of the suit and quality of representation."); *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 821 (5th Cir. 1996)("The district court may then adjust the lodestar upward or downward depending on the respective weights of the twelve factors set forth in *Johnson*); *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995)("The product of this multiplication is the lodestar, which the district court then either accepts or adjusts upward or downward, depending on the circumstances."). *See also In re Washington Public Power Supply Sys. Sec. Litig. ("WPPSS")*, 19 F.3d 1291, 1299 (9th Cir. 1994) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases."); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 54 (2nd Cir. 2000) ("We have...labeled the risk of success as 'perhaps the foremost' factor to be considered in determining whether to award an enhancement [to the lodestar]."); *Lindy I*, 487 F.2d at 168.

The reign of the lodestar analysis was, however, relatively short-lived. Within a decade of the *Johnson* decision, the lodestar methodology lost substantially all of its vitality as a rule of decision for awarding fees in common fund cases, and the percentage method regained its ascendancy as the prevailing template for attorneys' fee awards in all the circuits save for the 5th Circuit. *See Prudential-Bache*, 1994 WL 150742 at *1-*4; *Shaw*, 91 F.Supp. at 962-64; *Camp v. Progressive Corp.*, 2004 WL 2149079, *19 (E.D.La 2004).

Two reasons explain this impressive judicial turnabout. First, the Supreme Court's decision in *Blum v. Stenson*, 465 U.S. 886 (1984), led the courts to question the legal underpinnings for use of the lodestar. In *Blum*'s often-quoted footnote 16, the Court indicated that, "under the common fund doctrine...a reasonable fee is based on a percentage of the fund bestowed on the class...." *Id.*

at 900 n.16. *See Task Force Report*, 108 F.R.D. at 250-51 (discussing *Blum* footnote 16).

Second, a decade of experience led the courts to conclude that the legal "cure" prescribed by the lodestar method actually did more harm than good.[16] Ironically, this view was first crystallized by the Third Circuit itself in a 1985 report issued by a Third Circuit Task Force appointed to "develop[ ] recommendations to provide fair and reasonable compensation for attorneys in those matters in which fee awards are provided by federal statute or by the fund-in-court doctrine..." *Task Force Report,* 108 F.R.D. at 238. The Third Circuit Task Force, together with the courts and academics, noted a wide range of inequities that attended the use of the lodestar approach in common fund matters. *See Prudential-Bache*, 1994 WL 150742 at *2-*4; *Shaw*, 91 F.Supp.2d at 964 ("The lodestar method voraciously consumes enormous judicial resources, unnecessarily complicates already complex litigation, and inaccurately reflects the value of services performed . . . simply put, the lodestar method rewards plodding mediocrity and penalizes expedient success").

Following this trend most courts have shifted towards the employment of the POF in common fund cases. *See, e.g., Swedish Hospital Corp. v. Shalala,* 1 F.3d 1261, 1271 (D.C.Cir. 1993)(requiring application of the POF method in common fund cases); *In re Thirteen Appeals*, 56 F.3d 295, 305; (1st Cir. 1995); *Goldberger, supra* (2d Circuit employs POF); *In re Prudential Ins.*

[16]In *Foster v. Boise-Cascade*, Judge Vance questioned the merit of the lodestar analysis with the following often quoted analogy: "This method of compensation which equates professional services to those of laborers and mechanics frequently has little or no relationship to the value of the services performed in anything but the most routine work. A flash of brilliance by a trial lawyer may be worth far more to his clients than hours or days of plodding effort. Few among us would contend that an operation by a gifted surgeon who removes an appendix in fifteen minutes is worth only one-sixth that performed by his marginal colleague who requires an hour and a half for the same operation. Notwithstanding its limitations, I am reconciled to the reality that the hourly rate approach will remain with us and is properly considered in the search for compensation that is reasonable" *Foster*, 577 F.2d at 337 n.1.

Co. Of America Sales Practices Litigation, 148 F.3d 283, 333-34 (3d Cir. 1998), *cert. denied.*, 525 U.S. 1114 (1999); *Longden v. Sunderman*, 979 F.2d 1095 (5th Cir. 1992)[17]; *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 515-16 (6th Cir. 1993) (noting "the recent trend towards adoption of a percentage-of-the-fund method," and permitting use of this method in common fund cases); *Continental Illinois Sec. Litigation*, 962 F.2d 566, 572 (7th Cir. 1992)(fee award should not be based on "individual hours," but rather on the percentage that counsel "would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client"); *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) ("a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery"); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989) (endorsing use of percentage approach); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988) ("a fee award based on a percentage of a common fund" is appropriate); *Camden I Condominium Ass'n, Inc. v. Dunkle* , 946 F.2d 768 774 (11th Cir. 1991)(same).

The Federal Judiciary as a whole and the Fifth Circuit in practice have approved providing fees as a percentage of the common fund for several reasons. The primary reason appears to be to provide appropriate incentives to plaintiffs' counsel. *See In re Cendent Corp. PRIDES Litigation*, 243 F.3d 722, 732 (3d Cir. 2001) (the "percentage-of-recovery method...allow[s] courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.") The POF method also brings a degree of uniformity of treatment and predictability of result to the fee award

[17] *Longden* affirmed the district court's opinion that determined attorneys fees as a percentage of the fund under a *Johnson* analysis.

process, that was not immediately obvious through the application of the lodestar method As Judge Becker observed in *In re Cendant Corp. Litigation*, 264 F.3d 201, 256 (3d Cir. 2001), while the lodestar method "creat[es] the illusion of mathematical precision," in reality it "can be quite subjective and can produce wildly varying awards in otherwise similar cases." *Cendant*, 264 F.3d at 256.[18] Thus, the majority of the circuit courts of appeals has held that the percentage-of-the-fund method should normally be used to determine the award of attorneys' fees to counsel whose labors create a common fund for the benefit of class members.[19]

[18] *See also Task Force Report*, 108 F.R.D. at 246-47 ("the elements of the Lindy process are insufficiently objective and produce results that are far from homogeneous. Widespread variations in fees awarded lawyers...have led to a loss of predictability as to treatment, as well as a loss of confidence in the integrity of the fee-setting procedure").

[19] The lodestar method continues to be appropriate in statutory fee-shifting cases where it properly functions to "reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." *Prudential*, 148 F.3d at 333. In *Strong*, the 5th Circuit, without ruling, noted a trend for the application of lodestar methodology where the settlement evades precise evaluation. *See Strong*, 137 F.3d at 852 n. 5 ("we note that several courts have advocated the use of the lodestar method in lieu of the percentage of fund method precisely in the situation where the value of the settlement is difficult to ascertain, reasoning that there is a strong presumption that the lodestar is a reasonable fee."). This exception is exceedingly narrow. In *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litigation*, 55 F.3d 768, 821 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995), the Third Circuit required application of the percentage-of-the-fund methodology to determine counsel fees even though the principal benefit provided by the settlement consisted of coupons, redeemable within a limited fifteen-month period, toward the purchase of certain General Motors vehicles. *Id.* at 780. Although this settlement "fund" was admittedly "difficult to value," it "did not award the even more hard-to-value intangible rights that could in some limited circumstances justify using the lodestar method." *Id.* at 822. In the same vein, the settlement in *In re Prudential Ins. Co. Of America Sales Practices Litigation*, 148 F.3d 283 (3d Cir. 1998), *cert. denied.*, 525 U.S. 1114 (1999), involved "an uncapped, 'future fund' whose ultimate value is dependent on the final number of claims remediated under the settlement [such that] 'the settlement...cannot reasonably be valuated.'" *Id.* at 334. Nonetheless, the Third Circuit approved the use of the POF method. *Id.* at 333-34. Similarly, in *In re Cendent Corp. PRIDES Litigation*, 243 F.3d 722, 734 (3d Cir. 2001), the Court continued to emphasize application of the POF method for monetary class

(continued...)

In the Fifth Circuit in particular, the Court of Appeals still adverts to the application of the lodestar approach. However, as Judge Livaudais observed in 1994,

> since *Blum* was decided, there has been no Fifth Circuit decision that would preclude this Court from employing the percentage of the fund approach endorsed in *Blum* and the circuit and district court decisions that followed and applied *Blum*. *See Longden v. Sunderman*, 979 F.2d 1095, 1100 & n. 11 (5th Cir.1992).

Prudential-Bache, 1994 WL 150742, *4. This ruling remains prescient despite the Fifth Circuit's post-*Blum* statement in *Strong* that, "this circuit uses [the lodestar method] to assess attorneys' fees in class action suits." *Strong*, 137 F.3d at 850. In *Strong*, the Fifth Circuit was presented with the potential application of the percentage of the fund methodology but again declined to face it squarely, noting instead that, "we do not purport to resolve this issue." *Id.* at 852 n. 5. Thus, the district courts are left with the same directive from *Longden* adverted to by Judge Livaudais that, "Although the prevailing trend in other circuits and district courts has been towards awarding fees and expenses in common fund cases based on percentage amounts, the Fifth Circuit has yet to adopt this method." *Id.* at 1101 n. 9.

Despite incongruent statements from the court of appeals, the district courts in the Fifth Circuit routinely employ a POF analysis coupled with a *Johnson* analysis.[20] *See Shaw*, 91 F.Supp. 2d at 966-67 (citing 20 cases); *Prudential-Bache*, 1994 WL 150742, *4 (citing 9 cases). *See also In re Harrah's Entertainment, Inc. Sec. Litig.*, 1998 WL 832574 (E.D.La. 1998). In *Combustion*,

[19](...continued)
settlements even where the fund involved was difficult to value.

[20]In essence, the district courts in the Fifth have been practicing what only recently has become firmly established law in the Third Circuit, *i.e.*, a percentage award with a lodestar cross-check. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305-07 (3d Cir. 2005).

the district court (Haik, J.) extensively analyzed the history of common fund awards and Fifth Circuit methodology to conclude:

> It is the opinion of this Court that in common fund cases such as the instant case, Fifth Circuit precedent requires a district court only to justify its award of attorneys' fees within the framework of the *Johnson* factors regardless of whether the award is determined by the lodestar or percentage of fund method. Further, a district court may exercise its discretion as to whether the fee evaluation more reasonably fits into a percentage of fund or into a lodestar calculation as long as either selection is supported by *Johnson* factor analysis.

Combustion, 968 F.Supp. at 1135. Thus, these courts have resolved the extant jurisprudence to permit a POF award when coupled with some *Johnson* analysis to insure an adequate record for appellate review.[21]

Although the Settlement Program is unique in the fact that it is not a class action, it retains most of the hallmarks of a traditional fund in court such that the fee and cost award contractually agreed to may be analyzed as a percentage of that fund. Even under a lodestar analysis, the PSC is clearly entitled to recover the agreed to fee. The Settlement Program provides for a settlement fund of up to $90 million, based upon an escalation clause that is contingent upon enrollment above the minimum threshold. Provided that the minimum threshold enrollment is met (as is the case here), J&J and Janssen have agreed to pay counsel up to $22.5 million with no self-consuming effect on

[21]Under the provisions of the Term Sheet, this Court's ruling on attorneys fees will not be appealable. *See* Term Sheet ¶19 ('the MDL Court's fee order may not be reviewed pursuant to FRCP Rule 60 or on any other basis."). While the appeal is not subject to review contractually, this Court is still obliged to insure the reasonableness of the PSC's fee request. *See Strong*, 137 F.3d at 849 ("That the defendant will pay the attorneys' fees from its own fund likewise does not limit the court's obligation to review the reasonableness of the agreed-to fees.").

the funds available for compensation.[22] Either at the current level of enrollment or even if the level of enrollment reaches the anticipated higher level, then the fee represents approximately a level equal to 25% to 33 1/3% of the funds available for compensation. This amounts to less than the PSC's collective lodestar. Accordingly, either the percentage of the fund or the lodestar method is appropriate method to employ here.

1. The Counsel Fees Requested Here Are Well Within the Range of Percentage Awards In Other Cases

Under the percentage-of-recovery method, once a court has ascertained the value of a class settlement, it must determine what percentage to apply to that value to arrive at a resulting fee award. *See Shaw*, 91 F.Supp. at 972; *In re Catfish Antitrust Litig.*, 939 F.Supp. 493, 501-03 (N.D.Miss. 1996). *See also Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3rd Cir. 2000).

The leading jurisprudence in this area applies a two-step approach to derive the appropriate percentage award. Essentially, the approach requires that the district court (or the fee applicant) select a market-based percentage to apply as a "benchmark" for the court's fee determination. Once that benchmark has been selected, the district court is required to engage in a *qualitative* analysis of risk, complexity, work performed and result achieved to determine if the fee produced by the application of the benchmark percentage to the value of the settlement is reasonable. Decisions

[22]Several courts have recognized that 25% is the benchmark award in POF cases. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 273 (9th Cir. 1989). Judge Haik surveyed several opinions to conclude that, "District courts in the Fifth Circuit have awarded percentages of approximately one-third contingency fee." *See Combustion*, 968 F.Supp. at 1133. *See also* Herman, 74 Tulane L.Rev. at 2044-45.

which illustrate application of this modern approach include: *In re Synthroid Marketing Litigation*, 264 F.3d 712, 719 (7th Cir. 2001)(look to prevailing rates); *Camden I Condominium Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 775 (11th Cir. 1991)(employing *Johnson* factors); *Gunter*, 223 F.3d at 195(developing a qualitative standard); *Shaw*, 91 F. Supp. 2d at 972; *Catfish*, 939 F.Supp. at 501.

Turning to the first aspect of this two-step approach, courts have frequently observed, the contingent fee that plaintiffs in a free market typically agree to pay for legal representation is one third of the gross recovery. *See Blum v. Stevenson*, 104 S.Ct. at 1551; *In re: A.H. Robins Co., Inc.*, 86 F.3d 364 at 377 (4th Cir. 1996) ("court could reasonably assume...a one-third contingent fee" by private counsel representing persons injured by the Dalkon Shield intrauterine device); *Orthopedic Bone Screw*, 2000 WL 1622741 at * 7 (E.D.Pa. 2000)("plaintiffs' counsel in private contingency fee cases regularly negotiate agreements providing for thirty to forty percent of any recovery"); *Combustion,* 968 F.Supp. at 1133 (1/3 contingency fee is the norm).

Therefore, it has now become virtually routine for courts to use between 25 percent and 33 percent as the "benchmark" for a percentage fee award. *See, Shaw,* 91 F.Supp. at 972 (25-33.35% awards are routine); *Camp*, 2004 WL 2149079, *19 n. 10 (25% is the benchmark; award of 29.6% is reasonable); *Catfish*, 939 F.Supp. at 501 (25% is reasonable benchmark); Herman, 74 Tulane L.Rev. at 2044-45 (30% is the benchmark).

In this case, fee awards in similar matters and examination of suitable market proxies demonstrate that the fee award requested in this matter is well within the range of fees dictated by application of any appropriate benchmark percentage.

2. The Johnson Factors Support the Requested Percentage Fee Award or Counsel's Lodestar

The qualitative review of percentage awards often parallels that of the *Johnson* analysis. *See Camden I*, 946 F.2d at 775. The PSC's efforts amply support the benchmark percentage award as well as counsel's lodestar under the *Johnson* factors. Each factor will be briefly addressed.

The time and labor required. This Court has regularly been provided contemporaneous time reports compiled by the accounting firm of Wegmann Dazet and is aware of the significant amount of legal resources that the PSC has devoted to this litigation. The total amount of legal professionals' time up to April 2005 would conservatively justify a fee in excess of the $22.5 million requested for the Settlement Program portion of the Petition alone.

The novelty and difficulty of the issues. This MDL was fraught with highly complex legal, scientific and regulatory issues. The science underlying the pharmacology of Propulsid as well as the anatomy and electrical behavior of the human heart is nuanced and complicated. The PSC was required to grapple with the interplay between the medical science and legal causation throughout the length of the MDL. The PSC was successful in confirming that Propulsid does have a marked effect in prolonging the QT interval of the regular heartbeat sufficiently well that causation in certain instances could be readily established. In addition to the liability aspect of the case, the PSC addressed thorny legal issues involving discovery matters of ongoing medical studies, the availability of an All Writs Act injunction for MDL discovery orders and other novel and difficult issues.

The skill required to perform the legal services properly. In PTO No. 2, this Court required as a condition to the appointment the PSC that counsel demonstrate professional experience in this type of litigation and a degree of professionalism necessary to proper functioning of a committee

charged with the high level of responsibility leveled upon it. The PSC has endeavored to meet this Court's expectations at every moment of this litigation. Given the significant achievements reached by the PSC in this case, we humbly submit that our efforts speak for themselves as to the legal skill and savvy mustered against the resources of a well represented adversary.

The preclusion of other employment. The commitment of time and efforts demonstrated in the collective lodestar reflects that members of the PSC devoted substantial efforts to the successful prosecution of this MDL, in some instances to preclusion of taking on other matters. While the PSC was fortunate to have sufficient membership that the burden of the litigation was well distributed, nevertheless this litigation presented itself as a matter of premier importance to the committee sometimes to the exclusion of other litigation.

The customary fee. In *Shaw*, the court found that this factor "either does not pertain to this case, does not suggest any modification to the lodestar or benchmark percentage, or is already accounted for in the lodestar or benchmark percentage." *Shaw*, 91 F.Supp.2d at 970. Similarly, the Court in *Combustion*, 968 F.Supp. at 1138, found this factor "problematic". We submit that MDL litigation is complicated, prolix and uncertain. To apply the moniker of customary fee to the work performed at the level of the PSC is indeed problematic. Nevertheless, the PSC submits that with respect to any award from the MDL assessment, PTO No. 16 reflects the customary award in this type of litigation. *See, e.g., In re Diet Drugs Product Liab. Litig.*, PTO No. 2622, 2002 WL 32154197 (E.D.Pa. 2002)(awarding counsel fees from an assessment of 6% for federal cases and 4% from state coordinating cases).

Whether the fee is fixed or contingent. This case was also litigated on a contingency basis. At the onset of the litigation, it was highly speculative that any recovery would ever be obtained.

Given this contingency counsel should be rewarded for obtaining such a highly successful result.

Time limitations imposed by the client or the circumstances. This factor had marginal significance to this litigation. Other courts in similar instances have afforded it little weight. *See Combustion*, 968 F.Supp. at 1138.

The amount involved and the results obtained. This is the most important of the *Johnson* factors. *Migis*, 135 F.3d at 1047; *Shaw*, 91 F.Supp.2d at 971. The result obtained here is significant. The Settlement Program is unique in dimension and application. This Court is presiding over a new chapter being written in MDL jurisprudence. The ability of the parties to reach a private settlement within the context developed in this mass tort setting is sure to become the template for numerous other litigations too incohesive to meet standing class action jurisprudence. Nor is the fact that the settlement will be funded up to $90 million unsubstantial. This is a terrific result for this litigation and the PSC is proud to have presented the Program to the Court.

The experience, reputation, and ability of the attorneys. In selecting membership of the PSC, the Court was presented with submissions from some of the most talented plaintiffs counsel in the United States. Members of the PSC include highly regarded legal talent, including one past president of ATLA. While reputation in and of itself means little, we submit that the PSC was comprised of able counsel whose legal talent and perseverance led to this achievement.

The undesirability of the case. This factor had marginal significance to this litigation. Other courts in similar instances have afforded it little weight. *See Shaw*, 91 F.Supp.2d at 971.

The nature and length of the professional relationship with the client. This factor had marginal significance to this litigation. Other courts in similar instances have afforded it little weight. *See Shaw*, 91 F.Supp.2d at 971.

Awards in similar cases. As discussed above, percentage awards in class actions (which this is not) have frequently have a benchmark award between 25-33%. Similarly, awarding counsel their lodestar for contingent, highly complex litigation is not unusual. This factor supports the current petition.

As demonstrated above, given the highly successful result obtained in wholly contingent litigation, counsel are ordinarily rewarded for their efforts either through an enhancement to the percentage award or through the use of a multiplier factored against their lodestar. Here, the PSC is deserving of same, but is not making such a request. Under these circumstances, the award requested is a reasonable attorneys fee.

V. CONCLUSION

The PSC respectfully requests that their Petition for an Award of Counsel fees be granted.

Respectfully submitted:

RUSS M. HERMAN, T.A. (La. Bar #6819)
LEONARD A. DAVIS, #14190
JAMES C. KLICK, #7451
HERMAN, MATHIS, CASEY, KITCHENS & GEREL, LLP
820 O'Keefe Avenue
New Orleans, Louisiana 70113
Phone: (504) 581-4892; Fax: (504) 561-6024
LIAISON COUNSEL FOR PLAINTIFFS

DANIEL E. BECNEL, JR.
106 W. Seventh Street
Reserve, LA 70084-0508
Phone: (504) 536-1186
Fax: (504) 536-6445

JAMES DUGAN
650 Poydras Street, Suite 2150
New Orleans, LA 70130
Phone: (504) 648-0180
Fax: (504) 648-0181

ARNOLD LEVIN
FRED S. LONGER (on the brief)
510 Walnut Street, Suite 500
Philadelphia, PA 19106-3875
Phone: (215) 592-1500
Fax: (215) 592-4663

STEPHEN B. MURRAY
909 Poydras Street, Suite 2550
New Orleans, LA 70112
Phone: (504) 525-8100
Fax: (504) 584-5249

J. MICHAEL PAPANTONIO
316 S. Baylen Street, Suite 600
P.O. Box 12308
Pensacola, FL 32581
Phone: (850) 435-7000
Fax: (850) 435-7020

CHRISTOPHER A. SEEGER
One William Street
New York, NY 10004
Phone: (212) 584-0700
Fax: (212) 584-0799

BOB F. WRIGHT
556 Jefferson Street, Suite 500
Lafayette, LA 70502-3668
Phone: (337) 233-3033
Fax: (337) 232-8213

CHARLES S. ZIMMERMAN
651 Nicollet Mall, Suite 501
Minneapolis, MN 55402
Phone: (612) 341-0400
Fax: (612) 341-0844

PLAINTIFFS' STEERING COMMITTEE

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing has been served on Liaison Counsel, James Irwin, by U. S. Mail and e-mail or by hand delivery and e-mail and upon all parties electronically by

uploading the same to Lexis-Nexis File and Serve in accordance with Pre-Trial Order No. 4, on this 3rd day of May 2005.

LEONARD A. DAVIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

	:	**MDL NO. 1355**
IN RE: PROPULSID PRODUCTS LIABILITY LITIGATION	:	**SECTION: L**
	:	**JUDGE FALLON**
	:	**MAG. JUDGE ROBY**

NOTICE OF THE PLAINTIFFS' STEERING COMMITTEE'S MOTION FOR AWARD OF ATTORNEY'S FEES AND REIMBURSEMENT OF COSTS

Please take note that on the **25th** day of **May, 2005,** at **9:00 o'clock a.m.**, or as soon thereafter as counsel can be heard, at the United States District Court, Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana, the undersigned and/or counsel for the PSC shall bring on for hearing the Plaintiffs' Steering Committee's Motion for Award of Attorney's Fees and Reimbursement of Costs.

Respectfully submitted:

RUSS M. HERMAN, T.A. (La. Bar #6819)
LEONARD A. DAVIS, #14190
HERMAN, MATHIS, CASEY, KITCHENS & GEREL, LLP
820 O'Keefe Avenue
New Orleans, Louisiana 70113
Phone: (504) 581-4892
Fax: (504) 561-6024
LIAISON COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

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LEONARD A. DAVIS